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 7 GOOGLE INC.

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

11 GOOGLE INC., a Delaware corporation,  
 12 Plaintiff,

13 v.

14 AMERICAN BLIND & WALLPAPER  
 15 FACTORY, INC., a Delaware corporation  
 d/b/a decoratetoday.com, Inc., and DOES 1-  
 16 100, inclusive,

17 Defendants.

18 AMERICAN BLIND & WALLPAPER  
 19 FACTORY, INC., a Delaware corporation  
 d/b/a decoratetoday.com, Inc.,

20 Counter-Plaintiff,

21 v.

22 GOOGLE INC.,

23 Counter-Defendant.  
 24

Case No. C 03-5340-JF (EAI)

**COUNTER-DEFENDANT GOOGLE  
 INC.'S MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT OF  
 ITS MOTION TO COMPEL COUNTER-  
 PLAINTIFF ABWF TO SATISFY ITS  
 OUTSTANDING DISCOVERY  
 OBLIGATIONS**

Date: October 18, 2006  
 Time: 9:30 a.m.  
 Courtroom: 4  
 Judge: Hon. Richard Seeborg

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**I. INTRODUCTION**

By this motion, Google Inc. seeks to compel American Blind & Wallpaper Factory, Inc. (“ABWF”) to comply with a myriad of unfulfilled discovery obligations. While ABWF was wasting the Court’s time by unsuccessfully moving to compel Google to produce numerous witnesses for deposition and to respond to requests for admission, it was simultaneously committing discovery violation after discovery violation. Google has repeatedly asked ABWF to complete its document production and to provide substantive responses to its interrogatories and requests for admission. But ABWF refuses even though its obligations are clear.

ABWF’s violations are numerous and laid out in detail in this motion. By way of example, ABWF refuses to produce documents that one of its employees testified he relied upon this spring in reaching conclusions about advertising on Google. As another example, ABWF has produced spreadsheets that hide—apparently because of printing errors—much of the information they contain. Yet ABWF refuses to produce the missing information even though it does not deny that this information is in its possession. And, as a third example, even though ABWF earlier moved for an order compelling Google to produce documents as kept in the usual course of business or to label them to correspond with the categories in the request, American Blind has refused to conduct its document production in this manner.

Since ABWF has not complied with its discovery obligations and Google’s exhaustive efforts to resolve these violations informally have failed, Google moves for an order from the Court on ten issues, described below.

**II. FACTS**

**A. ABWF alleges that Google’s AdWords program violates its trademarks by allowing ABWF’s competitors to bid on keywords resembling those marks.**

In brief, the substance of this case is as follows: ABWF—the nominal Defendant and Counter-Plaintiff in this case—claims that Google’s AdWords program infringes ABWF’s trademarks. Google’s AdWords programs allows advertisers to place targeted advertising on the

1 results page of a Google search.<sup>1</sup> Specifically, when a user types a query into Google’s search  
2 engine, that query can trigger advertisements that will be displayed in special sections of the  
3 search results page.<sup>2</sup> Google allows advertisers to bid on keywords, such that if a user’s query  
4 contains that keyword or variants of that keyword, the advertiser’s advertisement will be more  
5 likely to be displayed on the search results page.<sup>3</sup>

6 This case arises out of Google’s policy of permitting advertisers to bid on keywords that  
7 include their competitors’ trademarks.<sup>4</sup> ABWF claims that because Google permits ABWF’s  
8 competitors to bid on keywords such as “American Blinds” and “American Blind and Wallpaper  
9 Factory”—which are identical or similar to ABWF’s alleged trademarks—Google infringes  
10 ABWF’s trademarks.<sup>5</sup> This is so even though Google prohibits advertisers from including a  
11 competitor’s trademark in the text of their advertisements.<sup>6</sup>

12 **B. With the discovery cut-off having past, ABWF still has substantial outstanding**  
13 **discovery obligations.**

14 The cut-off for fact discovery in this case was August 29, 2006. This motion seeks to  
15 compel discovery in response to discovery requests, interrogatories, requests for admission, and  
16 a Rule 30(b)(6) deposition notice. With regard to all of the issues raised herein, Google  
17 attempted to meet and confer with ABWF, but ultimately failed to obtain the discovery it sought.

18 **III. ARGUMENT**

19 **A. ABWF must produce more readable versions of its Online Customer Satisfaction**  
20 **Survey and all documents associated with this survey.**

21 On August 1, 2006, ABWF produced documents that it described as “an online customer  
22 survey conducted by American Blind regarding customer satisfaction with the products and

23 \_\_\_\_\_  
24 <sup>1</sup> See Defendant American Blind & Wallpaper Factory, Inc.’s Answer, Affirmative Defenses,  
Counterclaims, and Third-Party Claims (“ABWF’s Complaint”), ¶ 38.

25 <sup>2</sup> *Id.*

26 <sup>3</sup> *Id.*

27 <sup>4</sup> *Id.*, ¶ 44.

28 <sup>5</sup> *Id.*, ¶ 43-50.

<sup>6</sup> *Id.*

1 services of American Blind” (the “Online Customer Satisfaction Survey”).<sup>7</sup> These documents  
 2 are barely readable. They were printed as a text file that contains so much unreadable metadata,  
 3 that it is impossible to tell what the document means or how it is organized. Indeed, ABWF  
 4 concedes that the documents are “difficult to read,”<sup>8</sup> and ABWF’s corporate representative  
 5 testified that one of the survey documents “looks like a bunch of gobbledy gook.”<sup>9</sup> Nonetheless,  
 6 ABWF’s corporate representative did testify that the documents contain customer feedback from  
 7 an online survey form.<sup>10</sup> He also testified that ABWF “captures this information  
 8 and...distributes it in spreadsheets on a weekly basis to [its] management team.”<sup>11</sup> ABWF has  
 9 never argued that this survey or documents related to it are outside the scope of Google’s  
 10 document requests.

