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 GOOGLE INC., YOUTUBE, LLC, and GOOGLE UK LTD.

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 SAN JOSE DIVISION

21 BE IN INC., a New York Corporation,
 22 Plaintiff,

23 v.

24 GOOGLE INC., a California corporation;
 25 YOUTUBE, LLC, a Delaware limited liability
 26 company; and GOOGLE UK LTD., a private
 27 limited company registered in England and
 Wales,

28 Defendants.

Case No. 5:12-CV-03373-LHK-HRL

**JOINT CASE MANAGEMENT
 CONFERENCE STATEMENT**

Judge: Hon. Lucy H. Koh

1 The parties to the above-entitled action jointly submit this Joint Case Management
2 Statement & Proposed Order pursuant to the Standing Order for All Judges of the Northern
3 District of California dated July 1, 2011 and Civil Local Rules 16-9 & 16-10(d).

4 **1. FACTS**

5 Plaintiff's Statement:

6 Starting in 2007, Be In created and developed CamUp, an award-winning social
7 entertainment consumption platform. The platform allows up to eight users, such as groups of
8 friends, simultaneously to watch, listen, chat and collaborate around shared videos, music, and
9 other media in a real-time, personal environment online as they see live streaming video of each
10 other—something no other platform provided. By March 2011, Be In had developed the unique
11 technology, appearance and infrastructure for this social video sharing platform, CamUp, and had
12 developed proprietary strategies for integrating that platform into established content, social and
13 media platforms.

14 Be In publicly unveiled CamUp for the first time at the SXSW Trade Show, the industry-
15 leading technology conference, in Austin, Texas in March 2011. CamUp's demonstration booth
16 was located steps away from Google's booth, and several Google personnel visited the booth and
17 viewed the demonstration of the CamUp website. While Google is claiming it cannot identify
18 any personnel, the visitors to the CamUp booth included Google's Vice President of Consumer
19 Products. Be In publicly launched the CamUp website shortly thereafter in early April 2011.
20 That same month, Be In won the "Early Stage" award from MIPTV Connected Creativity
21 Ventures for the most innovative start-up of the year.

22 On May 12, 2011, Be In representatives met in London with Richard Robinson, a Google
23 executive, to discuss Be In's vision and strategy for the CamUp platform and a proposed business
24 partnership. At the meeting, Be In disclosed proprietary and confidential business strategies in
25 confidence, pursuant to a non-disclosure agreement. Among the information Be In disclosed was
26 using the platform Be In had devised to transform Google's (and YouTube's) massive—but
27 unstructured, and largely anonymous—user base into an organized social community that would
28 foster shared social experiences around Google's content products, including most immediately,

1 YouTube. Part of this integration strategy was a button that could be used to invite YouTube
2 users to “Watch With Your Friends,” allowing YouTube users to share content in a novel
3 dynamic environment using CamUp. Mr. Robinson was enthusiastic about CamUp and asked Be
4 In to send additional written information. Be In followed up on the meeting by sending
5 Mr. Robinson an eight-page memo the next day, marked “Confidential,” which described some
6 key aspects of Be In’s confidential strategic plan. Mr. Robinson forwarded an email about his
7 meeting with Be In to at least two others at Google.

8 Google points to a declaration of Mr. Robinson as evidence of Google’s lack of liability
9 for Be In’s trade secret claim, claiming that he did not discuss the meeting with others at Google.
10 However, Mr. Robinson’s recollection of the May 2011 meeting described in his declaration is
11 vague and incomplete and will be contradicted by the Be In representatives who attended the
12 meeting. Circumstantial evidence suggests that Mr. Robinson’s meeting prompted others at
13 Google to visit the CamUp website: On May 12, 2011, the same day that Mr. Robinson met with
14 Be In’s representatives, users in the Seattle area and Sweden visited the CamUp website. The
15 next day, on May 13, 2011, users in Seattle and Sydney, Australia visited the CamUp website.
16 Google has identified these three places as locations where Google engineers who developed
17 Hangouts worked. These visits at the time of the Robinson meeting are noteworthy because from
18 the time of CamUp’s launch in early April 2011 until the day of Be In’s meeting with Google on
19 May 12, 2011, camup.com had not received any visits from any users in the state of Washington.
20 And from the time of CamUp’s launch in early April 2011 until the day of Be In’s meeting with
21 Google on May 12, 2011, camup.com had received only one visit each from users in Sweden and
22 Sydney. Moreover, after initially refusing to answer discovery requests on this topic, Google has
23 now admitted that after the May 12, 2011 meeting and before August 18, 2011, when Hangouts
24 was integrated with YouTube using the “Watch With Your Friends” button idea Be In disclosed
25 to Mr. Robinson, he visited Google’s Mountain View headquarters.

