

ESTTA Tracking number: **ESTTA752914**

Filing date: **06/16/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063567
Party	Plaintiff Google Inc.
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Signature	/Rebecca Givner-Forbes/
Date	06/16/2016
Attachments	P Opp to Motion to Suspend.pdf(519946 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,948,486  
For the Trademark SPY PHONE  
Issued April 19, 2011

GOOGLE INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92063567
v.	)	
	)	
SPY PHONE LABS LLC,	)	
	)	
Registrant.	)	
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**OPPOSITION TO MOTION TO SUSPEND FOR CIVIL ACTION**

Petitioner Google Inc. (“Google”) hereby opposes the motion of Registrant Spy Phone Labs LLC (“Registrant”) to suspend the instant cancellation proceeding until the disposition of the civil action initiated by Registrant against Google and other parties before the U.S. District Court for the Northern District of California.

**I. INTRODUCTION**

In an effort to delay the cancellation proceeding to the prejudice of Google, Registrant conflates the issues of contributory liability raised in the civil action with the registrability issues before the Board. In the civil action, Registrant alleges that Google (1) allowed other developers on the Google Play platform to infringe Registrant’s SPY PHONE mark, (2) tortiously interfered with Registrant’s prospective economic advantage and Registrant’s contracts with Google, (3) breached California’s implied covenant of good faith and fair dealing, and (4) violated California’s unfair competition law. Adjudication of these claims has no bearing on whether Registrant may maintain its registration. Furthermore, suspension of a proceeding until after a

final disposition of the pending claims against 51 parties is not a good exercise of the discretion afforded to the Board under Trademark Rule 2.117(a).

Because the civil action is unlikely to bear on the issues of registrability in this proceeding for the reasons explained below, and because Google has an interest in a prompt resolution of its claims, Google respectfully requests that the Board permit this cancellation proceeding to move forward.

## **II. FACTS AND PROCEDURAL BACKGROUND**

### **A. The Parties' Dispute.**

Registrant began offering its phone tracker mobile app through the Google Play service in August 2012.<sup>1</sup> (Dkt. No. 1, p. 17.) Registrant then complained via Google's trademark infringement complaint form that other app developers were using app names that Registrant believed infringed its SPY PHONE mark. (Decl. of Rebecca Givner-Forbes, ¶ 1, Ex. A, p. 2.) ("Givner-Forbes Decl."). In accordance with its policies regarding trademark complaints, whenever Google suspended an app identified by Registrant, it sent the developer of the suspended app a notice explaining the infringement complaint and identifying Registrant as the complainant. (*Id.*)

After some time, Registrant stopped using Google's trademark infringement form to complain about other app developers. Instead, it submitted complaints that other app developers were violating Google's anti-spyware policy by offering apps that used the word "spy" in their names. (*Id.*, p. 4; Dkt. No. 4, Ex. A, ¶ 125.)

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<sup>1</sup> The Google Play service is an online platform for the distribution of apps and other media for mobile devices that use Google's Android operating system. It functions as a marketplace for app developers to distribute their apps and for users to search for, review, and download them.

**B. The Civil Action.**

Registrant sued Google and 50 unidentified app developers (the “Doe” defendants) in the U.S. District Court for the District of New Jersey in October of 2014. (Givner-Forbes Decl., ¶ 1, Ex. A, p. 5.) Registrant alleged that (1) the Doe defendants had infringed Registrant’s SPY PHONE mark by distributing apps with confusingly similar names; (2) Google had contributorily infringed Registrant’s SPY PHONE mark by allowing the Doe defendants to distribute their apps via Google Play; and (3) all defendants had tortiously interfered with Registrant’s prospective economic advantage. (*Id.*)

On March 21, 2016, the U.S. District Court for the Northern District of California, where the case had been transferred, granted Google’s Motion to Dismiss all claims against it. (*Id.*, p. 1.) The Court held that Registrant had not pled that Google had notice of any acts of alleged primary infringement that it had permitted to continue. (*Id.*, p. 7.) According to Registrant’s own allegations, Google had acted affirmatively in response to all of Registrant’s notifications of specific acts of infringement, either suspending the identified apps or, in one case, declining to do so after due consideration of the merits of the claim. (*Id.*, pp. 7-8.) Although the Court granted Registrant leave to amend its complaint, it instructed Registrant that “[a]bsent specific notice of trademark infringement, Google cannot be liable for contributory infringement....” (*Id.*, p. 8.)

Registrant amended its pleading on April 21, 2016, but failed to rectify the flaws identified by the Court in its contributory trademark infringement claim because it still had not alleged that Google had the requisite notice. (*Id.* ¶ 2, Ex. B, p. 1.) The majority of Registrant’s Second Amended Complaint consists of non-trademark claims. (Dkt. No. 4, Ex. A, ¶¶ 2-3.)

Registrant restated its claim of tortious interference with prospective economic advantage against Google and also added new claims for tortious interference with contract, breach of the implied covenant of good faith and fair dealing, and a violation of California Business and Professional Code § 17200. (*Id.*) On May 25, 2016, Google filed a Motion to Dismiss the Second Amended Complaint, which is now pending with the Court. (Givner-Forbes Decl. ¶¶ 2, 4, Ex. B.) The Court has not set a new hearing date. (*Id.* ¶ 4.)

Registrant has also maintained in its Second Amended Complaint its various claims against the Doe defendants. (Dkt. No. 4, Ex. A, ¶¶ 2-4.) To Google's knowledge, however, Registrant has identified only one of the Doe defendants, Andrei Ciuca d/b/a Cad Design, and it has not served any of them. (Givner-Forbes Decl. ¶ 5.) No issue bearing on the validity of Registrant's registration for the SPY PHONE mark is currently set to be adjudicated.

**C. Google's Petition to Cancel.**

On April 13, Google filed the instant petition to cancel Registrant's registration. (Dkt. No. 1.) As grounds for cancellation, Google asserts that (1) the SPY PHONE mark is generic or at least merely descriptive of Registrant's services, (2) the application underlying the subject registration was *void ab initio* and/or the submitted Statement of Use was invalid, and (3) Registrant does not own the registration due to an invalid assignment. (*Id.*) None of the foregoing claims overlaps with claims asserted in the pending civil action.

**D. Registrant's Motion to Suspend and Request for Amendment.**

On May 27, 2016, Registrant moved to suspend Google's petition to cancel the SPY PHONE registration pending the termination of the civil action. (Dkt. No. 4.) Registrant argued

that, “although Google has not yet filed an answer in the Infringement Action,” Google is “likely” to assert the same claims as it has in the cancellation proceeding. (*Id.*, ¶¶ 7-8.)

In addition, Registrant wrongly suggested that the suspension would allow it to unilaterally amend its registration in order to moot Google’s non-ownership claim. (*Id.* ¶ 9.) In defiance of the Board’s rules, Registrant did not submit a motion to amend to the Board. Instead, Registrant submitted a request to the PTO Examining Attorney assigned to its registration, in a transparent effort to circumvent the adjudication of Google’s claims.<sup>2</sup> (Givner-Forbes Decl. ¶ 3, Ex. C.)

In Registrant’s Request for Amendment, Registrant admitted to facts that confirm Google’s claims that (1) the application underlying the SPY PHONE registration is *void ab initio* because the applicant was not the owner of the mark and the entity that had a bona fide intent to use the mark in connection with the applied-for goods, (2) the Statement of Use was invalid because the applicant was not the entity using the mark at the time it was filed, and (3) Registrant does not own the mark because the assignment of the mark to Registrant from the applicant was invalid. (*Id.*)

For the foregoing reasons, Google anticipates a prompt resolution to the pending cancellation proceeding and respectfully requests that the Board permit the cancellation to proceed.

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<sup>2</sup> Because the Board’s June 10 order indicated that the request to amend “will receive no consideration,” Google has not filed an opposition brief. Google intends to do so should Registrant file an unconsented motion to amend the subject registration.

### III. ARGUMENT

#### A. There Is No Good Cause to Suspend the Proceeding.

“All motions to suspend, regardless of circumstances...are subject to the ‘good cause’ standard.” *Jodi Kristopher Inc. v. Int’l Seaway Trading Corp.*, 91 USPQ2d 1957, 1958 (TTAB 2009), quoting *Nat’l Football League v. DNH Mgmt. LLC*, 85 USPQ2d 1852, 1855, n.8 (TTAB 2008). The mere fact that pending litigation may bear on an *inter partes* proceeding is not, on its own, good cause for suspension. *Boyd’s Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2018 (TTAB 2003). Good cause typically exists when the civil action involves a claim of direct infringement between the same parties involving the same mark(s) as the Board proceeding and the parties can be expected to put forth similar evidence and arguments as they would before the Board. *See infra* note 3.

When suspension is likely to delay a Board proceeding without countervailing benefits of judicial economy and consistency, however, the Board should decline to suspend. *Jodi Kristopher*, 91 USPQ2d at 1959 (suspending Board proceeding pending civil action would merely cause delay and not advance resolution of the parties’ claims). In such circumstances, a petitioner’s interest in the timely adjudication of its claims outweighs any speculative benefit to awaiting a final end to the civil litigation. *See id.*; *Boyd’s Collection*, 65 USPQ2d at 2018 (denying petitioner’s motion to suspend despite finding that a pending civil action, which involved a direct infringement claim between the same parties involving the same marks, may bear on the Board proceeding). A party “should not be allowed to delay the outcome of this proceeding when there would be little or nothing to resume upon conclusion of [the party’s] civil suit.” *Boyd’s Collection*, 65 USPQ2d at 2019.

