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 Google Inc. and Richard Robinson

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

12	BE IN, INC., a New York corporation)	CASE NO.: 5:12-cv-03373-LHK
)	
13	Plaintiff,)	DEFENDANTS' CONDITIONAL
)	OPPOSITION TO MOTION FOR
14	v.)	LEAVE TO FILE SECOND
)	AMENDED COMPLAINT
15	GOOGLE, INC., a California corporation,)	
	RICHARD ROBINSON, an individual, and)	Hearing Date: September 26, 2013
16	DOES 1 through 3, inclusive,)	Hearing Time: 1:30 pm
)	Courtroom: 8, 4 th Floor
17	Defendants.)	Judge: Hon. Lucy H. Koh
)	Trial Date: None Set
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1 **INTRODUCTION**

2 Defendants Google Inc. and Richard Robinson (“Defendants”) did not in principle
3 oppose Plaintiff Be In’s filing of the Second Amended Complaint that was going to be filed by
4 Be In’s current counsel, Gibson Dunn & Crutcher (“Gibson Dunn”). Defendants were therefore
5 prepared to file today a statement of non-opposition to Plaintiff Be In’s Motion for Leave to File
6 Second Amended Complaint, in which Defendants expressly reserved all rights, defenses and
7 objections with respect to the proposed complaint. However, yesterday evening Gibson Dunn
8 informed Defendants for the first time that Gibson Dunn was planning to file an immediate
9 request to withdraw as counsel. This was a complete surprise to Defendants; Gibson Dunn has
10 only been counsel-of-record for Plaintiff for approximately two months. Gibson Dunn is the
11 fourth law firm that has represented Plaintiff in this matter.

12 Based on communications between counsel today, Defendants understand that Gibson
13 Dunn will likely sign the Second Amended Complaint, notwithstanding Gibson’s imminent
14 departure from the case. Indeed, new counsel for Plaintiff – Morrison & Foerster – filed this
15 evening a notice of substitution of counsel to replace Gibson Dunn.

16 Rule 11 requires that “[e]very pleading . . . be signed by at least one attorney of record”
17 for a party. Defendants therefore conditionally oppose the pending motion for leave, to the
18 extent Gibson Dunn – and not Plaintiff’s new counsel – signs the Second Amended Complaint.
19 Gibson Dunn should not be permitted to sign the Second Amended Complaint on Be In’s behalf
20 when it knows it will not be Be In’s counsel of record. Be In’s new counsel should be solely
21 responsible for any amended complaint, be subject to the requirements of Rule 11 in filing it
22 with this Court, and Plaintiff should not be given leave to amend in order to file a complaint not
23 signed by and sponsored by replacement counsel. This is particularly important given how
24 baseless the allegations Be In asserts against Defendants are and the sheer number of law firms
25 that have already withdrawn from representing Plaintiff. Finally, regardless of who files the
26 complaint on Plaintiff’s behalf, Defendants reserve all rights, defenses and objections to
27 challenge the Second Amended Complaint on any ground.

1 **FACTUAL BACKGROUND**

2 Morrison & Forester will be the fifth law firm to represent Plaintiff in this matter.
3 Plaintiff was originally represented by Weil, Gotshal & Manges LLP (“Weil Gotshal”). On
4 September 1, 2011, Weil Gotshal sent a letter to Google, alleging that Google’s development of
5 Google Hangouts violated a nondisclosure agreement with Be In. Google responded by letter
6 dated September 16, 2011, explaining that Google had developed Hangouts independently and
7 there was thus no basis for Plaintiff’s allegations. On March 30, 2012, after six months of
8 silence, Be In – now represented by Clifford Chance LLP – sent a second letter, this time to
9 Google Ireland Ltd. (“Google Ireland”) and Google UK Ltd. (“Google UK”), reiterating Be In’s
10 allegations, contesting Google’s assertions of independent development, and demanding proof
11 from Google. Counsel for Google UK and Google Ireland sent Clifford Chance a letter in
12 response on April 24, 2012, again explaining why Be In’s allegations were meritless.