11 Google has requested a more readable version of the Online Customer Satisfaction  
 12 Survey documents, as well as all documents associated with the survey, such as analysis of the  
 13 survey results, documents outlining the survey methodology, and documents indicating the  
 14 survey questions. ABWF’s position has been unambiguous—more readable versions of the  
 15 survey documents do not exist and no documents associated with the survey exist.<sup>12</sup>

16 But how could this possibly be? ABWF’s corporate representative testified that ABWF  
 17 “captures [the survey] information and distributes it *in spreadsheets* on a *weekly* basis to its  
 18 management team.”<sup>13</sup> Where are these weekly spreadsheets? There are nine members of the  
 19

20 <sup>7</sup> See Declaration of Ajay S. Krishnan in Support of Counter-Defendant Google Inc.’s Motion to  
 21 Compel Counter-Plaintiff ABWF to Satisfy its Outstanding Discovery Obligations (“Krishnan  
 22 Decl.”), ¶ 21. The Online Customer Satisfaction Survey actually consists of three documents: a  
 23 13-page file entitled “survey data comments 2001.txt” (ABWF 48851 - 48863), a 125-page file  
 24 entitled “product surveys.txt” (ABWF 48864 – 48987), and a 247-page file entitled “customer  
 25 surveys.txt” (ABWF 48988 – 49232). The first ten pages of each of these files are attached to  
 26 the supporting declaration. See *id.*, Ex. J.

27 <sup>8</sup> *Id.*, ¶ 22.

28 <sup>9</sup> *Id.*, Ex. K at 37:2.

<sup>10</sup> *Id.*, Ex. K at 38-40.

<sup>11</sup> *Id.*, Ex. K at 41:18 – 41:22.

<sup>12</sup> *Id.*, ¶ 22-23.

<sup>13</sup> *Id.*, Ex. K at 41:18 – 41:22 (emphasis added).

1 management team,<sup>14</sup> so there should at least be nine copies of each weekly spreadsheet.

2 Moreover, documents must exist that indicate the survey questions, the survey methodology, and  
3 analysis of the survey results.

4 ABWF should be compelled to produce readable versions of the survey results and all  
5 documents associated with the survey. If ABWF insists that no such documents exist, ABWF  
6 should be compelled to explain, in an affidavit or otherwise, why it is that no responsive  
7 documents exist. *See Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 125 (D. Md. 2002)  
8 (holding that a party can be compelled to produce an affidavit outlining document search and  
9 collection efforts when there is a basis for disbelieving the party's assertion that no responsive  
10 documents exist); *Hagemayer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 598  
11 (E.D. Wis. 2004) (same); *cf. Aureflam Corp. v. Pho Hoa Hiep, Inc.*, No. C 04-03824 JW (RS),  
12 2006 WL 2411411 at \*1 (N.D. Cal. Aug. 18, 2006) (requiring responding party to certify by  
13 declaration that a diligent search effort was performed when questions are raised as to the  
14 adequacy of its representations regarding the existence of documents); *iSmart Int'l Ltd. v. I-Doc-*  
15 *Secure, LLC*, No. C 04-03114 RMW (RS), 2006 WL 2263910 at \* 3 (N.D.Cal. Aug. 8, 2006)  
16 (requiring a responding party to produce a declaration explaining why it could not comply with  
17 its production obligations).

18 **B. ABWF must produce copies of spreadsheets such that all of the information in the**  
19 **cells is readable.**

20 ABWF has produced at least two sets of spreadsheets—ABWF 5530 – 5534 and ABWF  
21 5605 – 7802—that have been printed in such a way that some of the information inside particular  
22 spreadsheet “cells” has been omitted.<sup>15</sup> The bottom line is that given the way ABWF printed the  
23 spreadsheets, some of the information contained in the spreadsheet has not been produced.

24 Rather than simply produce either an electronic version of these spreadsheets or a better  
25 print-out, ABWF has taken the extreme position that it will not produce any such documents

26 <sup>14</sup> *Id.*, Ex. K at 42:18 – 42:24.

27 <sup>15</sup> These two sets of spreadsheets are ABWF 5530 – 5534 and ABWF 5605 – 7802. Because of  
28 the volume of the second Bates range, Google has provided the first five pages of those  
spreadsheets as a representative sample. *See id.*, Ex. L.

1 until Google re-produces all of the spreadsheets it has produced to date in electronic form.<sup>16</sup> Not  
2 only has Google previously produced spreadsheets in electronic form when doing so would assist  
3 ABWF, but Google has done so voluntarily.<sup>17</sup> Moreover, Google has offered to produce any  
4 omitted information where, as here, the nature of the print-out precludes the reader from seeing  
5 all of the information in the spreadsheet.

6 ABWF should be compelled to produce its spreadsheets in such a way that all of the  
7 information in the spreadsheet is visible.