In this case, as in *Boyd's Collection*, one party is seeking to avoid what will likely be a rapid resolution to an *inter partes* proceeding in the other party's favor. Although Google has not yet filed a potentially dispositive motion in the cancellation action, it would have the opportunity to do so once Registrant files an answer. By delaying the cancellation proceeding, Registrant seeks to avoid the consequences of various improprieties and misstatements in the prosecution of the application for and assignment of the SPY PHONE mark. Further, unlike *Boyd's Collection*, the pending civil action does not bear on the claims at issue in this proceeding, providing the Board with additional reason not to suspend this action.

**1. Suspension Would Not Promote Efficiency or Consistency Because the Civil Action Involves Different Claims and Numerous Parties.**

When deciding whether to suspend an *inter partes* proceeding during the pendency of a civil action, "it is incumbent upon the Board to consider the pleadings in the civil suit so as to determine whether the outcome thereof may have a bearing upon the issues involved in the [Board proceeding]." *Tokaido v. Honda Assoc. Inc.*, 179 USPQ 861, 862 (TTAB 1973); *see also New Orleans Louisiana Saints LLC and NFL Properties LLC v. Who Dat?, Inc.*, 99 USPQ2d 1550, 1552 (TTAB 2011).

In nearly every instance in which the Board has suspended a proceeding pending the outcome of a district court action, the district court action has involved either (1) a claim for cancellation of the same registration(s) involved in the Board proceeding or (2) a plea to enjoin a party's use of its own mark, leaving it unable to maintain federal registration.<sup>3</sup> Thus, in each

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<sup>3</sup> Recent examples include:

- *Guidry v. Louisiana Lightning, LLC*, Opp. No. 91217535 (TTAB Jan. 14, 2016) ("the Board finds that the civil action at issue may have a bearing on the above captioned proceeding...[because] Opposer seeks to enjoin Applicant's use of its mark(s).").

such case there is a clear and direct relationship between a decision on the merits in the district court action and the cancellation proceeding. No such relationship exists in this case.

This civil action involves primarily non-trademark claims, which concern Google's handling of disputes between Registrant and other app developers on the Google Play platform. The one extant trademark claim between Registrant and Google, a contributory infringement claim, turns on Google's awareness of alleged infringement by others. A decision regarding Google's knowledge or lack of knowledge of such acts has no bearing on the Board proceeding. Further, to date, Google has not asserted any claims in the civil action that would prevent Registrant from using its mark or maintaining its registration for the SPY PHONE mark.

In contrast, the cancellation action concerns the registrability of the SPY PHONE mark and whether the underlying application was *void ab initio* because it was not filed by the entity that had a bona fide intent to use the mark (indeed, another entity was actually using the mark), or is otherwise invalid because the actual owner of the mark did not file the Statement of Use or assign the mark to Registrant. In the civil action, the claims against Google involve the adjudication of ISP liability for the way Google managed its platform. Based on the current

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- *Cybernet Entertainment, LLC v. Balance Studio, Inc.*, Canc. No. 92061974 (TTAB Oct. 26, 2015) (“Inasmuch as the civil action involves both parties and the same mark at issue in this proceeding along with similar claims for relief, the civil action may be dispositive of or have a bearing on this proceeding.”).
  - *Global Marketing and Distribution AG v. K. Hansotia & Co., Inc.*, Canc. No. 92061211 (TTAB June 8, 2016) (The pleadings “indicate that the parties to this proceeding are both parties to the civil action involving questions of infringement, unfair competition, and abandonment, all related to the registration involved herein.”).
  - *Sefac S.A. v. Sefac, Inc.*, Canc. No. 92060499 (TTAB Jan. 12, 2016) (district court action involved claims to cancel the registration that was the subject of the Board proceeding and to enjoin Respondent's use of its mark).
  - *University of Kentucky v. Kentucky Mist Moonshine, Inc.*, Opp. No. 91225884 (TTAB Mar. 4, 2016) (district court action involved claim to cancel opposer's federal registration and declaratory judgment of no likelihood of confusion between applicant and opposer's marks).
  - *3 Daughters Brewing, LLC v. California Brewing Company Inc. dba California Brewing Company*, Canc. No. 92061411 (TTAB Feb. 1, 2016) (district court case involved a direct infringement claim and request to enjoin petitioner's use of its mark).

pleadings, the final disposition of the civil action will not have any bearing on the claims in the Board proceeding.

## **2. Suspension Would Cause Undue Delay to the Prejudice of Google.**

The Board should deny a motion to suspend when suspension would unduly delay the resolution of a case. *Jodi Kristopher*, 91 USPQ2d at 1959. Registrant's requested suspension would result in a protracted delay because it has moved to suspend the proceeding pending the final determination of the civil action. 37 CFR 2.117(a); TBMP § 510.02(b). "Final determination" means "when a decision on the merits of the case (i.e., a dispositive ruling that ends litigation on the merits) has been rendered, and no appeal has been filed therefrom, or all appeals filed have been decided." TBMP § 510.02(b).

Here, there are 49 as-of-yet unidentified Doe defendants in the federal litigation. Aside from Google, the only identified defendant has yet to be served despite nearly two years of litigation. In the meantime, Registrant is able to leverage the presumptions afforded by its federal registration for the SPY PHONE mark to attempt to exclude other developers from using terms similar to Registrant's mark in connection with their mobile apps on the Google Play platform, causing prejudice to such developers and to Google.

### **B. In the Alternative, the Suspension Should Be Conditioned on the Existence of a Pending Trademark Claim between Google and Registrant.**

"Suspension of a Board proceeding pending the final determination of another proceeding is solely within the discretion of the Board." 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:47 (4<sup>th</sup> ed.). To the extent that the Board has the discretion to suspend a proceeding, it also has the discretion to condition that suspension on the occurrence of certain events. *C.f. Miscellaneous Changes to Trademark Trial and Appeal Board Rules of*

*Practice*, 81 FR 19296-01, 2016 WL 1274388 (F.R. Apr. 4, 2016) (proposing to amend rules concerning suspension “to clarify that the Board...retains discretion to condition approval of consented or stipulated motions to suspend on the provision by parties of necessary information about the status of settlement talks or discovery or trial activities.”).

As explained above, a final determination of all claims as to all defendants in the civil action may result in a lengthy suspension. The claims between Google and Registrant, including a single trademark claim involving secondary trademark infringement liability, have already been dismissed once and may soon be dismissed again. Thus, the civil action could foreseeably continue long into the future when there are no pending trademark claims, or no claims at all, between the parties to this proceeding. If this occurs, there would be little justification, and great prejudice to Google, in holding the Board proceeding suspended and compelling Google to wait until the conclusion of the civil action to adjudicate the cancellation action.

For these reasons, if the Board decides to suspend the proceeding, it should provide for the proceeding to resume should the parties no longer have a trademark claim between them in the civil action.

#### **IV. CONCLUSION**

For the foregoing reasons, Google respectfully requests that the Board (1) deny Registrant’s Motion to Suspend or, (2) in the alternative, condition any suspension upon the existence of a trademark claim between Registrant and Google in the pending civil action.

Respectfully submitted,

Date: June 16, 2016

By: */Brendan J. Hughes/*

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*Counsel for Petitioner Google Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **OPPOSITION TO MOTION TO SUSPEND FOR CIVIL ACTION**, as well as the Declaration of Rebecca Givner-Forbes and exhibits attached herewith, has been served on Registrant by mailing said copy on June 16, 2016 via First Class Mail, postage prepaid, to Registrant's counsel at the following address of record:

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Date: June 16, 2016

By: /Rebecca Givner-Forbes/  
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,948,486  
For the Trademark SPY PHONE  
Issued April 19, 2011

GOOGLE INC.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92063567
v.	)	
	)	
SPY PHONE LABS LLC,	)	
	)	
Registrant.	)	
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**DECLARATION OF REBECCA GIVNER-FORBES IN SUPPORT OF  
GOOGLE’S OPPOSITION TO REGISTRANT’S MOTION TO SUSPEND**

I, Rebecca Givner-Forbes, am an associate at the law firm Cooley LLP and represent Petitioner Google Inc. (“Google”) in this cancellation action against Registrant Spy Phone Labs LLC (“Registrant”). I make this statement based on my personal knowledge of the facts set forth herein, my review of client files maintained by Cooley LLP for Google, and my conversations with Google. I submit this declaration in support of Google’s Opposition to Registrant’s Motion to Suspend.

1. Attached hereto as **Exhibit A** is a true and correct copy of the Order Granting Motion to Dismiss as to Google issued by the U.S. District Court for the Northern District of California on March 21, 2016 in the litigation styled *Spy Phone Labs LLC v. Google Inc., Andrei Ciuca d/b/a Cad Design, and John Does 1-49*, No. 5:15-CV-03756-PSG (the “Northern District of California Action”).

2. Attached hereto as **Exhibit B** is a true and correct copy of Google’s Motion to

Dismiss Registrant's Second Amended Complaint filed May 25, 2016 in the Northern District of California Action.

3. Attached hereto as **Exhibit C** is a true and correct copy of Registrant's request to amend the registration for the SPY PHONE mark obtained from the Patent and Trademark Office's online records.

4. The hearing date for Google's Motion to Dismiss Registrant's Second Amended Complaint has not yet been set. Google's Motion to Dismiss is still pending with the Court.

