

1 DOUGLAS E. OLSON (CSB NO. 38649)
dougolson@sandiegoiplaw.com
2 JAMES V. FAZIO, III (CSB NO. 183353)
jamesfazio@sandiegoiplaw.com
3 TREVOR Q. CODDINGTON, PH.D. (CSB NO. 243042)
trevorcoddington@sandiegoiplaw.com
4 SAN DIEGO IP LAW GROUP LLP
12526 High Bluff Drive, Suite 300
5 San Diego, CA 92130
Telephone: (858) 792-3446
6 Facsimile: (858) 792-3447

7 Attorneys for Plaintiff
STREETSPACE, INC.

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 STREETSPACE, INC., a Delaware
12 corporation,

13 Plaintiff,

14 vs.

15 GOOGLE INC., a Delaware corporation;
ADMOB, INC., a Delaware corporation;
16 APPLE INC., a California corporation;
QUATTRO WIRELESS, INC., a Delaware
17 corporation; NOKIA CORPORATION, a
foreign corporation; NOKIA INC., a
18 Delaware corporation; NAVTEQ
CORPORATION, a Delaware corporation;
19 MILLENNIAL MEDIA, INC., a Delaware
corporation; JUMPTAP, INC., a Delaware
20 corporation; and DOES 1 through 20,
inclusive,

21 Defendants.
22

CASE NO. 10-CV-1757-LAB-AJB

**PLAINTIFF STREETSPACE, INC.'S
RESPONSE TO THE COURT'S
MARCH 3, 2011 ORDER TO SHOW
CAUSE, AND REQUEST FOR LEAVE
TO AMEND ITS COMPLAINT**

Date: March 14, 2011
Time: 11:15 a.m.
Judge: Hon. Larry A. Burns
Ctrm: 9

1 Plaintiff Streetspace, Inc. (“Streetspace”) respectfully submits the following response to
2 the Court’s March 3, 2011, Order to Show Cause and this request for leave to amend its original
3 complaint. The proposed First Amended Complaint was inadvertently filed without leave on
4 February 25, 2011. D.E. No. 30. If the Court grants Streetspace leave to amend its complaint,
5 then Streetspace submits that Defendants’ motion to dismiss or, in the alternative, for a more
6 definite statement (D.E. No. 21) should be denied as moot and the hearing on Defendants’ motion
7 to dismiss should be vacated. At a minimum, in light of the pending status of this response and
8 request for leave to amend the complaint, Streetspace submits that the hearing on Defendants’
9 motion to dismiss or, in the alternative, for a more definite statement (D.E. No. 21) should be
10 continued and not be heard on March 14, 2011.

11 The proposed First Amended Complaint does not have a material effect on either
12 Defendants’ pending motion to transfer this action to the Northern District of California (D.E. No.
13 23), or Streetspace’s pending motion to disqualify Cooley LLP as counsel for Millennial Media
14 (D.E. No. 29). Accordingly, Streetspace submits that the hearings on Defendants’ pending
15 motion to transfer this action to the Northern District of California (D.E. No. 23), and
16 Streetspace’s pending motion to disqualify Cooley LLP as counsel for Millennial Media (D.E.
17 No. 29) should proceed on March 14, 2011, as noticed.

18 **I. INTRODUCTION**

19 The Court should grant Streetspace leave to amend its complaint because Rule 15(a) of
20 the Federal Rules of Civil Procedure provides that a district court should “freely” grant leave to
21 amend when justice so requires. Fed. R. Civ. P. 15(a). This policy is to be applied with “extreme
22 liberality.” *Three Rivers Provider Network, Inc. v. Meritain Health, Inc.*, 2008 WL 2872664, at
23 *17 (S.D. Cal. July. 23, 2008) (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
24 1051-52 (9th Cir. 2003)). Defendants cannot overcome the strong presumption in favor of
25 granting this motion because this case remains in its very early stages, no discovery has begun, no
26 previous request for leave to amend has been made, and no defendant has even answered the
27 original complaint yet. Moreover, the proposed First Amended Complaint is 17 pages longer
28 than the original complaint, adds considerable detail to many of its allegations, and seeks to

1 address the perceived shortcomings of the original complaint raised by Defendants in their motion
2 to dismiss. Accordingly, leave to amend should be granted.

