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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN JOSE DIVISION

21 CLRB HANSON INDUSTRIES, LLC
 d/b/a INDUSTRIAL PRINTING, and
 22 HOWARD STERN, on behalf of
 themselves and all others similarly situated,
 23
 Plaintiffs,
 24
 v.
 25 GOOGLE INC.,
 26
 Defendant.
 27

CASE NO. C 05-03649 JW
**Joint Case Management Statement
 Pursuant to October 2, 2008 Order
 Continuing Case Management
 Conference**
 Date: December 1, 2008
 Time: 10:00 a.m.
 Place: Courtroom 8
 Judge: Honorable James Ware

1 The parties to the above-entitled action jointly submit this Case Management Statement
2 pursuant to the Court's October 2, 2008 Order Continuing Case Management Conference.

3 **CLASS CERTIFICATION MOTION UPDATE**

4 **Plaintiffs' Position**

5 Although Plaintiffs have been diligently pursuing discovery from Google that is relevant
6 to class certification issues, Google's approach to the discovery process has essentially consisted
7 of initially stonewalling, and then offering empty promises and delaying as much as possible.
8 Plaintiffs had hoped that as of this date they would have the documents and testimony necessary
9 to move for class certification, but due to Google's discovery tactics, Plaintiffs' hopes have not
10 been realized. Furthermore, Plaintiffs recently learned new information from Google – namely,
11 that Google does not charge its advertisers the “average” daily budget over the course of the
12 month, but instead charges customers based on the highest daily budget on a given day times the
13 number of days their campaign ran – contrary to the FAQs. Plaintiffs expect that they will seek
14 leave to amend their complaint to include this newly discovered information and do not wish to
15 move for class certification until their expected motion is resolved.

16 Plaintiffs hesitate to burden the Court with details of the parties' discovery disputes in this
17 Joint Case Management Statement, but Google's statements below require a response. Google
18 touts its allegedly diligent efforts to produce discovery, but inaccurately represents what those
19 efforts have entailed. After months of delay and empty promises, two weeks ago Google began
20 taking the opposite approach by dumping over 44 *gigabytes* of documents on Plaintiffs (which
21 amounts to over a million pages, and over 340,000 emails, which Plaintiffs have yet to access due
22 to errors in the files). Prior to making the production, Google's counsel had informed Plaintiffs
23 that Google's initial electronic search of its customer e-mail database had resulted in over
24 300,000 “hits” that were potentially responsive. On September 22, 2008, Plaintiffs suggested that
25 Google's search was too broad and requested the opportunity to work together with Google to
26 refine the search. Google's counsel agreed that the search should be narrowed and represented
27 that Google would furnish Plaintiffs with the list of “canned responses” it used to search the
28 database so that the parties could refine the search. But then, with no further word, Google

1 produced the 44 gigabytes of emails, most of which consists of irrelevant “canned responses” by
2 Google employees. Google did not even verify that each of the “canned response” searches
3 actually generated responsive documents (it admits only to conducting a “random” review of an
4 unspecified number), and it did not search for *any* responsive emails between Google and its
5 customers (other than Plaintiffs) that *did not* include “canned responses.” Google’s search was
6 thus both over- and under-inclusive. This is not the type of discovery envisioned by the federal
7 rules.

8 Just last Friday, Plaintiffs received Google’s production of its entire “canned responses”
9 database (which consists of thousands and thousands of “canned responses,” the overwhelming
10 majority of which are not responsive to Plaintiffs’ document requests), along with what Plaintiffs
11 understand to be over 770 iterations of the AdWords FAQs – which Google had previously
12 represented it would produce back in September. To date, Plaintiffs have been unable to view
13 this production because Google produced the embedded images separately from the textual
14 material, such that each image must be “reunited” with the corresponding text document.
15 Plaintiffs’ vendor has been unable to accomplish this, and although Plaintiffs on numerous
16 occasions requested instructions from Google or its vendor regarding how to “unite” the text with
17 the images, Google only today agreed to allow Plaintiffs’ vendor to speak with Google’s vendor
18 on this issue.

