

EXHIBIT A
to Pfefferkorn Declaration ISO Motion to Seal

REDACTED
Version of Document Sought To Be Sealed

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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 BE IN, INC., a New York corporation)
14 Plaintiff,)
15 v.)
16 GOOGLE INC., a California corporation;)
17 YOUTUBE, LLC, a Delaware limited liability)
18 company, and GOOGLE UK LTD., a private)
19 Defendants.)

CASE NO.: 5:12-cv-03373-LHK-HRL
DISCOVERY DISPUTE JOINT REPORT #2
PROVISIONALLY UNDER SEAL
The Honorable Howard R. Lloyd

20 This Joint Report covers a dispute regarding Plaintiff Be In, Inc.’s (“Be In”) response to
21 Defendant Google Inc.’s (“Google”) interrogatory requesting the identification of the alleged
22 trade secrets Plaintiff claims Defendants misappropriated. Google informed Be In of the parties’
23 impasse on October 7. Lead counsel affirm their compliance with the Standing Order re: Civil
24 Discovery Disputes; however, counsel for Be In disagrees with Google’s decision to file a
25 Report with respect to only part of Be In’s response to Google’s Interrogatory No. 1, while other
26 aspects of that response remain subject to ongoing meet and confer discussions. Google
27 responds that the parties have met and conferred (by phone, in writing, and twice in person) over
28 the distinct question presented here for months. Google is prejudiced by delay because it needs

1 to formulate its defenses to the trade secret claims Plaintiff refuses to identify and to conduct
2 discovery on them. Plaintiff's other trade secret claims are no basis for further delay.

3 **DEFENDANTS' POSITION**

4 **I. INTRODUCTION**

5 This is a trade secret case. Like many such cases, the plaintiff seeks to avoid giving the
6 defendants a complete and specific identification of each of the trade secret claims it asserts as
7 intellectual property. That is a common tactic in trade secret cases – a tactic employed to inhibit
8 the defendant's ability to prepare a defense to each separate claim being asserted, and to keep the
9 intellectual property being asserted as vague and amorphous as possible.

10 Here, and in response to an interrogatory asking Plaintiff to provide a complete, written
11 identification of each separate trade secret claim without referring to documents, Plaintiff
12 referred to an 8-page business plan document. Plaintiff has refused to tell Google whether it
13 asserts that any of the more than 50 different items listed in the document are asserted in this
14 litigation as individual, stand-alone trade secret claims, or whether it is solely claiming that the
15 combination of the 50 different items in the business plan is a single trade secret. Google thus
16 seeks to compel Plaintiff to inform Google whether Plaintiff asserts that any of the items listed
17 within the document are free-standing, individual trade secret claims.

18 Google served an interrogatory asking Plaintiff to provide a precise, written identification
19 of each separate trade secret claim, without referring to documents. One of Plaintiff's answers is
20 at issue on this motion. In that answer, Plaintiff cited an 8-page document it sent to a Google
21 UK employee – a document that contains numerous features and concepts spread across more
22 than 50 paragraphs or bullet points of text¹ – but did not list which (if any) items within the
23 document it claims as stand-alone, individual trade secret claims. In meet-and-confer
24 discussions, Plaintiff stated its contention that the entire document is a “combination trade
25 secret.” For a combination trade secret, a plaintiff must prove that the defendant misappropriated
26 *all of the elements of the combination*. Thus, asserting a combination trade secret is very

27
28 ¹ In keeping with the Court's standing order, Google has not attached the May 2011
document as an exhibit. Google will provide a copy at the Court's request.

1 different from asserting the individual elements of the combination as stand-alone trade secret
2 claims. But Plaintiff refuses to tell Google whether (1) it *only* asserts the 8-page document as a
3 single trade secret claim, or (2) it *also* asserts individual items within the 8-page document as
4 stand-alone trade secret claims.

