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 11 GOOGLE INC.

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14 GOOGLE INC., a Delaware corporation,  
 15 Plaintiff,

16 v.

17 AMERICAN BLIND & WALLPAPER  
 18 FACTORY, INC., a Delaware corporation  
 19 d/b/a decoratetoday.com, Inc., and  
 20 DOES 1-100, inclusive,  
 21 Defendants.

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

**JOINT CASE MANAGEMENT  
 CONFERENCE STATEMENT**

**Date: May 11, 2007**

**Time: 10:30 a.m.**

**Court: Hon. Jeremy Fogel**

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

Counter Plaintiff,

25 v.

26 GOOGLE INC.,  
 27 Counter Defendant

1 Plaintiff/Counter-Defendant Google Inc. (“Google”), and Defendant/Counter-Plaintiff  
2 American Blind & Wallpaper Factory, Inc. (“ABWF”) submit the following joint case  
3 management conference statement.

4  
5 **I. DESCRIPTION OF THE CASE**

6 **A. Background**

7 Google filed this action against ABWF on November 26, 2003, seeking a declaratory  
8 judgment that its current policy regarding the sale of keyword-triggered advertising does not  
9 constitute trademark infringement. ABWF contends that Google’s sale of trademarked terms as  
10 keywords violates the Lanham Act because there is a likelihood of confusion as to the source,  
11 sponsorship or affiliation of the Sponsored Links delivered by Google’s search engine in  
12 response to searches using the trademarked terms, including the registered and common law  
13 trademarks owned by ABWF. Google disagrees that ABWF’s customers are likely to be  
14 confused as a result of the purchase of such keywords, or that Google assists in or encourages  
15 illegal conduct on the part of ABWF’s competitors.

16 ABWF filed counterclaims and third-party claims against Google for trademark  
17 infringement and dilution, unfair competition, and tortious interference with prospective  
18 economic advantage.

19 Discovery in this case is closed. On April 18, 2007, the Court issued its ruling granting  
20 in part and denying in part Google’s motion for summary judgment.

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22 **B. The Court’s Summary Judgment Ruling**

23 ABWF has raised nine counterclaims against Google: (i) trademark infringement in  
24 violation of the Lanham Act, (ii) false representation in violation of the Lanham Act, (iii)  
25 trademark dilution under the Lanham Act, (iv) injury to business reputation and dilution in  
26 violation of Cal. Bus. & Prof. Code § 14330, (v) unfair competition in violation of Cal. Bus. &  
27 Prof. Code § 14330, (vi) common law trademark infringement, (vii) tortious interference with  
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1 prospective economic advantage; and, in the alternative, (viii) contributory trademark  
2 infringement, and (ix) contributory trademark dilution. Additionally, ABWF asserted five  
3 alleged trademarks: “American Blind,” “American Blinds,” “American Blind & Wallpaper  
4 Factory,” “American Blind Factory,” and “Decoratetoday.”

5 In March 2005, the Court granted Google’s motion to dismiss as to ABWF’s seventh  
6 cause of action, tortuous interference with prospective economic advantage, and denied its  
7 motion as to all other claims.

8 In its recent summary judgment ruling, the Court ruled that ABWF has not evinced  
9 sufficient evidence of fame as to any of its asserted marks. Consequently, the Court granted  
10 Google summary judgment as to ABWF’s third and fourth causes of action (i.e., its federal and  
11 state dilution claims). Notably, the Court did not grant summary judgment as to ABWF’s ninth  
12 cause of action for contributory trademark dilution—an issue that is addressed below.

13 The Court also granted Google summary judgment motion with regard to all claims to the  
14 extent they rely on the “American Blind” and “American Blinds” marks. The Court ruled that  
15 ABWF did not evince sufficient evidence that it had protectable rights in those alleged marks.

16 The Court denied Google’s motion for summary judgment as to ABWF’s remaining  
17 Lanham Act and California causes of action, finding triable issues of fact as to whether  
18 consumers are likely to be confused by Google’s sale of trademarked terms as keywords and  
19 delivery of Sponsored Links in response to searches using such trademarked terms.

### 20 **C. ABWF’s Ninth Cause of Action for Contributory Trademark Dilution**

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22 It is Google’s position that the Court should have granted summary judgment on the ninth  
23 cause of action (for contributory trademark dilution) as well, and the failure to do so appears to  
24 have been merely an oversight. Google moved for judgment on all three dilution claims on the  
25 same basis, and the Court’s finding that ABWF cannot establish the required element of fame  
26 applies with equal force to all three claims. Google therefore respectfully requests that the Court  
27 clarify or modify its summary judgment ruling to include judgment on the ninth cause of action  
28

1 as well.

2 ABWF is not opposed to Google's request.

3  
4 **D. Google's Outstanding Motion for Sanctions Based on Alleged Spoliation**

5 Google has brought a motion for sanctions based on alleged spoliation of evidence by  
6 ABWF. This Court referred that matter to Judge Seeborg, who heard argument on March 14,  
7 2007. The motion remains under submission.

8  
9 **E. Google's Anticipated Motions**

10 Google plans to bring two motions that could substantially impact the scope and length of  
11 trial. First, Google intends to bring a motion in limine precluding any evidence of damages,  
12 based on 15 U.S.C. § 1114. That statute provides that only injunctive relief is available against  
13 publishers of "paid advertising matter in a newspaper, magazine, or other similar periodical or in  
14 an electronic communication." 15 U.S.C. § 1114(2). Second, Google intends to bring *Daubert*  
15 motions to preclude admission at trial of ABWF's expert evidence on damages and on its  
16 trademark survey. Google believes that these motions should be scheduled significantly in  
17 advance of trial, because of their potential impact on the scope and length of trial.

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19 **F. ABWF's Anticipated Motions**

20 ABWF does not anticipate any additional motions at this time. However, motions in  
21 limine may become necessary depending upon Google's proposed exhibits and intended use of  
22 deposition testimony. ABWF may also decide to renew its *Daubert* motion directed to Google's  
23 trademark survey expert.

24  
25 **II. ALTERNATIVE DISPUTE RESOLUTION**

26 The parties participated in a mediation before retired Judge Fern Smith on December 13,  
27 2005, and an informal settlement meeting on September 13, 2006, both without success.

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**III. CASE MANAGEMENT PLAN**

**A. Google's Position**

Subject to the Court's availability, Google proposes a November trial date. This will give the Court sufficient time to hear and rule on Google's forthcoming motions in limine, and for the parties to alter their trial preparation accordingly. Additionally, Google's lead trial counsel and second chair currently have a trial scheduled on September 10, 2007, that is expected to last two to three weeks.

Google has previously estimated that a trial in this case would last two weeks. If Google's motions in limine are granted, the number of days needed for trial may be substantially reduced.

**B. ABWF's Position**

ABWF is agreeable to an early November trial date. ABWF estimates the trial will take about 5 to 7 court days.

Dated: April 27, 2007

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Dated: April 27, 2007

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