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14
 15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18 CLICK DEFENSE, INC., a Colorado)
 19 corporation, Individually and on behalf of all)
 20 others similarly situated,)

21 Plaintiff,

22 vs.

23 GOOGLE, INC., a Delaware corporation and)
 24 Does 1 through 100, inclusive,)

25 Defendants.

Case No.: 5:05-cv-02579-RMW

E-FILING

**MOTION BY PLAINTIFF CLICK
 DEFENSE, INC. FOR LEAVE TO: (1)
 WITHDRAW AS REPRESENTATIVE
 PLAINTIFF; (2) DISCONTINUE
 INDIVIDUAL CLAIMS WITHOUT
 PREJUDICE; (3) SUBSTITUTE
 ADVANCED INTERNET
 TECHNOLOGIES, INC. AS
 REPRESENTATIVE PLAINTIFF; and (4)
 TO AMEND THE CAPTION**

Date: January 13, 2006

Time: 9:00 a.m.

Judge: Hon. Ronald M. Whyte

Date Complaint Filed: June 24, 2005

1 **NOTICE OF MOTION BY PLAINTIFF CLICK DEFENSE, INC. FOR**
2 **LEAVE TO: (1) WITHDRAW AS REPRESENTATIVE PLAINTIFF;**
3 **(2) DISCONTINUE INDIVIDUAL CLAIMS WITHOUT PREJUDICE;**
4 **(3) SUBSTITUTE ADVANCED INTERNET TECHNOLOGIES, INC. AS**
5 **REPRESENTATIVE PLAINTIFF; and (4) TO AMEND THE CAPTION.**

6 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

7 PLEASE TAKE NOTICE that on January 13, 2005, at 9:00 a.m., or as soon thereafter as
8 this matter may be heard before the Honorable Ronald M. Whyte of the United States District
9 Court for the Northern District of District of California, 280 South First Street, San Jose,
10 California, Plaintiff, Click Defense, Inc. ("Click Defense") will and hereby does move the Court
11 for Leave to: (1) withdraw as representative plaintiff; (2) discontinue the individual claims of
12 Click Defense against Google, Inc. ("Google") without prejudice; (3) substitute Advanced
13 Internet Technologies, Inc. ("AIT") for Click Defense as representative plaintiff; and (4) to
14 amend the caption accordingly.

15 This motion is supported by the following Memorandum of Points and Authorities, the
16 Declaration of Scott Boyenger, the Declaration of Clarence Briggs, the arguments of counsel,
17 and any other matters properly before the Court.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19
20 **1. This Court Should Grant Click Defense Leave to Withdraw as Representative Plaintiff.**

21 In this pre-certification class action, class representative Click Defense requests leave to
22 withdraw as the class representative because it does not believe that it can continue to serve in
23 that capacity. [Declaration of Scott Boyenger, para. 2.] Parties may be dropped or added by
24 order of the court on motion of any party or of its own initiative at any stage of the action and on
25 such terms as are just. Any claim against a party may be severed and proceeded with separately.
26 Fed. R. Civ. P. 21. Leave to amend at this stage in the proceedings "shall be freely given" in the
27 absence of countervailing factors such as undue delay, bad faith or dilatory motive, undue
28 prejudice to the opposing party, or futility of the amendment. See Fed. R. Civ. P. 15(a); *Foman*
29

1 *v. Davis*, 371 U.S. 178, 182 (1962). Although Rule 21, and not Rule 15(a), normally governs the
2 addition [and subtraction] of new parties to an action, the same standard of liberality applies
3 under either Rule. *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997).
4 Leave to withdraw as a representative plaintiff is customarily given in a class action when
5 another representative plaintiff is willing to substitute into the action. *See, e.g., Cook Inv. Co. v.*
6 *Harvey*, 1975 WL 394 *3, 20 Fed.R.Serv.2d 612, Fed. Sec. L. Rep. P 95,203 (N.D. Ohio Apr 04,
7 1975). Insofar as no countervailing factors exist and another representative plaintiff is willing to
8 substitute into the action, this Court should grant leave for Click Defense to withdraw.

