

1 DAVID H. KRAMER, State Bar No. 168452
 2 STEPHEN C. HOLMES, State Bar No. 200727
 3 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 4 650 Page Mill Road
 Palo Alto, CA 94304-1050
 Telephone: (650) 493-9300
 Facsimile: (650) 565-5100

5 Attorneys for Defendant/Counterclaimant
 6 Google Inc.

7 UNITED STATES DISTRICT COURT
 8 NORTHERN DISTRICT OF CALIFORNIA
 9 SAN JOSE DIVISION

11 DIGITAL ENVOY, INC.,)
 12)
 Plaintiff/Counterdefendant,)
 13)
 v.)
 14)
 GOOGLE INC.,)
 15)
 Defendant/Counterclaimant.)

CASE NO.: C 04 01497 RS
**DECLARATION OF STEPHEN C.
 HOLMES IN SUPPORT OF
 GOOGLE INC.'S MOTION FOR
 LEAVE TO AMEND ITS
 COUNTERCLAIMS AND FOR
 RELIEF FROM CASE
 MANAGEMENT SCHEDULE**

Date: February 9, 2005
 Time: 9:30 a.m.
 Courtroom: 4, 5th Floor
 Judge: Hon. Richard Seeborg

16 _____)
 17)
 18)
 19)

20
 21
 22
 23
 24
 25
 26
 27
 28

1 I, Stephen C. Holmes, declare as follows:

2 1. I am an attorney at law duly licensed to practice in the State of California and
3 before this Court. I am an associate with Wilson Sonsini Goodrich & Rosati, counsel for
4 defendant and counterclaimant Google Inc. ("Google"). I have personal knowledge of the facts
5 set forth herein and, if called as a witness, could and would testify competently thereto.

6 2. Attached as Exhibit A is a true and correct copy of Google's proposed Answer to
7 Amended Complaint and Amended Counterclaims.

8 3. Attached as Exhibit B is a true and correct copy of a Mutual Non-Disclosure
9 Agreement dated November 29, 2000 between Google Inc. and Digital Envoy, Inc. and
10 amendments.

11 4. Attached as Exhibit C is a true and correct copy of a Product and Electronic
12 Database Evaluation and License Agreement dated November 30, 2000 between Google Inc. and
13 Digital Envoy, Inc.

14 5. Attached as Exhibit D is a true and correct copy of an email from Steve Schimmel
15 of Google to Rob Friedman of Digital Envoy dated November 17, 2000.

16 6. Attached as Exhibit E is a true and correct copy of an email from Steve Schimmel
17 to Susan Daw of Digital Envoy, dated March 28, 2002.

18 7. On August 27, 2004, the Court issued a Case Management Scheduling Order
19 setting that same day as the deadline for amending the pleadings. That same day, Digital Envoy
20 sought leave to file an amended complaint. Google did not oppose the request. *See* Google
21 Statement of Nonopposition, dated September 15, 2004. The Court also set a fact discovery cut-
22 off of April 29, 2005 and a trial date of October 24, 2005.

23 8. After the deadline for amending pleadings had passed, Google received its first
24 production of documents from Digital Envoy. Included among the documents Google received,
25 were several indicating that Digital Envoy had repeatedly shared information regarding the
26 parties' relationship with Google's fiercest competitors.

27 9. On November 17, 2004, Google deposed Mr. Rob Friedman, Digital Envoy's vice
28 president of corporate development and corporate counsel, pursuant to Fed. R. Civ. P. 30(b)(6).

1 During the deposition, Mr. Friedman confirmed what the documents suggested – in marketing its
2 services to third parties, Digital Envoy made a practice of sharing information about its
3 relationship with Google and Google’s various uses of its technology.

4 10. On Wednesday, November 24, 2004, one week after the deposition of
5 Mr. Friedman, Digital Envoy’s vice president of corporate development and corporate counsel, I
6 sent a draft of Google’s proposed Answer to Amended Complaint and Amended Counterclaims
7 to counsel for Digital Envoy, Messrs. Tim Kratz and P. Craig Cardon, along with a request that
8 Digital Envoy consent to the proposed amendments. On Tuesday, November 30, 2004, I spoke
9 by telephone with Mr. Kratz who refused to consent to proposed amendments. On Thursday,
10 December 2, 2004, I sent a revised draft of Google’s proposed Answer to Amended Complaint
11 and Amended Counterclaims to Messrs. Kratz and Cardon. On December 14, 2004, I sent a
12 letter to Mr. Kratz stating that I had not heard from him in response to my December 2 letter and
13 revised draft counterclaims, and asking him to confirm whether Digital Envoy would consent to
14 the proposed amendments. Later that day, Mr. Kratz stated in an email to me that Digital Envoy
15 would not consent to the amendments.

16
17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing is true and correct.

19 Executed on December 28, 2004, at Palo Alto, California.

20
21 /s/ Stephen C. Holmes
22 Stephen C. Holmes
23
24
25
26
27
28