8 **C. ABWF must produce an adequately-prepared Rule 30(b)(6) deposition witness on**  
9 **the issue of damages.**

10 Google noticed and took a Rule 30(b)(6) deposition of ABWF. Topic 19 of the  
11 deposition notice was: “The injuries and damages allegedly suffered by American Blind as a  
12 result of Google’s actions.”<sup>18</sup> ABWF designated Gerald Curran, ABWF’s Chief Financial  
13 Officer, to testify on this topic.<sup>19</sup> Mr. Curran understood that he was responsible for testifying  
14 on Topic 19, and he had met with ABWF counsel to prepare for his deposition.<sup>20</sup>

15 Yet, Mr. Curran testified that he had done nothing to prepare for testifying on Topic 19.<sup>21</sup>  
16 He also testified that he has never attempted to calculate the damages ABWF would suffer, that  
17 he was not aware of any such calculations, and that “[i]t would be hard to calculate” what portion  
18 of ABWF's decrease in revenues is attributable to Google.<sup>22</sup>

19 ABWF is obligated to provide a witness that is able to testify fully as to the topics  
20 identified in the notice, and must provide a substitute deponent if it turns out at the deposition  
21 that the original designee is unable to so testify. Fed. R. Civ. P. 30(b)(6); *Nevada Power Co. v.*

22 \_\_\_\_\_  
23 <sup>16</sup> *See id.*, ¶ 24.

24 <sup>17</sup> Google Inc.’s Opposition to American Blind & Wallpaper Factory, Inc.’s Motion to Compel  
and for Sanctions Pursuant to F.R.C.P. 37(a) (Docket Item No. 138) at 7.

25 <sup>18</sup> Krishnan Decl., Ex. I at 3.

26 <sup>19</sup> *Id.*, ¶ 25.

27 <sup>20</sup> *Id.*, Ex. M at 10:11 – 11:4.

28 <sup>21</sup> *Id.*, Ex. M at 13:1 – 15:11.

<sup>22</sup> *Id.*

1 *Monsanto Co.*, 891 F.Supp. 1406, 1417-18 (D. Nev. 1995); *Sony Electronics, Inc. v. Soundview*  
2 *Technologies, Inc.*, 217 F.R.D. 104, 112 (D. Conn. 2002).

3 Given that Mr. Curran was unable to testify as to Topic 19, ABWF should be compelled  
4 to produce an adequately prepared corporate designee on that topic.

5 **D. ABWF must produce Jeffrey Alderman for a supplemental 30(b)(6) deposition and**  
6 **must produce the responsive documents about which he testified.**

7 ABWF produced Jeffrey Alderman, its Director of Business Development and E-  
8 Commerce, to testify as to Topic 23 in Google’s 30(b)(6) Deposition Notice of ABWF,  
9 “American Blind’s Affiliate Program.”<sup>23</sup> ABWF’s Affiliate Program is a marketing program, in  
10 which ABWF affiliates—who are third parties that advertise for ABWF on their websites—  
11 receive commissions for web traffic that they direct to ABWF’s website. Mr. Alderman testified  
12 about a relatively technical issue—the impact on ABWF’s sales when ABWF implemented a  
13 policy for six weeks in May and June of 2006 of prohibiting affiliates from competing with  
14 ABWF when bidding for priority placement in search engine advertising (the “May/June 2006  
15 Affiliate Bidding Experiment”)—the specifics of which are not important here.<sup>24</sup>

16 The important issue is that in testifying about the conclusions he had drawn from the  
17 May/June 2006 Affiliate Bidding Experiment, Mr. Alderman testified that he had relied on  
18 certain documents (the “Alderman documents”), *which include an analysis of ABWF’s natural*  
19 *search results*.<sup>25</sup> Mr. Alderman’s deposition took place on August 4, 2006.<sup>26</sup> At the deposition  
20 itself, ABWF agreed to identify the Alderman documents or to produce them.<sup>27</sup> Google did not  
21 hear back from ABWF.<sup>28</sup> On August 14, Google reminded ABWF that it had not yet identified

22  
23 <sup>23</sup> *Id.*, Ex. I at 3.

24 <sup>24</sup> Declaration of Michael H. Page in Support of Counter-Defendant Google Inc.’s Motion to  
25 Compel Counter-Plaintiff ABWF to Satisfy Outstanding Discovery Obligations (“Page Decl.”),  
¶ 4.

26 <sup>25</sup> *Id.*, ¶ 4.

27 <sup>26</sup> *Id.*, ¶ 3.

28 <sup>27</sup> *Id.*, ¶ 4.

<sup>28</sup> *Id.*, ¶ 5.

1 the Alderman documents.<sup>29</sup> There was still no response from ABWF.<sup>30</sup> On August 28, Google  
2 again reminded ABWF to identify the Alderman documents.<sup>31</sup>

3 On August 30, ABWF referred Google to a certain Bates range of documents that it had  
4 already produced, claiming that these were the Alderman documents.<sup>32</sup> Google reviewed the  
5 referenced documents, and explained that these could not have been *all* of the Alderman  
6 documents because they did not include *an analysis of ABWF natural search results*.<sup>33</sup> Next,  
7 ABWF attempted to sidestep the issue by demanding that Google identify the document requests  
8 to which the Alderman documents were responsive.<sup>34</sup> Google provided eight document requests.  
9 Finally, on September 6, ABWF produced eleven pages of new documents, which were alleged  
10 to be the last of the Mr. Alderman documents.<sup>35</sup>

11 These newly produced documents raise two issues. First, these documents amount to the  
12 “good cause” necessary for a supplemental deposition of Mr. Alderman. Specifically, it is not at  
13 all clear how Mr. Alderman, using these documents, would have arrived at the conclusions to  
14 which he testified at his deposition. There is also no explanation as to why ABWF produced  
15 these documents late. After all, all of the Alderman documents must have existed prior to Mr.  
16 Alderman’s deposition, as these are the documents he claims to have reviewed and relied on in  
17 June or July of 2006. Google therefore requires a supplemental deposition of Mr. Alderman  
18 regarding these new eleven pages of documents and the May/June 2006 Affiliate Bidding  
19 Experiment to which they relate.