26 On or about June 28, 2011, Google launched an invitation-only field test of Google+, its
27 then-most recent and ambitious attempt to create a social network to rival Facebook and other
28 competitors. Included as part of Google+ was Google Hangouts, a social video platform that

1 bears striking similarity to CamUp, and infringes Be In’s copyrights. It immediately was hailed
2 by the media as the new social network’s “killer” feature. CNN called Hangouts “a key
3 component of Google+” and “Google’s sharpest edge over Facebook’s current product.”
4 TechCrunch gushed that “nailing an intimate experience that supports two or more people in a
5 video conference is no small feat, but Google knocked it out of the park with Hangouts It’s
6 more than just one-on-one chat though, which is why Hangouts are so magical.”

7 Google claims that the development of Hangouts began “long before” the events giving
8 rise to this lawsuit. But Google has acknowledged publicly that Hangouts was developed late in
9 the process of Google+, and that the Hangouts group was the last group to join the development
10 team for Google+. At least one news article based on an interview with the lead developer for
11 Hangouts, Chee Chew, places the start of the development for Hangouts at only “several months”
12 before June 28, 2011.

13 In addition, Mr. Chew has claimed in a video that the prototype for Google Hangouts
14 purportedly only took “about an hour” to develop. The video, which pre-dates the filing of this
15 lawsuit, can be found at [http://thenextweb.com/google/2012/03/31/hangouts-how-an-internal-
16 video-link-between-seattle-and-stockholm-became-an-awesome-google-feature/](http://thenextweb.com/google/2012/03/31/hangouts-how-an-internal-video-link-between-seattle-and-stockholm-became-an-awesome-google-feature/). Google’s claim
17 that Hangouts’ development started earlier is apparently based on the fact that what Mr. Chew
18 describes in the video as a “permanent video link” between two Google engineering offices had
19 previously existed. The video makes clear that this permanent link was simply a means of
20 enabling Google developers in Seattle and Stockholm to collaborate. This is very different from
21 the consumer-facing Google Hangouts, whose conception Mr. Chew places at a much later point
22 in time. Moreover, Google fundamentally mischaracterizes Be In’s claim. The issue for trial will
23 not be when Google first began development of some of the base elements it later incorporated
24 into Hangouts, but whether it copied from Be In during the development process and used the Be
25 In trade secrets that it provided in confidence. The discovery provided by Google to date
26 indicates that Hangouts did not take its final, infringing form until after Google personnel had
27 access to CamUp at SXSW. While Google claims that it “developed the Hangouts user interface
28 before March 10, 2011,” in fact, according to a Google internal email, the design of the user

1 interface was still in progress after the SXSW show where Be In publicly unveiled CamUp. Of
2 course, Be In can establish copying by showing access and substantial similarity.

3 Google used and continues to use proprietary integration and business strategies disclosed
4 by Be In at the May meeting in marketing and implementing Google Hangouts, including
5 placement of a button underneath YouTube videos in August 2011 encouraging viewers to share
6 the viewing experience with others. The button was labeled “Watch With Your Friends”—the
7 language that was proposed by Be In—and was placed in the same position on the screen that Be
8 In had described at the meeting in May. Google claims that before this meeting it had the idea of
9 allowing Hangouts subscribers to share YouTube videos by providing a link on Hangouts that
10 would permit them to do this. But Google does not contend that before the May 2011 meeting it
11 had conceived of the idea of directly providing a link *from* YouTube to Hangouts comparable to
12 the button that Be In disclosed. In fact, Google has acknowledged that the development of this
13 button did not begin until July 2011, two months after Mr. Robinson’s meeting with Be In. As
14 described above, the button was part of a larger strategy disclosed by Be In to tap directly into
15 Google’s large, but anonymous and scattered, user base to create an organized social community,
16 not merely a means of giving existing Hangouts users an easy way to share YouTube videos from
17 the Hangouts website as Google claims to have proposed.

18 Google subsequently modified the language of the button, but when a user placed the
19 mouse over the button, the “Watch With Your Friends” language still appeared. In the summer of
20 2013, Google removed the “Watch With Your Friends” language from YouTube entirely. Google
21 has offered no explanation for all of these changes, leaving the logical inference that it did so to
22 cover up its copying.

23 With this action, Be In seeks to stop Defendants from their continued copying, use, and
24 misappropriation of Be In’s valuable trade secrets and intellectual property.

25 Google attaches a timeline to this case management conference statement which Be In
26 disputes, and repeatedly refers to its document production, which it claims “irrefutably
27 demonstrates” prior development, failing to mention that *over 90%* of that document production
28 has been made in just the past 13 days. Until that time, Defendants’ document production lagged

1 behind Be In's. Be In has not even had the opportunity to review these documents. In fact,
2 Defendants make several references below to documents that were only produced after close of
3 business on Friday, September 27, less than a week before this Case Management Conference
4 Statement was filed.

5 Google's claim that it "has tried to put these dispositive documents in Plaintiff's hands for
6 months" is highly misleading. Plaintiff has been asking for Google to provide evidence of prior,
7 independent development of Hangouts for more than two years, long before this lawsuit was filed
8 but Google repeatedly refused to provide it. The only time Plaintiff declined to review
9 documents from Google was when Google offered to produce a much smaller subset of
10 documents in paper form for in person inspection, well after its responses to Plaintiff's discovery
11 requests were due. Plaintiff told Google it was willing to review these documents and declined
12 only after Google insisted that it would not allow the documents to be copied in any form as
13 required by Rule 34.

