

1 KEKER & VAN NEST, LLP
MICHAEL H. PAGE - #154913
2 MARK A. LEMLEY - #155830
KLAUS H. HAMM - #224905
3 AJAY S. KRISHNAN - #222476
710 Sansome Street
4 San Francisco, CA 94111-1704
Telephone: (415) 391-5400
5 Facsimile: (415) 397-7188

6 Attorneys for Plaintiff and Counter Defendant
7 GOOGLE INC.

8 UNITED STATES DISTRICT COURT
9
10 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
25
26
27
28

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

**DECLARATION OF AJAY S. KRISHNAN
IN SUPPORT OF GOOGLE'S MOTION
FOR EVIDENTIARY AND MONETARY
SANCTIONS AGAINST ABWF FOR
SPOILIATION OF EVIDENCE**

Date: January 30, 2007
Time: 9 a.m.
Courtroom: 3, 5th Floor
Judge: Hon. Jeremy Fogel

PUBLICLY FILED VERSION

1 I, Ajay S. Krishnan, declare as follows:

2 1. I am an attorney at the firm of Keker & Van Nest LLP, counsel for Plaintiff and
3 Counter-Defendant Google Inc., and am admitted to practice before this Court. I make this
4 declaration in support of Google's Motion for Evidentiary and Monetary Sanctions Against
5 American Blind & Wallpaper Factory, Inc. ("ABWF") for Spoliation of Evidence. Unless
6 otherwise stated, I know the facts stated herein of my personal knowledge and if called as a
7 witness, I would testify competently thereto.

8 **List of Exhibits**

9 2. Attached hereto as Exhibit A is a true and correct copy of a letter from Susan
10 Greenspon to Alana Karen, dated July 23, 2002, and Bates numbered ABWF 000573 – ABWF
11 000575.

12 3. Attached hereto as Exhibit B are true and correct copies of correspondence
13 between Google and ABWF. These documents were filed as Exhibits B, C, E, and F to the
14 Declaration of Rose Hagan in Opposition to Defendants' Motion to Dismiss or Alternatively, to
15 Stay (Docket Item No. 14).

16 4. Attached hereto as Exhibit C is a true and correct copy of a letter from Joe Charno
17 to Rose Hagan, dated July 11, 2003. This document was filed as Exhibit D to the Declaration of
18 Rose Hagan in Opposition to Defendants' Motion to Dismiss or Alternatively, to Stay (Docket
19 Item No. 14).

20 5. Attached hereto as Exhibit D is a true and correct copy of the Proof of Service to
21 Google, Inc.'s First Set of Requests for Production of Documents and Things from American
22 Blind & Wallpaper Factory, Inc., dated May 21, 2004.

23 6. Attached hereto as Exhibit E is a true and correct copy of the Declaration of
24 Susan Greenspon in Support of American Blind & Wallpaper Factory Inc.'s Reply in Support of
25 Motion to Amend and Extend Case Management Order Dates (Docket Item No. 137) (filed
26 under seal). Google has under separate cover requested that this document be filed under seal.

27 7. Attached hereto as Exhibit F are true and correct copies of pages from the
28 Deposition of Steven Katzman, taken on July 25, 2006. Google has under separate cover

1 requested that this document be filed under seal.

2 8. Attached hereto as Exhibit G are true and correct copies of pages from the
3 Deposition of Scot Powers, taken on July 11, 2006. Google has under separate cover requested
4 that this document be filed under seal.

5 9. Attached hereto as Exhibit H are true and correct copies of pages from the
6 Deposition of Michael Layne, taken on August 2, 2006.

7 10. Attached hereto as Exhibit I is a true and correct copy of Google Inc.'s First Set
8 of Requests for Production of Documents and Things from American Blind & Wallpaper
9 Factory, Inc., dated May 21, 2004.

10 11. Attached hereto as Exhibit J is a true and correct copy of Google Inc.'s Second
11 Set of Requests for Production of Documents and Things from American Blind & Wallpaper
12 Factory, Inc, dated May 10, 2006.

13 12. Attached hereto as Exhibit K is a true and correct copy of a letter from myself to
14 Caroline Plater, dated May 12, 2006.

15 13. Attached hereto as Exhibit L is a true and correct copy of a letter from myself to
16 David Rammelt, dated March 28, 2006.

17 14. Attached hereto as Exhibit M is a true and correct copy of a letter from Caroline
18 Plater to myself, dated April 10, 2006.

19 15. Attached hereto as Exhibit N are true and correct copies of pages from the
20 Deposition of Joseph Charno, taken on July 21, 2006. Google has under separate cover
21 requested that this document be filed under seal.

22 16. Attached hereto as Exhibit O are true and correct copies of pages from the
23 Deposition of William Smith, taken on June 22, 2006. Google has under separate cover
24 requested that this document be filed under seal.

25 17. Attached hereto as Exhibit P is a true and correct copy of a sample email cover
26 page for a Coremetrics report, and is Bates numbered ABWF 008806. Google has under separate
27 cover requested that this document be filed under seal.

28

1 18. Attached hereto as Exhibit Q are true and correct copies of email correspondence
2 between American Blind and Google, Bates numbered ABWF 001949- ABWF 001952 and
3 ABWF1958- ABWF 001964. Google has under separate cover requested that these documents
4 be filed under seal.

5 19. Attached hereto as Exhibit R is a true and correct copy of the Declaration of
6 Steven B. Katzman, filed August 10, 2006, in the matter of *American Blinds And Wallpaper*
7 *Factory, Inc. v. Steve Katzman*, Case No. 06-cv-13576 (E.D. Mich.).

