



1 TO ALL PARTIES OF RECORD AND THEIR COUNSEL:

2 PLEASE TAKE NOTICE that on January 27, 2006 or as soon as counsel may be heard,  
3 Defendant/Counter-Plaintiff American Blind & Wallpaper Factory, Inc. (“American Blind”) will  
4 and hereby does move this Court for an order compelling Plaintiff/Counter-Defendant Google,  
5 Inc. (“Google”) to comply with the dictates of Rule 34(b) of the Federal Rules of Civil Procedure,  
6 by (a) labeling the 110,033 pages of documents produced by Google to correspond to each  
7 request or, in the alternative, or (b) providing an index to the 24 boxes and 10 CDs containing the  
8 documents that designate the source and origin of the file(s) for each box and/or CD produced  
9 and to indicate whether the boxes and/or CDs contain documents from multiple files.

10 The motion will be based on this Notice, the attached Memorandum of Points and  
11 Authorities, the accompanying declaration of Caroline C. Plater, the pleadings and papers on file  
12 in this action, the arguments of counsel, and upon such other evidence as may be presented at the  
13 hearing on this matter.

14 **I. INTRODUCTION**

15 In response to the document requests American Blind has served on it in this litigation,  
16 Google has produced over a hundred thousand pages of documents, without providing an index or  
17 labeling the documents to correspond with each document request. However, these documents all  
18 appear to be documents produced originally in a separate litigation, *Government Employee Ins.*  
19 *Co. v. Google Inc.*, Case No. 1:04cv507 (E.D. Va.) (“*GEICO*”). As such, they fail to comply with  
20 Google’s obligation under Rule 34 to produce documents “as they are kept in the usual course of  
21 business or . . . organize[d] and label[ed] . . . to correspond with the categories in the request.”  
22 Fed. R. Civ. P. 34(b). Google should be ordered to comply with its Rule 34 obligations.

24 **II. STATEMENT OF FACTS**

25 On April 20, 2005, American Blind served Google with American Blind’s First Set Of  
26 Requests For Production Of Documents And Things From Google Inc. (Declaration of Caroline  
27 C. Plater (“Plater Decl.”), Ex. A.) Google provided its written response and objections to the  
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1 requests on June 21, 2005. (Plater Decl., Ex. B.) Thereafter, on October 26, 2005, Google  
2 produced 24 boxes of documents and 10 CDs containing documents Google deemed responsive  
3 to American Blind's requests. In total, Google produced 110,033 pages of documents.  
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5 Unfortunately, Google has failed to produce these documents as they are "kept in the  
6 usual course of business," nor has it labeled the documents to correspond to each of American  
7 Blind's specific document requests as required by Fed. R. Civ. P. 34(b). Rather, Google appears  
8 to have only produced documents it previously produced in the *GEICO* litigation, without any  
9 indication as to the source or origin of any of these documents, or as to the document request or  
10 requests to which the documents are responsive.<sup>1</sup>

11 American Blind has in good faith conferred with Google regarding Google's failure to  
12 produce its documents in the usual course of business or designate the specific requests for which  
13 the documents were produced. These discussions have occurred via letter, e-mail and at least two  
14 telephone conversations. More specifically, on November 29, 2005, American Blind contacted  
15 Google by telephone, asking that Google identify specifically which documents were being  
16 produced in response to each document request. In the alternative, counsel for American Blind  
17 requested that Google identify the source of the documents or bates ranges or boxes, assuming the  
18 documents were produced in the ordinary course of business. In response to both requests,  
19 Google indicated that it did not know if it would specify which documents were being produced  
20 in response to each specific document request or identify the source of the documents or bates  
21 ranges or boxes and was not sure if it was required to do either. (*See* Plater Decl., Ex. C.)  
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24 Eventually, Google's counsel decided that it was under no obligation to identify the  
25 source of, or to categorize, any of the documents because, as counsel explained, they had all been  
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27 <sup>1</sup> Although Google later provided some minimal information regarding some of the electronic  
28 data contained on the 10 CD's – which is insufficient – Google has provided no information at all  
with regard to the 24 boxes of documents.

1 produced in another lawsuit. (Plater Decl., Ex. D). Google's counsel stated that it was Google's  
2 position that any resulting confusion was American Blind's own fault for requesting the  
3 documents produced in another lawsuit.

4 To make Google's job easier, American Blind's counsel even suggested during a  
5 telephone conversation on November 29, 2005, that the problem might be resolved if Google  
6 simply would generally identify which documents it has produced in response to American  
7 Blind's requests *in this case*. Indeed, a review of a great majority of documents produced by  
8 Google in this case shows that Google has failed to produce standard items, such as e-mails and  
9 correspondence between American Blind and Google and other basic data specifically related to  
10 this case. Elsewhere, Google has responded to specific interrogatories, as is its right, by referring  
11 to documents that are being produced, but it is impossible to determine which of the 110,000-plus  
12 documents answer these interrogatories. (Plater Decl., Ex. E.)<sup>2</sup>

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15 Google refused this solution and has confirmed that it has no intention of providing the  
16 information requested in order to identify the production in relation to the specific requests or to  
17 indicate how and whether the production was produced in the ordinary course of business. (Plater  
18 Decl., Ex. F.)