5. Apart from Google, Registrant has identified in its Second Amended Complaint only one other defendant. Registrant has not served this other named defendant or any of the other 49 "John Doe" defendants described in its Second Amended Complaint.

Date: June 16, 2016

/Rebecca Givner-Forbes/  
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# **Exhibit A**

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SPY PHONE LABS LLC.,  
Plaintiff,  
v.  
GOOGLE INC., et al.,  
Defendants.

Case No. [15-cv-03756-PSG](#)

**ORDER GRANTING MOTION TO  
DISMISS AS TO GOOGLE**

**(Re: Docket No. 35)**

After registering SPY PHONE as a trademark, Plaintiff Spy Phone Labs LLC submitted its Android app, named “SPY PHONE® Phone Tracker,” to Defendant Google Inc.’s Play Store.<sup>1</sup> The app racked up over a million downloads, and at SPL’s behest Google took down a number of competing apps with names too similar to the SPY PHONE mark.<sup>2</sup> Sometime in 2013, however, SPL claims that Google stopped enforcing SPL’s trademark and, worse yet, suddenly and unjustifiably removed SPL’s app from the Play Store.<sup>3</sup> Because of these and other actions, SPL alleges that Google is liable to it for contributory trademark infringement and tortious interference with prospective economic advantage.<sup>4</sup> Google now moves to dismiss for failure to state a claim.<sup>5</sup> Google’s motion is GRANTED, but with leave to amend.

<sup>1</sup> Docket No. 17 at ¶¶ 29, 42-47.

<sup>2</sup> *See id.* at ¶¶ 46-54.

<sup>3</sup> *See id.* at ¶¶ 58-63, 81-86, 89-90.

<sup>4</sup> *See id.* at ¶¶ 130-150.

<sup>5</sup> *See* Docket No. 35.

**I.**

1           SPL first established its Google developer account sometime around August 2012.<sup>6</sup> SPL's  
2 app allows authorized third parties, usually parents or guardians, to track where a particular phone  
3 is located and how it is being used.<sup>7</sup> The app stores the information it collects on SPL's secure  
4 server, and SPL only allows authorized users to view the data.<sup>8</sup> As an added protection against  
5 misuse, the app periodically displays an icon so that the user always knows that the app is  
6 running.<sup>9</sup> The app is free to use, but SPL generates revenue through Google-provided ads placed  
7 on SPL's "spyphone.com" website.<sup>10</sup> The more app users, the more traffic to the website—and  
8 the more revenue for SPL.<sup>11</sup>

9           Between August 2012 and June 2013, over 1.1 million users downloaded the app from  
10 Google's Play Store, making it one of the most popular apps in that period.<sup>12</sup> The app's success  
11 generated significant advertising revenues through the SPL website.<sup>13</sup> Throughout this period,  
12 SPL regularly used Google's online complaint form to submit trademark infringement complaints  
13 about similarly named apps, and Google regularly responded by taking down the offending apps.<sup>14</sup>  
14 Whenever Google removed an app for infringing SPL's mark, it sent the app developer a  
15 notification containing the complainant's name and email address.<sup>15</sup>

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17 <sup>6</sup> See Docket No. 17 at ¶¶ 42.

18 <sup>7</sup> See *id.* at ¶ 43.

19 <sup>8</sup> See *id.* at ¶¶ 34-35.

20 <sup>9</sup> See *id.* at ¶ 36.

21 <sup>10</sup> See *id.* at ¶¶ 37-38.

22 <sup>11</sup> See *id.* at ¶¶ 39-40.

23 <sup>12</sup> See *id.* at ¶ 46.

24 <sup>13</sup> See *id.* at ¶¶ 46-47.

25 <sup>14</sup> See *id.* at ¶¶ 48-51.

26 <sup>15</sup> See *id.* at ¶ 50.

1 In May of 2013, SPL submitted one such trademark infringement complaint about an app  
 2 named “Spy Phone App,” and Google again took down the app.<sup>16</sup> Almost immediately, the app’s  
 3 developer, Defendant Andrei Ciuca, emailed SPL’s representative complaining about the  
 4 removal.<sup>17</sup> SPL’s representative responded that Ciuca’s chosen name infringed SPL’s trademark  
 5 and that Ciuca had to use a different name.<sup>18</sup>

6 From that point, the relationship between Google and SPL eroded. Soon afterwards, SPL  
 7 submitted a trademark infringement complaint about another app, called “Reptilicus.net Brutal  
 8 Spy Phone.”<sup>19</sup> But this time, instead of removing the app, Google said that it was “unable to  
 9 determine the merits of [SPL’s] claim” and took no action.<sup>20</sup> And on June 28, 2013, the Google  
 10 Play team removed SPL’s own app, citing violations of Google’s anti-spyware policy.<sup>21</sup> Google  
 11 gave SPL no prior warning, and SPL’s app in fact complied fully with that policy.<sup>22</sup> SPL alleges,  
 12 on information and belief, that Ciuca caused Google’s sudden about-face by making a false  
 13 complaint about SPL’s app.<sup>23</sup>

14 SPL appealed the removal using Google’s internal process and even filed suit, all to no  
 15 avail.<sup>24</sup> Eventually, Google explained that although none of the functions of SPL’s app violated  
 16 the anti-spyware policy, the name itself was unacceptable because it contained the word “spy.”<sup>25</sup>

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17 <sup>16</sup> *Id.* at ¶¶ 53-54.

18 <sup>17</sup> *See id.* at ¶¶ 54-55.

19 <sup>18</sup> *See id.* at ¶ 56.

20 <sup>19</sup> *Id.* at ¶ 58.

21 <sup>20</sup> *Id.* at ¶ 59.

22 <sup>21</sup> *See id.* at ¶¶ 60-61.

23 <sup>22</sup> *See id.* at ¶¶ 62-63.

24 <sup>23</sup> *See id.* at ¶¶ 63-64.

25 <sup>24</sup> *See id.* at ¶¶ 66-70.

26 <sup>25</sup> *Id.* at ¶¶ 71-73.

1 SPL’s counsel observed that other apps used the same word, but Google promised that it intended  
2 to prohibit all developers from doing so in the future.<sup>26</sup>

3 Given that representation, SPL decided to drop its lawsuit and relaunch its app under the  
4 name “Phone Tracker.”<sup>27</sup> In October 2013, Google reinstated SPL’s developer account, but it first  
5 deleted all the consumer reviews and records of downloads for SPL’s original app, meaning that  
6 SPL’s app lost the high ranking it had boasted before.<sup>28</sup> In its first ten months, the new app  
7 managed only 260,000 downloads, leading to a steep reduction in SPL’s advertising revenue.<sup>29</sup>  
8 Meanwhile, other apps continued to use “spy” in their names with impunity.<sup>30</sup>

9 In January 2014, SPL again started submitting complaints about apps that used either the  
10 word “spy” or the mark SPY PHONE.<sup>31</sup> Now, however, instead of using the trademark  
11 infringement complaint form—which tipped the target apps’ developers off about SPL’s  
12 identity—SPL asserted violations of the same anti-spyware policy that Google had cited when  
13 taking down SPL’s app.<sup>32</sup> In July 2014, SPL made one of these complaints about another Ciuca  
14 app that used the word “spy” in its name.<sup>33</sup> Within days, Google again suspended SPL’s account  
15 without warning, this time for purportedly violating Google’s spam policy.<sup>34</sup> Again, SPL claims  
16 that its app complied with that policy, but that Ciuca had submitted a false complaint.<sup>35</sup>

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17 <sup>26</sup> *See id.* at ¶¶ 74-75.

18 <sup>27</sup> *See id.* at ¶¶ 76, 78.

19 <sup>28</sup> *See id.* at ¶ 77.

20 <sup>29</sup> *See id.* at ¶¶ 79-80.

21 <sup>30</sup> *See id.* at ¶¶ 81-88.

22 <sup>31</sup> *See id.* at ¶ 89.

23 <sup>32</sup> *See id.* at ¶ 90.

24 <sup>33</sup> *See id.* at ¶¶ 91-92.

25 <sup>34</sup> *See id.* at ¶¶ 93-94.

26 <sup>35</sup> *See id.* at ¶¶ 95-96.

1 According to SPL, multiple Play Store parental monitoring apps can be traced back to  
 2 Ciuca—which in itself violates Google’s policies—and several of these apps contain the word  
 3 “spy,” or even the phrase “Spy Phone,” in their names.<sup>36</sup> In addition, SPL alleges that it received a  
 4 letter from a “concerned” member of the Google Play team confirming SPL’s suspicions.<sup>37</sup> And  
 5 after Google took down SPL’s app for the second time, Google searches for the phrase “spy  
 6 phone” started to list competing apps before SPL’s website; in fact, the top-listed result is now an  
 7 app that infringes SPL’s trademark.<sup>38</sup>

8 In October 2014, SPL filed this suit in the District of New Jersey.<sup>39</sup> In August of last year,  
 9 that court granted Google’s motion to transfer the case here.<sup>40</sup> In the operative complaint, SPL  
 10 alleges three causes of action: (1) direct trademark infringement<sup>41</sup> against Ciuca and a number of  
 11 unnamed Defendants; (2) contributory trademark infringement against Google and (3) tortious  
 12 interference with prospective economic advantage against all Defendants.<sup>42</sup> Ciuca and the  
 13 unnamed Defendants have not yet been served.