5 Whether or not the entire document is a valid “combination trade secret” (a merits issue),
6 Google is entitled to discover if Plaintiff *also* contends that individual items listed within the
7 document are asserted against Google as individual, stand-alone trade secret claims. Trade
8 secret plaintiffs often assert “combination trade secret” claims at the outset, but then (1) try to
9 change the claim as the case proceeds; (2) later claim that individual items within the
10 combination separately constitute individual trade secrets; and (3) try to proceed with as vague a
11 claim as possible to prevent the defendant from focusing deposition questions, discovery
12 requests, and a motion for summary judgment on discrete, specific items. To prevent such
13 tactics, Google’s interrogatory specifically called for a precise identification of *all* of Plaintiff’s
14 trade secret claims. Google has a right to this information so that it can prepare defenses as to
15 each separate trade secret claim that Plaintiff asserts.

16 **II. PROCEDURAL HISTORY AND BACKGROUND**

17 On May 30, 2013, Google served its Interrogatory No. 1, asking Plaintiff to provide a
18 precise and specific identification of each alleged trade secret Plaintiff contends Google
19 misappropriated, and called for a clear, written identification of each claim without conclusory
20 phrases or reference to documents. Plaintiff has supplemented once. *See* Exhibit B at 2-5.

21 From July to September, Google engaged in multiple written and telephonic meet and
22 confer efforts with Plaintiff and two in-person meetings. Google stated that Plaintiff’s reference
23 to an 8-page document was not an adequate response to the interrogatory Google served, which
24 asked Plaintiff to identify each separate trade secret claim in writing, and without reference to
25 documents. Google also noted that Plaintiff appears to have publicly disclosed much of the
26 document’s content of the 8-page document in an April 2011 YouTube video, heightening the
27 importance of understanding whether Plaintiff asserts individual, stand-alone trade secret claims
28 based on specific items within the document.

1 In response, Plaintiff stated that even though the document contains things it has publicly
2 disclosed, Plaintiff need not provide any further identification because Plaintiff claims the
3 document as a “combination trade secret.” Google responded that even if Plaintiff claims the
4 document as a single “combination trade secret,” it still must identify any individual items in the
5 8-page document that Plaintiff asserts as stand-alone trade secret claims. Plaintiff refused to tell
6 Google whether or not it asserts such additional trade secret claims, stating during an in-person
7 meeting that “this is more than you get in most cases.”

8 **III. ARGUMENT**

9 **A. Legal Standard: Interrogatories and Trade Secret Claim Identification**

10 A trade secret plaintiff bears the burden to identify its alleged secrets. *See Imax Corp. v.*
11 *Cinema Tech., Inc.*, 152 F.3d 1161, 1164-67 (9th Cir. 1998). Courts agree that trade secret
12 plaintiffs must answer a contention interrogatory seeking a precise identification of each trade
13 secret claim, in a complete response without evasive wording or conclusory phrases. *See*
14 *Stoncor Group, Inc. v. Campton*, 2006 WL 314336, *1-2 (W.D. Wash. 2006) (plaintiff’s
15 response insufficient where it “listed generic technical categories such as ... ‘customer lists.’”).²
16 For example, in one recent case involving an identification interrogatory and instruction almost
17 verbatim with Google’s here, the court compelled the trade secret plaintiff to supplement its
18 response, which consisted merely of a high-level description of its product features and “generic
19

20 ² Rulings on trade secret identification disputes are common, and many address deficient
21 interrogatory responses. *E.g.*, *Dura Global Tech., Inc. v. Magna Donnelly Corp.*, 2007 WL
22 4303294, *4 (E.D. Mich. Dec. 6. 2007) (ordering better response to identification interrogatory);
23 *DeRubeis v. Witten Tech., Inc.*, 244 F.R.D. 676, 680 (N.D. Ga. 2007) (same where response
24 “does not specify any trade secrets at all, but rather reveals the end results of, or the functions
25 performed by, the claimed trade secrets); *Excelligence Learning Corp v. Oriental Trading Co.,*
26 *Inc.*, 2004 WL 2452834, *3-4 (N.D. Cal. 2004) (granting motion to compel interrogatory
27 requesting that plaintiff “identify in detail” alleged secrets where plaintiff had apparently listed
28 only general categories); *Compuware Corp. v. Health Care Serv. Corp.*, 2002 WL 485710, *7
(N.D. Ill. 2002) (issuing sanctions where defendant won motion to compel regarding
interrogatory requesting identification of alleged secrets but plaintiff “dragged its feet” in
responding, and merely listed functions of allegedly secret software); *Uresil Corp. v. Cook*
Group, Inc., 135 F.R.D. 168, 174 (N.D. Ill. 1991) (granting motion to compel better
interrogatory responses; “[I]t is clear that Uresil has not identified the components and/or
concepts incorporated in the products Uresil claims Cook misappropriated.”). For a nationwide
survey, see Graves and Range, *Identification of Trade Secret Claims in Litigation*, 5
NORTHWESTERN J. OF LAW & TECH. 68 (2006).