14 Defendants' Statement:

15 **INTRODUCTION**

16 Google's documents demonstrate not merely that Plaintiff Be In's accusations are false,
17 but that they cannot possibly be true. Plaintiff's central allegation is that it launched a video
18 conferencing product called CamUp and that Google hastily copied that product to launch
19 Google Hangouts a few months later. But Google's documents irrefutably demonstrate that it
20 would have had to invent time travel to copy from CamUp, because Google developed Hangouts
21 *before* Plaintiff made its CamUp product public. Google developed the Hangouts user interface
22 before March 10, 2011; Plaintiff claims to have first publicly released CamUp at a trade show
23 beginning on March 14, 2011 and to have launched its CamUp website on April 6, 2011.
24 Attached as Exhibit A is a timeline showing Google's first-in-time development.¹

25 Plaintiff does not dispute the timeline. Nor can it identify a single design element in the

26 _____
27 ¹ Google redacted the user names from the exhibit, but can provide an unredacted version
28 to the Court if requested.

1 June 28, 2011 launched version of Hangouts that is not present in the March 10, 2011 version.
2 Google's first-in-time development is fatal to Plaintiff's case.

3 Despite this dispositive evidence, and instead of withdrawing accusations that are plainly
4 false, Plaintiff persists with a strained argument that Google copied the design of the Hangouts
5 user interface from Plaintiff's CamUp website after a Google UK salesperson (Richard
6 Robinson) met with Plaintiff in London on May 12, 2011. Plaintiff's "circumstantial evidence"
7 of copying is the fact that a total of four unknown Internet users visited Plaintiff's CamUp
8 website on May 12-13, 2011 from Seattle, Washington and Sydney, Australia, and cities in
9 Sweden and Washington State many miles from any Google office. The inference Plaintiff seeks
10 to draw is nonsense. There is no good faith inference that these four of the millions of Internet
11 users populating these cities are someone connected to Google (much less to the development of
12 Hangouts). The evidence is all to the contrary, as Google has confirmed through its own
13 searches and inquiries that no Hangouts developer visited Plaintiff's website until well after
14 Plaintiff initiated this lawsuit in June 2012. And in any event, the dates of the four visits to
15 Plaintiff's website are more than two months *after* Google had already designed the Hangouts
16 user interface. Plaintiff's feeble Hail Mary does not rebut Google's first-in-time development
17 evidence.

18 Google has tried to put its dispositive documents in Plaintiff's hands for months.
19 Plaintiff has chosen not to engage with Google regarding the bases for its claims or to review
20 Google's documents demonstrating independent development. Instead, it has sought to hide
21 from the facts, while pressing for massive discovery, hoping attrition can substitute for merit.

22 Google has now produced over 8,200 documents totaling over 26,000 pages, which
23 uniformly demonstrate that it independently developed Hangouts and the other accused features.
24 Google has also searched the documents and email of approximately 175 employees, and
25 conducted inquiries of each, in response to Plaintiff's discovery requests. There is no evidence
26 that anyone was aware of Plaintiff or its CamUp product, much less copied anything from
27 Plaintiff.

28 When previously challenged, Plaintiff withdrew allegations from its complaint that it had

1 no good faith basis to assert, including (1) that Google UK’s Richard Robinson transmitted
2 information Plaintiff told him during a London meeting in May 2011 to other Google or
3 YouTube personnel, and (2) that Plaintiff experienced a “dramatic spike” in traffic to its CamUp
4 website following the London meeting from locations where Google employees are located.
5 With irrefutable evidence of independent development in hand, Plaintiff should voluntarily
6 withdraw the rest of its case, or face sanctions for pressing claims it knows are meritless.

7 **A. Plaintiff Should Voluntarily Dismiss Its Frivolous Case**

8 There are two primary issues in this lawsuit: (1) whether Google independently
9 conceived and designed the user interface for its Hangouts video chat product, or instead
10 committed copyright infringement by copying the user interface from Plaintiff’s CamUp product
11 at a technology conference or from the CamUp website; and (2) whether YouTube employees in
12 California independently added a link from YouTube to Google’s Hangouts product, or stole the
13 idea for the link from a conversation Plaintiff had with a Google UK sales employee (Richard
14 Robinson) in London in May 2011.

15 Plaintiff alleges that Hangouts is “A Blatant Copy of CamUp”; that “Google slavishly
16 copied the CamUp platform in a hurried attempt to bolster its new social network, Google+”; and
17 that Google came up with the idea to develop Hangouts from Mr. Robinson’s May 2011 London
18 meeting, and thereafter copied the Hangouts interface from Plaintiff’s CamUp website:

19 Upon information and belief, following Plaintiff’s meeting with Google in May,
20 2011, Defendants and/or their employees, agents, and/or other individuals acting
21 on their behalf used and/or visited the CamUp website for the purpose of, or with
22 the result of, copying individual expressive elements and the overall design of
CamUp to create a competing social entertainment consumption platform,
Hangouts, and for the purpose of, or with the result of, furthering Defendants’
misappropriation of Plaintiff’s confidential, proprietary information.