20 Second, the new documents still do not appear to include *an analysis of ABWF natural*  
21 *search results*, which Mr. Alderman claims to have reviewed.<sup>36</sup> ABWF must produce the

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22 <sup>29</sup> *Id.*, ¶ 5.

23 <sup>30</sup> *Id.*

24 <sup>31</sup> *Id.*

25 <sup>32</sup> *Id.*

26 <sup>33</sup> *Id.*

27 <sup>34</sup> *Id.*, ¶ 6.

28 <sup>35</sup> *Id.*, ¶ 7.

<sup>36</sup> *Id.*

1 analysis of ABWF's natural search results that Mr. Alderman claims to have reviewed in June  
 2 2006, or in the alternative, explain why such documents no longer exist. *See, e.g., iSmart Int'l*  
 3 *Ltd.*, 2006 WL 2263910 at \* 3 (requiring a responding party to produce a declaration explaining  
 4 why it could not comply with its production obligations).

5 **E. ABWF must produce substantive responses to Google's First Set of Requests for**  
 6 **Admissions.**

7 As explained above, the core of this lawsuit involves ABWF's allegation that Google's  
 8 policy of permitting ABWF's competitors to bid on keywords that resemble ABWF's alleged  
 9 trademarks—such as “American Blind & Wallpaper Factory”—violates ABWF's trademarks.  
 10 ABWF fears that a person entering “American Blind & Wallpaper Factory” as a search engine  
 11 query might trigger a competitor's advertisement, and accidentally click through to the  
 12 competitor's website, thinking that he or she was actually visiting ABWF's website.<sup>37</sup> But what  
 13 if ABWF's competitors merely bid on the keyword “blind,” which is not an ABWF trademark?  
 14 In this scenario, it is still possible that a search engine user, by entering the query “American  
 15 Blind & Wallpaper Factory,” would trigger the competitor's advertisement—because the query  
 16 contains the word “blind.” And once the competitor's ad is triggered, the user might accidentally  
 17 visit the competitor's website, instead of ABWF's. Does ABWF claim that this, too, violates its  
 18 trademark? This is the very question that Google posed in two requests for admissions and that  
 19 ABWF twice refused to answer.

20 Google's First Set of Requests for Admissions consists of two requests. The first request  
 21 (“Request One”) states:

22 Admit that if an ad appears on a Google search results page when a user searches  
 23 for “American Blind & Wallpaper Factory” only because the advertiser has  
 24 selected “blind” as a BROAD MATCH KEYWORD, and that if the ad does not  
 include any variant of the ALLEGED AMERICAN BLIND MARKS in its text,  
 no ALLEGED AMERICAN BLIND MARKS has been “used” within the  
 meaning of the Lanham Act.<sup>38</sup>

25 The following definition is included in the First Set of Requests for Admissions:  
 26

27 <sup>37</sup> ABWF's Complaint, ¶ 51.

28 <sup>38</sup> Krishnan Decl., Ex. E.

1 The term “BROAD MATCH KEYWORD” shall mean a term that will trigger an  
2 ad on a Google search results page when a user’s query includes that term, even if  
3 the query includes other terms. A BROAD MATCH KEYWORD also will  
4 trigger an ad if the user’s query includes synonyms, related phrases, and plurals,  
5 even if the query does not contain the precise BROAD MATCH KEYWORD  
6 itself.<sup>39</sup>

7 ABWF’s response to Request One was:

8 Objection. This request for admission (a) improperly seeks conclusions and/or  
9 admissions of law that do not relate to the facts of this case,<sup>40</sup> (b) presents a  
10 hypothetical question which is not within the purview of Fed. R. Civ. P. 36,<sup>41</sup> (c)  
11 improperly seeks to compel American Blind to prove Google’s legal position in  
12 this case,<sup>42</sup> and (d) could not be answered even with reasonable inquiry because  
13 no information known or readily obtainable by American Blind could allow it to  
14 fairly admit or deny the request.<sup>43</sup> Furthermore, this request contains vague and  
15 ambiguous wording which fails to comply with Fed. R. Civ. P. 36 in that it does  
16 not present simple cones statements of facts which would allow American Blind  
17 to fairly admit or deny the statements without explanation or qualification.<sup>44</sup>

18 The second request (“Request Two”) states:

19 Admit that if an ad appears on a Google search results page when a user searches  
20 for “american blind,” the user has no way to determine for certain whether the  
21 ad’s appearance was triggered by the phrase “american blind” or some other word  
22 or phrase.<sup>45</sup>

23 ABWF’s objections to Request Two are identical to those for Request One except that  
24 ABWF *omitted* the following two objections: “improperly seeks conclusions and/or admissions  
25 of law that do not relate to the facts of this case,” and “improperly seeks to compel American  
26 Blind to prove Google’s legal position in this case.”<sup>46</sup>

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27 <sup>39</sup> *Id.*

28 <sup>40</sup> In later correspondence, ABWF cited *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d  
1050, 1057 (S.D. Cal. 1999), in support of this objection.

<sup>41</sup> In later correspondence, ABWF cited *Abbott v. United States*, 177 F.R.D. 92, 93 (N.D. N.Y.  
1997), in support of this objection.

<sup>42</sup> In later correspondence, ABWF cited *California v. The Joules Fribourg*, 19 F.R.D. 432, 436  
(N.D. Cal. 1955), in support of this objection.

<sup>43</sup> In later correspondence, ABWF failed to substantiate or even re-state this objection.