19 Had Google had it its own way, Google’s production from its 20 custodians’ files would
20 have resulted in an even larger “data dump.” Back in September, Google promised to provide
21 Plaintiffs with the list of search terms it would run against 21 custodians’ files (apparently Google
22 has now limited its search to 20 custodians), and on multiple occasions represented that the terms
23 would be provided to Plaintiffs “hopefully by the end of the week.” After sitting on the search
24 terms for months, Google finally provided a list of the terms last Friday night, along with the
25 number of “hits” per custodian and the total number of “hits” – the latter being 735,626
26 documents. Google did not provide Plaintiffs with a list of “hits” per term until Tuesday. That
27 list evidenced that many of the search terms are unduly broad and are generating a high number
28 of likely irrelevant hits. Google did not even verify whether any of the “hits” from any of the

1 search terms generated responsive documents. Plaintiffs are currently narrowing this list and
2 expect to give Google a revised list today that will significantly reduce the number of responsive
3 documents in order to greatly reduce the burden on both sides.

4 Google has taken the same approach with its interrogatory responses – stonewalling,
5 stalling, and offering empty promises. Plaintiffs served Google with the interrogatories nearly
6 three and a half months ago. Google’s initial responses to three of Plaintiffs’ interrogatories
7 amounted to no more than pointing Plaintiffs to documents that Google has not even produced –
8 including *all correspondence between Google and AdWords advertisers* and three entire
9 deposition transcripts. Google responded to the fourth interrogatory by stating that it would make
10 available its business records, but it has refused to produce such records until after class
11 certification. After much prodding, Google finally agreed to supplement its responses by
12 November 7, but that date came and went with no supplementation (much less an explanation) by
13 Google. Google finally provided supplemental responses to three interrogatories last night, which
14 Plaintiffs are currently reviewing to assess the sufficiency of Google’s response. Google has yet
15 to provide adequate responses to Plaintiffs’ fourth and fifth interrogatories, which will be the
16 subject of a motion to compel.

17 Plaintiffs served Google with a 30(b)(6) notice last July, consisting of 8 topics pertaining
18 to document custodial issues and two “substantive” topics. Plaintiffs initially scheduled some of
19 the topics for September depositions, assuming that prior to the depositions Google would (1)
20 provide substantive responses to the interrogatories Plaintiffs served on July 1, 2008; (2) produce
21 all of the iterations of the FAQs; and (3) produce “screen shots” of the sign-up screens.
22 Plaintiffs’ assumption turned out to be completely wrong, and Plaintiffs were forced to cancel the
23 depositions so as to avoid having to re-depose Google after the necessary discovery was
24 produced.¹ Plaintiffs have *consistently* represented that it would be necessary to depose Google
25

26 ¹ When Plaintiffs informed Google that they were considering taking the 30(b)(6) depositions in
27 September in order to comply with the initial September 30 class certification deadline, even Google’s
28 counsel cautioned Plaintiffs that Google’s document production was “far from complete,” and requested
that it be permitted without objection to rely on documents in opposing class certification that Google did
not produce to Plaintiffs prior to the September 30 deadline.

1 on topics 9 and 10 prior to class certification briefing. Regarding the remaining topics, which are
2 limited to document custodial issues, Plaintiffs’ counsel informed Google that it would be better
3 to “wait and see” how Google’s document production and search efforts progressed before
4 scheduling such depositions, so as to avoid having to re-depose Google on those issues or take an
5 unnecessary deposition. Even though Plaintiffs never wavered from this position, Google
6 informed Plaintiffs last Friday evening that “Given plaintiffs delay in confirming topics, witness
7 schedules and the intervening holidays, Google expects these depositions will take place *no*
8 *sooner than the week of January 12*. If you disagree, we are more than happy to address this with
9 the Court.” (emphasis added). It is incomprehensible why Google needs over two months to
10 prepare witnesses to address two 30(b)(6) topics – yet Google asserts below that it wants to
11 proceed “as quickly as practicable” with a hearing on class certification.

12 Meanwhile, Plaintiffs have been extremely diligent in meeting their discovery obligations
13 under the federal rules, contrary to Google’s representation below. Google served a total of
14 twenty-two interrogatories and eleven requests for admission to each Plaintiff, along with
15 seventy-six requests for production to Plaintiff Stern, and seventy-seven to Plaintiff CLRB
16 Hanson Industries, LLC. Plaintiffs’ counsel informed Google that Plaintiffs diligently searched
17 for responsive documents, consistent with their obligations under the Federal Rules, and the
18 parties are still in the process of meeting and conferring. Much of the requested information is
19 highly irrelevant – such documents relating to Plaintiffs’ web hosting and website logs.

