

Exhibit J

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10 AMERICAN BLIND AND WALLPAPER
FACTORY, INC.

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 GOOGLE INC., a Delaware corporation,

14 Plaintiff,

15 v.

16 AMERICAN BLIND & WALLPAPER
17 FACTORY, INC., a Delaware corporation
d/b/a decoratetoday.com, Inc.; and DOES 1-
18 100, inclusive,

19 Defendants.

21 AMERICAN BLIND & WALLPAPER
FACTORY, INC., a Delaware corporation
22 d/b/a decoratetoday.com, Inc.,

23 Counter-Plaintiff,

24 v.

25 GOOGLE, INC.

26 Counter-Defendants.

Case No. C 03-5340-JF (RS)

**DEFENDANT AMERICAN BLIND AND
WALLPAPER FACTORY, INC.'S NOTICE
OF MOTION AND MOTION TO COMPEL
GOOGLE TO RESPOND TO DISCOVERY
TIMELY SERVED GIVEN THE CURRENT
CUTOFF DATE OF AUGUST 26, 2006**

Date: TBD
Time: TBD.
Courtroom: 4
Hon. Richard Seeborg

27 PUBLIC VERSION

28 Case No.: C-03-5340-JF (RS)
DEFENDANT AMERICAN BLIND AND
WALLPAPER FACTORY, INC.'S NOTICE OF
MOTION & MOTION TO COMPEL

1 PLEASE TAKE NOTICE that as soon as counsel may be heard, Defendant/Counter-
2 Plaintiff American Blind and Wallpaper Factory, Inc. ("American Blind") will and hereby does
3 move this Court for an order compelling Plaintiff/Counter-Defendant Google Inc. ("Google") to
4 respond to all discovery issued by American Blind that is timely served given the current
5 discovery cutoff date of August 26, 2006.

6 The motion will be based on this Notice and Motion, the accompanying exhibits, the
7 pleadings and papers on file in this action, the arguments of counsel, and upon such other
8 evidence as may be presented at the hearing on this matter.

9 **I. BACKGROUND**

10 During the two months prior to the originally scheduled close of discovery, American
11 Blind underwent a battle for control of the company and then a change of management and
12 ownership of the company. (*See generally* Dkt. No. 137 ("Greenspon Decl.")). As a result,
13 several of the employees who were assisting with discovery either left the company or were
14 completely consumed with addressing urgent company business. Upon application of American
15 Blind, Judge Fogel recognized that these facts justified a 60-day extension of all case
16 management dates, including the discovery cutoff date. (*See* Dkt. No. 133.) Judge Fogel noted
17 that:

18 the extension of case management dates is intended only to allow
19 the parties to complete discovery that is within the previously
20 established scope of discovery. If during the remaining period of
21 discovery a party believes that additional discovery is necessary,
22 the parties should attempt resolve the matter between themselves.
23 However, if an agreement cannot be reached, permission to conduct
24 additional discovery shall be sought from Magistrate Judge
25 Seeborg.

23 (*Id.*; *see also* Plater Declaration ("Plater Decl.") Ex. A (transcript of hearing).)

24 Unfortunately, the recent change of ownership at American Blind severely disrupted its
25 ability not only to respond to discovery (as recognized by Judge Fogel) but also to propound
26 discovery. After Judge Fogel's ruling, American Blind issued the following discovery to Google:
27 First Set of Requests for Admission, Notice of Deposition of Larry Page and Notice of Deposition
28 of Sergey Brin. (Plater Decl., Ex, B, C, D.) Google objected and refused to respond to any of the

1 newly issued discovery from American Blind on the sole ground of untimeliness. (Plater Decl.
2 Ex. E, F.) As instructed by Judge Fogel, prior to filing this motion, American Blind corresponded
3 with Google on several occasions in an attempt to resolve the dispute. (Plater Decl. Ex. G, H, I)
4 However, the parties were unable to reach an agreement. American Blind now seeks an order
5 compelling Google to respond to this discovery and any other discovery American Blind may
6 serve that is timely given the current discovery cutoff date of August 26, 2006.

