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

12 HAL K. LEVITTE, Individually and On
 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 v.

15 GOOGLE, INC., a Delaware corporation; and
 16 DOES 1 through 10, inclusive,

17 Defendants.

Case No. 08-CV-03369 JW RS

**GOOGLE INC.'S CONSOLIDATED
 OPPOSITION TO HAL K. LEVITTE
 AND PULASKI & MIDDLEMAN,
 LLC'S ADMINISTRATIVE
 MOTIONS TO CONSIDER
 WHETHER CASES SHOULD BE
 RELATED (Civil L.R. 3-12)**

1 **I. INTRODUCTION**

2 Defendant Google Inc. (“Google”) opposes the respective administrative motions filed by
3 Plaintiffs Pulaski & Middleman, LLC (“Pulaski”) ¹ and Hal K. Levitte (“Levitte”), which
4 represent unnecessary preemptive strikes against Google’s counsel’s previously announced
5 administrative motion to relate four cases pending in this district regarding Google’s AdWords
6 advertising program, which Google filed in the low-numbered case *David Almeida v. Google,*
7 *Inc.*, Case No. C 08-02088-RMW on September 4, 2008. On August 25, 2008, over a week
8 before Pulaski and Levitte filed their duplicative administrative motions in this case, Google
9 wrote all plaintiffs’ counsel in the four related cases and notified them that Google stood ready to
10 file an administrative motion in the low-numbered *Almeida* case to relate the cases, provided
11 copies of the four complaints, and requested that the plaintiffs stipulate on the issue, as Google
12 was required to do under Civil Local Rule 7-11 before filing its motion. After obtaining a one-
13 week extension to respond to Google’s August 25, 2008 letter, Pulaski and Levitte notified
14 Google on September 2 and September 3, respectively, that they would not stipulate that the
15 *Almeida* case was related, and then filed their own administrative motions despite Google’s
16 counsel advising them it was unnecessary to do so. Pulaski and Levitte seek to relate three of the
17 four cases that Google notified them that it intended to relate.

18 Pulaski and Levitte’s motions are procedurally unnecessary in light of Google’s motion
19 filed in the low-numbered *Almeida case*, procedurally defective because they were not properly
20 served, and substantively defective because they exclude the related *Almeida* case. Consequently,
21 their motions should be denied.

22 **II. BACKGROUND**

23 There are four cases presently pending against Google in this district relating to Google’s
24 AdWords advertising program that are related and that should be reassigned for coordinated or
25 consolidated proceedings before the same judge. Those cases are:

- 26 • *David Almeida v. Google, Inc.*, Case No. C 08-02088-RMW (“*Almeida case*”);

27 _____
28 ¹ Pulaski & Middleman, LLC is the plaintiff in the related action *Pulaski & Middleman, LLC v. Google Inc.*, Case No. C 08-03888-SI.

- 1 • *Hal K. Levitte v. Google, Inc.*, Case No. C 08-03369-JW (“*Levitte* case”);
- 2 • *RK West, Inc. v. Google, Inc.*, Case No. C 08-03452-RMW (“*RK West* case”); and
- 3 • *Pulaski & Middleman, LLC v. Google Inc.*, Case No. C 08-03888-SI (“*Pulaski* case”).²

4 On August 25, 2008, Google’s counsel sent all plaintiffs’ counsel in those cases a meet
5 and confer letter that: (1) notified all plaintiffs that Google was prepared to file an administrative
6 motion under Civil Local Rules 3-12 and 7-11 in the *Almeida* case; (2) provided all plaintiffs with
7 copies of the complaints and the reasons why the cases were related; (3) attempted to reach a
8 stipulation that the four cases are related as it was required to do under Civil Local Rule 7-11; and
9 (4) requested that Google’s deadline to respond to the *Levitte*, *RK West*, and *Pulaski* complaints
10 be coordinated and extended until September 30, 2008. Norton Declaration, ¶ 3 & Exhibit 2.
11 Plaintiff’s counsel in the *Levitte* case, purportedly on behalf of all plaintiffs, requested a one-week
12 extension to respond to September 3, 2008, and then later stated they would respond by August
13 28, 2008. Norton Declaration, ¶ 4 & Exhibit 3. Having not yet received a response as of the
14 morning of September 2, 2008, Google’s counsel again demanded a response. Norton
15 Declaration, ¶ 5 & Exhibit 4.