<sup>44</sup> In later correspondence, ABWF cited *Herrera v. Scully*, 143 F.R.D. 545, 549 (S.D.N.Y. 1992),  
in support of this objection. *See also* Krishnan Decl., Ex. F.

<sup>45</sup> Krishnan Decl., Ex. E.

<sup>46</sup> *Id.*

1 Each of ABWF's objections lacks merit. As a general matter, Google ABWF's  
 2 "boilerplate objections" are insufficient to assert an objection. *See Burlington N. & Santa Fe Ry.*  
 3 *Co. v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005). Nonetheless, Google  
 4 deals with each ABWF objection in turn.

5 *First*, ABWF objects that Request One improperly seeks legal conclusions. That  
 6 objection is inapplicable to Request One. Request One clearly seeks an application of law to  
 7 fact—namely, whether bidding on the word "blind" constitutes a Lanham Act "use" of ABWF's  
 8 alleged trademarks—which is expressly permitted by Rule 36. *See Fed. R. Civ. P. 36(a)* ("A  
 9 party may serve...a written request for the admission...of the application of law to fact");  
 10 *Marchand v. Mercy Medical Ctr.*, 22 F.3d 933, 937 n.4 (9th Cir. 1994).

11 *Second*, ABWF objects that these two Requests pose improper hypothetical questions,  
 12 citing *Abbott v. United States*, 177 F.R.D. 92, 93 (N.D. N.Y. 1997). ABWF takes *Abbott*  
 13 completely out of context. *Abbott* noted at least six times that the requests for admission at issue  
 14 involved, "hypothetical fact situations *unrelated to the facts of the case.*" *Id.* at 92-94. *Abbott*  
 15 reasoned that such applications of law to hypothetical, wholly unrelated to the facts of the case  
 16 were tantamount to pure legal questions. *Id.* at 93. Of course, the facts raised in these requests  
 17 are in no way hypothetical. The very core of ABWF's complaint envisions user searches for  
 18 "American Blind" and "American Blind & Wallpaper Factory."<sup>47</sup> And as a simple Google  
 19 search for "blind" or "blinds" reveals, those keywords are bid on by many advertisers, including,  
 20 apparently, ABWF. Moreover, *Abbott* has no applicability at all to Request Two, since Request  
 21 Two is a purely factual question. Request Two could not therefore, under any circumstances, be  
 22 tantamount to a purely legal question.

23 *Third*, ABWF claims that Request One is improper because it would "compel American  
 24 Blind to prove Google's legal position." But this is precisely what a request for admission seeks  
 25 to do. ABWF cites *California v. The Joules Fribourg*, 19 F.R.D. 432, 436 (N.D. Cal. 1955), a  
 26 1955 district court case in support of this objection. *Id.* at 436 ("[T]here is general agreement  
 27

28 <sup>47</sup> ABWF's Complaint, ¶¶ 44 & 47.

1 that requests for admission are not to be treated as substitutes for discovery processes to uncover  
2 evidence, and that they may not be applied to controverted legal issues lying at the heart of the  
3 case. Their purpose is to eliminate from the trial matters as to which there is no genuine  
4 dispute”). As a preliminary matter, this legal proposition is bizarre: If the request for admission  
5 pertains to a controverted legal issue, the responding party is free to deny the request. In any  
6 event, *The Joules Fribourg* has no application here as Request One pertains to an issue that is  
7 reasonably beyond dispute, and should be eliminated from trial.

8 *Fourth*, ABWF objected that it had no readily available information that would permit it  
9 to admit or deny the request. ABWF has had a full opportunity to take discovery. Moreover,  
10 when pressed in early September to elaborate on its objections, ABWF did not re-assert this  
11 objection, which suggests that it has been abandoned.<sup>48</sup>

12 *Fifth*, ABWF objects that neither of the requests is “direct, simple and limited to singular  
13 relevant fact so that it can be admitted or denied without explanation.” Here, in particular, the  
14 boilerplate nature of the objection should be held against ABWF: Neither ABWF, nor the case it  
15 cites, *Herrera v. Scully*, 143 F.R.D. 545, 549 (S.D.N.Y. 1992), explains what it means to be too  
16 indirect or complicated to be admitted or denied without explanation. In any event, Request  
17 One and Request Two both pose “direct” questions. And to the extent either Request is not  
18 “simple”—Request One contains two “if” clauses and Request Two contains one—it is that way  
19 precisely so that it can be admitted or denied without explanation. Indeed, failing to include all  
20 the necessary assumptions in the request itself would make it more complicated, as the  
21 responding party would have to clarify its assumptions. Finally, although Request One includes  
22 the phrase “BROAD MATCH KEYWORD,” which is defined elsewhere, that phrase was only  
23 defined because it is not used in common parlance. ABWF, like anyone familiar with Google’s  
24 AdWords program, knows perfectly well what a broad match keyword is.

25 As Request One and Request Two are proper requests for admissions and ABWF’s  
26 objections are invalid, ABWF should be compelled to respond substantively to these requests.

27 \_\_\_\_\_  
28 <sup>48</sup> Krishnan Decl., ¶ 26.