9
10 **2. Click Defense's Individual Claims Against Google Should be Dismissed Without Prejudice.**

11 Click Defense also seeks leave to dismiss of its individual claims against Google without
12 prejudice. The dismissal without prejudice is meant solely to tie up loose ends and avoid the
13 incongruous result of Click Defense proceeding with its own relatively small claims in parallel
14 with the identical claims being pressed on behalf of the proposed class. *See, e.g., Corbell v.*
15 *Norton*, 213 F.R.D. 43 (D.C. 2003) (former class representative would not become merely an
16 absent class member because suit was commenced in dual capacity, both "on his own behalf"
17 and "on behalf of all persons similarly situated" and thus would continue to be an individual
18 plaintiff.) Presumably, such an inefficient and wasteful result would not be in the interests of
19 either the litigants or the Court.

20 Because the class action will continue if the motion for substitution is granted, a dismissal
21 of Click Defense's individual claims would be an ordinary Fed. R. Civ. P. 41(b) dismissal rather
22 than a dismissal of a class action pursuant to Fed. R. Civ. P. 23(e)(1)(a). A plaintiff possesses
23 the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal
24 prejudice will result to the defendant other than the mere prospect of a second litigation upon the
25 subject matter. *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 20 (1936). The
26 purpose of Rule 41(a)(2) is primarily to prevent the unfair use of voluntary dismissals which
27 cause prejudice to defendants. 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2364
28 (1971). Here, there is no indication that voluntary dismissal would cause Google to suffer "plain
29

1 legal prejudice" within any reasonable reading of the term. Indeed, Google will likely not even
2 face a second litigation with Click Defense unless Click Defense were to opt out of any
3 hypothetical subsequent class settlement since dismissal of Click Defense's individual claims
4 without prejudice would merely convert Click Defense to an absent class member.

6 **3. The Motion to Substitute Representative Plaintiffs Should be Granted.**

7 Plaintiffs' Counsel hereby moves to substitute the representative plaintiff in this pre-
8 certification class action. The current representative plaintiff is Click Defense. The proposed
9 representative plaintiff is AIT.

10 Plaintiffs' Counsel owe a fiduciary duty to the class and have a responsibility to seek an
11 appropriate substitute representative if the initial representative plaintiff seeks to withdraw.
12 *Lowenschuss v. Bluhdorn*, 78 F.R.D. 675, 678 (S.D.N.Y. 1978). By all accounts, it appears that
13 AIT would make an appropriate representative plaintiff.

14 AIT is a corporation whose primary business is internet hosting for other businesses.
15 AIT is an established company, with approximately 140 employees and annual revenues in
16 excess of \$30 million. [Declaration of Clarence Briggs, para. 2.] The corporation has been
17 recognized by, among others, Deloitte & Touche for its corporate performance, and its founder
18 and CEO has been selected by the North Carolina Technological Development Authority as the
19 Entrepreneur of the Year. [*Id.*]

20 AIT began its participation in Google's AdWords program in 2003. [*Id.* at para. 4.]
21 From that point until it ended its relationship with Google, AIT spent approximately \$475,000 in
22 Google's AdWords program. [*Id.*, at para. 4.] AIT has reviewed the complaint in this action,
23 and shall adopt it as AIT's own complaint in this action. [*Id.*, at para. 5.] AIT is prepared to
24 discharge its responsibilities as representative plaintiff, and has the necessary staff and resources
25 to see this case through to resolution. [*Id.*, at para. 6.]

26 Liberal substitution of representatives is commonly allowed in class actions. *Van Horn v.*
27 *Trickey*, 840 F.2d 604, 608 (8th Cir. 1988). This is particularly true when the substitution is
28 made prior to certification. *See, In re Harcourt Brace Jovanovich, Inc. Securities Litigation*, 838
29

1 F. Supp. 109, 114 (S.D.N.Y. 1993) (*citing*, MANUAL FOR COMPLEX LITIGATION, SECOND, §
 2 30.1.5, at 30-12 (Draft Feb.1985)). Liberal substitution of representatives in class actions is
 3 animated at least in part by the absent class members' right to intervene under F.R.C.P. 24(a).
 4 *See, e.g., Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974)
 5 (intervention granted for Chinese parents whose interests were not adequately represented in
 6 school desegregation suit).