23 *See* Second Amended Complaint ¶¶5, 59, 60. Plaintiff has no good faith basis to pursue these
24 allegations in light of Google’s evidence that Hangouts was developed before CamUp was first
25 publicly released.

26 Prior to the first case management conference on August 14, 2013, Google assembled a
27 set of documents demonstrating that Plaintiff’s claims are meritless and offered Plaintiff’s
28 counsel the opportunity to review the documents at WSGR’s offices (across the street from

1 Morrison & Foerster’s offices) before the documents had been fully processed for distribution to
2 Plaintiff. Plaintiff’s counsel refused to inspect them. *See* Docket No. 67 at 6. Since then,
3 Google has sent Plaintiff’s counsel copies of those documents, and produced thousands more, at
4 tremendous burden and expense. Plaintiff and its lawyers can no longer claim to be unaware of
5 Google’s prior development of Hangouts. The evidence is in their hands. The documents show:

6 **1. Google could not possibly have copied Plaintiff’s CamUp user interface.**

7 Google’s evidence demonstrates that it independently conceived, designed and developed
8 the user interface for its Hangouts product, *starting years before* Plaintiff ever thought about
9 CamUp. Google has produced scores of user interface mock ups, wire frames and other planning
10 documents, beginning with Google’s April 2007 acquisition of video conferencing technology
11 from a company called Marratech AB, and continuing to the Hangouts launch in June 2011.

12 These documents not only show Google’s development path independent of Plaintiff’s
13 CamUp product, but also demonstrate that Google had substantially completed its user interface
14 at the latest by March 10, 2011.² *See* Exh. A (showing development timeline); *see also* Exh. B
15 (comparing Hangouts UI with CamUp UI). While Plaintiff argues without specifics that
16 Hangouts was not really “final” on March 10, 2011, Plaintiff fails to identify a single design
17 element of Hangouts as launched in June 2011 that is not seen in the March 10, 2011 version. It
18 cannot because there are none. Google designed the Hangouts user interface *before* Plaintiff
19 contends anyone working for Google could theoretically have seen the CamUp user interface for
20 the first time, either at the South by Southwest trade show (March 14-17, 2011) or when Plaintiff
21 launched its CamUp website (April 6, 2011), and before Google UK salesperson Mr. Robinson
22 met with Plaintiff in London in May 2011.

23 Google’s prior development of the Hangouts user interface renders Plaintiff’s accusations
24 not merely false but *impossible*, since Google could not have stolen something that did not yet

25 ² This includes every design element (and the selection and arrangement of elements)
26 that Plaintiff claims in this case, including a user interface with a large rectangular screen over a
27 row of smaller screens, a link for watching YouTube videos, a box for chat on the side, large
28 buttons, a silhouette icon for participants and invite functionality using pre-existing social
contacts. *Compare* SAC [Docket No. 59] ¶¶62-64 (identifying allegedly copied user interface
elements) *with* Exh. A (showing Google’s March 10, 2011 Hangouts user interface).

1 exist. Plaintiff should dismiss its claims for copyright infringement of the CamUp user interface
2 and for breach of the CamUp website's Terms of Service (based on alleged copying of the user
3 interface from the website), rather than continue to press patently false claims.

4 **2. Defendants did not misappropriate Plaintiff's claimed trade secrets.**

5 Plaintiff's claims for trade secret misappropriation and breach of implied contract, which
6 center on Plaintiff's May 2011 London meeting with Mr. Robinson, fare no better. Plaintiff
7 accuses Google and YouTube of improperly using information it conveyed to Mr. Robinson at
8 the London meeting, even though Plaintiff does not allege that Mr. Robinson transmitted any
9 information he learned at that meeting to anyone else (and even though Plaintiff amended its
10 complaint to drop all such accusations).³ Plaintiff focuses in particular on YouTube's
11 development of a button on the YouTube player linking to Hangouts, and Google's development
12 of a Hangouts feature called "On Air" which allows Hangouts users to "broadcast" their
13 Hangouts sessions as a live video stream, like a podcast. Plaintiff has produced no evidence that
14 it can claim these ideas as its trade secrets, since (1) it does not appear to have thought up these
15 ideas before Google and YouTube adopted them, and (2) the ideas are too generic to be secrets.
16 Regardless, Defendants did not misappropriate them.

17 **a. Mr. Robinson did not use or transmit Plaintiff's claimed trade secrets.**

18 Mr. Robinson told only two Google UK co-workers and his assistant about the May 2011
19 London meeting. He did not tell them, or anyone else, any of Plaintiff's claimed trade secrets.
20 The fact that Mr. Robinson never disclosed Plaintiff's trade secrets to anyone disposes of
21 Plaintiff's trade secret claims, since the alleged secrets never went to anyone who worked on the
22 features Plaintiff claims were stolen.