## 14 II.

15 This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. The  
 16 parties who have appeared have consented to the jurisdiction of the undersigned magistrate judge  
 17 under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a).<sup>43</sup>

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18 <sup>36</sup> *Id.* at ¶¶ 98-102.

19 <sup>37</sup> *Id.* at ¶¶ 103-106. The complaint does not include a copy of the letter.

20 <sup>38</sup> *Id.* at ¶¶ 107-115.

21 <sup>39</sup> *See* Docket No. 1.

22 <sup>40</sup> *See* Docket No. 22.

23 <sup>41</sup> *See* 15 U.S.C. § 1114(a).

24 <sup>42</sup> *See* Docket No. 17 at ¶¶ 122-150.

25 <sup>43</sup> *See* Docket Nos. 28, 31. Because Ciuca has not yet been served, the court has no jurisdiction  
 26 over him. *See Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009)  
 27 (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986)). Therefore, Ciuca is not a party under  
 28

### III.

1 A complaint must contain “a short and plain statement of the claim showing that the  
2 pleader is entitled to relief.”<sup>44</sup> When a plaintiff fails to proffer “enough facts to state a claim to  
3 relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon  
4 which relief may be granted.<sup>45</sup> A claim is facially plausible “when the pleaded factual content  
5 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
6 alleged.”<sup>46</sup> Under Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable  
7 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”<sup>47</sup>  
8 Dismissal with prejudice and without leave to amend is appropriate if it is clear that the complaint  
9 could not be saved by amendment.<sup>48</sup>

10 At this stage of the case, the court must accept all material allegations in the complaint as  
11 true and construe them in the light most favorable to the non-moving party.<sup>49</sup> The court’s review  
12 is limited to the face of the complaint, materials incorporated into the complaint by reference and  
13 matters of which the court may take judicial notice.<sup>50</sup> However, the court need not accept as true  
14 allegations that are conclusory, unwarranted deductions of fact or unreasonable inferences.<sup>51</sup>  
15

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16 Section 636, and the court need not obtain his consent before issuing a case-dispositive ruling.  
17 *See Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995); *Third World Media, LLC v. Does 1-1568*,  
18 Case No. 10-cv-04470, 2011 WL 4344160, at \*3 (N.D. Cal. Sept. 15, 2011) (citing *Ornelas v. De*  
*Frantz*, Case No. 00-cv-01067, 2000 WL 973684, at \*2 n.2 (N.D. Cal. June 29, 2000)).

19 <sup>44</sup> Fed. R. Civ. P. 8(a)(2).

20 <sup>45</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

21 <sup>46</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

22 <sup>47</sup> *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

23 <sup>48</sup> *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

24 <sup>49</sup> *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

25 <sup>50</sup> *See id.*

26 <sup>51</sup> *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*,  
27 550 U.S. at 561 (holding that “a wholly conclusory statement of [a] claim” will not survive a  
28

1 Neither of SPL’s claims against Google satisfies these standards.

2 **First**, SPL’s complaint does not allege facts sufficient to state a claim for contributory  
 3 trademark infringement by Google. To be liable for contributory infringement, Google must have  
 4 “continue[d] to supply [a] product to one whom it knows or has reason to know is engaging in  
 5 trademark infringement.”<sup>52</sup> In the specific context of an online marketplace, “a service provider  
 6 must have more than a general knowledge or reason to know that its service is being used to sell  
 7 counterfeit goods. Some contemporary knowledge of which particular listings are infringing or  
 8 will infringe . . . is necessary.”<sup>53</sup> Notice of certain acts of infringements does not imply  
 9 generalized knowledge of—and liability for—others.<sup>54</sup>

10 For almost all of the allegedly infringing apps, SPL has not alleged that Google had notice  
 11 of those specific acts of infringement.<sup>55</sup> When SPL did complain about these apps, it intentionally  
 12 made spyware complaints instead of trademark complaints in order to remain anonymous.<sup>56</sup> But  
 13 spyware complaints are not the same as trademark complaints, and Google could not be expected  
 14

15 motion to dismiss).

16 <sup>52</sup> *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982); *see also Lockheed Martin*  
 17 *Corp. v. Network Sols., Inc.*, 194 F.3d 980, 984 (9th Cir. 1999) (finding contributory infringement  
 18 given “[d]irect control and monitoring of the instrumentality used by a third party to infringe”).  
 19 Contributory infringement also applies if a defendant “intentionally induces another to infringe a  
 20 trademark,” *Inwood Labs*, 456 U.S. at 854, but SPL does not allege this form of infringement.

21 <sup>53</sup> *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010); *see also Louis Vuitton Malletier,*  
 22 *S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 943 (9th Cir. 2011) (“Plaintiffs asserting contributory  
 23 trademark infringement claims must prove that defendants provided their services with actual or  
 24 constructive knowledge that the users of their services were engaging in trademark  
 25 infringement.”).

26 <sup>54</sup> *See Free Kick Master LLC v. Apple Inc.*, Case No. 15-cv-03403-PJH, 2015 WL 6123058, at \*6  
 27 (N.D. Cal. Oct. 19, 2015); *Academy of Motion Picture Arts & Sciences v. GoDaddy.com, Inc.*,  
 28 Case No. 10-cv-03738-AB, 2015 WL 5311085, at \*52 (C.D. Cal. Sept. 10, 2015).

<sup>55</sup> SPL’s allegation that Google actually knew of particular infringing apps, *see* Docket No. 17 at  
 ¶ 134, is a conclusory statement that the court need not take as true. *See Iqbal*, 556 U.S. at 678.

<sup>56</sup> *See id.* at ¶ 90.

1 to respond to a complaint about one offense by investigating another. Absent specific notice of  
 2 trademark infringement, Google cannot be liable for contributory infringement merely for failing  
 3 to remove infringing apps preemptively.<sup>57</sup>

4 The only instance where SPL did notify Google of infringement involved the  
 5 “Reptilicus.net Brutal Spy Phone” app.<sup>58</sup> But Google did not ignore that notification. Instead, it  
 6 investigated and responded that it could not assess the merits of the claim.<sup>59</sup> As Google now  
 7 points out, that app may have used the words “Spy Phone” simply as a descriptor, as opposed to  
 8 the distinctive prefix “Reptilicus.net Brutal”—a characteristic that would constitute a defense to  
 9 trademark infringement.<sup>60</sup> This kind of “uncertainty of infringement” is “relevant to the question  
 10 of an alleged contributory infringer’s knowledge.”<sup>61</sup> Here, that uncertainty, combined with  
 11 Google’s investigation and response, undercuts SPL’s assertion that Google had actual notice of  
 12 that infringement. Without any allegations rendering plausible actual notice of any infringement,  
 13 Google cannot be liable.

14 **Second**, SPL has not stated a claim for tortious interference because it has not pled that  
 15 Google committed any “act that is wrongful apart from the interference itself.”<sup>62</sup> In opposition to  
 16 Google’s motion, SPL argues that Google’s actions render it liable for unfair competition under  
 17

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18  
 19 <sup>57</sup> Cf. *Free Kick Master*, 2015 WL 6123058, at \*6 (“The SAC alleges no facts showing that . . .  
 20 Google . . . knew that the third-party developers’ apps/games were infringing plaintiff’s mark but  
 21 continued to allow the infringing apps/games to remain available in the application stores.”).

22 <sup>58</sup> Docket No. 17 at ¶¶ 58-59.

23 <sup>59</sup> See *id.* at ¶ 59.

24 <sup>60</sup> See 15 U.S.C. § 1115(b)(4).

25 <sup>61</sup> *Lockheed Martin Corp. v. Network Sols., Inc.*, 985 F. Supp. 949, 964 (C.D. Cal. 1997), *aff’d*,  
 26 194 F.3d 980 (9th Cir. 1999); see also *id.* at 963 (“The mere assertion by a trademark owner that a  
 domain name infringes its mark is not sufficient to impute knowledge of infringement . . .”).

27 <sup>62</sup> *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153-54 (2003).

1 Cal. Bus. & Prof. Code § 17200—a cause of action that does not appear in SPL’s complaint.<sup>63</sup> As  
 2 Google observes, unfair competition itself also depends on an independently unlawful act.<sup>64</sup>  
 3 Because SPL has not pled such an act, it has failed to state a claim for tortious interference with  
 4 prospective economic advantage.<sup>65</sup>

5 **IV.**

6 Google’s motion to dismiss is GRANTED. Dismissal without leave to amend is only  
 7 appropriate if it is clear that the complaint could not be saved by amendment such as after a  
 8 plaintiff’s “repeated failure to cure deficiencies by amendments previously allowed.”<sup>66</sup> Because  
 9 this is the first time the court has ruled on the sufficiency of SPL’s complaint, it cannot yet say  
 10 that further amendment would be futile. Leave to amend therefore is GRANTED. SPL shall file  
 11 any amended complaint within 21 days.

12 **SO ORDERED.**

13 Dated: March 21, 2016

14   
 15 PAUL S. GREWAL  
 16 United States Magistrate Judge

17  
18  
19  
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22 \_\_\_\_\_  
 23 <sup>63</sup> See Docket No. 37 at 20-22.

24 <sup>64</sup> See *Korea Supply*, 29 Cal. 4th at 1143 (quoting *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel.*  
 25 *Co.*, 20 Cal. 4th 163, 180 (1999)) (“Section 17200 ‘borrows’ violations from other laws by making  
 26 them independently actionable as unfair competitive practices.”).

27 <sup>65</sup> The court does not reach Google’s remaining arguments for dismissing this claim.