1 references to products” and did not expressly identify each and every technical trade secret claim
2 asserted. *See Hill v. Best Med. Int’l, Inc.*, 2010 WL 2546023, at *1-4 & n.4 (W.D. Pa. June 24,
3 2010). These decisions are unsurprising, as an interrogatory “must, to the extent it is not
4 objected to, be answered separately and fully,” and “evasive or incomplete” responses are not
5 permitted. Fed. R. Civ. P. 33(b)(3), 37(a)(4).

6 **B. Plaintiff’s Citation to an Eight-Page Document is Insufficient**

7 Plaintiff’s citation to the 8-page document runs afoul of these standards. *See* Exhibit B at
8 4 (“Be In’s overall strategic business plan as disclosed to Richard Robinson on May 13, 2011 in
9 an eight-page confidential document”). Google’s interrogatory specifically requested that
10 Plaintiff identify each separate trade secret claim in writing, and not by reference to documents.
11 By referring to a document and not stating what items (if any) within the document are asserted
12 as individual trade secret claims, Plaintiff did not provide the requested information.

13 The eight-page document in question contains more than 50 separate paragraphs or bullet
14 points, listing a host of website features, prices, planned features, and various social networking
15 concepts. Examples include (1) text that appears verbatim from Plaintiff’s prior, public April
16 2011 press release; (2) concepts that Plaintiff disclosed publicly in an April 2011 YouTube
17 video;³ (3) concepts that have no overlap with anything Google does, such as [REDACTED]
18 [REDACTED] (4) plans to work with potential
19 customers with whom Plaintiff does not accuse Google of working; (5) descriptions and a screen
20 shot of Plaintiff’s publicly-released website; and (6) social networking and Internet
21 entertainment concepts, such as [REDACTED]

22 Some of the bullet points and wording in the document include the following: [REDACTED]
23 [REDACTED]
24 [REDACTED]

25
26
27 ³ In a YouTube video posted by Plaintiff’s executive in April 2011, Plaintiff describes
28 such ideas and features as watching embedded YouTube videos on CamUp (at :33 and 2:17),
private rooms for users (at :45), customized rooms (at 1:30), watching movies (at 1:50), avatars
(at 2:23), playlists (at 3:34), and a variety of special events sponsored by entertainment
companies (passim). *See* < <http://www.youtube.com/watch?v=VnLK7JIB-rg>>.

1 [REDACTED]
2 [REDACTED]
3 In the face of Google’s interrogatory as phrased, Plaintiff’s reference to the 8-page
4 document is insufficient. In trade secret litigation, plaintiffs who assert “combination trade
5 secret” claims often try to change course when they realize they have no basis to allege
6 misappropriation of all of the elements of the combination; they later allege that individual items
7 within a claimed “combination” separately constitute stand-alone trade secrets. To the extent
8 Plaintiff alleges that any of the individual items listed in the 8-page document are stand-alone,
9 individual trade secret claims misappropriated by Google, Google is entitled to a response listing
10 each such item, so that Google can formulate its defenses to each.

11 **C. Google’s Reasonable Proposal**

12 For each item listed in the 8-page document that Plaintiff claims as a trade secret on an
13 individual, stand-alone basis, Plaintiff must provide a precise and specific identification of each
14 such trade secret claim, even if it contends the entire document is a “combination trade secret.”

15 **PLAINTIFF’S POSITION**

16 **I. INTRODUCTION**

17 This dispute concerns Be In’s response to Interrogatory No. 1. It does not concern what
18 Google asserts other trade secret plaintiffs allegedly “often” do or what “common tactics” other
19 unnamed parties may employ. Remarkably, however, Google’s motion fails to quote the
20 interrogatory at issue, and in fact repeatedly misstates what it asked.