- 23 • In August 2012, Google gave to Plaintiff Mr. Robinson's lengthy, sworn
24 declaration stating that he did not disclose the substance of his conversation to
25 anyone and did not use any of the information Plaintiff told him. He stated that

26 ³ Plaintiff's failure to allege improper "disclosure or use of a trade secret" is the subject of
27 Defendants' pending motion to dismiss Plaintiff's trade secret misappropriation claim. *See* Cal.
28 Civ. Code §3426.1 (definition of trade secret misappropriation).

1 he does not even know any of the Google or YouTube employees who conceived,
2 designed or developed the Hangouts user interface or the YouTube button linking
3 to Hangouts.

- 4 • Google subsequently produced all documents regarding the 2011 London
5 meeting.
 - 6 • Google conducted an in-depth investigation of the four London employees,
7 including by searching their email and documents. None transmitted anything
8 about Plaintiff to anyone else. *See* Response to Interrogatory Nos. 3, 4, 14.
- 9 **b. YouTube independently conceived the idea for the link to Hangouts.**
- 10 • Google produced documents demonstrating the moment, just days after Hangouts
11 launched, that a YouTube employee came up with the idea to add the link from
12 YouTube to Hangouts. *See* GOOG 2030-32.
 - 13 • Google produced all documents concerning the conception and development of
14 the link by the four California-based YouTube employees who worked on it.
 - 15 • Google conducted an investigation, including electronic searches, of Mr.
16 Robinson and the two co-workers he emailed about Plaintiff, to determine that the
17 four London-based employees did not transmit anything to the four YouTube
18 developers concerning Plaintiff, CamUp or the London meeting. *See* Response to
19 Interrogatory No. 14.
 - 20 • Google’s documents demonstrate that Google planned to link Hangouts with
21 YouTube years *prior* to the May 2011 London meeting. *See* Response to
22 Interrogatory No. 5. For instance, Google produced a document to Plaintiff
23 showing a link from Hangouts to YouTube with a button titled “Watch a
24 YouTube video together” dated February 16, 2011. GOOG 243-44.
 - 25 • Plaintiff contends in this CMC statement that Google has never offered any
26 explanation for its decision in July 2013 remove the button from YouTube,
27 arguing that the removal was “to cover up its copying.” Plaintiff’s statement
28 makes no sense – removing a button from a public product is hardly “covering

1 up” anything – and is false. Google has produced documents reflecting Google’s
2 detailed business rationale for removing the button. *See* GOOG 25921-44.

3 **c. Google’s users inspired it to develop Hangouts On Air.**

- 4 • Google’s documents demonstrate that it was inspired to create the On Air feature
5 by Hangouts *users* who broadcast Hangouts segments. The evidence
6 demonstrates that even the name “On Air” comes from users’ vernacular. *See*
7 GOOG 2847-2849.
- 8 • Google conducted an investigation, including electronic searches, to determine
9 that the four London employees did not transmit anything to the developers of
10 Hangouts On Air or any other aspects of Hangouts regarding Plaintiff, CamUp, or
11 the London meeting. *See* Response to Interrogatory No. 4.

12 **d. Miscellaneous Website Features.**

13 Plaintiff also contends that vague, generic ideas, such as having apps associated with
14 video conferencing technology or working with content providers, are its trade secrets. Even
15 ignoring that generic information cannot constitute trade secrets, Plaintiff has no possible trade
16 secret claim since no one working on the relevant features at YouTube or for Hangouts ever
17 knew anything about Robinson’s meeting with Plaintiff, Plaintiff or CamUp before this dispute
18 began.

19
20
21 **2. MOTIONS**

22 The parties have filed a Discovery Dispute Joint Report regarding the terms of a
23 protective order to govern discovery of allegedly confidential information (D.I. 76). The dispute
24 is pending before Magistrate Judge Lloyd.

25 Plaintiff’s Statement

26 Plaintiff expects that it will need to file additional discovery motions to compel responses
27 to interrogatories and requests for admission. Plaintiff may need to file a motion to compel
28

1 further production of documents as well, but has not yet had time to digest the approximately
2 25,000 pages of documents Google has produced within the past 13 days.

3 Defendants' Statement

4 Defendants expect that they will need to file an additional discovery motion to require
5 Plaintiff to identify its claimed trade secrets with specificity and to compel a complete response to
6 numerous other interrogatories and requests for admissions.

7 Defendants expect to file a motion for summary judgment. Defendants may also file
8 motions for sanctions against Plaintiff, including for maintenance of bad faith trade secret claims
9 and under FRCP 26(g) for unreasonable and unduly burdensome discovery in light of the
10 allegations at issue.