28 <sup>66</sup> *Eminence Capital*, 316 F.3d at 1052 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

# **Exhibit B**

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7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION

11 SPY PHONE LABS LLC,  
12 Plaintiff,  
13 v.  
14 GOOGLE INC. and ANDREI CIUCA,  
15 Defendants.

Case No. 5:15-cv-03756-PSG

**DEFENDANT GOOGLE INC.’S NOTICE OF  
MOTION AND MOTION TO DISMISS  
PLAINTIFF SPYPHONE LABS LLC’S  
SECOND AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: June 28, 2016  
Time: 10:00 a.m.  
Ctrm: 5 – 4th Floor  
Judge: Honorable Paul Singh Grewal

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 28, 2016 at 10:00 a.m. in Courtroom 5 of the above-entitled court, located at 280 South 1st Street, San Jose, CA 95113, Defendant Google Inc. (“Google” or “Defendant”) by its attorneys Durie Tangri LLP, will move and hereby moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff SpyPhone Labs LLC’s (“SpyPhone” or “Plaintiff”) Second Amended Complaint against Google with prejudice.

This Motion is based upon this Notice of Motion and Memorandum of Points and Authorities in support thereof, the Second Amended Complaint and other pleadings on file in this matter, the arguments of counsel, and all other material which may properly come before the Court at or before the hearing on this Motion.

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**I. INTRODUCTION AND FACTUAL SUMMARY**

This Court has already dismissed Plaintiff SpyPhone’s complaint once, finding that the facts alleged do not state a cause of action. Because the predecessor version (the Amended Complaint, or “AC”) affirmatively alleged that Google had responded to each specific notice of alleged trademark infringement by removing the accused infringing app from the Google Play store, this Court held that the AC did not state a claim for contributory trademark infringement. Order Granting Motion to Dismiss as to Google (“Order”) at 7-8, ECF No. 52. And because the AC failed to allege an independently wrongful act committed by Google, this Court also dismissed SpyPhone’s claim for tortious interference with prospective business advantage. *Id.* at 8-9. Because it dismissed both claims on the merits, this Court did not reach Google’s additional arguments, in particular those based on the Communications Decency Act. This Court granted leave to amend, so that SpyPhone might bring forth additional facts that would alter that conclusion.

SpyPhone has now filed a Second Amended Complaint (“SAC”). But—with the exception of a few post-filing allegations that change nothing—the SAC states precisely the same facts as its predecessor, and should meet the same fate. Based on those same facts, SpyPhone attempts to state three additional state law causes of action (interference with contract, breach of the duty of good faith and fair dealing, and violation of Business and Professions Code Section 17200). Each fails: one cannot interfere with one’s own contract, and the covenant of good faith and fair dealing cannot be used to create an implied contractual term that is contrary to an express term of the same contract. And, as this Court noted in the prior dismissal (Order at 8-9), a Section 17200 claim based on alleged underlying unlawful acts stands—or in this case falls—with those underlying claims.

The factual allegations of the AC and SAC are the same in all relevant respects. The AC alleged that in 2012 and 2013, SpyPhone regularly used Google’s trademark complaint form to report alleged infringements, and that Google regularly responded by taking down the allegedly infringing Apps. AC at ¶¶ 48-51; Order at 2. The SAC contains the identical allegations. SAC ¶¶ 48-56, ECF No. 53. The AC and SAC both allege that, in one instance, (“Reptilicus.net Brutal Spy Phone”), Google requested additional information rather than take down the App, and SpyPhone did not respond. AC ¶¶ 58-59; SAC ¶¶ 58-59; Order at 3. And both the AC and the SAC allege that, thereafter, SpyPhone chose not to

1 use Google's trademark infringement form, instead reporting competing applications as violations of  
2 Google's anti-spyware policies. AC ¶¶ 81-92; SAC ¶¶ 125-144; Order at 4.

3 Both versions of the complaint make identical allegations concerning Google's responses to  
4 SpyPhone's non-trademark complaints: that Google selectively applied its anti-spyware policies due to  
5 an alleged animus towards SpyPhone. Both versions base that allegation on the purported receipt of an  
6 anonymous, poorly written letter that SpyPhone assumes came from a Google employee, but neither  
7 version pleads any factual basis (such as postmark, date, address, or anything else) that would make that  
8 assumption plausible, or establish a reasonable inference that "Something Sinister is Afoot." AC ¶¶103-  
9 106; SAC 146-151. Both versions recite that Google suspended the SpyPhone App and account, and  
10 then allowed SpyPhone to return to the App store using the name "Phone Tracker." AC ¶¶ 53-115; SAC  
11 ¶¶ 75-144; Order at 4-5.

12 Based on those facts, this Court dismissed the AC's trademark claim, noting that "a service  
13 provider must have more than a general knowledge or reason to know that its service is being used to sell  
14 counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will  
15 infringe . . . is necessary." Order at 7 (quoting *Tiffany (NJ) Inc. v eBay Inc.*, 600 F.3d 93, 107 (2d Cir.  
16 2010). The SAC pleads no new facts relevant to that claim: no additional trademark notices were  
17 submitted or alleged, and thus there is no basis to change the Court's prior analysis.

18 This Court also dismissed SpyPhone's interference with prospective advantage claim, because  
19 that claim requires an independently wrongful act. Order at 8-9. Previewing the SAC, the Court  
20 addressed SpyPhone's argument in opposition briefing that an unpled Section 17200 claim would satisfy  
21 that requirement. This Court rejected that argument as well, noting that even if pled, Section 17200 is  
22 itself a derivative statute, and similarly would require an underlying wrongful act. *Id.* Accordingly, this  
23 Court did not reach Google's other arguments for dismissal, most importantly Google's immunity under  
24 the Communications Decency Act ("CDA"), 47 U.S.C. § 230.

25 SpyPhone's SAC seeks to cure the AC's deficiency, not by pleading new facts, but by attempting  
26 to support its derivative claims on the back of two new state law claims based on those same facts:  
27 interference with its own contract with Google (the Developer Distribution Agreement (hereafter  
28 "DDA"), SAC Ex. 1), and breach of the implied covenant of good faith and fair dealing. Both claims

1 fail, on the merits and because they are barred by CDA Section 230. Accordingly, the SAC should be  
2 dismissed, this time with prejudice.

## 3 **II. ARGUMENT**

### 4 **A. SpyPhone's Contributory Trademark Claim is Unchanged, and Must Be Dismissed** 5 **Anew**

6 SpyPhone's trademark claim is unchanged: as the Court noted in dismissing it last time, Google  
7 acted promptly to respond to each legitimate trademark complaint SpyPhone submitted by removing the  
8 accused App, and thus cannot be held liable for contributory trademark infringement. Order at 7-8.  
9 "Without any allegations rendering plausible actual notice of any infringement, Google cannot be liable."  
10 *Id.* at 8.

11 That ruling was correct, and there is no basis to revisit it. Contributory trademark infringement  
12 liability on the part of internet services requires actual, specific notice of the particular alleged  
13 infringements. Absent inaction in the face of such express notice, internet marketplaces are not liable for  
14 contributory trademark infringement. As the Second Circuit made clear in its seminal opinion in *Tiffany*,  
15 600 F.3d at 107, in the unique context of an online marketplace, "[f]or contributory trademark  
16 infringement liability to lie, a service provider must have more than a general knowledge or reason to  
17 know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which  
18 particular listings are infringing or will infringe in the future *is necessary*." (emphasis added).

19 The SAC, just as the AC, pleads no facts meeting this standard. SpyPhone again admits that  
20 Google in fact responded to every specific trademark complaint that SpyPhone submitted to Google and  
21 removed those apps listed in the Google Play store. SAC ¶¶ 64-71. In only one instance did Google not  
22 remove the App in question, as it could not determine if it was infringing. When Google requested  
23 additional information, SpyPhone did not respond, leading this Court to observe that "[t]he mere  
24 assertion by a trademark owner that a domain name infringes its mark is not sufficient to impute  
25 knowledge of infringement . . . ." Order at 8 (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*,  
26 985 F Supp. 949, 963 (C.D. Cal. 1999). SpyPhone again also admits that it thereafter elected voluntarily  
27

28 <sup>1</sup> As before, Claim 1 does not state a claim against Google, but rather a direct infringement claim against  
the as yet unserved Mr. Ciuca and "Doe" defendants.

1 not to use Google's trademark complaint reporting process to report other allegedly infringing apps.  
2 SAC ¶¶ 64-72.

3       SpyPhone's failure to provide notice to Google of the allegedly infringing apps at issue is fatal to  
4 any claim of contributory infringement. Mere generalized knowledge that some third-party content is  
5 claimed to infringe does not create an obligation on the service provider's part to search out and  
6 eliminate unreported infringements, even if the provider has received *thousands* of notices of  
7 infringement. As the Second Circuit explained in *Tiffany*, while eBay "clearly possessed general  
8 knowledge as to counterfeiting on its website," under *Inwood Labs*, such general knowledge is  
9 insufficient to impose contributory liability on a defendant. 600 F.3d at 107 (citation omitted). Rather,  
10 consistent with *Inwood Labs*, to impose such liability it must be shown that a defendant continued to  
11 supply its services, in the case of eBay, "to one whom it knows or has reason to know is engaging in  
12 trademark infringement." *Id.* (citation omitted). The Court held that "[f]or contributory trademark  
13 infringement liability to lie, a service provider must have more than a general knowledge or reason to  
14 know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which  
15 particular listings are infringing or will infringe in the future is necessary." 600 F.3d at 107.

