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 GOOGLE INC.

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UNITED STATES DISTRICT COURT  
 9  
 NORTHERN DISTRICT OF CALIFORNIA

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GOOGLE INC., a Delaware corporation,

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

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Plaintiff,

**DECLARATION OF AJAY S. KRISHNAN  
 IN SUPPORT OF GOOGLE'S MOTION  
 TO MAINTAIN THE CURRENT  
 SCHEDULE OR ABIDE BY IT AS  
 CLOSELY AS POSSIBLE**

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v.

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

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Defendants.

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

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Counterclaimant,

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v.

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GOOGLE, INC., AMERICA ONLINE, INC.,  
 23 NETSCAPE COMMUNICATIONS  
 CORPORATION, COMPUSERVE  
 24 INTERACTIVE SERVICES, INC., ASK  
 JEEVES, INC., and EARTHLINK, INC.,

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Counter-Defendants/  
Third-Party Defendants.

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

2 1. I am an attorney at the firm of Kecker & 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, pursuant to Civil Local Rule 6–3, in support of Google’s Motion to Maintain the  
5 Current Schedule or Abide by It as Closely as Possible. Unless otherwise stated, I know the  
6 facts stated herein of my personal knowledge and if called as a witness, I would testify  
7 competently thereto.

8 **Relief Sought by Google**

9 2. Google requests that the Court calendar the hearing for Google’s Motion For  
10 Summary Judgment and Google’s Motion for Terminating, Evidentiary, and Monetary Sanctions  
11 Against ABWF for Spoliation of Evidence (collectively, “Motions”)—which had been set for  
12 January 30, 2007—on either January 30, 2007, or as soon as practicable thereafter. Google notes  
13 that its lead counsel, Michael Page, will be unavailable for a hearing from February 5 through  
14 February 8, 2007, inclusive. For any additional briefing time that results from the postponement  
15 of the hearing date after January 30, 2007, Google requests that this time be divided evenly  
16 between the parties.

17 3. Additionally, Google requests an explicit finding that the hearing for dispositive  
18 motions was indeed set for January 30, 2007, and that as a result, the deadline for *filing*  
19 dispositive motions was December 26, 2006. Moreover, Google requests a finding that the  
20 postponement of the hearing for Google’s motions will not affect any other case-management  
21 dates in this case.

22 **The Reasons for the Requested Enlargement of Time.**

23 4. The hearing date for dispositive motions was set by this Court for January 30,  
24 2007, at 9 a.m. In a minute order on February 16, 2006, with regard to the hearing for  
25 dispositive motions, the Court stated, “motion hearing on 12/1/06 at 9:00 a.m.” *See* Docket Item  
26 No. 95. In a written order on June 23, 2006, the Court stated, “the Court will amend and extend  
27 the case management dates by only sixty (60) days.” *See* Docket Item No. 133. Thus, the  
28 hearing date for dispositive motions was set for January 30, 2007, at 9 a.m. This set a filing

1 deadline for dispositive motions of December 26, 2006.

- 2 a. That the Court’s hearing date for dispositive motions establishes a filing  
3 deadline 35 days earlier was made clear on February 16, 2006, from  
4 Michael Page, counsel for Google, to Susan Greenspon and David  
5 Rammelt, counsel for ABWF. On information and belief, ABWF never  
6 responded to that email. A true and correct copy of that email is attached  
7 hereto as Exhibit A.
- 8 b. Google was also clear to ABWF—in the two weeks prior to the December  
9 26, 2006 filing deadline—that the deadline for filing dispositive motions  
10 was imminent. In those two weeks, ABWF and Google negotiated a  
11 stipulation to exceed the page limits on both parties’ summary judgment  
12 briefing. The Court subsequently ratified that stipulation. *See* Docket  
13 Item No. 229. In an email on December 18, 2006, I informed Mr.  
14 Rammelt that we needed to file the stipulation that day, so the Court  
15 would have enough time to rule on it. A true and correct copy of that  
16 email is attached as Exhibit B.
- 17 c. ABWF’s contrary argument about the hearing and filing deadlines in this  
18 case makes no sense. ABWF attorney Caroline Plater explained to me in  
19 an email on December 28, 2006, that ABWF believes that the filing  
20 deadline for dispositive motions is January 29, 2007, and that *the hearing*  
21 *date for dispositive motions is January 30, 2007!* This is an absurd result.  
22 Ms. Plater stated that this was because the Court’s February 16, 2006  
23 Order that set the hearing date for dispositive motions on December 1,  
24 2006 (1) was silent as to the filing date for dispositive motions (which was  
25 previously set for July 31, 2006), and (2) postponed all other case-  
26 management dates by four months. Thus, according to Ms. Plater, this  
27 Court’s February 16, 2006 Order created an absurd situation wherein the  
28 hearing date for dispositive motions was December 1, 2006, and the filing

1 date was November 30, 2006. Ms. Plater then believes that this Court's  
2 June 23, 2006 Order simply postponed this scenario—with one day  
3 between the hearing date and filing date—by sixty days. A true and  
4 correct copy of this email from Ms. Plater is included in a string of  
5 correspondence between ABWF and Google, which is attached hereto as  
6 Exhibit C. Attached hereto as Exhibits D and E are true and correct copies  
7 of letters between Ms. Plater and myself, both dated December 27, 2006,  
8 that are referenced in Exhibit C.

9 d. Of course, the correct, and considerably more plausible reading of the  
10 Court's February 16, 2006 Order is that it did not need to explicitly  
11 mention a filing deadline because it explicitly set a hearing date for  
12 dispositive motions. Civil Local Rule 7-2 would naturally supply a filing  
13 deadline of 35 days prior to the Court-set hearing date.

