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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 )  
 company, and GOOGLE UK LTD., a private )  
 18 limited company registered in England and )  
 Wales, )  
 19 )  
 Defendants. )  
 20 )  
 21 )

CASE NO.: 5:12-cv-03373-LHK  
**DEFENDANTS' CONDITIONAL  
 NON-OPPOSITION TO  
 PLAINTIFF'S MOTION FOR  
 EXTENSION OF TIME TO FILE  
 THIRD AMENDED COMPLAINT**  
 Courtroom: 8, 4th Floor  
 Judge: Hon. Lucy H. Koh

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## INTRODUCTION

2 Defendants do not oppose Plaintiff’s request for more time to secure yet another  
3 successor law firm to file a Third Amended Complaint. In light of the overwhelming evidence  
4 that there is no good faith basis for Plaintiff’s claims, however, Defendants ask the Court to  
5 account for the possibility that Plaintiff will be unable to find a sixth firm to press those claims.  
6 Accordingly, Defendants respectfully request that – to the extent Plaintiff is granted the  
7 extension it requests but nonetheless fails to file a Third Amended Complaint by the extended  
8 deadline (December 2, 2013) – Plaintiff be required to show cause within 14 days thereafter why  
9 the case should not be dismissed with prejudice in its entirety.

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## ARGUMENT

11 Plaintiff’s current counsel Morrison & Foerster is the fifth firm to represent it since  
12 Plaintiff first raised this misguided dispute in September 2011. On August 14, 2013, the firm  
13 assured the Court that, unlike prior counsel, it was in this case to stay (Court: “And as far as you  
14 know, you’re here to stay?” Plaintiff’s counsel: “That’s our plan, Your Honor.”). *See* Hearing  
15 Transcript [Docket No. 80] at 5:6-8. But following the Court’s dismissal of most of the case, and  
16 the evidence Defendants have presented showing that the case is being pursued in bad faith,  
17 Morrison & Foerster too now seeks to withdraw. It would appear that Morrison & Foerster has  
18 recognized, as Defendants have maintained from the start, that there is no good faith basis for  
19 this case.

20 When asked to identify successor counsel, Morrison & Foerster was unable to do so –  
21 evidently because none has been retained.

22 Defendants do not believe that any law firm can file Plaintiff’s claims consistent with  
23 Rule 11. To demonstrate the falsity of Plaintiff’s accusations, Defendants have conducted an  
24 inquiry of more than 175 people, conducted intensive electronic searches, and produced  
25 thousands of documents. The dates in the metadata of Defendants’ documents showing  
26 independent, prior development cannot reasonably be disputed.

27 Plaintiff’s allegation that Google developed its Hangouts user interface by copying from  
28 Plaintiff’s CamUp platform is rendered impossible by Google’s evidence that Google developed

1 the disputed user interface *before* Plaintiff claims to have made CamUp public.<sup>1</sup> Google's  
2 independent, prior development is backed up by thousands of pages of Google development  
3 documents that have been produced to Plaintiff – evidence conclusively demonstrating that  
4 Plaintiff's copying claims (copyright infringement and breach of terms of service) cannot be  
5 maintained in good faith.

6 Plaintiff's allegations that Google misappropriated trade secrets relating to Hangouts and  
7 a link from YouTube to Hangouts are also unquestionably false. The only person from  
8 Defendants whom Plaintiff ever met (and the only person to whom Plaintiff claims it disclosed  
9 trade secrets) – Google UK salesperson and former defendant Richard Robinson – did not  
10 transmit anything about that meeting to anyone who worked on the Hangouts or YouTube  
11 features at issue and did not even know those employees. Google long ago submitted to Plaintiff  
12 a detailed declaration from Mr. Robinson attesting to the facts that he did not use Plaintiff's  
13 alleged trade secrets or transmit them to anyone else. Google also conducted an intensive  
14 investigation which verified Defendants' independent development and the absence of any  
15 transmission from Mr. Robinson to any of the relevant developers. Meanwhile, Plaintiff  
16 disclosed all or most of its alleged trade secrets in an April 2011 YouTube video presentation, *a*  
17 *month before it met Mr. Robinson in London.*

18 Given these facts, Plaintiff has struggled to come up with any viable claims. Plaintiff (1)  
19 amended its original complaint to remove a doctored graphic after Defendants pointed out that  
20 the graphic could not have existed when Plaintiff claimed to have disclosed it to Mr. Robinson;  
21 (2) amended its First Amended Complaint to remove (a) factual allegations that it could not  
22 possibly support, (b) all claims against Mr. Robinson, and (c) a trade dress claim that Defendants  
23 had moved to dismiss as a matter of law; and (3) now must amend, if it can in good faith, to re-

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26 <sup>1</sup> Attached as Exhibits A and B are (1) the timeline showing Google's first-in-time  
27 development, and (2) screen shots showing the significant differences between the Hangouts and  
28 CamUp user interfaces, that Google submitted with the joint case management conference  
statement on October 3, 2013.

1 allege previously-removed fact allegations necessary to state claims for trade secret  
2 misappropriation and for breach of terms of service.

3 Each time Plaintiff has hired replacement counsel, Defendants have spent more time and  
4 more money repeating the same facts that conclusively rebut Plaintiff's claims. Each time,  
5 replacement counsel has withdrawn after a few months. With Plaintiff's latest counsel now  
6 withdrawing, Defendants seek finality so that the case does not languish should Plaintiff be  
7 unable to find another law firm willing to pursue this baseless case.

8 Accordingly, Defendants request an order that – to the extent Plaintiff is granted the  
9 extension it requests but nonetheless fails to file a Third Amended Complaint by the extended  
10 deadline (December 2, 2013) – Plaintiff be required to show cause within 14 days thereafter why  
11 the case should not be dismissed with prejudice in its entirety.<sup>2</sup>

### 12 CONCLUSION

13 For all of these reasons, Defendants respectfully request an order that if Plaintiff's  
14 successor counsel does not file a Third Amended Complaint by December 2, 2013, Plaintiff must  
15 show cause within 14 days as to why this action should not be dismissed with prejudice in its  
16 entirety.

17  
18 Dated: October 24, 2013

WILSON SONSINI GOODRICH & ROSATI

19 By: /s/ Colleen Bal

Colleen Bal

20  
21 *Attorneys for Defendants*

Google Inc., YouTube, LLC, and Google UK Ltd.

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25 <sup>2</sup> In its October 9, 2013 order granting Defendants' motion to dismiss, the Court ordered that  
26 Plaintiff's failure to "cure deficiencies" with respect to the two causes of action for which it was  
27 granted leave to amend (trade secret misappropriation and breach of terms of service) "will result  
28 in the dismissal of these claims with prejudice." See Oct. 9, 2013 Order (Docket No. 80) at 9.  
The only claim that would remain to be the subject of the order to show cause would be the  
copyright infringement claim, which is entirely premised on the false copying allegations  
discussed above.