3 **II. STATEMENT OF FACTS**

4 Streetspace’s proposed First Amended Complaint (“FAC”), D.E. No. 30, adds
5 considerable detail to many of its allegations, and seeks to address the perceived deficiencies
6 raised by Defendants in their motion to dismiss or, in the alternative, for a more definite
7 statement. D.E. No. 21.

8 For example, in their motion to dismiss, Defendants claim that (1) Streetspace fails to
9 state a claim for direct infringement against Millennial Media or Jumtap; (2) Streetspace’s
10 claims for indirect infringement against the Defendants are deficient because (according to
11 Defendants) Streetspace fails to identify any direct infringers, fails to state facts sufficient to show
12 that any Defendant knew of the ‘969 patent prior to the filing of the lawsuit, and fails to plead
13 facts sufficient to show how any Defendant actively induce infringement; and (3) Streetspace fails
14 to state a claim for contributory infringement. D.E. No. 21 at 5-6, 8-9, 11.

15 In its proposed First Amended Complaint, Streetspace addresses these perceived
16 deficiencies. Specifically, Streetspace alleges that Millennial Media and Jumtap directly
17 infringe by “making, using, selling, importing, exporting, and/or offering for sale a system and/or
18 method that employs a terminal, a database, and a program as recited in one or more claims of the
19 ‘969 patent.” D.E. No. 30 [FAC, ¶¶ 176, 189]. For example, Streetspace alleges that Millennial
20 Media and Jumtap use terminals to test and develop their mobile advertising network. D.E. No.
21 30 [FAC, ¶¶ 177-78, 191, 193]. Further, Streetspace alleges in the FAC that all Defendants
22 directly infringe by maintaining databases in the United States and abroad that store and retain
23 consumer data obtained from consumers located inside and outside the United States. The
24 consumer data that Defendants retain in their databases includes, among other things, Internet
25 behavior of consumers; locations of consumers and/or consumers’ terminals; personal
26 information such as income and gender; responses to advertising; login and logoff times; IP
27 addresses, visited web sites, pages, and apps; unique cookie IDs; browser types; and terminal
28 types. *Id.*, ¶¶ 62, 87, 101, 120, 134, 149, 163, 178, 193. Streetspace also alleges in the FAC that

1 Millennium Media and Jumtap utilize server software and/or tracking cookies located on
2 consumer terminals in order to identify consumers and target advertisements. *Id.*, ¶¶ 179, 194.

3 It remains to be seen whether any Defendant actually knew of the ‘969 patent before filing
4 of this lawsuit on August 23, 2010, which will be the subject of discovery. Thus, Streetspace
5 pleads that Defendants knew of the ‘969 patent since at least August 23, 2010 (the filing date of
6 the original complaint). *Id.*, ¶¶ 72, 90, 109, 123, 138, 152, 167, 181, 196.

7 As for its indirect infringement allegations, Streetspace identifies the alleged direct
8 infringers whom each Defendant induces to infringe, such as (1) consumers receiving targeted
9 advertisements from the Defendants, (2) advertisers employing Defendants’ systems and
10 methodologies for delivering and displaying targeted advertisements, and (3) web site or app
11 developers utilizing Defendants’ targeted advertisements. *Id.*, ¶¶ 73, 91, 110, 124, 139, 153, 168,
12 182, 197. Further, Streetspace alleges that Defendants induce direct infringement by intentionally
13 designing, manufacturing, marketing, promoting, selling, servicing, supporting, providing
14 software developer kits and online help, and educating consumers, advertisers, and app
15 developers on their software, and systems and methodologies for delivering and displaying
16 targeted advertisements. *Id.* Moreover, Streetspace alleges that Defendants intentionally
17 encourage and/or aid consumers, advertisers, and app developers to use terminals, Defendants’
18 databases comprising consumer data, and Defendants’ specified software (i.e., programs) for the
19 display of targeted advertisements. *Id.* Defendants knew or should have known that these actions
20 would cause direct infringement of the ‘969 patent and did so with specific intent to encourage
21 and aid direct infringement. *Id.*