20 There are a number of other discovery disputes that Plaintiffs could recount here, but they
21 are better left as the subject of a motion to compel, to the extent the parties are not able to resolve
22 them without the Magistrate Judge’s assistance. Due to the ongoing disputes, Plaintiffs have not
23 received the discovery they had hoped to receive by this time. Rather than commit at this time to
24 a date certain as to when Plaintiffs will move for class certification, Plaintiffs instead request that
25 the Court permit them to first resolve their discovery disputes with Google, begin the review
26 process of the millions of pages that Google has recently produced, depose Google witnesses, and
27 seek leave to amend their complaint. Plaintiffs therefore request that the Court permit Plaintiffs
28 to file their motion for class certification at any time prior to the close of discovery.

1 Google's suggested briefing schedule set forth below is unreasonable for a number of
2 reasons. First, Plaintiffs will need more than two weeks to file a reply brief. Google's counsel
3 has represented that Google expects to use five or six testifying experts in support of its
4 opposition to Plaintiffs' motion for class certification. Plaintiffs will need time to depose those
5 experts in order to prepare its reply and will therefore need more than two weeks to file the reply
6 brief. Second, Google's proposed schedule allows for a "surreply." Plaintiffs object to any filing
7 of a "surreply." Finally, for the reasons set forth above, Plaintiffs believe that a January 30, 2009
8 deadline for Plaintiffs to file their motion for class certification is unreasonable, given the
9 discovery delays that have occurred and Plaintiffs' expected motion for leave to file an amended
10 complaint.

11 **Google's Position**

12 Google does not believe that plaintiffs' substantive claims or class allegations have merit
13 and would like to proceed with a hearing on plaintiffs' anticipated class certification motion as
14 quickly as practicable.² For the reasons detailed below, Google proposes the following schedule:

15

16 Plaintiffs file opening brief	January 30, 2009
17 Google files opposition	February 27, 2009
18 Plaintiffs file reply	March 13, 2009
19 Google files surreply (if Plaintiffs introduce new evidence)	March 27, 2009
20 Hearing	On or after April 10, 2009

21
22 Google has thus far produced several hundred thousand documents, including all
23 communications with plaintiffs, the data for their AdWords accounts, and communications
24 ("canned responses") between Google and members of the putative class relating to plaintiffs'

25
26 _____
27 ² Plaintiffs have raised for this first time TODAY in this Case Management Conference Statement
28 their intention to try to amend their complaint to add another claim. Google will address any such
potential claim at the appropriate time, but suffice it to say for now that plaintiffs are wrong on the facts
and the law.

1 claims. Google’s production has also included the various iterations of the AdWords FAQs,
2 which include screenshot images of each step of the AdWords sign-up process including Step
3 Three “Specifying your daily budget.” These images include the sign-up steps, which were
4 operative when plaintiffs signed up for their accounts. Pursuant to plaintiffs’ request, Google has
5 produced materials in their native, searchable electronic format pursuant to Magistrate Judge
6 Trumbull’s order and as they are stored in the ordinary course of business.

7 Google did not, as plaintiffs’ assert, “dump” its “entire ‘canned responses’ database.”
8 Google has a list of “canned responses” that customer service representatives can use in
9 responding to customer questions. Out of that list of thousands of “canned responses,” Google
10 identified sixteen that it believed address the relevant topics and searched its database of millions
11 of documents for those that contained those sixteen responses. The documents are in native
12 format and searchable. Plaintiffs have the same capability to search these documents as Google,
13 and plaintiffs can narrow these documents if they want to by conducting their own searches.
14 Google has also produced the full list of canned responses so that plaintiffs can review them to be
15 satisfied that Google has in fact identified the relevant communications.³

16 Google has further collected an additional 21,861,820 documents from 20 employees.
17 After crafting search terms that would help identify relevant materials, Google has reduced that
18 number to 735,626 documents that it will need to review manually. To make the process as
19 transparent as possible and enable plaintiffs to express a view as to whether the search terms were
20 too narrow or too broad, Google gave plaintiffs the list of search terms with the hits per term as
21 well as the hits per custodian so that they can suggest any deletions or additions of search terms
22 that they believe appropriate. Google is more than happy to try to reduce the number of
23 documents that it must manually review. If there are no changes to the universe of documents to
24 be reviewed manually, Google expects to complete its review and rolling production of these

25
26 ³ Google learned today for the first time that plaintiffs are claiming that they cannot “access a vast
27 majority of [Google’s] production due to errors in the files.” Although plaintiffs’ inability to access these
28 files is likely caused by their failure to use an appropriate viewer, Google will work with plaintiffs to
resolve this claimed technical problem. Similarly, as a courtesy, Google’s document vendor told plaintiffs
today how to “unite” certain image files with corresponding text files, even though Google produced them
in the manner in which they are kept, and plaintiffs only made such a request this week.