1 **F. ABWF must provide dates that it began and ceased using the four names that it has**  
2 **used in communications with customers to refer to its retail business.**

3 Google’s first Interrogatory in its Second Set of Interrogatories states:

4 For each name that AMERICAN BLIND has used, in communications with  
5 customers and/or potential customers, to refer to its retail business, STATE the  
6 name that was used, the dates that AMERICAN BLIND began and ceased using  
7 the name, and the reasons for adopting and ceasing to use each name.<sup>49</sup>

8 ABWF’s response states:

9 American Blind objects to this interrogatory because it is over broad [*sic*], unduly  
10 burdensome and not reasonably calculated to lead to the discovery of relevant or  
11 admissible evidence. American Blind also objects to this request to the extent that  
12 it calls for the production of documents protected by the attorney client privilege  
13 or the attorney work product doctrine. Subject to and without waiving these  
14 objections, American Blind states that the name changes that American Blind has  
15 undergone reflect the changes in the products being sold by American Blind at  
16 any given time and changes in the marketplace in general. By way of example, as  
17 the company expanded from selling window treatments to selling wall coverings  
18 and window treatments, the name was changed from “American Blind” to  
19 “American Blind and Wallpaper Factory.” When the company decided to expand  
20 its product offerings to include light fixtures, pictures and throw rugs, the  
21 company changed its name to “American Blind & Wallpaper & More.”<sup>50</sup> During  
22 the late 1990’s, the company changed its corporate name to “decoratetoday.com”  
23 to include additional products and services then being offered by the Company  
24 and to evidence its strong internet presence. It was subsequently determined that  
25 customers identified with the “American Blind” names too strongly to fully cross  
26 over to the “decoratetoday.com” brand name as the sole brand name. As a result,  
27 the name was changed back to “American Blind, Wallpaper & More”<sup>51</sup> to  
28 incorporate the “American Blind” names while signifying that the company sold  
more than window treatments and wall coverings. American Blind refers to  
documents Bates range ABWF 003054-003772 for a complete list of all the  
names under which American Blind has done business, including corporate  
minutes regarding name changes, corporate name change information and  
assumed name filings.<sup>52</sup>

20 This interrogatory response does not provide the dates during which ABWF used  
21 particular names, as the interrogatory specifically requests. This interrogatory response clearly  
22 states that ABWF used four names “in communications with customers and/or potential  
23 customers, to refer to its retail business”: “American Blind,” “American Blind and Wallpaper

24 \_\_\_\_\_  
<sup>49</sup> *Id.*

25 <sup>50</sup> ABWF almost certainly intended to use the name “American Blinds, Wallpaper & More,” as  
26 that is the name currently on ABWF’s website.

27 <sup>51</sup> ABWF almost certainly intended to use the name “American Blinds, Wallpaper & More”  
(emphasis added), as that is the name currently on ABWF’s website.

28 <sup>52</sup> Krishnan Decl., Ex. H at 2-3.

1 Factory,” “American Blinds, Wallpaper & More,” and “decoratetoday.com.” When asked to  
2 produce the dates that ABWF began and ceased using these four names, ABWF referred Google  
3 to the 700 pages of documents listed in the interrogatory response.<sup>53</sup>

4 But these 700 pages of documents do not and could not contain the response to Google’s  
5 interrogatory. As the interrogatory response states, those 700 pages contain a list of several  
6 hundred names under which ABWF claims to have done business, its corporate minutes  
7 regarding name changes, and assumed name filings for numerous business names. Notably,  
8 none of these documents list the dates that ABWF has used particular names “*in communications*  
9 *with customers and/or potential customers to refer to its retail business,*” as the interrogatory  
10 specifies. Nor could these documents answer Google’s interrogatory because ABWF could (and  
11 indeed did) have one corporate name, while having a different assumed name, and yet another  
12 name that it used in communications with customers to refer to its retail business. Google only  
13 seeks ABWF’s names that were used in communications with customers and potential customers  
14 to refer to its retail business. This is not the information that ABWF provided.

15 Thus, ABWF should be compelled to provide dates on which it began and ceased using  
16 the names it used in communications to customers and potential customers to refer to its retail  
17 business.

18 **G. If ABWF is unable to produce all of the Kaden questionnaires, it must explain why.**

19 The Kaden Company conducted three focus groups on behalf of ABWF in the past  
20 several years.<sup>54</sup> The Kaden Company offered to provide ABWF with the questionnaires that  
21 accompanied these focus groups.<sup>55</sup> Google requested production of these questionnaires, and  
22 ABWF initially refused because it was not in direct possession of the Kaden questionnaires.<sup>56</sup>  
23 Google then provided ABWF with legal authority indicating that ABWF is obligated to obtain  
24

25 \_\_\_\_\_  
<sup>53</sup> *Id.*

26 <sup>54</sup> *Id.*, ¶ 28.

27 <sup>55</sup> *Id.*

28 <sup>56</sup> *Id.*, ¶ 29.

1 these questionnaires and produce them.<sup>57</sup> ABWF agreed to do so, but only if the documents  
 2 exist—a constant refrain from ABWF.<sup>58</sup> ABWF has not yet told Google whether these  
 3 documents exist. If they do exist, ABWF must produce them. If ABWF is unable to produce the  
 4 Kaden questionnaires, ABWF should be compelled to explain, by affidavit or otherwise, why it  
 5 was unable to produce these questionnaires.