7 Even in a certified class action, if the representative plaintiff is forced to withdraw, the
 8 district court should "allow a reasonable period of time for a member of the class to intervene or
 9 to be substituted as the class representative." *Birmingham Steel Corp. v. Tennessee Valley*
 10 *Authority*, 353 F.3d 1331, 1341-1343 (11th Cir. 2003); *Harriss v. Pan American World Airways,*
 11 *Inc.*, 74 F.R.D. 24, 40 (N.D. Cal. 1977.) In this context, the Fifth Circuit has held that:

12 if after the class has been certified and its claims heard and the
 13 representatives are found to be inadequate for some reason during
 14 the course of the class claims or during a bifurcated hearing with
 15 respect to individual claims, the appropriate step is appointment of
 new representatives from the existing class, not decertification.

16 *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617-18 (5th Cir.1983) (*citing*
 17 *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir.1981) (per curiam)).

18 In considering this motion, this Court's inquiry on substitution of the class representative
 19 should not touch on the adequacy of the proposed representative. The determination of adequacy
 20 is properly made on a motion for certification pursuant to Fed. R. Civ. P. 23(a). *See, e.g.,*
 21 *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1020 (9th Cir. 1998) ("The final hurdle
 22 interposed by Rule 23(a) is that 'the representative parties will fairly and adequately protect the
 23 interests of the class.' Fed. R. Civ. P. 23(a)(4)"). The question of whether or not AIT is an
 24 adequate plaintiff awaits the motion for class certification.¹

25
 26
 27
 28 ¹ Even though such issue should not be considered in this motion, the declaration from
 Clarence Briggs clearly demonstrates that AIT would qualify under such a standard.

1 Finally, no prejudice would result to Google as a result of the proposed substitution.
2 Apart from mandatory disclosure,² discovery has not yet begun in this action and no dates will
3 need to be changed as provided for in the prior Case Management Order entered by this Court in
4 the related action of *Mizera v. Google, Inc.* C 05-02885 RMW on November 18, 2005.

5 **4. The Caption in this Action Should be Amended to Reflect the Substitution.**

6 Fed. R. Civ. P. 10(a) requires that the caption of the complaint include the names of all of
7 the parties to the action. A caption may be amended with the permission of the court.
8 *Hernandez-Avila v. Averill*, 725 F.2d 25, 28 (2nd Cir. 1984) Accordingly, if the motion to
9 substitute plaintiffs is granted, the caption of this action should be amended to identify,
10 “ADVANCED INTERNET TECHNOLOGIES, INC., a North Carolina corporation, Individually
11 and on behalf of all others similarly situated,” as the plaintiff in compliance with Fed. R. Civ. P.
12 10(a).

13
14 **CONCLUSION**

15 For all the foregoing reasons, Plaintiff Click Defense respectfully requests that this Court
16 grant its motion for leave to: (1) withdraw as representative plaintiff; (2) discontinue the
17 individual claims of Click Defense against Google without prejudice; (3) substitute AIT for
18 Click Defense as representative plaintiff; (4) to amend the caption accordingly and grant such
19 other and further relief as the Court deems just and proper.

20 DATED: December 7, 2005

Respectfully submitted,

21 CHITWOOD HARLEY HARNES LLP

22
23 By: /s/DARREN T. KAPLAN

24 DARREN T. KAPLAN (Admitted *pro hac vice*)

25 And KABATECK BROWN KELLNER LLP and LAW
26 OFFICES OF SHAWN KHORRAMI
27 Attorneys for Plaintiff

28 ² Plaintiffs Counsel hereby explicitly represent to the Court that they will provide AIT’s
29 mandatory disclosure to Google within twenty-four hours of the grant of this motion.