### 19 **III. ARGUMENT**

20 Rule 34(b) of the Federal Rules of Civil Procedure requires that "[a] party who produces  
21 documents for inspection shall produce them as they are kept in the usual course of business or  
22 shall organize and label them to correspond with the categories of the request." F.R.C.P. 34(b).  
23 The Northern District of California has interpreted Rule 34 to require that a litigant produce  
24 documents either as kept in the ordinary course of business or by specifying the bates stamp range  
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26 <sup>2</sup> For example, Google has referred to the documents it is producing in response to  
27 American Blind's Interrogatory No. 1 stating "Google will produce a document describing  
28 its quarterly AdWords and total revenues and profits from January 1, 2000 to the present."  
(See Plater Decl., Exhibit F).

1 or at least the box number of the documents responsive to each request. *See Ultratech, Inc. v.*  
2 *Tamarack Scientific Co.*, 2005 WL 40074, \* 3-4 (N.D. Cal. Jan. 5. 2005).

3 Numerous jurisdictions have interpreted this provision to require that a litigant do more  
4 than simply produce documents en masse. *See Cardenas v. Dorel Juvenile Group, Inc.*, 230  
5 F.R.D. 611, 618 (D. Kan. 2005) (“a party who chooses the Rule 34 option to produce documents  
6 as they are kept in the ordinary course of business bears the burden of showing that the  
7 documents were in fact produced in that manner”); *Stiller v. Arnold*, 167 F.R.D. 68, 71 (N.D. Ind.  
8 1996) (production of 7000 documents in no apparent order does not comply with a party’s  
9 obligation under Rule 34(b)); *Montania v. Aetna Casualty & Surety Co*, 153 F.R.D. 620, 621  
10 (N.D. Ill. 1994) (defendant properly moved to compel plaintiff to indicate what documents are  
11 responsive to which document request, where some 17,570 pages were contained in the boxes  
12 produced); *Scripps Clinic & Research Found. v. Baxter Travenol Labs., Inc.*, 1988 WL 70013 (D.  
13 Del. June 21, 1988) (court granted motion to compel defendant to label the 45,000 documents  
14 produced to correspond to each request where defendant had produced documents in fifteen boxes  
15 and documents were arranged in each box in bundles with no designation as to the origin of the  
16 file, or whether the bundles contained documents from multiple files).

17 The court in *Cardenas* recognized that Rule 34 clearly requires something more than  
18 simply producing the documents without any labels, indices or guides. *See id.* “A mere assertion  
19 that they were produced is not sufficient to carry the burden. In addition, merely categorizing the  
20 documents produced does not, without some further explanation, satisfy the requirement that they  
21 be produced as kept in the usual course of business.” *Id.*

22 Here, Google has not produced document as they were kept in the usual course of  
23 business — rather, it simply provided documents it had gathered up in another lawsuit. To be  
24 sure, American Blind did request documents produced by Google in *Government Employees Ins.*

1 *Co. v. Google Inc.* (See Plater Decl., Ex. A, Request No. 44). If it is Google's contention that  
2 some or all of the 110,330 pages of materials are responsive to Request No. 44, than so be it. But  
3 Google still is under an obligation to identify with specificity which documents are responsive to  
4 Request No. 44, not to mention which documents are responsive to any of the other specific  
5 requests. Otherwise, American Blind has no way to decipher which documents were originally  
6 produced in *GEICO* and which documents are being produced for the first time here.  
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8 Google's claim that it has no obligation to do anything other than produce 110,033 pages  
9 of documents in no apparent order clearly violates Rule 34 and the case law that has interpreted  
10 the rule. American Blind has provided very specific and detailed document requests for Google.  
11 In turn, Google should be required to produce its responsive documents in a manner that provides  
12 American Blind the ability to decipher which requests have properly been answered. Moreover,  
13 the voluminous nature of this production warrants imposing an even greater duty to organize the  
14 documents with labels and/or indices. As addressed by *Cardenas*, merely categorizing the  
15 documents produced does not, without some further explanation, satisfy the requirement that they  
16 be produced as kept in the usual course of business. 230 F.R.D. at 618.  
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18 **IV. CONCLUSION**

19 For the foregoing reasons, American Blind requests that the Court compel Google to label  
20 the 110,033 pages of documents produced to correspond to each request or, in the alternative,  
21 provide an index to the 24 boxes and 10 CDs that designates the origin of the file for each box  
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1 and/or CD produced and indicates whether the boxes and/or CDs contain documents from  
2 multiple files.

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