16       Significantly, the Second Circuit emphasized that Tiffany's demand letters to eBay and other  
17 actions it took "did not identify particular sellers who Tiffany thought were then offering or would offer  
18 counterfeit goods." 600 F.3d at 109. Where eBay did receive notice from Tiffany identifying *specific*  
19 acts of counterfeiting, eBay removed those listings. Tiffany therefore "failed to demonstrate that eBay  
20 was supplying its service to individuals who it knew or had reason to know were selling counterfeit  
21 Tiffany goods." *Id.* See also *Peek & Cloppenburg KG v. Revue, Inc.*, No. 11 Civ. 5967 (DAB), 2012  
22 WL 4470556, at \*5 (S.D.N.Y. Sept. 19, 2012) (in the context of an online service that hosts sales of  
23 allegedly infringing goods, *Tiffany* requires "a higher standard of awareness of the infringing activity" in  
24 recognition of "the difficulties that an online auction host has in ascertaining which Tiffany-branded  
25 products were authentic and which were counterfeit when Tiffany only made general allegations of  
26 counterfeiting.") (citing *Tiffany*, 600 F.3d 105-09).

27       Although Google did not ignore any *specific* trademark complaint submitted by SpyPhone, and  
28 removed from Google Play all but a single third-party app as to which SpyPhone submitted such

1 complaints, SpyPhone nevertheless seeks to hold Google liable for alleged infringement of which Google  
2 had no specific knowledge. SpyPhone merely alleges that Google had a general right and ability to  
3 monitor and remove third-party apps from Google Play and had general knowledge that other apps being  
4 distributed through Google Play were using names that either were the same as or confusingly similar to  
5 the “Spy Phone” name.<sup>2</sup> Based on these alleged facts, SpyPhone’s contributory infringement claim fails  
6 under *Inwood Labs, Lockheed Martin, Tiffany*, and this Court’s prior order. SpyPhone’s admission that  
7 Google removed the apps as to which SpyPhone provided specific notice of alleged infringement using  
8 the online complaint process is fatal to its contributory trademark claim.<sup>3</sup>

9 The fact that SpyPhone concocts an elaborate reason for *choosing* not to use Google’s trademark  
10 complaint form does not change the analysis: Whatever SpyPhone’s reasons, it affirmatively pleads a  
11 deliberate choice *not* to put Google on notice of alleged trademark infringement. SpyPhone was clearly  
12 aware of the trademark complaint procedure, having used it in the past. SpyPhone affirmative alleges its  
13 familiarity with that procedure, noting that the instructions for using Google’s trademark complaint form  
14 provide that “[i]f an app is removed from Google Play in response to a trademark complaint using  
15 Google’s online form, the developer of the infringing app receives a notice from Google stating, among  
16 other things, why its app has been removed from Google Play, the identity of the trademark that has been  
17 infringed and the name and email address of the person who filed the infringement complaint.” SAC ¶  
18 67.

19 SpyPhone alleges that subsequently “dozens and dozens of other developers, including Ciuca and  
20 the Doe Defendants, were permitted to list parental monitoring and other apps on Google Play containing  
21 the word ‘spy’ in the name.” *Id.* ¶ 114. But SpyPhone admits that it elected voluntarily not to submit  
22 any further trademark complaints and instead submitted alternative “spyware” complaints against these  
23 third-party developers. *Id.* ¶ 90. SpyPhone readily admits it did this to avoid having its true identity

24 \_\_\_\_\_  
25 <sup>2</sup> The DDA expressly provides that Google “does not undertake an obligation to monitor Products or  
26 their content” but reserves the right in its discretion to remove content based upon *notification* that  
27 another app “violates the intellectual property rights or any other rights of a third party.” DDA § 7.2(a)  
28 (emphasis added).

<sup>3</sup> As discussed above, the sole exception was a case in which Google determined that, based on the  
information provided, it did not have sufficient basis to remove the app, for valid reasons communicated  
to SpyPhone. *Id.* ¶¶ 84-85. SpyPhone does not allege it followed up with the requested additional  
information.

1 disclosed to third-party developers about whom it alleged trademark infringement: “Instead of  
 2 submitting trademark infringement complaints against those apps, however, which could result in Google  
 3 revealing SpyPhone’s identity to the developer against whom the complaint was made, SpyPhone’s  
 4 complaints asserted violations of Google’s anti-spyware policy . . . which could be submitted without  
 5 Google revealing the complainant’s identity to the other developer.” AC ¶ 90; *see also* SAC ¶ 125.  
 6 SpyPhone’s spyware complaints did not reference any trademark claims. Accordingly, based on the facts  
 7 alleged in the SAC, as a matter of law SpyPhone still cannot sustain its burden of proving contributory  
 8 infringement against Google, and that cause of action must be dismissed again.

9 **B. Google Cannot Interfere With Its Own Contract**

10 In an attempt to conjure up an “independently wrongful act” to support its derivative causes of  
 11 action, SpyPhone brings a new claim, accusing Google of interference with SpyPhone’s contract with  
 12 Google. The Court need not tarry long on this claim. It is hornbook law that a party cannot be liable for  
 13 interference with its own contract. *Mintz v. Blue Cross of Cal.*, 92 Cal. Rptr. 3d 422, 429 (2009) (“But  
 14 only a stranger to the contract may be liable for interfering with it.”) (internal quotation marks omitted)  
 15 (alteration omitted); *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 513 (1994)  
 16 (a contracting party cannot be held liable in tort for conspiracy to interfere with its own contract; “[t]he  
 17 tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate  
 18 interest in the scope or course of the contract’s performance”). The Google AdSense contract and the  
 19 DDA are contracts between SpyPhone and Google. SAC ¶ 58 (DDA “is a valid and binding agreement  
 20 between Plaintiff and Google.”) & Ex. 1, *id.* ¶ 212; *see also* ¶ 193. Google cannot be liable for  
 21 interfering with its own contract.

22 **C. Good Faith and Fair Dealing**

23 SpyPhone’s second attempt at a new claim, breach of the implied covenant of good faith and fair  
 24 dealing, fares no better. While it is true that California law implies a duty of fair dealing into all  
 25 contracts, that duty cannot trump or contradict an express term of the contract at issue. Courts cannot  
 26 imply the covenant of good faith and fair dealing if it conflicts with a contract’s express grant of  
 27 discretionary power. *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995); *Carma*  
 28 *Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992); *Halvorsen v. Aramark*

1 *Uniform Servs., Inc.*, 65 Cal. App. 4th 1383, 1390 (1998) (written “at-will” employment contract  
 2 precluded existence of implied contract requiring good cause for termination); *PMC v. Porthole Yachts,*  
 3 *Ltd.*, 65 Cal. App. 4th 882, 891 (1998) (covenant cannot limit express discretionary power); *Balfour,*  
 4 *Guthrie & Co. v. Gourmet Farms*, 108 Cal. App. 3d 181 (1980) (same); *Brandt v. Lockheed Missiles &*  
 5 *Space Co.*, 154 Cal. App. 3d 1124 (1984) (same); *Gerdlund v. Elec. Dispensers Int’l*, 190 Cal. App. 3d  
 6 263 (1987) (same).

7 The contract at issue (the DDA) falls squarely within this proscription. Section 7.2 of the DDA,  
 8 on which SpyPhone relies, grants Google broad discretionary power to police its own website, and to  
 9 remove material that “violates Google’s hosting policies or other terms of service . . . .”

10 **7.2. Google Takedowns.** While Google does not undertake an obligation  
 11 to monitor the Products or their content, if Google is notified by you or  
 12 otherwise becomes aware and determines in its sole discretion that a  
 13 Product or any portion thereof or your Brand Features; (a) violates the  
 14 intellectual property rights or any other rights of any third party;  
 15 (b) violates any applicable law or is subject to an injunction; (c) is  
 16 pornographic, obscene or otherwise violates Google’s hosting policies or  
 17 other terms of service as may be updated by Google from time to time in its  
 18 sole discretion; (d) is being distributed by you improperly; (e) may create  
 19 liability for Google or Authorized Carriers; (f) is deemed by Google to  
 20 have a virus or is deemed to be malware, spyware or have an adverse  
 21 impact on Google’s or an Authorized Carrier’s network; (g) violates the  
 22 terms of this Agreement or the Developer Program Policies for Developers;  
 23 or (h) the display of the Product is impacting the integrity of Google  
 24 servers (i.e., users are unable to access such content or otherwise  
 25 experience difficulty), Google may remove the Product from the Market or  
 26 reclassify the Product at its sole discretion. Google reserves the right to  
 27 suspend and/or bar any Developer from the Market at its sole discretion.

28 DDA Section 7.2, SAC Ex. A at 20.

This is precisely the sort of bargained-for discretionary power that established caselaw places  
 beyond the scope of the covenant of good faith and fair dealing. Under the express terms of that contract,  
 Google has the right to remove all, some, or none of the Apps it determines violate (for example) its anti-  
 spyware policies, or the rights of others. That express contractual right cannot be contradicted by the  
 implied covenant of fair dealing. Accordingly, SpyPhone’s claim fails.

