

EXHIBIT A

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

11 ADVANCED INTERNET TECHNOLOGIES,
 INC., a North Carolina corporation,
 12 Individually and on behalf of all others
 similarly situated,

13 Plaintiffs,

14 v.

15 GOOGLE, INC., a Delaware corporation, and
 16 DOES 1 through 100, Inclusive,

17 Defendants.

18 STEVE MIZERA, an Individual, individually
 and on behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 GOOGLE, INC., a Delaware corporation; and
 22 DOES 1 through 100, inclusive,

23 Defendants.

Case No. C 05 02579 RMW

Consolidated with
Case No. C 05 02885 RMW

**DEFENDANT GOOGLE INC'S MOTION
TO STAY PENDING SETTLEMENT**

Judge: Hon. Ronald M. Whyte

Date Comp. Filed: June 24, 2005

Trial Date: None set

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I. INTRODUCTION

Under Civil L.R. 7-11, defendant Google Inc. (“Google”) moves for an administrative order staying this action pending judicial approval of a class settlement that the parties have reached in an overlapping, and earlier filed, nationwide class action pending in state court in Arkansas.

After more than a year of litigation, and settlement negotiations presided over by retired United States District Judge Layn R. Phillips, Google and the plaintiffs in the Arkansas case have reached a comprehensive class settlement that, once finalized, will resolve all of the class claims pending before this Court. Under the nationwide settlement, Google will establish a settlement fund to resolve, on a class-wide basis, all claims arising out of alleged “click fraud” or other invalid clicks on pay-per-click advertisements—the same claims that the plaintiffs are asserting here. Thus, staying this case pending approval of the settlement will conserve judicial resources, will avoid needless and wasteful expenditure of the parties’ resources on discovery and motion practice, and will support judicial comity.

Further, a stay will not prejudice the named plaintiffs in this action. Advanced Internet Technologies, Inc. (“AIT”), one of the named plaintiffs, has moved to intervene as a plaintiff in the Arkansas action. And even if that motion is denied, the named plaintiffs will have the right to opt out of the class settlement to protect their individual interests, and will have all of the protections afforded by Arkansas law to ensure that the settlement adequately protects the class’s interests, including the right to object to the settlement.

For the foregoing reasons, and as explained in more detail below, Google respectfully requests that the Court enter the accompanying Proposed Order staying this action pending approval of the class settlement reached in the Arkansas action.

II. BACKGROUND

This is a “copycat” lawsuit based upon an earlier suit alleging that Google and other pay-per-click advertising companies overcharged advertisers as a result of “click fraud.” The original action, which is pending in Circuit Court in Miller County, Arkansas, was filed on February 5, 2005, and asserts claims on behalf of a nationwide class for breach of contract, unjust

1 enrichment, and civil conspiracy. A copy of the Second Amended Complaint in the Arkansas
2 action is attached is Exhibit A to the Declaration of David J. Silbert (“Silbert Decl.”).

3 Some five months after the Arkansas plaintiffs filed their class-action complaint, Click
4 Defense, Inc. commenced this action, making virtually identical allegations. A copy of Click
5 Defense’s Complaint, filed on June 24, 2005, is attached as Exhibit B to the Silbert Declaration.
6 AIT has since replaced Click Defense as the named plaintiff in this action, and has adopted Click
7 Defense’s complaint as its own. In addition, in January 2006, the *Click Defense/AIT* action was
8 consolidated with one filed on July 15, 2005 by Steve Mizera. Mizera is represented by the same
9 attorneys as Click Defense and AIT, and his allegations duplicate theirs. A copy of Mizera’s
10 Complaint is attached as Exhibit C to the Silbert Declaration.

11 After a year of intensive litigation in Arkansas, including litigating at the trial and
12 appellate court levels in both state and federal court, Google and the plaintiffs agreed to engage
13 in discussions to attempt to settle the case. *See* Silbert Decl. ¶ 5. In February 2006, the parties
14 held a two-day mediation before the Hon. Layn R. Phillips, a retired United States District Judge
15 and former United States Attorney, and a highly regarded mediator. *Id.* ¶ 6. Through the
16 settlement process that Judge Phillips oversaw, the parties ultimately signed a confidential
17 settlement agreement. *Id.* ¶ 7. While the details of that agreement are still confidential, its
18 principal terms include the creation of a nationwide settlement class, the establishment of a
19 settlement fund with a total value of up to \$90 million, and the resolution of all class members’
20 claims against Google relating to “click-fraud” or other invalid clicks on pay-per-click
21 advertisements. *Id.* A hearing on preliminary approval of the settlement is currently set for
22 April 3, 2006. *Id.* ¶ 8, Ex. D.

23 Unless this Court enters a stay, the parties and the Court will expend a great deal of
24 resources litigating matters that will become moot once the class settlement is finalized. AIT
25 filed its class-certification motion on March 6, and Google’s opposition to that motion is
26 currently due on April 3, with a hearing set for May 16. Before Google files its opposition, it
27 will need to depose AIT, Click Defense, Mizera, Clarence Briggs (the declarant in support of
28 AIT’s motion), and possibly other witnesses as well. AIT may also wish to depose additional

1 witnesses. Other discovery activities are also underway, including AIT's, Mizera's and Click
2 Defense's responses to document requests, which are due in several weeks. Further, unless the
3 parties resolve their disputes, they may need to move in the next few weeks for the entry of a
4 protective order, and possibly for other relief as well. *Id.* ¶ 9.