11 **3. AMENDMENT OF PLEADINGS**

12 Be In does not presently anticipate seeking further leave to amend the Second Amended
13 Complaint, but Be In reserves the right to seek leave to amend its pleading if necessary. The
14 Court set the deadline for such an amendment on November 1, 2013.

15 **4. EVIDENCE PRESERVATION**

16 The parties have reviewed the Guidelines Relating to the Discovery of Electronically
17 Stored Information, and met and conferred on May 15, 2013 pursuant to Fed. R. Civ. P. 26(f).

18 Plaintiff's Statement

19 Be In has confirmed to undersigned counsel that it has taken reasonable and proportionate
20 steps taken to preserve evidence relevant to the issues reasonably evident in this action. Pursuant
21 to the instructions of prior counsel, Be In notified relevant employees and contractors of Be In of
22 their obligation to preserve evidence. Current counsel for Be In has reminded relevant employees
23 and contractors of their obligations.

24 Google's comments below about an "executed" copy of the NDA are puzzling, because as
25 Google notes the NDA was a form on its website, to which one acceded by clicking a button. As
26 far as Be In is aware, neither party "executed" a copy; Google certainly hasn't produced one from
27 its files that bears anyone's signature.

1 Defendants' Statement

2 Defendants confirm that they have taken reasonable and proportionate steps to preserve
3 evidence relevant to the issues reasonably evident in this action.

4 **Possible Failure to Preserve Documents By Plaintiff.** Aspects of Plaintiff's document
5 production suggest that Plaintiff may have failed to fulfill its document preservation obligations,
6 including by failing to retain documents of its former Business Development Director Nik
7 Miskov (from whom Plaintiff has not produced any documents). For instance, Mr. Miskov
8 signed the NDA governing the May 2011 London meeting on Plaintiff's behalf, and Mr. Miskov
9 should therefore have an executed copy of the agreement. However, Plaintiff has never
10 produced an executed copy of the NDA from its own files, but has instead produced (1) a
11 downloaded, blank form copy from Google's website, and (2) a copy that Google filed in the
12 course of the litigation. In addition, Plaintiff's counsel has requested that Google de-designate
13 certain documents in Google's production that were sent to or received from Mr. Miskov. The
14 request by Plaintiff's counsel suggests that Plaintiff failed to retain a non-confidential version of
15 the same documents from Mr. Miskov's files. (Google agreed to the de-designation.)

16 On September 26, 2013, Google's counsel wrote to Plaintiff's counsel, explaining the
17 bases for Google's suspicions that Plaintiff had failed to retain Mr. Miskov's documents, and
18 asking for confirmation no later than October 1, 2013 that Plaintiff had in fact retained all
19 relevant documents, including Mr. Miskov's documents. Plaintiff's counsel failed to respond,
20 and even in this CMC statement fails to confirm that it has properly preserved Mr. Miskov's
21 documents (and other relevant documents). Google therefore respectfully requests that the
22 Court require Plaintiff's counsel to submit declarations from Plaintiff and its counsel setting
23 forth in detail all measures they have taken to preserve documents, and either affirming their full
24 compliance with all document retention obligations or stating in detail all documents and
25 categories of documents they have failed to retain.

26 **5. DISCOVERY**

27 Discovery has begun. Be In has served a total of 17 Interrogatories, 90 Requests for
28 Production, and 36 Requests for Admission on the defendants. Be In's first set of discovery

1 requests were served on May 24, 2013. Defendants have served a total of 25 Interrogatories,
2 96 Requests for Production, and 104 Requests for Admission on Be In.

3 The parties have stipulated to an e-discovery order, which is pending before the Court.
4 The parties have met and conferred on a proposed stipulated protective order. With respect to the
5 protective order, all terms have been agreed upon except for one provision concerning a
6 prerequisite for the qualification of experts to access confidential information, which is the
7 subject of the motion before Magistrate Judge Lloyd.

8 The parties have met and conferred on several occasions concerning several discovery
9 issues. As a result of those discussions, supplemental and amended responses were recently
10 served by both parties. Additional meet and confer meetings are likely.

11 Plaintiff's Statement

12 Be In recognizes this Court's direction to the parties at the August case management
13 conference that "all of your discovery disputes should go to Judge Lloyd." D.I. 77, at 25. Be In
14 is nevertheless compelled to respond here to the discovery issues that Google has inserted below
15 into this case management statement. Be In would prefer, however, to continue to make progress
16 through further meet and confer conferences and, if necessary, to follow Magistrate Judge
17 Lloyd's standing order for the proper procedure to bring discovery matters to the attention of the
18 Court.