22 **III. ARGUMENT**

23 Rule 15(a) of the Federal Rules of Civil Procedure provides that a district court should
24 “freely” grant leave to amend a complaint “when justice so requires.” Fed. R. Civ. P. 15(a)(2).
25 This policy is to be applied with “extreme liberality.” *Three Rivers Provider Network, Inc. v.*
26 *Meritain Health, Inc.*, 2008 WL 2872664, at *17 (S.D. Cal. July. 23, 2008) (citing *Eminence*
27 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003)). Absent prejudice or a
28 strong showing of any of the other *Foman* factors, there is a strong presumption in favor of

1 granting leave to amend. *Id.*; see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (detailing
2 factors to consider in evaluating a motion for leave to amend, including undue delay, bad faith,
3 repeated failure to cure deficiencies, and futility).

4 In view of the very early procedural posture of this case, and applying the *Foman* factors,
5 leave to amend should be granted. Streetspace has not unduly delayed in seeking leave to amend
6 because Defendants filed their motion to dismiss or, in the alternative, for a more definite
7 statement alleging perceived deficiencies in Streetspace’s complaint on January 18, 2011—
8 scarcely six weeks ago. D.E. No. 21. No dates have been set, no discovery has commenced, and
9 no Defendant has even answered the original complaint yet, so this factor strongly weighs in
10 favor of granting leave to amend.

11 Moreover, Streetspace is not seeking leave to amend in bad faith; to the contrary,
12 Streetspace’s proposed First Amended Complaint seeks to address the alleged deficiencies
13 asserted by Defendants in their motion to dismiss. For example, in their motion to dismiss,
14 Defendants claim that (1) Streetspace fails to state a claim for direct infringement against
15 Millennial Media or Jumtap; (2) Streetspace’s claims for indirect infringement against the
16 Defendants are deficient because (according to Defendants) Streetspace fails to identify any direct
17 infringers, fails to state facts sufficient to show that any Defendant knew of the ‘969 patent prior
18 to the filing of the lawsuit, and fails to plead facts sufficient to show how any Defendant actively
19 induced infringement; and (3) Streetspace fails to state a claim for contributory infringement.
20 D.E. No. 21 at 5-6, 8-9, 11.

21 In its proposed First Amended Complaint, Streetspace addresses these perceived
22 deficiencies. Specifically, Streetspace alleges that Millennial Media and Jumtap directly
23 infringe by “making, using, selling, importing, exporting, and/or offering for sale a system and/or
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25 ‘969 patent.” D.E. No. 30 [FAC, ¶¶ 176, 189]. For example, Streetspace alleges that Millennial
26 Media and Jumtap use terminals to test and develop their mobile advertising network. D.E. No.
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4 information such as income and gender; responses to advertising; login and logoff times; IP
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8 consumer terminals in order to identify consumers and target advertisements. *Id.*, ¶¶ 179, 194.

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10 infringers whom Defendants induce to infringe, such as (1) consumers receiving targeted
11 advertisements from the Defendants, (2) advertisers employing Defendants' systems and
12 methodologies for delivering and displaying targeted advertisements, and (3) web site or app
13 developers utilizing Defendants' targeted advertisements. *Id.*, ¶¶ 73, 91, 110, 124, 139, 153, 168,
14 182, 197.

