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6 Attorneys for Plaintiff  
HANGINOUT, INC.

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

11 HANGINOUT, INC., a Delaware  
12 corporation,

13 Plaintiff,

14 vs.

16 GOOGLE, INC., a Delaware  
17 corporation,

18 Defendant.

Case No. 3:13-cv-02811-AJB-NLS

**DECLARATION OF BEN WAGNER  
IN SUPPORT OF REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF HANGINOUT, INC.'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

Date: April 25, 2014

Time: 2:00pm

Dept: 3B

The Honorable Anthony J. Battaglia

21 I, BEN WAGNER, DECLARE AS FOLLOWS:

22 1. I am an attorney at law duly licensed to practice before all courts of the  
23 State of California and the Southern District of California, and am an associate of the  
24 law firm Mintz Levin Cohn Ferris Glovsky and Popeo, PC, attorneys of record for  
25 Plaintiffs HANGINOUT, INC. ("Hanginout" or "Plaintiff"). I am readily familiar  
26 with the facts in this matter and if called as a witness to testify, could competently do  
27 so.

2. Attached as **Exhibit 1** is a true and correct copy of Wayback Machine screen captures retrieved from archive.org on April 4, 2014, depicting Google's use of "Google + Hangouts" on April 7, 2012, August 19, 2012, and January 31, 2013. "Archive.org" alleges to provide a method of viewing content on a domain page's webpage as it existed at various points in the past. On information and belief, the website is run by the Internet Archive, a 501(c)(3) non-profit that was founded in 1996 to build an Internet library, with the purpose of offerings permanent access to historical collections that exist in digital format.

3. Attached as **Exhibit 2** is a true and correct copy of printouts of search results from Trademark Electronic Search System ("TESS"), the U.S. Patent and Trademark Office's ("USPTO") public online search portal, including status reports for U.S. Ser. Nos. 85704369, 85916384, and 85916316.

4. Attached as **Exhibit 3** is a true and correct copy of a printout of a Response to Office Action for the "Google+ Hangouts" application (Ser. No. 85704369) from tsdr.uspto.gov, the USPTO's online database for Trademark Trial and Appeal Board ("TTAB") proceedings.

5. Attached as **Exhibit 4** is a true and correct copy of a printout of a Notice of Allowance for the "Google+ Hangouts" application (Ser. No. 85704369) from tsdr.uspto.gov, the USPTO's online database for TTAB proceedings.

6. Attached as **Exhibit 5** is a true and correct copy of a printout of the Wikipedia.org entry for "Google Hangouts," retrieved April 4, 2014. Wikipedia is an online encyclopedia.

7. Attached as **Exhibit 6** is a true and correct copy of U.S. Reg. No. 3,857,338 for HANGOUT.

8. Attached as **Exhibit 7** is a true and correct copy of a December 3, 2012 Petition for Cancellation on U.S. Reg. No. 3,857,338 (HANGOUT), retrieved from the USPTO's online portal for TTAB, ttabvue.uspto.gov.

1           9.       Attached as **Exhibit 8** is a true and correct copy of a Service by  
2 Publication in the cancellation proceedings for U.S. Reg. No. 3,857,338, dated March  
3 5, 2013, requiring appearance by registrant within 30 days, retrieved from the  
4 USPTO's online portal for TTAB, ttabvue.uspto.gov.

5           10.      Attached as **Exhibit 9** is a true and correct copy of an April 26, 2013  
6 Order by TTAB granting the Petition to Cancel U.S. Reg. No. 3,857,338, retrieved  
7 from the USPTO's online portal for TTAB, ttabvue.uspto.gov.

8           11.      Attached as **Exhibit 10** is a true and correct copy of a Wayback Machine  
9 printout retrieved from archive.org on April 4, 2014, depicting Google's trademark  
10 list as of July 20, 2012.

11          12.      Attached as **Exhibit 11** is a true and correct copy of a Wayback Machine  
12 printout retrieved from archive.org on April 4, 2014, depicting Google's trademark  
13 list as of April 11, 2013.

14          13.      Attached as **Exhibit 12** is a true and correct copy of a Wayback Machine  
15 printout retrieved from archive.org on April 4, 2014, depicting Google's trademark  
16 list as of April 23, 2013.

17          14.      Attached as **Exhibit 13** is a true and correct copy of a printout of the  
18 Application for U.S. Ser. No. 85674801 from tsdr.uspto.gov, the USPTO's online  
19 database for TTAB proceedings.

20          15.      Attached as **Exhibit 14** is a true and correct copy of a printout of the  
21 Application for U.S. Ser. No. 85674799 from tsdr.uspto.gov, the USPTO's online  
22 database for TTAB proceedings.

23          16.      Attached as **Exhibit 15** is a true and correct copy of a printout of App  
24 Review, retrieved from developer.apple.com on April 4, 2014.

25          17.      Attached as **Exhibit 16** is a true and correct copy of a printout of  
26 Apple's App Store Review Guidelines for review of apps, retrieved from  
27 appleinsider.com on April 4, 2014.  
28

18. Attached as **Exhibit 17** is a true and correct copy of a printout of the iTunes Store application profile for Google's Hangouts, followed by true and correct archive.org printouts for the same page showing 8 previous versions of the app.

19. Attached as **Exhibit 18** is a true and correct copy of the LegalMetric Nationwide Report on Preliminary Injunctions in Trademark Cases from January 1990 through October 2013.

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

Executed this 4th day of April, 2014, at San Diego, California.

/s/Ben Wagner  
BEN WAGNER

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify and declare that I am over the age of 18 years,  
3 employed in the County of San Diego, State of California, and am not a party to the  
4 above-entitled action.

5 On April 4, 2014, I filed a copy of the following document:

6 **DECLARATION OF BEN WAGNER IN SUPPORT OF REPLY**  
7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
8 **PLAINTIFF HANGINOUT, INC.'S MOTION FOR PRELIMINARY**  
9 **INJUNCTION**

10 by electronically filing with the Clerk of the Court using the CM/ECF system which  
11 will send notification of such filing to the following:

11 Andrew D. Skale	askale@mintz.com, adskale@mintz.com, 12 bwagner@mintz.com, Docketing@mintz.com, kasteinbrenner@mintz.com, kjenckes@mintz.com
13 Benjamin L. Wagner	bwagner@mintz.com, Docketing@mintz.com, 14 kjenckes@mintz.com
15 Margaret M. Caruso	mmc@quinnemanuel.com, calendar@quinnemanuel.com, 16 cherylgalvin@quinnemanuel.com, sherrinvanetta@quinnemanuel.com

17 Executed on April 4, 2014, at San Diego, California. I hereby certify that I am  
18 employed in the office of a member of the Bar of this Court at whose direction the  
19 service was made.

20  
21 /s/Andrew D. Skale

22 Andrew D. Skale, Esq.  
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