19 Be In denies that the discovery it seeks from Google is unduly burdensome or otherwise
20 unjustified. Be In has narrowed, deferred or withdrawn certain requests as a result of the normal
21 meet and confer process required by the Court's rules. The Court does not have to take Be In's
22 word for this. The number of documents produced by Google in the case thus far—8,200
23 documents totaling just over 26,000 pages—is a fraction of the discovery the Court normally sees
24 in cases of this type and shows that Be In's discovery requests have not been unreasonable or
25 unduly burdensome. Moreover, Google's responsiveness to legitimate discovery requests is
26 incomplete, and over 90 percent of its document production has been made in just the past two
27 weeks, obviously timed to coincide with the October 10 case management conference.
28

1 In fact, until two weeks ago, Google had produced just 2,875 pages of documents,
2 whereas Be In had produced 5,176 pages, nearly twice as many. Google repeatedly makes
3 reference in this CMC statement to documents it only produced on September 27, less than a
4 week before this CMC statement was filed. The truth is that Google has only momentarily—and
5 very recently—surpassed Be In’s production and for the rest of this case has lagged behind.

6 Google claims below that “Plaintiff has all along had in its sole custody and control
7 whatever data exist regarding traffic to its CamUp website following the May 2011 London
8 meeting,” but this is not true. The data that Be In has (and has cited above) showing visits to its
9 site from Washington, California and Australia immediately following the Robinson meeting are
10 Google Analytics data maintained by Google itself. Google should have the ability to determine
11 whether those visits were made by any of its past or present employees or contractors, but is
12 claiming it cannot do so.

13 Google alleges below that “CamUp’s first appearance at the trade shows occurred after
14 Google designed the Hangouts user interface” as an excuse for not providing full discovery, but
15 this assertion is not accurate. Even accepting that Hangouts development was underway before
16 the March trade show, the documents produced by Google confirm that the Hangouts interface
17 continued to be revised and was not finalized until after the SXSW event. Indeed, a Google email
18 dated March 16, 2011, indicates that the design of the Hangouts still not been finalized at the time
19 Be In’s CamUp product was publicly unveiled. Many of the alternatives considered during the
20 final stages of design were very different from the Hangouts user interface that was ultimately
21 chosen.

22 Google’s allegations below that Be In’s discovery is deficient are incorrect. The claim
23 that Be In has not produced any documents in the categories identified by Google below is
24 incorrect. Google contends that Be In “has failed to produce *any documents*” concerning
25 development of CamUp or the conception of Be In’s trade secrets, but Be In has in fact produced
26 over 250 documents related to development and conception, and over 300 documents related to
27 strategy and/or monetization. Be In has also produced the Google Analytics data showing user
28 traffic to its website, including the unusual traffic immediately following the May 2011 meeting.

1 Be In has produced documents reflecting prior user interfaces for the GigIn website, from which
2 the CamUp website evolved. Google acknowledges that Be In has produced emails regarding the
3 Robinson meeting and only speculates that there should be more. And Be In has also produced
4 the terms of service documents for CamUp.com. Google’s complaint about “scalability”
5 documents is difficult to understand, since Be In is not making any contentions regarding
6 scalability in this lawsuit.

7 The bottom line is that Google has adopted the classic strategy of attempting to
8 overwhelm a tiny litigant with massive discovery requests, many of which demand irrelevant
9 details or call for the provision of information or admission of facts that are in Google’s
10 possession alone.

11 Defendant’s Statement

12 **A. Google Has Engaged in Extensive Discovery Efforts**

13 Plaintiff continues to demand burdensome discovery on claims it has no good faith basis
14 to pursue. In response to Plaintiff’s discovery requests, Google conducted a document search
15 and inquiry of more than 175 employees, none of whom was even aware of Plaintiff or CamUp,
16 and produced over 8,200 documents. With respect to key specific issues, Google has
17 undertaken the following efforts.

18 1. **CamUp Website:** Plaintiff continues to demand discovery concerning access by
19 Google to the CamUp website, even though the evidence demonstrates that Google’s
20 development *pre-dated* Plaintiff’s launch of the CamUp website on April 6, 2011.

21 Plaintiff has all along had in its sole custody and control whatever data exist regarding
22 traffic to its CamUp website following the May 2011 London meeting, yet it has repeatedly
23 changed its characterization of the data over the course of the case. Plaintiff’s ever-changing
24 allegations regarding its website traffic only underscore its lack of credibility. Initially, Plaintiff
25 alleged that, after the May 2011 meeting, the website experienced “a dramatic spike” in user
26 traffic “from individuals located in Mountain View, California where Google is headquartered.”
27 [Docket No. 1, ¶32]. Within several months, Plaintiff changed course and alleged that the
28 “dramatic spike” was instead “from within the United Kingdom, the areas of Palo Alto and

1 Mountain View California, where Google is headquartered, and Seattle, Washington, where
2 Google engineers alleged developed Hangouts.” [Docket No. 39]. Now, upon receiving
3 discovery from Google that places potential Hangouts development elsewhere, Plaintiff claims
4 in this CMC statement that the supposed spike in traffic was instead from users in Seattle,
5 Sweden and Sydney, Australia.