21 Be In has provided Defendants with a succinct list of the trade secrets at issue in this case.
22 Only one of the trade secrets on the list is a document—an eight-page document excerpting from
23 Be In’s business plan. (Ex. B at4:8-9.) It is not surprising or remarkable to claim a business plan
24 is a trade secret, and it does not “inhibit [Defendants’] ability to prepare a defense” to do so. The
25 business plan was sent to Defendants under NDA the day after a meeting between the parties
26 when Google’s representative requested that Be In send follow-up material. Defendants were
27 not entitled to make use of it.
28

1 Be In has repeatedly explained that the confidential business plan is a combination trade
2 secret. In a change from their position articulated during meet and confer, Defendants do not
3 appear to be contesting that Be In can claim the eight-page confidential strategic business plan is
4 a combination trade secret. Instead, Defendants insist that Be In is required to also specifically
5 identify any “stand-alone” trade secrets contained within the confidential business plan that they
6 misappropriated. As discussed below, however, Be In has no obligation to identify the specific
7 confidential components of a combination trade secret that Google misappropriated, particularly
8 at this stage of the case, where discovery is just beginning.⁴

9 **II. PROCEDURAL HISTORY AND BACKGROUND**

10 In response to Interrogatory No. 1, Be In specifically identified the trade secrets that it
11 claims Defendants have misappropriated. Only one of the items on the list is a document, an
12 eight-page business plan that was disclosed to Google employee Richard Robinson pursuant to a
13 non-disclosure agreement the day after the parties met, because Mr. Robinson requested follow-
14 up material at the meeting. During meet and confer sessions, Defendants asked about the nature
15 of the trade secret disclosed in the document and Be In explained that the business plan itself was
16 a combination trade secret. This should have settled the matter. Instead, Defendants insisted that
17 Be In could not claim the business plan was a trade secret and demanded that Be In identify the
18 individual items contained in the business plan that are trade secrets that Google misappropriated.
19 In this Joint Report, Defendants shift position and now do not challenge whether Be In can claim
20 the business plan is a trade secret, but insist that the interrogatory also requires Be In to identify
21 individual components of the business plan misappropriated by Google that are trade secrets.

22 **III. ARGUMENT**

23 **A. Defendants Mischaracterize the Interrogatory and Improperly Impose 24 Limitations on Be In’s Response**

25 Defendants assert *three times* that their interrogatory “specifically requested” that a
26 response could not reference a document. Defendants never quote from Interrogatory No. 1,
27 which does not in fact make this request. Rather, Interrogatory No. 1 states:

28 ⁴ Depositions have not yet begun and to date Defendants have produced just over 25,000
pages of documents, more than 90% of which was produced within just the last three weeks.

1 IDENTIFY WITH PRECISION AND SPECIFICITY EACH AND
2 EVERY ALLEGED TRADE SECRET that PLAINTIFF contends
3 GOOGLE unlawfully acquired, used, or disclosed. (“IDENTIFY WITH
4 PRECISION AND SPECIFICITY EACH AND EVERY ALLEGED
5 TRADE SECRET” as used herein means to provide a specific description
6 of each such alleged trade secret, on an individual basis for each such
7 alleged trade secret, in such a manner that the exact identity, scope,
8 boundaries, constitutive elements, and content of each such alleged trade
secret are fully disclosed in writing, in contrast to an agglomerated set of
conclusory phrases that does not separately list and describe each such
alleged trade secret, in contrast to a mere list of documents or file names,
and with precision above that required by California Code of Civil
Procedure Section 2019.210.)⁵

9 (Ex. A at 5:1-11.)

10 Be In provided a comprehensive response to Interrogatory No. 1 (Ex. B at 3:3-5:7). It did
11 not provide “a mere list of documents or file names.” The response contains a detailed
12 description of the trade secrets Be In contends Google misappropriated, and the business plan is
13 the only document on that list.