7 **II. ARGUMENT**

8 The question posed by this motion is whether American Blind's new management and
9 ownership, now fully aware of and engaged in this litigation, should be allowed to utilize the
10 additional time Judge Fogel granted for the completion of discovery to take minimal discovery
11 based upon information American Blind learned during its change of management and ownership,
12 when (as Judge Fogel noted), the company was understandably preoccupied. Given the new
13 discovery cutoff date of August 26, 2006, there is no prejudice at all to Google to respond to this
14 discovery — Google will not be forced to respond on shortened time, and the additional
15 discovery will not disrupt the rest of the present schedule. Moreover, the additional discovery
16 served thus far (3 requests for admissions and two deposition notices) is minimal. American
17 Blind should be allowed to take this recently served discovery, and Google should be compelled
18 to respond to it.

19 **A. The Brin and Page Depositions are Necessitated by Facts Disclosed in Google's**
20 **30(b)(6) Depositions, During American Blind's Ownership Change.**

21 As stated above, during the two months leading up to the original close of discovery,
22 American Blind's sole focus was on the continuing operations and successful transition of the
23 company's management and ownership. During that time period, American Blind could not
24 adequately digest discovery requests, or information gleaned from its own discovery. Once
25 American Blind was once again able to turn its attention to this litigation, it realized that the
26 depositions of Sergey Brin and Larry Page were critical to this case.

27 Although American Blind placed Messrs. Brin and Page on its Initial Disclosures early in
28 this case (Plater Decl. Ex. K), it did not seek their deposition, recognizing the general rule that top

1 executives at a company are not generally subject to deposition unless they have specific
2 knowledge relevant to the case.¹ In Google's 30(b)(6) depositions held April 12, 2006 and May
3 18, 2006 (thus occurring during the time American Blind was preoccupied with its management
4 change), Google's representatives noted that [REDACTED]
5 [REDACTED]
6 [REDACTED]. (See Plater Decl., Ex. M
7 at 98:5-99:13; see also Plater Decl., Ex. L at 122:12-123:12.) These are crucial issues in this
8 case, which centers around Google's trademark policy, and American Blind should be allowed to
9 discovery this specific knowledge known by Messrs. Brin and Page.

10 Given the ownership and management change, American Blind's new management was
11 not able to sit down and discuss this case with counsel until close to the original discovery cutoff
12 date. It was not until that point that American Blind was able to review the information in the
13 April and May depositions and determine that Messrs. Brin and Page have information that was
14 necessary for American Blind's defense. The deposition notices were issued on June 26, 2006
15 (which, in any event, was prior to the original close of discovery).

16 In addition to the Brin and Page depositions, American Blind wishes to maintain the
17 flexibility to take depositions of additional witnesses or serve additional written discovery should
18 it become necessary. Two more depositions of Google personnel remain (apart from Messrs Page
19 and Brin).² American Blind may uncover information in these previously-noticed depositions that
20 suggests additional witnesses need to be deposed or additional discovery needs to be served. This
21 is common discovery practice — additional discovery is issued based on the continuing stream of
22 information that comes in during the completion of fact discovery.³ This Court should permit

23 ¹ Because Google has solely objected to these depositions on timeliness grounds, American
24 Blind does not address this issue here. Should Google later seek a protective order on the
25 grounds that Messrs. Brin and Page are not subject to deposition in this case, American
26 Blind will address the issue at that time.

27 ² Notably, the remaining depositions of Google's witnesses have not proceeded due to
28 Google's counsel's insistence that American Blind's witnesses be deposed before Google
will produce its remaining witnesses.

³ Google likewise still has to take the depositions of five American Blind's representatives,
which may or may not disclose new information or avenues that Google would need to
pursue. Of course, should the Court rule that Google must respond to all timely

1 American Blind to serve any additional discovery and take additional depositions so long as all
2 discovery is completed by the discovery cutoff date of August 26, 2006.