#### **D. SpyPhone’s Derivative Claims Fall With Its State Law Claims**

Which brings us back to what are now two derivative claims: tortious interference with  
 prospective advantage, and violations of the unlawful prong of Business and Professions Code Section

1 17200. As this Court has already held, SpyPhone’s interference with prospective advantage claim failed  
 2 because SpyPhone did not plead any “act that is wrongful apart from the interference itself,” Order at 8  
 3 (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153-54 (2003)). Similarly, as  
 4 the Court also noted, “Section 17200 ‘borrows’ violations from other laws by making them  
 5 independently actionable as unfair competitive practices.” Order at 9 n. 64 (quoting *Korea Supply*, 29  
 6 Cal 4th at 1143 (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180  
 7 (1999)).

8 These two derivative claims stand—or in this case fall—with the two new state law claims on  
 9 which they purport to rely. This Court has already dismissed the contributory trademark infringement  
 10 and tortious interference claim once, and the SAC pleads no new facts that could alter the analysis.  
 11 Absent an independent wrong that violates the law, there can be no claim for tortious interference.  
 12 SpyPhone attempts two new claims of independent wrong, but as set forth above neither the interference  
 13 with contract claim nor the covenant of good faith and fair dealing claim survives. And without those  
 14 underpinnings, the tortious interference claim fails again.

### 15 1. SpyPhone’s Tortious Interference Claim Fails

16 The elements of a claim for tortious interference with prospective advantage are well-settled:  
 17 (1) the plaintiff must have a protectable right giving rise to a reasonable expectation of economic  
 18 advantage, (2) the defendant must have been aware of the prospective economic advantage, (3) the  
 19 defendant must have interfered intentionally and with malice, (4) there must be a reasonable probability  
 20 that the plaintiff would have received the anticipated economic benefits, but for the defendant’s  
 21 interference, and (5) resulting damage. *Korea Supply*, 29 Cal. 4th at 1154 (citing *Della Penna v. Toyota*  
 22 *Motor Sales, U.S.A., Inc.*, 11 Cal 4th. 376, 378 (1995)) (listing elements of claim). In addition, in order  
 23 to plead a claim for tortious interference, “a plaintiff must plead that the defendant engaged in an act that  
 24 is wrongful apart from the interference itself.” *Korea Supply*, 29 Cal. 4th 1158-9 (“The tort of intentional  
 25 interference with prospective economic advantage is not intended to punish individuals or commercial  
 26 entities for their . . . commercial relationships or their pursuit of commercial objectives, . . . . ***[A]n act is***  
 27 ***independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory,***  
 28 ***regulatory, common law, or other determinable legal standard.*”) (citing *Della Penna*, 11 Cal. 4th at**

1 393) (emphasis added). Where, as here, Google is contractually authorized to exercise the editorial  
 2 judgment and policing of its own website, there is no independent wrong on which to rest an interference  
 3 claim. When the defendant is contractually privileged to commit the alleged act, no claim for  
 4 interference will lie. *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 17-18 (1978).<sup>4</sup>

5 Here, Google did nothing more than exercise its contractual rights under the DDA—"superior"  
 6 rights that cannot be the basis of a finding of malicious or tortious conduct. *Wexco*, 2008 WL 5427867,  
 7 at \*8. Under the express terms of the DDA, Google is authorized to take down any app that Google has  
 8 deemed to be spyware. DDA § 7.2(f). Such spyware is also prohibited by Google's Developer Program  
 9 Policies, which are incorporated into the DDA. DDA § 4.11; SAC ¶ 24. Plaintiff's conclusory allegation  
 10 that Google "knew that there was no real justification to take down Plaintiff's App from the Store or the  
 11 termination of Plaintiff's developer account" is irrelevant. SAC ¶ 94. Google's actions were expressly  
 12 privileged under the parties' contract and thus, as a matter of law, any tortious interference claim fails.  
 13 For the same reason, Plaintiff's conclusory assertion that Google acted in "bad faith" is nothing more  
 14 than "a formulaic recitation of the element[] of a cause of action" that does not meet the pleading  
 15 standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

16 Similarly, Google's alleged failure to remove allegedly infringing apps or to suspend other  
 17 developers' accounts is completely within Google's discretion under the DDA. DDA § 7.2(f). As a  
 18 matter of law, Google could not have acted intentionally and with malice simply by exercising that  
 19 express contractual right. Additionally, the DDA expressly provides that a violation of its terms (and the  
 20 spyware and other policies incorporated by reference therein) is a ground for Google to terminate its  
 21 contract with Plaintiff. DDA § 10.3(A). Thus, Google's termination and subsequent suspension of  
 22

23 <sup>4</sup> The law is the same in New Jersey, where in order to establish the required "malice" the alleged harm  
 24 must have been inflicted intentionally and without justifiable excuse. *Printing Mart*, 116 N.J. at 751.  
 25 The test is whether the defendant "had the right to perform the act or set of actions that gave rise to the  
 26 lawsuit." *Wexco Indus. V. ADM21 Co.*, No. 04-5244(JLL), 2008 WL 5427867, at \*8 (D.N.J. Dec. 30,  
 27 2008). "Tort liability for interference with prospective economic benefit arises when the conduct of the  
 28 defendant is not in the reasonable exercise of an equal or superior right." *Id.* (citation omitted). "[O]ur  
 courts have concluded that 'violence, fraud, intimidation, misrepresentation, criminal or civil threats,  
 and/or violations of the law' are among the kinds of conduct that would be considered to be 'wrongful  
 means.'" *Nostrame v. Santiago*, 213 N.J. 109, 124 (N.J. 2013) (quoting *E Z Sockets, Inc. v. Brighton-  
 Best Socket Screw Mfg. Inc.*, 704 A.2d 1364, 1370 (N.J. Super. Ct. Ch. Div. 1996), *aff'd*, 704 A.2d 1309  
 (N.J. Super. Ct. App. Div. 1997).

1 Plaintiff's account also were completely within Google's rights under the DDA. Google's exercise of its  
2 contractual rights is not "independently wrongful conduct" and cannot support Plaintiff's claim of  
3 tortious interference.

4 Nor has Plaintiff pled any recoverable damages on this claim. Plaintiff alleges that the  
5 "prospective customers" with whom Google allegedly interfered are the prospective customers who  
6 would have downloaded its app from Google Play. SAC ¶¶ 202-210. But the SAC also alleges that  
7 those prospective customers would have downloaded Plaintiff's app for free. *Id.* ¶ 49. Plaintiff thus  
8 seeks only consequential lost profits damages. The connection of those claimed damages to Google's  
9 allegedly "wrongful" conduct is tenuous at best. But putting aside the tenuous logic of this chain, the  
10 DDA expressly *precludes* any recovery for precisely this sort of consequential and lost profits damages.  
11 DDA § 12. Particularly here, where Google Play is a free service and Plaintiff's App was a free  
12 download, such contractual limitations on consequential losses and lost profits are regularly enforced by  
13 courts. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1055 (C.D. Cal.  
14 2003) (allowing TV service provider to invoke against distributor limitations clause that barred recovery  
15 of lost profits); *Hebert v. Rapid Payroll, Inc.*, No. CV 02-4144 DT (PJXw), 2005 WL 6172659, at \*7  
16 (C.D. Cal. Feb. 9, 2005) (limitation of damages provision in license agreement is not unconscionable and  
17 bars plaintiff's recovery of lost profits as a matter of law).

## 18 **2. SpyPhone's Section 17200 Claim Fails**

19 In opposition to Google's motion to dismiss the previous complaint, SpyPhone argued that  
20 Google's conduct would constitute a violation of the unlawful prong of Section 17200. Although that  
21 claim was not stated in the AC, this Court addressed it, and held that it too would fail: "Section 17200  
22 'borrows' violations from other laws by making them independently actionable as unfair competitive  
23 practices." Order at 9 n. 64 (quoting *Korea Supply*, 29 Cal 4th at 1143 (quoting *Cel-Tech*, 20 Cal.4th at  
24 180).

25 SpyPhone has now affirmatively pled the same Section 17200 claim suggested in its prior  
26 briefing. It bases that claim on the allegedly unlawful acts by Google discussed above: trademark  
27 infringement, breach of contract, and breach of the covenant of good faith and fair dealing. SAC ¶ 221.  
28 No new facts are pled to support those claims, and each fails on the merits. Thus this Court's analysis of

1 that argument should also remain unchanged. As none of the trademark, interference with contract, or  
 2 good faith and fair dealing claims can survive, there are no independent unlawful acts on which to rest a  
 3 Section 17200 claim, and thus that claim fails as well.

4 **E. Section 230 of the Communications Decency Act Bars SpyPhone’s State Law Claims**

5 As set forth above, each of SpyPhone’s state law claims fails on the merits. But even were that  
 6 not so, they fail for the additional reason that they are barred by the CDA. Section 230 of the CDA  
 7 contains two separate provisions, each of which immunizes Google from SpyPhone’s state law claims,  
 8 which are all grounded in Google’s decisions whether to remove content from its online Google Play  
 9 store.<sup>5</sup> Section 230(c)(2)(A) grants civil immunity for blocking and screening certain content and  
 10 provides:

11 No provider or user of an interactive computer service shall be held liable on  
 12 account of . . . any action voluntarily taken in good faith to restrict access to  
 13 or availability of material that the provider or user considers to be obscene,  
 14 lewd, lascivious, filthy, excessively violent, harassing, or otherwise  
 15 objectionable, whether or not such material is constitutionally protected.

16 47 U.S.C. § 230(c)(2)(A).