15 Further, Streetspace alleges that Defendants induce direct infringement by intentionally
16 designing, manufacturing, marketing, promoting, selling, servicing, supporting, providing
17 software developer kits and online help, and educating consumers, advertisers, and app
18 developers on their software, and systems and methodologies for delivering and displaying
19 targeted advertisements. *Id.* Moreover, Streetspace alleges that Defendants intentionally
20 encourage and/or aid consumers, advertisers, and app developers to use terminals, Defendants'
21 databases comprising consumer data, and Defendants' specified software (i.e., programs) for the
22 display of targeted advertisements. *Id.* Defendants knew or should have known that these actions
23 would cause direct infringement of the '969 patent and did so with specific intent to encourage
24 and aid direct infringement. *Id.* Accordingly, this factor strongly favors granting leave to amend.

25 Next, Streetspace has not repeatedly failed to cure perceived deficiencies in its complaint;
26 rather, this is Streetspace's first request for leave to amend the complaint. Finally, it is not futile
27 to allow leave to amend, nor would Defendants suffer any prejudice from granting leave to
28 amend; to the contrary, Streetspace's proposed First Amended Complaint adds considerably more

1 detail to many of its allegations, and seeks to address the perceived deficiencies raised by
2 Defendants. Indeed, the Defendants all requested extensions of time to respond to the original
3 complaint in this matter, so they cannot reasonably claim prejudice from any delay in having to
4 respond to the FAC. Therefore, all factors strongly weigh in favor of granting leave to amend.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court should not strike the First Amended Complaint (D.E.
7 No. 30) and should grant Streetspace's request for leave to amend the complaint.

8 Dated: March 4, 2011

SAN DIEGO IP LAW GROUP LLP

9
10 By: /s/James V. Fazio, III

11 DOUGLAS E. OLSON
12 JAMES V. FAZIO, III
13 TREVOR Q. CODDINGTON, PH.D.

14 Attorneys for Plaintiff
15 STREETSPLACE, INC.
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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify and declare that I am over the age of 18 years old, employed in
3 the County of San Diego, State of California, and am not a party to the above-entitled action.

4 On March 4, 2011, I filed a copy of the following documents:

5 **PLAINTIFF STREETSPACE, INC.’S RESPONSE TO THE COURT’S MARCH 3,
6 2011 ORDER TO SHOW CAUSE, AND REQUEST FOR LEAVE TO AMEND ITS
7 COMPLAINT**

8 by electronically filing with the Clerk of the Court using the CM/ECF system, which will send
9 notification of such filing to the following email addresses:

10 **John S. Kyle**

11 Cooley LLP

12 Email: jkyle@cooley.com

13 **Frank V. Pietrantonio**

14 Cooley LLP

15 Email: fpietrantonio@cooley.com

16 **Christopher C. Campbell**

17 Cooley LLP

18 Email: ccampbell@cooley.com

19 **George A. Riley**

20 O’Melveny & Myers LLP

21 Email: griley@omm.com

22 **Luann L. Simmons**

23 O’Melveny & Myers LLP

24 Email: lsimmons@omm.com

25 **Anne E. Huffsmith**

26 O’Melveny & Myers LLP

27 Email: ahuffsmith@omm.com

28 **Shawn E. McDonald**

Foley & Lardner LLP

Email: semcdonald@foley.com

1 **Matthew B. Lowrie**
2 Foley & Lardner LLP
3 Email: m_lowrie@foley.com

4 **Justin E. Gray**
5 Foley & Lardner LLP
6 Email: j_gray@foley.com

7 **Kurt M. Kjelland**
8 Goodwin Procter LLP
9 Email: k_kjelland@goodwinprocter.com

10 **David Hesel Ben-Meir**
11 Alston & Bird LLP
12 david.ben-meir@alston.com

13 I hereby certify and declare, under the penalty of perjury, under the laws of the United
14 States and of the State of California, that the foregoing is true and correct.

15 Executed on this 4th day of March 2011, at San Diego, California.

16 By: /s/ James V. Fazio, III
17 JAMES V. FAZIO, III