13 On June 28, 2012, Be In filed the original complaint against Google Inc. and Richard
14 Robinson. At the time, Be In was represented by Clifford Chance and Davis Wright Tremaine
15 LLP (“DWT”). (Docket No. 1). On August 3, 2012, Google sent a letter to Clifford Chance and
16 DWT, reviewing the parties’ pre-suit correspondence, explaining why Plaintiff’s allegations
17 were demonstrably false, noting that graphics included in the complaint had apparently been
18 doctored so as to be misleading, and notifying Plaintiff and its counsel that Be In had no good-
19 faith basis for its trade secret and conspiracy claims. On August 8, 2012, Google sent Clifford
20 Chance and DWT another letter, attaching a sworn, lengthy declaration by Richard Robinson –
21 the person accused of receiving information from Be In and disclosing it to Google – that
22 thoroughly refuted Be In’s allegations of claimed trade secret misappropriation. The Robinson
23 declaration explained that he did not pass on to Google the information received from Be In and
24 had no connection to Google’s development of Hangouts, and attached supporting emails and
25 meeting notes. Plaintiff amended its complaint eight days later, but continued to assert the same
26 baseless allegations. (Docket No. 12).

27 On September 4, 2012, Google moved to dismiss the trade dress and copyright causes of
28 action in the amended complaint. (Docket No. 15). At Plaintiff’s request, Google subsequently

1 stipulated to extend Plaintiff's time to oppose the motion. (Docket No. 19). In February of this
2 year, after the parties' briefing was completed but before oral argument on the motion to dismiss,
3 Clifford Chance and DWT moved to withdraw as counsel due to Plaintiff's alleged non-payment
4 of attorneys' fees and expenses. (Docket No. 28).

5 Gibson Dunn appeared as counsel for Plaintiff in early March. (Docket Nos. 30, 31).
6 Gibson Dunn promptly moved to continue the hearing on Defendants' motion to dismiss in order
7 to get up to speed on the case and to prepare a proposed Second Amended Complaint. (Docket
8 No. 34). The Court granted Plaintiff's request. (Docket No. 35). On April 30, 2013, Plaintiff
9 moved for leave to file the Second Amended Complaint. (Docket Nos. 37-41).

10 Google's response to the motion for leave is due today. At approximately 5:30 P.M. PDT
11 last night, Gibson Dunn notified Defendant's counsel by email that Gibson Dunn intended to
12 withdraw as counsel for Plaintiff. (Declaration of Colleen Bal ["Bal Decl."], Exh. A, at 3). The
13 email asked Defendants to stipulate to a continuance of case deadlines to allow time for Plaintiff
14 to transition to new counsel, and offered to prepare a stipulation and proposed order.

15 Defendant's counsel responded this morning, asking Gibson Dunn to clarify its intentions
16 with respect to the pending motion for leave, and in particular, whether it was "planning to
17 withdraw that motion" and if not, whether it "intended to seek to file the Second Amended
18 Complaint prior to [its] withdrawal." (*Id.*). Gibson Dunn responded by email that Be In did not
19 intend to withdraw the motion, that it had already retained new counsel, and that it might not
20 need a continuance of the case after all. (*Id.* at 2-3). Gibson Dunn later added Morrison &
21 Forester to the email chain, and introduced Morrison & Foerster as Plaintiff's new counsel. (*Id.*
22 at 2).

23 Defendants continued to press Plaintiff's counsel for more information about their
24 intentions going forward, and particularly, whether Morrison & Forester or Gibson Dunn would
25 sign and appear on the Second Amended Complaint. (*Id.* at 1-2). Ultimately, Defendants'
26 counsel spoke by telephone with counsel at Morrison & Forester, who confirmed that Plaintiff
27 did not intend to withdraw the motion for leave to amend, and stated his belief that Gibson Dunn
28

1 would sign the Second Amended Complaint. (Bal Decl., ¶ 3). Shortly thereafter, Morrison &
2 Forester filed a Notice of Substitution of Counsel with the Court. (Docket No. 42).

3 ARGUMENT

4 **1. Plaintiff’s New Counsel Should Be Fully Responsible for the Second Amended** 5 **Complaint**

6 While Defendants do not in principle oppose Plaintiff’s filing of an amended complaint,
7 they do oppose any scenario in which Gibson Dunn would sign or otherwise sponsor the Second
8 Amended Complaint (or any other amended complaint), and then promptly withdraw from the
9 action. Upon learning of Gibson Dunn’s intent to withdraw as counsel, Defendants immediately
10 asked Gibson Dunn whether it “intend[ed] to seek to file the Second Amended Complaint prior
11 to [its] withdrawal” and whether “Be In’s successor counsel be solely responsible for the filing
12 of any amended complaint.” (Exh. A at 2). After various communications between the parties,
13 Defendants now understand that Gibson Dunn will sign the Second Amended Complaint, even
14 though Morrison & Forester has already filed a notice for substitution of counsel to replace
15 Gibson Dunn. (Bal Decl., ¶¶ 2-3; Docket No. 42).