14 Moreover, Defendants do not cite any authority showing they can prohibit Be In from
15 referencing a document in an interrogatory response. Indeed, Federal Rule of Civil Procedure
16 33(d) permits Be In to reference documents in its response. Be In expressly objected to
17 Interrogatory No. 1 as “overbroad and unduly burdensome in that it purports to require Be In to
18 provide specificity beyond that which is required by the Federal Rules of Civil Procedure.”

19 (Ex. B at 3:6-8.)

20 Perhaps most importantly, however, as shown below, the law is clear that a document can
21 be claimed as a trade secret. Defendants are trying to artificially restrict what Be In can claim as
22 a trade secret by unilaterally asserting that documents cannot be included in its response.

23 **B. Be In Is Entitled to Claim a Confidential Business Plan as a Trade Secret**

24 Be In is entitled to claim its confidential business plan as a trade secret. Defendants
25 demand in their interrogatory that Be In respond “with precision above that required by

26
27 ⁵ Defendants appear to be conflating Interrogatory No. 1 with Interrogatory No. 23, which
28 asks Be In to answer “without referencing documents.” The parties have only just begun
meeting and conferring about Interrogatory No. 23, which has never been discussed at an in
person meeting and it is not at issue here.

1 California Code of Civil Procedure section 2019.210.” But section 2019.210 reflects the balance
2 that the California legislature decided was required for identifying trade secrets at the outset of
3 discovery of a trade secret case, and, to Be In’s knowledge, all of the courts in this District have
4 applied section 2019.210, either because they believed they were required to do so or as a case
5 management tool. Notably, Defendants do not cite any authority requiring a plaintiff to specify
6 with more particularity than that required by section 2019.210 in response to an interrogatory,
7 especially where, as here, a case is in the earliest stage of discovery.

8 There is a large body of case law providing guidance regarding the “reasonable
9 particularity” standard. “The California Court of Appeal has interpreted ‘reasonable
10 particularity’ to include enough detail so that the defendant is able to learn the boundaries of the
11 alleged trade secret in order to investigate defenses.” *VasoNova Inc. v. Grunwald*, C 12-02422
12 WHA, 2012 WL 4119970, at *2 (N.D. Cal. Sept. 18, 2012) (citing *Brescia v. Angelin*, 172 Cal.
13 App. 4th 133, 138 (2009)). “‘Reasonable particularity’ mandated by section 2019.210 does not
14 mean that the party alleging misappropriation has to define every minute detail of its claimed
15 trade secret at the outset of the litigation. Nor does it require a discovery referee or trial court to
16 conduct a miniature trial on the merits of a misappropriation claim before discovery may
17 commence.” *I-Flow Corp. v. Apex Med. Techs., Inc.*, 2008 WL 2233962, at *2 (S.D. Cal. May
18 23, 2008) (emphasis added) (quoting *Advanced Modular Sputtering, Inc. v. Super. Ct.*, 132 Cal.
19 App. 4th 826, 835 (2005)). Despite this clear authority, Defendants attempt to litigate the merits
20 of Be In’s trade secrets claims in this joint discovery report. Be In has provided more detail than
21 is required by the “reasonable particularity” standard, and there is no concern that Defendants are
22 unable “to learn the boundaries of the alleged trade secret in order to investigate defenses.”
23 *VasaNova*, 2012 WL 411970, at *2. Defendants do not even contend in this Joint Report that by
24 identifying the specific business plan that Defendants misappropriated Be In has failed to satisfy
25 the reasonable particularity standard of section 2019.210.

26 Defendants also have not shown that Be In failed to meet the standard of particularity
27 required by any of the cases that they cite. Defendants rely almost exclusively on out-of-state
28 authority that has no application here because it is factually distinct. These cases stand for the