16 Shrugging off judicial and party economy and the Civil Local Rules, rather than
17 coordinating their responses to Google’s letter or coordinating their unnecessary administrative
18 motions, plaintiffs opted to individually respond to Google’s letter (or simply not respond at all)
19 and to serially file administrative motions in two separate actions. *RK West*’s counsel never
20 responded to Google’s letter, and instead filed its own administrative motion on August 29, 2008
21 in the *RK West* case, and served it by mail, which Google received in the late morning on
22 September 2, 2008. Norton Declaration, ¶ 6. That motion, like the instant motions, seeks to
23 relate all but the *Almeida* case before the Honorable James Ware. *Id.* On September 2, 2008,
24 *Pulaski*’s counsel notified Google’s counsel that it would not stipulate that the *Almeida* case was

25 ² A copy of the *Almeida* case Complaint is attached as Exhibit 1 to the Declaration of Leo P.
26 Norton in Support of Opposition. A copy of the *Levitte* case Complaint is Document No. 1 in this
27 action. A copy of the *RK West* case Complaint is attached as Exhibit A to the Declaration of
28 Willem F. Jonckheer i/s/o *Levitte*’s Administrative Motion (Document No. 10) (“*Jonckheer*
Declaration”). A copy of the *Pulaski* case complaint is attached as Exhibit B to the *Jonckheer*
Declaration.

1 related and that Pulaski would file its own administrative motion. Norton Declaration, ¶ 7.
2 Pulaski filed its motion in this case later that day, and served it by mail, which Google received in
3 the late morning on September 5, 2008. *Id.*; Document Nos. 5, 8. On September 3, 2008,
4 Levitte’s counsel notified Google’s counsel that it would not stipulate that the *Almeida* case was
5 related and that Levitte would file its own administrative motion. Norton Declaration, ¶ 8.
6 Levitte filed his motion in this case later that day, and served it by mail, which Google received in
7 the late morning on September 5, 2008. *Id.*; Document Nos. 9, 12.

8 **III. PULASKI AND LEVITTE’S ADMINISTRATIVE MOTIONS SHOULD BE DENIED**

9 Pulaski and Levitte’s respective administrative motions should be denied on three
10 independent grounds: (1) the motions are procedurally unnecessary in light of Google’s
11 administrative motion filed in the low-numbered *Almeida* case; (2) Pulaski and Levitte failed to
12 deliver their motions to Google the same day the motions were filed; and (3) the motions fail to
13 include the related low-numbered *Almeida* case.

14 **A. Pulaski and Levitte’s Administrative Motions Are Procedurally Unnecessary** 15 **Because of Google’s Administrative Motion Filed in the Low-Numbered** 16 ***Almeida* Case.**

17 Google filed its own administrative motion to relate the *Almeida*, *Levitte*, *RK West*, and
18 *Pulaski* cases in the *Almeida* case as it notified all plaintiffs that it would. Norton Declaration, ¶
19 10. Google’s motion renders Pulaski and Levitte’s motions unnecessary because Civil Local
20 Rule 3-12 provides an opportunity for parties in Pulaski and Levitte’s position to contend that
21 some, but less than all, of the cases subject to an administrative motion are related.

22 Civil Local Rule 3-12(e) allows a non-moving party to file a response to an administrative
23 motion, and specifically provides that if “a party contends that not all of the cases are related, the
24 party must address whether any of the cases are related to one another.” Civil L.R. 3-12(e).
25 Moreover, Civil Local Rule 3-12(f) provides that if the judge assigned to the low-numbered case
26 (here, the *Almeida* case and Judge Ronald Whyte) decides that the cases are not related, the Clerk
27 shall submit the order to the judges assigned to the other cases, in the order those cases were filed,
28 (here, the next in line is this case) to decide whether any of those cases are related (all parties
agree that at a minimum the *Levitte*, *RK West*, and *Pulaski* cases are related). Civil L.R. 3-

1 12(f)(2)-(3).