6 **H. ABWF must either produce all documents related to the “American Wallpaper  
 7 Survey” or explain why such documents do not exist.**

8 In roughly July 2004—while this lawsuit was pending—ABWF conducted an online  
 9 survey of those individuals who visited ABWF’s website after performing an internet search for  
 10 the phrase “american wallpaper” (the “American Wallpaper Survey”).<sup>59</sup> Individuals were asked  
 11 why they visited ABWF’s website. The survey was conducted by Michael Layne, ABWF’s  
 12 Vice-President of Internet Content. Michael Layne was also a designated witness for the  
 13 30(b)(6) deposition of ABWF.<sup>60</sup>

14 At the time of Google’s deposition of Mr. Layne (who was testifying on behalf of  
 15 ABWF), ABWF had produced only two sets of documents associated with the American  
 16 Wallpaper Survey: (1) four CDs containing the raw data from the survey, which consisted of  
 17 captured screenshots indicating how the survey participants navigated the online survey, which  
 18 was placed on ABWF’s website, and (2) an 8-line e-mail from May 2006—two years after the  
 19 survey was conducted—in which Mr. Layne explained the survey results that were obtained in  
 20 July 2004, using very specific numbers.<sup>61</sup>

21 At the time of the Layne deposition, Google requested that ABWF produce *all* documents  
 22 related to the American Wallpaper Survey, including any documents discussing the survey  
 23 methodology or analyzing the results.<sup>62</sup> Google pointed out that there must at least have been a

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24 <sup>57</sup> *Id.*

25 <sup>58</sup> *Id.*

26 <sup>59</sup> *Id.*

27 <sup>60</sup> *Id.*

28 <sup>61</sup> *Id.*, ¶ 31 & Ex. N.

<sup>62</sup> *Id.*, ¶ 31.

1 document from July 2004 describing the survey results, because Mr. Layne could not have  
2 possibly remembered the precise results of the survey two years after the fact.<sup>63</sup> Google received  
3 ABWF's counsel's usual refrain that it had produced all the documents received from ABWF,  
4 but that they would check if further documents existed.<sup>64</sup> One week later, ABWF produced only  
5 one additional document—a July 2004 email to which Mr. Layne had referred when he drafted  
6 his May 2006 email.<sup>65</sup> This July 2004 email was sent to at least seven non-lawyers at ABWF.<sup>66</sup>

7       Importantly, ABWF still maintains that the only documents in its possession concerning  
8 the July 2004 American Wallpaper Survey are the raw data from the survey, the July 2004 email  
9 reporting the survey results, and the May 2006 email from Mr. Layne recapitulating the July  
10 2004 email results.<sup>67</sup> This survey took place *after* Google served its first set of document  
11 requests. Bafflingly, ABWF must therefore contend that there were no written communications  
12 at ABWF about a survey, the results of which were reported to seven members of the company,  
13 most of whom were in upper management. Additionally, ABWF contends that there were no  
14 such communications concerning the need for the survey, or how it might be constructed.  
15 Finally, there were seven individuals copied on the July 2004 e-mail and three individuals copied  
16 on Layne's May 2006 e-mail—why did Google only receive one copy of the email in ABWF's  
17 document production?

18       Obviously, Google cannot know the adequacy of ABWF's document search and  
19 collection efforts. But given the serious questions raised as to ABWF's document search,  
20 ABWF should be compelled either to produce all documents related to the American Wallpaper  
21 Survey or explain, by affidavit or otherwise, why no such documents exist. *See Buchanan*, 206  
22 F.R.D. at 125 (holding that a party can be compelled to produce an affidavit outlining document  
23 search and collection efforts when there is a basis for disbelieving the party's assertion that no  
24

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25 <sup>63</sup> *Id.*, ¶ 32.

26 <sup>64</sup> *Id.*

27 <sup>65</sup> *Id.*, ¶ 33 & Ex. O.

28 <sup>66</sup> *Id.*, ¶ 33.

<sup>67</sup> *Id.*

1 responsive documents exist); *Hagemayer N. Am., Inc.*, 222 F.R.D. at 598 (same); *Aureflam*  
 2 *Corp.*, 2006 WL 2411411 at \*1 (requiring responding party to certify by declaration that a  
 3 diligent search effort was performed when questions are raised as to the adequacy of its  
 4 representations regarding the existence of documents); *iSmart Int'l Ltd.*, 2006 WL 2263910 at \*  
 5 3 (requiring a responding party to produce a declaration explaining why it could not comply with  
 6 its production obligations).

7 **I. If ABWF is unable to find the original copy of ABWF 1308 – 1310, it must explain**  
 8 **why.**

9 A relatively minor matter—which primarily serves to highlight Google’s concerns about  
 10 ABWF’s document production—is ABWF’s inability to explain why the top portion of a  
 11 particular document, ABWF 1308 – 1310,<sup>68</sup> was redacted on the basis of attorney-client  
 12 privilege. When Google asked, ABWF counsel responded, “at this time, I can only speculate as  
 13 to why ABWF 1308 was redacted because we have been unable to locate the original.”<sup>69</sup>  
 14 Google has encountered many times before the inability of ABWF counsel to find documents  
 15 known to exist. ABWF should therefore be required to explain its inability to find the original  
 16 document if it is ultimately unable to do so. *See iSmart Int'l Ltd.*, 2006 WL 2263910 at \* 3  
 17 (requiring a responding party to produce a declaration explaining why it could not comply with  
 18 its production obligations).

19 **J. ABWF must either produce documents “as they are kept in the usual course of**  
 20 **business” or organize and label them to correspond with the categories in Google’s**  
 21 **document requests.**

22 Federal Rule of Civil Procedure 34(b) requires that “A party who produces documents for  
 23 inspection shall produce them as they are kept in the usual course of business or shall organize  
 24 and label them to correspond with the categories in the request.” ABWF has not done this,  
 25 despite numerous requests by Google. ABWF must therefore be compelled to comply with Rule  
 26 34(b).

27 <sup>68</sup> Krishnan Decl., Ex. P.

28 <sup>69</sup> *Id.*, ¶ 34.