1 proposition that plaintiffs are not allowed to list generic categories of trade secrets—something
2 Defendants have not even accused Plaintiff of doing. For example, in *StonCor Grp., Inc. v.*
3 *Campton*, the Court found Plaintiff’s interrogatory response deficient where Plaintiff simply
4 “listed generic categories of trade secrets: ‘installer list/network,’ ‘pricing strategy and policies,’
5 and ‘customer lists.’” No. C05-1225JLR, 2006 WL 314336, at *1 (W.D. Wash. Feb. 7, 2006).
6 That would be the equivalent of Be In merely listing as its trade secret “business plans,” which
7 Be In has not done. Defendants also cite to *Dura Global Technologies, Inc. v. Magna Donnelly,*
8 *Corp.*, a case where Plaintiff “provide[d] a list of general categories and types of information
9 they allege comprise their trade secret” and referenced 8500 pages of documents. No. 07-CV-
10 10945, 2007 WL 4303294, at *4 (E.D. Mich. Dec. 6, 2007). *See also Hill v. Best Med. Int’l, Inc.*,
11 No. 07-1709, 2010 WL 2546023, at *4 (W.D. Pa. June 24, 2010) (taking issue with general
12 allegations of trade secrets including “[g]eneral allegations of drawings, patterns, software
13 programs, methods, techniques, processes, source code, libraries, data files, and ‘tens of
14 thousands of files.’”).

15 None of Defendants’ cited authority states that it is inappropriate to cite a discrete
16 document as a trade secret. In contrast, there is authority supporting pointing to documents for
17 the identification of trade secrets. In *3M v. Pribyl*, for example, the court found that it was
18 sufficiently “concrete” even at trial for plaintiff to have cited to more than 500 pages of operating
19 procedures and manuals as containing its combination trade secret. 259 F.3d 587, 595 & n. 2
20 (7th Cir. 2001). Be In’s eight-page document is, of course, much narrower than the 500 pages of
21 procedures and manuals at issue in *3M*.

22 The Seventh Circuit recognized further in *3M* that a plaintiff is not required to identify
23 specific secrets in documents that are claimed as combination trade secrets. *See id.*
24 (“Throughout the course of their argument, defendants press 3M to divulge what specific
25 information contained within the more than 500 hundred pages of materials could be considered
26 secret. In doing so, defendants seem to suggest that if 3M cannot point to specific items within
27 its manuals that are not known by the industry, then 3M cannot claim a trade secret in the
28 combined product. We disagree.”) Other courts agree. *See, e.g., Mike’s Train House, Inc. v.*

1 *Lionel, L.L.C.*, 472 F.3d 398, 411 (6th Cir. 2006) (holding that when trade secrets are based on
2 “a unique combination of both protected and unprotected material, a plaintiff should not be
3 obligated to identify which components of the protected material is secret.”) Like *3M*, the Sixth
4 Circuit found such a dissection was not even required at trial. *See id.*

5 **C. Plaintiff’s Reasonable Proposal**

6 Be In does not believe it is required to identify the individual claimed secret components
7 in the strategic business plan that it disclosed to Google, as Defendants contend in this motion,
8 and Be In accordingly does not propose modifying or further supplementing its response to
9 Interrogatory No. 1.

10 **IV. CONCLUSION**

11 Defendants’ assertion that there is no burden on Be In is beside the point. Be In’s
12 supplemental response to Interrogatory No. 1 comprehensively sets forth Be In’s trade secret
13 claims, and Be In is not required to further identify specific secret components of its business
14 plan in response to Interrogatory No. 1. Defendants cannot be prejudiced by receiving a full and
15 comprehensive response to their interrogatory.

16 **DEFENDANT’S REPLY**

17 Plaintiff does not deny that it alleges as free-standing trade secret claims individual items
18 in the 8-page document that it refuses to identify. Google is entitled to a precise identification of
19 each claimed trade secret. Plaintiff’s arguments fall flat: (1) whether the entire document is a
20 valid “combination trade secret” (a merits issue) is distinct from whether Plaintiff must identify
21 the items it asserts as individual trade secrets; (2) Rule 33(d) does not apply, as reading the
22 document does not identify the items Plaintiff asserts as individual trade secret claims; (3)
23 Section 2019.210 and Plaintiff’s cases addressing *pre-discovery*-stage identification do not apply
24 to the *interrogatory* stage; (4) this is not about whether the identification is sufficiently detailed,
25 but whether entire claims are unidentified; and (5) Plaintiff identifies no prejudice or burden.

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Dated: October 11, 2013

MORRISON & FOERSTER LLP

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Dated: October 11, 2013

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LOCAL RULE 5-1(I)(3) ATTESTATION

I, Colleen Bal, 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 Charles S. Barquist has concurred in this filing.

/s/ Colleen Bal
Colleen Bal