2 Rather than rushing to file their own preemptive administrative motions, the proper for
3 Pulaski and Levitte to attempt to relate only the *Levitte*, *RK West*, and *Pulaski* cases would have
4 been to oppose Google's administrative motion filed in the *Almeida* case, and request that the
5 Court relate the *Levitte*, *RK West*, and *Pulaski* cases, but not the *Almeida* case. If Judge Ronald
6 Whyte in the *Almeida* case denies Google's administrative motion, the Honorable James Ware in
7 this case can relate the *Levitte*, *RK West*, and *Pulaski* cases, which all parties in all cases agree at
8 a minimum are related. This would have conserved judicial and party resources and avoided
9 confusion, compared to the present situation of four separate motions filed on four separate days
10 in three separate cases before two different judges. Google's counsel advised all plaintiffs'
11 counsel, including Pulaski and Levitte, that preemptive or competing administrative motions were
12 not necessary under Civil Local Rule 3-12. Norton Declaration, ¶ 9 & Exhibit 5. Pulaski and
13 Levitte's rush to file motions to compete with Google's motion and their failure to adhere to Civil
14 Local Rule 3-12 has resulted in needless duplicative administrative motions and the attendant
15 expense of multiple filings in different cases. Because Pulaski and Levitte's respective
16 administrative motions are procedurally unnecessary, they should be denied. Levitte's respective
17 administrative motions are procedurally unnecessary, they should be denied.

18 **B. Pulaski and Levitte Failed To Deliver Their Administrative Motions to**
19 **Google on the Same Day the Motions Were Filed As Required.**

20 Civil Local Rule 3-12(b) requires compliance with Civil Local Rule 7-11's requirements
21 for Administrative Motions, and requires service on all known parties in the cases sought to be
22 related. Civil L.R. 3-12(b). Civil Local Rule 7-11 requires that the "moving party must deliver
23 the motion and all attachments to all other parties on the same day as the motion is filed." Civil
24 L.R. 7-11(a). Both Pulaski and Levitte failed to satisfy this requirement.

25 Pulaski filed its administrative motion on Tuesday, September 2, 2008. Document No. 5.
26 Google did not receive the motion until late in the morning on Friday, September 5, 2008—the
27 day Google's opposition was due under Civil Local Rule 7-11—because Pulaski served the
28 motion and supporting documents by U.S. Mail, rather than delivering them on the same day as

1 filed as required. Norton Declaration, ¶ 7; Document No. 8. Levitte filed its administrative
2 motion on Wednesday, September 3, 2008. Document No. 9. Google did not receive the motion
3 until Friday, September 5, 2008—a mere one day before Google’s opposition is due—because
4 Levitte served the motion and supporting documents by U.S. Mail, rather than delivering them on
5 the same day as filed as required. Norton Declaration, ¶ 8; Document No. 12. Pulaski and
6 Levitte’s respective motions should be denied for failure to adhere to Civil Local Rule 7-11.

7 **C. Pulaski and Levitte’s Administrative Motions Should Be Denied Because**
8 **They Do Not Include the *Almeida* case Which Is Also Related And Which Is**
9 **the Low-Numbered Case**

10 Pulaski and Levitte’s administrative motions also fail substantively because they rest on
11 the theory that the *Almeida* case is not related. They are wrong. The *Almeida* case, like the
12 *Levitte*, *RK West*, and *Pulaski* cases, asserts claims against Google based on alleged issues with
13 Google’s AdWords advertising program. The claims are based on the same legal theories—
14 unjust enrichment and California Business and Professions Code section 17200. Further, the
15 cases involve overlapping putative class of Google AdWords customers. The only difference
16 between the cases is the aspect of the AdWords advertising program being challenged. But that
17 difference is insubstantial, and does not avoid the potential for unduly burdensome duplication of
18 labor and expense in document and deposition discovery directed at Google’s AdWords
19 advertising program and the contracts that govern that program or conflicting results.

19 **IV. CONCLUSION**

20 Pulaski and Levitte’s motions should be denied because they are procedurally unnecessary
21 in light of Google’s motion filed in the *Almeida case*, procedurally defective because they were
22 not properly served, and substantively defective because they exclude the related *Almeida* case.

23 Dated: September 8, 2008

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26 By: _____ /s/Leo P. Norton
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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed the foregoing **GOOGLE INC.'S CONSOLIDATED OPPOSITION TO HAL K. LEVITTE AND PULASKI & MIDDLEMAN, LLC'S ADMINISTRATIVE MOTIONS TO CONSIDER WHETHER CASES SHOULD BE RELATED (CIVIL L.R. 3-12)** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record at the following listed email addresses.

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I also hereby certify that I caused the foregoing document to be personally delivered by consigning the document(s) to an authorized courier and/or process server for hand delivery on this 8th day of September, 2008 to the following listed addresses.

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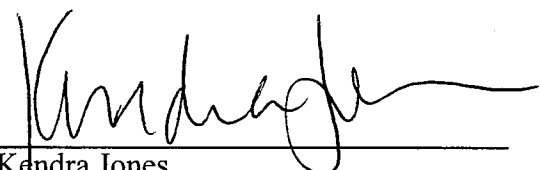
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