14 5. On December 28, 2006—two days after Google had already filed its Motions—  
15 the Court's clerk informed Google that the January 30, 2007 hearing date had not been  
16 calendared. Google was informed of this during a conference call involving (1) the Court's  
17 clerk, Christian Delaney, (2) Ms. Plater, counsel for ABWF, and (3) myself and Klaus Hamm,  
18 counsel for Google. Ms. Delaney explained that it is the chambers' policy that counsel must call  
19 chambers and reserve a hearing date *even when the hearing date is set by Court order*.

20 6. With regard to the calendaring of the hearing date for Google's Motions, Ms.  
21 Delaney also stated that the Court would likely be open to setting the hearing date after January  
22 30, 2007. She also stated that although the outgoing voicemail message of the scheduling clerk,  
23 Teresa Fleishman, stated that February 16, 2007 is the earliest available hearing date for civil  
24 motions, the Court is sometimes able to schedule an earlier date—particularly an earlier Friday—  
25 if there is cause for doing so. Ms. Delaney then suggested that the parties attempt to stipulate to  
26 a briefing schedule and a hearing date, and that barring that, either party could file a motion  
27 seeking relief from the Court.

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1                   **Efforts Google Has Made to Obtain a Stipulation to the Time Change**

2                   7.           Immediately after the December 28, 2006 conference call with Ms. Delaney,  
3 pursuant to Ms. Delaney’s suggestion, the parties remained on the line and attempted to stipulate  
4 to a briefing schedule. Ms. Plater stated that ABWF would likely agree to a February 16, 2007  
5 hearing date (which, according to Ms. Fleishman’s outgoing message, was the earliest available  
6 hearing date), with additional briefing time divided evenly between the parties, but that she  
7 would have to check. Mr. Hamm suggested that the parties ask the Court to schedule the hearing  
8 as soon as possible, with the parties evenly dividing any additional briefing time that resulted  
9 from the new schedule. Mr. Hamm made it clear that this might mean that, if the Court’s  
10 schedule so permitted, the hearing would be held earlier than February 16, 2007. Ms. Plater said  
11 that she would need to speak to other lawyers on her team.

12                  8.           On the morning of December 29, 2006, Ms. Plater stated in an email to Mr.  
13 Hamm and myself that ABWF would not agree to any hearing date earlier than February 16,  
14 2007, and that ABWF would not agree to splitting additional briefing time between the parties.

15                   **The Harm or Prejudice that Would Occur if the Court Does Not Change the Time**

16                  9.           It would be prejudicial and inequitable to Google if the Court does not reschedule  
17 the hearing date either on, or shortly after January 30, 2007, and if the Court does not equitably  
18 allocate briefing time between the parties.

19                  10.          It would be prejudicial to Google if the Court were to substantially delay the  
20 hearing on these motions because ABWF has consistently been dilatory in prosecuting this  
21 action. The history of ABWF’s efforts to delay this action—which was filed over three years  
22 ago—is laid out in detail in the accompanying motion. Trial is set for this case on May 15, 2007.

23                  11.          It would be inequitable because Google went through substantial hardship to  
24 abide by the Court’s own orders, and file its Motions by December 26, 2006. Numerous  
25 attorneys worked on these Motions while on vacation, and I personally altered my holiday travel  
26 plans to ensure that the filing could take place on December 26, 2006. I and other attorneys have  
27 also planned our schedules around the briefing schedule that would result from a January 30,  
28 2007 hearing date. ABWF now seeks to capitalize on the Court’s unavailability on January 30,

1 2007 not only to postpone substantially this case, but to assign to itself all of the additional  
 2 briefing time. The inequity is heightened by the fact that ABWF’s interpretation of this Court’s  
 3 orders, with regard to the hearing date and filing deadline for dispositive motions, is entirely  
 4 unreasonable and unsupportable.

5 **All Previous Time Modifications in this Case**

6 12. On May 16, 2005, the Court adopted following schedule:

7 Cutoff of Fact Discovery	February 27, 2006
8 All Parties’ Expert Reports Due	March 31, 2006
9 Rebuttal Expert Reports Due	May 15, 2006
10 Cutoff of Expert Discovery	June 30, 2006
11 Cutoff for filing Dispositive Motions	July 31, 2006
12 Pretrial Conference Statement	October 2, 2006
13 Pretrial Conference	October 13, 2006 at 11:00 a.m.
14 Trial Date	November 17, 2006 at 11:00 a.m.

15 *See* May 16, 2005 Order (Docket Item No. 57).

16 13. On February 16, 2006, the Court issued an order stating “The Court extends all  
 17 case management dates by 4 months. The case is set for jury trial on 3/16/07 at 1:30 p.m, pretrial  
 18 conference on 3/2/07 at 11:00 a.m. and motion hearing on 12/1/06 at 9 a.m.” *See* February 16,  
 19 2006 Order (Docket Item No. 95).

20 14. On June 23, 2006, the Court issued an order stating that “the Court will amend  
 21 and extend the case management dates by only sixty (60) days.” *See* June 23, 2006 Order  
 22 Granting In Part Defendant’s Motion To Extend Case Management Deadlines (Docket Item No.  
 23 113).

24 15. On August 31, 2006, the Court extended the deadline for the serving of expert  
 25 reports from September 29, 2006 to November 14, 2006 and extended the deadline for the  
 26 serving of rebuttal expert reports from November 14, 2006 to December 5, 2006. *See* Stipulation  
 27 and Order Amending Case Management Dates for Expert Reports (Docket Item No. 180).  
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1 I state under penalty of perjury of the laws of the United States of American that the  
2 foregoing statements are true and correct. Executed December 29, 2006, at San Francisco,  
3 California.

4  
5 /s/ Ajay S. Krishnan  
6 AJAY S. KRISHNAN

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