5 III. ARGUMENT

6 A. Principles of Judicial Comity And The Encouragement of Settlement Require A 7 Stay of This Action

8 Federal courts have repeatedly stressed that a stay is appropriate when necessary to
9 support judicial comity and the encouragement of settlement. In *Sandpiper Vill. Condo. Ass'n v.*
10 *Louisiana-Pacific Corp.*, 428 F.3d 831 (9th Cir. 2005), for example, the Ninth Circuit held that a
11 federal district court properly stayed proceedings in *another* court in order to safeguard the
12 settlement process in a nationwide class action. As the Ninth Circuit explained, a stay was
13 appropriate to permit the settlement-approval process to proceed undisturbed:

14 We concluded that a temporary stay pending settlement of the nationwide class
15 action was appropriate A competing state class action covering a portion of
16 the federal class posed a significant danger to the delicate and transitory process
17 of approving a settlement agreement, and thereby threatened the district court's
18 ability to resolve the litigation.

19 *Id.* at 845. Thus, the Ninth Circuit recognized both the sensitivity and the importance of
20 finalizing national class-action settlements, and held that those interests warranted even a stay of
21 proceedings in *another* court. *Id.*; see also *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*,
22 396 F.3d 922, 927 (8th Cir. 2005) (noting district court's stay of all other class actions pending
23 settlement of the case before it).

24 In this case, of course, the Court need not impinge upon another court's jurisdiction in
25 order to safeguard "the delicate and transitory process of approving a settlement agreement"
26 Instead, it need only stay its own proceedings pending approval of the Arkansas settlement. This
27 Court unquestionably has the power, and would exercise it properly, by staying the case under
28 these circumstances. See *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458,
1465 (9th Cir. 1983) ("a trial court may, with propriety, find it is efficient for its own docket and
the fairest course for the parties to enter a stay of an action before it, pending resolution of

1 independent proceedings which bear upon the case.”). Thus, a stay is necessary and appropriate
2 both to facilitate settlement and to promote judicial comity by permitting the Arkansas court to
3 finalize the class settlement undisturbed.

4 **B. A Stay Will Conserve the Court’s and the Parties’ Resources**

5 In addition, a stay will prevent the Court and the parties from wasting resources on
6 litigation that will serve no purpose. Once the settlement is finalized, it will preclude the class
7 claims that the plaintiffs are asserting here. As the Ninth Circuit has observed, the “full faith and
8 credit” provisions embodied in 28 U.S.C. § 1738, “require[] a federal court to give precisely the
9 preclusive effect to a state court judgment that the state prescribes for its own courts,” in order to
10 “take into account concerns of both finality and federalism.” *Noel v. Hall*, 341 F.3d 1148, 1160
11 (9th Cir. 2003). Under Arkansas law, a final settlement of an action has a claim- and issue-
12 preclusive effect on all parties to the action. *See, e.g., East Texas Motor Freight Lines, Inc. v.*
13 *Freeman*, 289 Ark. 539, 543 (1986) (“Res judicata or claim preclusion bars the relitigation of
14 issues which were actually litigated or which could have been litigated in an earlier suit”). Thus,
15 because the settlement will resolve all claims relating to “click fraud” on a class-wide basis, it
16 will preclude any further class proceedings in this action.

17 Accordingly, by staying the case, this Court will save itself and the parties from
18 expending enormous resources litigating issues (such as class certification) that will have no
19 impact on the resolution of this case. On the other hand, if the Court did not enter a stay, the
20 parties would likely have to conduct numerous depositions, compile and produce tens of
21 thousands of pages of documents, and present motions to the Court, all to no end.

22 **C. The Named Plaintiffs Will Not Be Prejudiced By a Stay**

23 Finally, a stay will not prejudice the plaintiffs. As noted, AIT has moved to intervene in
24 the Arkansas action. *See* Silbert Decl. ¶ 8, Ex. D. Thus, AIT may be allowed to participate fully
25 in the Arkansas case as a named plaintiff. Moreover, apart from any intervention, Arkansas law
26 provides a full panoply of rights by which an interested party may comment on or oppose a
27 class-action settlement. *See, e.g.,* Arkansas R. Civ. Pro. 23; Ark. R. App. Pro. 2(a)(9). Under
28 Arkansas Rule of Civil Procedure 23, which is patterned on the Federal Rule, Arkansas courts

1 rigorously scrutinize class-action settlements to ensure fairness. *See, e.g., Ballard v. Martin*, 349
 2 Ark. 564, 575 (Ark. 2002) (“no court should accept a settlement that is unfair or inadequate, and
 3 the burden is on the proponents of the settlement to show that the proposed settlement meets
 4 standards of fairness and adequacy”). Thus, if the named plaintiffs believe for any reason that
 5 the settlement fails to protect the class’s interests, they will have a full and fair opportunity to
 6 present their objections.

7 Moreover, if the named plaintiffs are dissatisfied with the settlement, they may, of
 8 course, opt out of it and pursue their individual claims against Google. Thus, the plaintiffs can
 9 be assured that their individual interests, as well as the class’s interests, will be safeguarded.
 10 They will suffer no prejudice that could weigh against the promotion of federal-state comity, the
 11 encouragement of settlements, and the conservation of resources that will result from a stay.¹

12 **IV. CONCLUSION**

13 For the foregoing reasons, Google respectfully requests that the Court enter a stay of all
 14 proceedings in this action pending finalization of the settlement in the Arkansas action.

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 16 Dated: March 9, 2006

KEKER & VAN NEST, LLP

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 19 By: /s/ David Silbert
 20 DAVID J. SILBERT
 Attorneys for Defendant GOOGLE, INC.

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 28 ¹ As set forth in the Silbert Declaration, counsel for the named plaintiffs has refused to stipulate to the entry of a stay. *See* Silbert Decl. ¶ 10.