1 materials by the end of February. Google, however, does not believe that plaintiffs need these
2 documents to file their motion for class certification. (At plaintiffs' insistence, class and merits
3 discovery were not bifurcated.)

4 On the other hand, plaintiffs' continued refusal to identify the 30(b)(6) topics on which
5 they want to depose Google could delay the class certification schedule. Although the Court
6 opened discovery on June 16 (and Judge Trumbull issued a Discovery Plan Order on July 7),
7 plaintiffs waited until July 21 to serve their discovery requests. The tight schedule then in place
8 for class certification required that Google begin immediately identifying and preparing witnesses
9 even before plaintiffs confirmed in meet and confer what it is that they wanted. On August 22,
10 Google proposed dates for the depositions on all of the topics (even though plaintiffs had not yet
11 narrowed the scope). Because of the breadth of those topics, eight different witnesses were
12 required, and Google proposed dates that would have completed the depositions by mid-
13 September. After initially confirming that some of the depositions would go forward on the
14 proposed dates, plaintiffs informed Google on September 8 that they would not proceed with any
15 of the depositions because its new counsel had not been admitted yet, and it wanted to wait for
16 Google to complete its document production.

17 Google warned plaintiffs at the time that, given the schedules of the witnesses, it would
18 require significant lead time to secure time on their calendars. Since then, Google repeatedly has
19 asked plaintiffs to identify the topics they will want. Plaintiffs, however, have thus far identified
20 only two topics. Google explained that it would object to producing witnesses on any other topics
21 that plaintiffs did not identify by November 14, and that it does not expect depositions to start
22 earlier than the week of January 12 given their delay in confirming topics, witness schedules and
23 the intervening holidays. Google respectfully requests that the order issued by the Court
24 following this Case Management Conference require plaintiffs to identify by December 5, 2008:
25 (i) each specific topic on which it wants to depose Google prior to filing their motion for class
26 certification and (ii) the weeks in which they want to take those depositions.

27 Google also anticipates having to file a motion to compel given plaintiffs' wholesale
28 failure to comply with their discovery obligations. For example, plaintiffs have yet to quantify

1 their alleged damages despite having all of the data necessary to do so. Of even greater concern
2 is plaintiffs' apparent failure to comply with their obligation to preserve potentially relevant
3 materials. Although plaintiffs claim that they have completed their production (which amounts to
4 only a few hundred pages), they have failed to produce, among other things: (i) numerous
5 communications they have had with Google; (ii) financial statements and sales reports; (iii)
6 documents regarding their dealings with other online advertising services; (iv) website logs; and
7 (v) documents relating to hosting of their websites.

8 Even more troubling is that many of the presumably destroyed documents were created
9 *after* plaintiffs had filed this lawsuit. Plaintiffs must have been aware of their retention
10 obligations when they apparently destroyed the materials. In an effort to determine whether such
11 documents no longer exist or whether plaintiffs simply have failed to conduct a reasonable search,
12 Google has asked their counsel to explain the parameters of their searches. Plaintiffs, however,
13 have stonewalled. Their counsel has refused to describe what efforts they undertook to search for
14 documents, other than to say that they searched "everywhere they thought to look."

15 Plaintiffs' counsel has asserted that Google will have to await the depositions of its clients
16 to learn anything about their document collection efforts. In sharp contrast to the position that
17 plaintiffs' have taken, Google has made its document collection process completely transparent.
18 It has voluntarily identified precisely where it has searched, whom it has searched and what
19 search terms it is using. Google has provided this information without requiring plaintiffs to
20 incur the time and expense of a deposition. Google should not have to wait to depose plaintiffs
21 before learning such information from them (particularly given their counsel's position that they
22 will be made available for deposition only once).

1 Dated: November 13, 2008

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