16 Federal Rule of Civil Procedure 11 states in pertinent part that:

17 By presenting to the court . . . a pleading, . . . an attorney . . . is certifying that to the
18 best of the person’s knowledge, information, and belief, formed after an inquiry
19 reasonable under the circumstances, . . . (3) the allegations and other factual
20 contentions have evidentiary support, or, if specifically so identified, are likely to
21 have evidentiary support after a reasonable opportunity for further investigation or
22 discovery

23 Fed. R. Civ. P. 11(b)(3). Plaintiff’s new counsel, and not Gibson Dunn, should be required to
24 provide this certification to the Court. Defendants have repeatedly informed Plaintiff that its
25 claims are baseless – including by providing sworn, detailed testimony directly contradicting
26 Plaintiff’s allegations that Google used Be In’s alleged trade secret information. Four different
27 law firms have withdrawn from representing Plaintiff. Particularly under these circumstances,
28 the law firm representing Plaintiff going forward -- Morrison & Forester -- should be held fully
responsible for the allegations Plaintiff asserts against Defendants.

1 **2. Defendants Reserve All Rights With Respect to the Proposed Complaint**

2 To the extent Plaintiff’s new counsel intends to submit the Second Amended Complaint
3 previously presented to Defendants by Gibson Dunn, Defendants do not otherwise oppose
4 Plaintiff Be In’s Motion for Leave to File Second Amended Complaint.¹ This is not, and should
5 not be construed as, a waiver by Defendants of any rights or as an admission of any of the
6 allegations stated in the proposed complaint. Defendants expressly reserve any and all rights,
7 defenses and objections. As is apparent from Plaintiff’s motion and the attached exhibits,
8 Defendants have repeatedly advised Plaintiff that any agreement not to file an opposition to
9 Plaintiff’s motion would not constitute a waiver of Defendants’ rights to challenge the proposed
10 Second Amended Complaint on any ground, including but not limited to lack of personal
11 jurisdiction, failure to state a claim, improper venue, failure of service of process, or impropriety
12 of naming any party to the case. *See e.g.*, Mot. at 3; Townsend Decl., Exh. B at 2, 4, 6 (email
13 correspondence between counsel); *see also* March 26, 2013 Order (Docket No. 35) at 2 (denying
14 as moot Defendants’ prior motion to dismiss and noting that if Court granted Plaintiff’s motion
15 for leave to file second amended complaint, “Defendants may file a new Motion to Dismiss”).

16 Substantively, Plaintiff’s motion raises two issues that require clarification or response.
17 First, as Plaintiff notes, the parties were unable to reach a stipulation concerning the proposed
18 Second Amended Complaint. Defendants will not trouble the Court with a point-by-point
19 response to Plaintiff’s characterization of events. From Defendants’ perspective, Defendants
20 could not reach agreement with Plaintiff largely because the agreement Plaintiff proposed was
21 illusory; Plaintiff offered not to name certain entities as defendants in the case in exchange for
22 discovery concessions, yet it insisted that it be permitted to name those entities as defendants at
23 any time in the future for any reason. Second, Plaintiff seems to suggest that Google Inc.’s
24 refusal to agree to Plaintiff’s discovery proposal reflects unwillingness on Google Inc.’s part to

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27 ¹ In light of the requirements of Rule 11, it is of course incumbent upon Plaintiff’s new
28 counsel to review the allegations of the proposed Second Amended Complaint and determine
whether those allegations have evidentiary support.

1 abide by its discovery obligations. Google Inc. informed Plaintiff twice during meet-and-confer
2 negotiations that it would abide by its discovery obligations, and it fully intends to do so.

3 **CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Court require new
5 counsel for Plaintiff to sign the Second Amended Complaint and to take full responsibility for it.
6 Defendants do not otherwise oppose Plaintiff's motion for leave, while reserving all rights,
7 defenses and objections with respect to the proposed Second Amended Complaint.

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9 Dated: May 14, 2013

WILSON SONSINI GOODRICH & ROSATI

10 By: /s/ Colleen Bal

11 Colleen Bal

12 *Attorneys for Defendants*

13 Google Inc. and Richard Robinson
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