1 The Court is likely familiar with Rule 34(b)'s requirements as to the form of document  
 2 production because ABWF brought a motion several months ago seeking to compel Google to  
 3 comply with these requirements. In granting that motion, the Court's Order ("the Discovery  
 4 Order") recognized several legal principles that are relevant here. First, this Court explained that  
 5 an unsupported statement that that documents were produced "as they were kept in the usual  
 6 course of business" will not satisfy Rule 34(b).<sup>70</sup> Second, this Court stressed that "merely  
 7 categorizing the documents produced does not, without some further explanation, satisfy the  
 8 requirement that they be produced as kept in the usual course of business."<sup>71</sup> The Court  
 9 explained that categorization, "though perhaps somewhat helpful," must "correspond to the  
 10 manner in which those files were maintained."<sup>72</sup> Finally, the Court emphasized that Rule 34(b)  
 11 places the obligation on the responding party to organize and label the produced documents.<sup>73</sup>

12 It is abundantly clear that ABWF paid no heed to the Court's Discovery Order. First, a  
 13 quick perusal of the cover letters that accompanied ABWF's document productions<sup>74</sup> will show  
 14 that ABWF repeatedly provided categorization that did not "correspond to the manner in which  
 15 those files were maintained." For instance, on June 14, 2006, a cover letter produced by ABWF  
 16 stated, in relevant part:

17 Enclosed please find the following documents, Bates range ABWF 002926 –  
 18 007802. These documents are responsive to Google's initial and second set of  
 document requests.

19 Bates Range ABWF 002926-00002936 contains trademark information;

20 Bates Range ABWF 002937-00002949 contains information concerning website  
 21 visits;

22 Bates Range ABWF 002950-00003017 contains consumer and advertising  
 23 research and analysis information;

24 <sup>70</sup> Order Granting Defendant's Motion to Enforce Protective Order and to Compel Designation  
 25 of and Classification of Documents ("Discovery Order") (Docket Item No. 94), filed February 8,  
 2006, at 5 (citing *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611 (D. Kan. 2005))

26 <sup>71</sup> *Id.* (quoting *Cardenas*, 230 F.3d at 618).

27 <sup>72</sup> *Id.* at 5-6.

28 <sup>73</sup> *Id.* at 6 (quoting *Stiller v. Arnold*, 167 F.R.D. 68, 71 (N.D. Ind. 1996)).

<sup>74</sup> Krishnan Decl., Ex. Q.

1 Bates Range ABWF 003018-003053 contains advertising costs and spending  
information;<sup>75</sup>

2 Obviously, this sort of categorization provides no insight at all as to how “those files were  
3 maintained.”

4 During the meet-and-confer process, Google requested so many times that ABWF correct  
5 its document production to comply with Rule 34(b) that ABWF stated that the issue had been  
6 discussed “ad nauseum.” Nonetheless, ABWF took two consistent positions: the documents  
7 were produced as they were “kept in the usual course of business,” and the guidelines of the  
8 Court’s Discovery Order applied only to Google, not to ABWF.

9 In fact, ABWF’s production could not have been produced as they were kept in the usual  
10 course of business. Although the examples are too numerous to count, the following provide an  
11 illustration of ABWF’s failure to produce documents in the “usual course of business”:

- 12 • On July 7, ABWF produced documents with Bates ranges ABWF 044473 –  
13 045522 and 046457 – 046870, which consisted of roughly 1500 pages of  
14 documents. ABWF’s cover letter accompanying the production stated that these  
15 Bates ranges “contain annual capitalization documentation for the payroll  
16 expenses attributable to the maintenance of American Blind’s website for the  
17 years 2000-2006.”<sup>76</sup> These 1500 pages are simply a compilation of loose-leaf  
18 papers without any divisions, tabs, or indices.<sup>77</sup> There is also no indication of  
19 whose files these are. It defies belief that ABWF would be able to use a  
20 compilation of 1500 loose-leaf sheets of paper without any divisions, tabs, or  
21 indices “in the usual course of business.”
- 22 • As stated above, ABWF produced numerous spreadsheets with data missing from  
23 the print-outs. Obviously, in the “usual course of business,” employees can read  
24 all of the information in a spreadsheet.

25  
26 <sup>75</sup> *Id.*

27 <sup>76</sup> *Id.*

28 <sup>77</sup> Krishnan Decl., ¶ 35.

- 1           • On July 7, 2006, ABWF produced, *inter alia*, ABWF 046106 – 046114, a chart  
2           titled “Google Top Drivers 2005,” with notes in the margin.<sup>78</sup> The cover letter  
3           accompanying the production simply states that this document, along with 900  
4           pages of adjacent documents, “contain information regarding American Blind’s  
5           internet search engine marketing, including financial analyses (e-commerce  
6           reviews), search engine results analyses and other data regarding internet searches  
7           for American Blind).”<sup>79</sup> This description provides no explanation as to how  
8           “those files were maintained.” Additionally, there is no way to know whose  
9           handwriting is on the document.
- 10          • On June 30, 2006, ABWF produced, *inter alia*, ABWF 043139 – 043140, a chart  
11          titled “SEO Analysis for MSN.”<sup>80</sup> This chart is devoid of any context at all. The  
12          accompanying cover letter states that the document, along with 200 pages of  
13          adjacent documents, “contain information regarding keyword and search engine  
14          analysis and strategy, including financial analysis regarding the same.”<sup>81</sup> Not  
15          only is this description inscrutable, but it is impossible to tell who maintained this  
16          file.

17           Thus, ABWF must be compelled either to re-produce its documents “as they are kept in  
18          the usual course of business” or to organize and label them to correspond with Google’s  
19          document requests.

20          ///

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25          <sup>78</sup> *Id.*, Ex. R.

26          <sup>79</sup> *Id.*, Ex. Q.

27          <sup>80</sup> *Id.*, Ex. S.

28          <sup>81</sup> *Id.*, Ex. Q.