8 20. Attached hereto as Exhibit S is a true and correct copy of American Blind And
9 Wallpaper Factory's Motion For a Temporary Restraining Order and Preliminary Injunction,
10 filed on August 10, 2006, in the matter of *American Blinds And Wallpaper Factory, Inc. v. Steve*
11 *Katzman*, Case No. 06-cv-13576 (E.D. Mich.). This document is available on PACER.

12 21. Attached hereto as Exhibit T is a true and correct copy of the Complaint, filed
13 August 10, 2006, in the matter of *American Blinds And Wallpaper Factory, Inc. v. Steve*
14 *Katzman*, Case No. 06-cv-13576 (E.D. Mich.). This document is available on PACER.

15 22. Attached hereto as Exhibit U are true and correct copies of pages from the
16 deposition transcript of Jeffrey Alderman, taken on August 4, 2006.

17 23. Attached hereto as Exhibit V is a true and correct copy of a letter from Caroline
18 Plater to Ajay Krishnan, dated December 4, 2006, which accompanied a production of
19 documents.

20 24. Attached hereto as Exhibit W is a true and correct copy of American Blind &
21 Wallpaper Factory, Inc.'s Initial Disclosures Pursuant to Federal Rule of Civil Procedure 26,
22 which are dated April 27, 2005.

23 25. Attached hereto as Exhibit X is a true and correct copy of a chart, produced by
24 ABWF in response to an order by Judge Seeborg, that matches each document ABWF has
25 produced to the document request to which it is responsive. A true and correct copy of the cover
26 letter that accompanied the chart is also included in Exhibit X.

27 26. The following statements pertain to factual issues raised in the spoliation motion:
28

Documents Produced by ABWF

27. To date, ABWF has produced roughly 50,000 pages of documents. ABWF first produced 2790 pages of documents on October 26, 2005. And on April 21, 2006, ABWF produced another 156 pages of documents. After June 14, 2006, ABWF produced the remaining roughly 47,000 pages of documents. These are estimates, based on the Bates numbers associated with the documents produced.

Kaden Company Studies

28. ABWF produced three studies that it conducted through a marketing research firm called Kaden Company on the issues of what it should call the company, what URL it should use on its website, and how consumers reacted to ABWF's catalog. The reports were produced as ABWF 002950 – ABWF 003017. Because the contents of the reports are not at issue here, Google has not submitted the reports here. However, two of the three Kaden reports will be submitted in support of Google's summary judgment motion, which will be filed on the same day as this spoliation motion.

Analysis of Emails Produced by ABWF

29. In November, 2006, I asked a paralegal in my office to identify all of the emails in ABWF's document production. I then asked her to exclude the following categories of emails:

- a. Emails that were cover letters to Coremetrics reports.
- b. Emails where the most recent email in the string was between an employee at ABWF and a Google employee. The content of these entire email strings would have been completely known to Google. The paralegal informed me that there were roughly 350-365 such emails.
- c. Emails between ABWF's outside counsel and a third party, where no ABWF employee was included as a sender or an addressee. These emails would have been produced as a result of document searches performed by outside counsel, of the outside counsel's email files. Thus, the production of these emails does not bear on the quality of the document search

1 performed at ABWF's offices.

2 I reviewed the resulting set of emails. Discounting a handful of exact duplicates (copies of the
3 same email that were produced from the same employee's email account), there were 65 emails.
4 These emails span from 2001 to 2006.

5 30. On December 5, 2006—more than three days after the close of discovery—
6 ABWF produced another set of documents, which were “from Michael Layne's email files.” *See*
7 Exhibit V. This production included another 65 emails.

8 31. The Coremetrics emails were all sent from the email address
9 reports@coremetrics.com, included the title of the report in the subject line, contained no text in
10 the body of the email, and included the report as an attachment to the email. Attached hereto as
11 Exhibit P is a sample cover letter for a Coremetrics report. ABWF produced roughly three
12 thousand Coremetrics reports on a set of CDs.

13 32. Of the emails between ABWF and Google that ABWF produced, some contain, in
14 the string of prior emails that are included at the bottom of the message, purely internal ABWF
15 communications that were incidentally forwarded to Google. Exhibit Q contains two examples
16 of email strings that demonstrate this phenomenon. For instance, in the first email message
17 included in Exhibit Q, the most recent message in the string is between a Google employee,
18 Britton Picciolini, and an ABWF employee, Jeffrey Alderman. But in the string of forwarded
19 messages, there is a message between Joe Charno and Jeffrey Alderman, and another message
20 between Steve Katzman and Joe Charno, all of whom were ABWF employees. These purely
21 internal ABWF messages happen to have been forwarded to a Google employee, and therefore
22 happen to be known to Google. But ABWF never produced the original messages between
23 Charno and Alderman and between Katzman and Charno. This same phenomenon is seen in the
24 second email string included in Exhibit Q. The most recent message, between Google employee
25 Emily Nichols and ABWF employee Alderman, is followed by forwarded messages between
26 Katzman, Alderman, and Charno that were never produced.

Lawsuit Between ABWF and Katzman

33. I and other attorneys at my law firm first learned of the lawsuit between ABWF and Katzman on October 23, 2006.

Katzman as ABWF's 30(b)(6) Designee

34. ABWF designated Steve Katzman as its 30(b)(6) deposition witness for all 25 topics noticed by Google. This designation was revoked when ABWF informed Google that Katzman had left ABWF.

I state under penalty of perjury of the laws of the United States of American that the foregoing statements are true and correct. Executed December 26, 2006, at San Francisco, California.

/s/ Ajay S. Krishnan
AJAY S. KRISHNAN