3 **B. The Requests For Admission Are Minimal And Will Cause No Prejudice To
4 Google If Compelled To Answer Them.**

5 Instead of answering the three simple requests contained in American Blind's First Set of
6 Requests For Admission, Google objected and forced American Blind to seek the Court's
7 intervention to obtain this limited discovery. These requests raise no new issues and thus would
8 not require Google to undertake any new efforts to address them. Moreover, answering these
9 three requests would cause no prejudice to Google. The requests state as follows:

10 **Request No. 1:** Admit that Google has produced all settlement
11 agreements confidential or otherwise between Google and any
12 third party(s) regarding any claims arising out of Google's sale of
13 keywords as part of its AdWords Program and/or any claims that
14 allege that Google has engaged in trademark infringement,
15 including but not limited to those arising as a result of Google's
16 sale of keywords as part of its AdWords Program.

17 **Request No. 2:** Admit that Google has produced to American
18 Blind all responsive, non-privileged documents requested in
19 American Blind's First Set of Requests for Production of
20 Documents and Things from Google.

21 **Request No. 3:** Admit that, as of the date of answering this
22 request, Google continues to sell keywords as part of its AdWords
23 Program that incorporate the American Blind Marks.

24 (Plater Decl. Ex. B.)

25 Requests Nos. 1 and 2 address Google's compliance with discovery issued prior to the
26 extension of fact discovery. American Blind must know whether it is in possession of all of the
27 requested discovery to which it is entitled. Because Google has failed to respond to American
28 Blind's correspondence regarding matters contained in the requests for admission, American
Blind sought to confirm the status of Google's compliance with discovery through its First Set of
Requests For Admission. Notably, on June 23, 2006, the date of the hearing on the motion to
extend the scheduling order, Google was still producing documents to American Blind. And as

discovery, American Blind would apply that ruling in a reciprocal manner to allow
Google additional discovery should it deem it necessary.

1 recently as July 11, 2006, Google has indicated, anecdotally, that it has in fact not produced all
2 requested documents, such as all relevant settlement agreements. (Plater Decl. Ex. J.) With
3 Google still producing documents and having not confirmed that it has completed its production,
4 it is extremely prejudicial to American Blind to be foreclosed from issuing new discovery to
5 Google that is timely given the August 26, 2006 close of fact discovery.

6 Moreover, Google will suffer no prejudice to its case or any defense maintained if it is
7 required to answer the requests for admission. The first two requests pertain to Google's
8 discovery compliance. The third request simply seeks confirmation that Google continues to
9 maintain the same trademark policy as it did as when it filed its Complaint and American Blind
10 filed its Answer and Counterclaim. The subject matters of these requests are consistent with the
11 scope of the initial discovery period and do not open up any new issues which might expose
12 Google to any new defense or claim.

13 Finally, answering these three requests will not substantially detract from the time Google
14 would otherwise devote to other matters in this case. Requests for admission, by their very
15 nature, are the least onerous of discovery requests for the respondent. Google need only state
16 "admitted" or "denied."

17 **III. CONCLUSION**

18 American Blind has issued limited additional discovery (3 requests for admissions and
19 two deposition notices) since the fact discovery cutoff was extended to August 26, 2006. Google
20 will not be prejudiced if this and other additional discovery is allowed that is timely given the
21 new cutoff date; conversely, given the circumstances, American Blind would be prejudiced by
22 being unable to obtain all relevant discovery. In granting an extension of time to complete fact
23 discovery, Judge Fogel implicitly found that American Blind had demonstrated good cause for an
24 extension. This Court should likewise find that American Blind has established good cause for
25 issuing additional discovery under these circumstances and order Google to respond to this
26 discovery.

27 ///

28 ///

1 WHEREFORE, American Blind and Wallpaper Factory Respectfully requests that the
2 Court grant its Motion to Compel Google To Respond To Discovery Timely Served Given The
3 Current Cutoff Date Of August 26, 2006.

4 Dated: July 13, 2006

HOWREY, LLP

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7 By: _____

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