6 Whatever traffic Plaintiff claims to have experienced after the May 2011 London
7 meeting, the traffic was completely unrelated to Hangouts development. First, the evidence
8 demonstrates that Google had developed the Hangouts user interface before the May 2011
9 London meeting (and before the launch of the CamUp website), and therefore could not
10 possibly have copied anything from Plaintiff. Second, Google conducted a document search
11 and inquiry of the more than 60 members of the Hangouts development team (including for
12 members in California, Seattle, Stockholm, and Sydney). There is no evidence that any
13 Hangouts developer ever heard of Plaintiff or CamUp or visited Plaintiff’s website, before this
14 dispute arose. *See* Response to Interrogatory No. 3.

15 2. **SXSW Festival and MIPTV Conference.** Plaintiff also continues to demand
16 discovery regarding attendance by Google employees at two trade shows, even though CamUp’s
17 first appearance at the trade shows occurred *after* Google designed the Hangouts user interface.
18 Google conducted a document search and inquiry of the Google employees who even
19 potentially attended these trade shows (totaling over 100 employees, none of whom overlap
20 with the Hangouts development team). None was aware of CamUp or Plaintiff, noticed Plaintiff
21 or CamUp at either trade show or visited the CamUp website. *See* Response to Interrogatory
22 Nos. 1, 7. While Plaintiff alleges that a Google employee stopped by its booth at South by
23 Southwest, that is irrelevant. None of the Hangouts developers attended the conference, and
24 Hangouts was already designed by the time the conference started.

25 **B. Plaintiff’s Discovery Efforts Are Deficient**

26 In stark contrast to the massive, wide-ranging discovery Google has performed to defend
27 against Plaintiff’s frivolous claims, Plaintiff’s discovery efforts to date have been trivial.
28

1 1. **Production from a single custodian.** Plaintiff has produced documents
2 from exactly *one custodian*. Google knows there are many, many more custodians with
3 relevant documents. For instance, Plaintiff identified 17 witnesses in its initial
4 disclosures to be “contact[ed] through counsel for Be In,” plus another eight who
5 apparently had relevant communications with Plaintiff.

6 2. **Missing categories of documents.** Plaintiff has failed to produce *any*
7 *documents* regarding the following categories of information requested by Google:

- 8 • Login or visitor information concerning Plaintiff’s CamUp or GigIn websites
- 9 • Complete user traffic data for Plaintiff’s websites
- 10 • Documents concerning the development of the CamUp product
- 11 • Documents concerning Plaintiff’s claimed trade secrets, such as documents showing
12 who purportedly invented or conceived them, when or how
- 13 • Numerous documents concerning Plaintiff’s May 2011 London meeting with
14 Richard Robinson. To date, Plaintiff has produced only a small number of email
15 communications concerning the meeting. Plaintiff has not even produced a copy of
16 its non-disclosure agreement with Google from Plaintiff’s own files
- 17 • Documents concerning visitors to its booth at the South by Southwest festival
- 18 • Documents concerning the claimed “unusual traffic” to Plaintiff’s websites following
19 the May 2011 London meeting
- 20 • Third party communications concerning the current dispute
- 21 • Documents reflecting prior versions of the CamUp user interface
- 22 • Documents concerning the claimed scalability of the CamUp product

23 **6. SETTLEMENT AND ADR**

24 The Court referred the parties to private mediation with a deadline of March 14, 2014.
25 Be In is open to conducting an early mediation well in advance of the deadline.

26 **7. SCHEDULING**

27 The Court set the following case schedule in its August 14, 2013 Minute Order and Case
28 Management Order (D.I. 70):

1 Deadline to File Motion to Amend or Add Parties – November 1, 2013
2 Fact Discovery Cutoff – May 17, 2014
3 Deadline for Designation of Experts – May 19, 2014
4 Expert Discovery:
5 Opening Expert Reports – June 18, 2014
6 Rebuttal Expert Reports – July 18, 2014
7 Expert Discovery Cut-Off – August 8, 2014
8 Last Day to File Dispositive Motions – September 8, 2014
9 Last Day for Hearing on Dispositive Motions – October 23, 2014, At 1:30 P.M.
10 Pretrial Conference Date – December 18, 2014, At 1:30 P.M.
11 Jury Trial Date – January 12, 2015, at 9 a.m.

12 **8. TRIAL**

13 Be In, Inc. has requested a jury trial. The parties expect trial will last seven to ten court
14 days.

15
16 Dated: October 3, 2013 MORRISON & FOERSTER LLP
17 By: /s/ Charles S. Barquist
18 CHARLES S. BARQUIST
19 Attorneys for Plaintiff BE IN INC.

20
21
22 Dated: October 3, 2013 WILSON SONSINI GOODRICH ROSATI
23 By: /s/ Colleen Bal
24 COLLEEN BAL
25 Attorneys for Defendants
26 GOOGLE INC., YOUTUBE, LLC, and
27 GOOGLE UK LTD.
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LOCAL RULE 5-1(I)(3) ATTESTATION

I, Charles S. Barquist, am the ECF User whose ID and password are being used to file the Joint Proposed Case Management Schedule. In compliance with Local Rule 5-1(i)(3), I hereby attest that Colleen Bal has concurred in this filing.

 /s/ Charles S. Barquist
Charles S. Barquist