17 Similarly, Section 230(c)(1) of the CDA provides immunity from state law claims that seek to  
 18 hold an interactive computer service liable for acting as the publisher of content provided by another:  
 19 “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any  
 20 information provided by another information content provider.” As the Ninth Circuit and this Court have  
 21 held, that immunity extends to the exercise of a publisher’s decision to remove such content: precisely  
 22 the conduct of which Google is accused.

23 **1. CDA Section 230(c)(2)(A) Immunizes Google From Liability for Policing Its**  
 24 **Website**

25 To qualify for Section 230(c)(2)(a) immunity, a movant must qualify as a provider of an  
 26 “interactive computer service”; have voluntarily blocked or filtered material that is “obscene, lewd,  
 27

28 <sup>5</sup> Courts routinely recognize Section 230 immunity to bar state law claims of tortious interference with prospective economic advantage. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177-78 (9th Cir. 2009); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609-10 (N.D. Ill. 2008); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004); *Holomaxx*, 2011 WL 865794, at \*4-5. Section 17200 claims are similarly subject to the CDA, *see Gentry v. eBay*, 99 Cal. App. 4th 816 (2002), as are contract claims, *see Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007).

1 lascivious, filthy, excessively violent, harassing, or otherwise objectionable”; and have done so in “good  
 2 faith.” *Holomaxx Techs. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794, at \*4 (N.D. Cal. Mar.  
 3 11, 2010) (quoting 47 U.S.C. § 230(c)(2)(A)). Google easily satisfies all three prongs of this test.

4 **a. Google Play is an “Interactive Computer Service”**

5 The CDA defines an “interactive computer service” as “any information service, system, or  
 6 access software provider that provides or enables computer access by multiple users to a computer  
 7 server.” 47 U.S.C. § 230(f)(2).<sup>6</sup> Google Play, an online distribution marketplace for Android apps and  
 8 other content, falls squarely within the definition. Numerous courts have held that Google Play and other  
 9 Google online platforms are interactive computer services under the CDA and other federal statutes. *See,*  
 10 *e.g., Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 726 (N.D. Cal. 2014) (Google Play is an interactive  
 11 computer service); *In re Google Inc. Privacy Policy Litig.*, No. C-12-01382-PSG, 2013 WL 6248499, at  
 12 \*12 (N.D. Cal. Dec. 3, 2013) (same); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006),  
 13 *aff’d*, 242 Fed. App’x 833 (3d Cir. 2007); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del.  
 14 2007); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010); *Mmubango v. Google Inc.*,  
 15 No. 12-1300, 2013 WL 664231, at \*2 (E.D. Pa. Feb. 22, 2013).

16 **b. Google Blocked Material that Is “Objectionable”**

17 Section 230(c)(2)(A) of the CDA permits a provider of an interactive computer service to block  
 18 or filter content that the provider considers to be “obscene, lewd, lascivious, filthy, excessively violent,  
 19 harassing, or otherwise objectionable, . . .” 47 U.S.C. § 230(c)(2)(A). Whether material is  
 20 “objectionable” is consigned to the judgment of the online service provider, which need not demonstrate  
 21 whether material is in fact “objectionable.” *Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807-JCC, 2007  
 22 WL 5189857, at \*4 (W.D. Wash. Aug. 28, 2007); *see also e360Insight, LLC v. Comcast*, 546 F. Supp. 2d  
 23 605, 608 (N.D. Ill. 2008) (“[S]ection 230 imposes a subjective element into the determination of whether  
 24 a provider or user is immune from liability.”) (citing *Zango*, 2007 WL 5189857, at \*4); *Holomaxx*, 2011  
 25

26  
 27 <sup>6</sup>Courts generally construe “interactive computer service” broadly to include various online platforms.  
 28 *See Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, No. 09-4567 (RBK/KMW), 2011 WL  
 900096, at \*4 (D.N.J. Mar. 15, 2011); *see also Baztel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003);  
*Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

1 WL 865794, at \*5 (referring to the determination of what is objectionable as “subjective”); *Smith*, 2011  
2 WL 900096, at \*5.

3 The public policy necessity for such “Good Samaritan” immunity is clear: if policing the  
4 contents of websites exposes service providers to liability for material provided by third parties, service  
5 providers will be less likely to police their websites. *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d.  
6 Cir. 2003) (Section 230(c)(2) allows providers of interactive computer services “to establish standards of  
7 decency without risking liability for doing so.”) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th  
8 Cir. 1997)). Google’s decisions to suspend SpyPhone’s account, and to enforce its anti-spyware and  
9 spam policies, were both expressly privileged by the contract between SpyPhone and Google and  
10 squarely within the scope of CDA immunity.

11 Based on the facts alleged in the SAC, Section 230(c)(2)(A) immunizes Google from liability for  
12 its blocking decisions regarding content (apps) it deemed objectionable. *See Langdon*, 474 F. Supp. 2d at  
13 631 (finding immunity for Google, Yahoo and Microsoft’s editorial discretion, which included screening  
14 and deleting “objectionable” content from their networks); *see also Green*, 318 F.3d at 471 (citing *Zeran*,  
15 129 F.3d at 330)). As a matter of law, Google is not liable for suspending SpyPhone’s App from the  
16 Google Play store in response to the app’s violations of specific Google policies and Google’s own  
17 assessment of such violations, which are representative of content that Google believed to be  
18 “objectionable.” *See Green*, 318 F.3d at 472 (stating Section 230(c)(2) allows providers of interactive  
19 computer services “to establish standards of decency without risking liability for doing so.”). As alleged  
20 in the SAC, Google suspended SpyPhone’s App in response to violations of Google’s “spam” policy,  
21 which prohibits the sending of electronic messages on behalf of users without their confirmation. SAC ¶  
22 131. *See Smith*, 2011 WL 900096, at \*5 (“Users or providers of an interactive computer service may  
23 determine that spam is material that is harassing or otherwise objectionable under Section  
24 230(c)(2)(A).”); *see also e360Insight*, 546 F. Supp. 2d at 607-08 (finding unsolicited and bulk-emails  
25 may be viewed as objectionable). SpyPhone’s App was also suspended due to a violation of Google’s  
26 “spyware” policy. Am. Compl. ¶¶ 23, 61. *See Zango*, 568 F.3d at 1174 (analogous malware, which can  
27 retrieve personal information, is objectionable).



1 Moreover, SpyPhone’s unsubstantiated assertion that Google’s policies were only enforced against  
 2 SpyPhone and not other apps on Google Play does not justify an inference of bad faith. As numerous  
 3 courts have found, liability for allegedly selective enforcement is not available. *See e360Insight*, 546 F.  
 4 Supp. 2d at 609 (granting immunity where plaintiff claimed he was being “singl[ed] out” because the  
 5 defendant ISP allowed other companies to send bulk emails) (citation omitted); *Langdon*, 474 F. Supp.  
 6 2d at 631 (finding immunity for Google, Yahoo and Microsoft’s editorial discretion where plaintiff  
 7 argued defendants created “purported reasons for not running his ads.”).

8 SpyPhone’s SAC, as did its predecessor, cloaks the same factual allegations in the mantra of “bad  
 9 faith,” but adding that conclusory label to actions that are expressly privileged or within the scope of  
 10 CDA immunity does not change the analysis. As the *Iqbal* Court held:

11 These bare assertions, much like the pleading of conspiracy  
 12 in *Twombly*, amount to nothing more than a “formulaic recitation of the  
 13 elements” of a [] claim, 550 U.S., at 555, 127 S.Ct. 1955, namely, that  
 14 petitioners adopted a policy “‘because of,’ not merely ‘in spite of,’ its  
 15 adverse effects upon an identifiable group.” *Feeney*, 442 U.S., at 279, 99  
 16 S.Ct. 2282. As such, the allegations are conclusory and not entitled to  
 17 be assumed true. *Twombly*, *supra*, 550 U.S., at 554–555, 127 S.Ct. 1955.

18 *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

## 19 2. CDA Section 230(c)(1) Also Immunizes Google

20 Google is also immunized by Section 230(c)(1) of the CDA, which bars state law claims that seek  
 21 to hold interactive service providers liable for publishing or declining to publish the works or words of  
 22 others. While there is significant overlap between Sections 230(c)(1) and 230(c)(2)(A), there are also  
 23 important differences: unlike Section 230(c)(2)(A), Section 230(c)(1) immunizes decisions to publish or  
 24 remove any third party content, whether objectionable or not, and contains no good faith requirement.  
 25 And although the paradigmatic application of this section is a claim for defamation based on third-party  
 26 content, both this Court and the Ninth Circuit repeatedly have held that its protections also extend to the  
 27 exercise of the traditional publishing function of deciding whether to publish or remove third party  
 28 content on the defendant’s own website. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009);  
*Riggs v. MySpace, Inc.*, 444 Fed. App’x 986, 987 (9th Cir. 2011). “It is because such conduct is  
 publishing conduct that we have insisted that section 230 protects from liability ‘any activity that can be  
 boiled down to deciding whether to exclude material that third parties seek to post online.’” *Barnes*, 570

1 F.3d at 1103 (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d  
2 1157, 1170-71 (9th Cir. 2008)).

3 As Judge Koh recently held, in a case on all fours with this one:

4 To determine whether a plaintiff’s theory of liability treats a defendant as a  
5 publisher, “what matters is not the name of the cause of action.” *Barnes*,  
6 570 F.3d at 1101. Instead, “what matters is whether the cause of action  
7 inherently requires the court to treat the defendant as the ‘publisher or  
8 speaker’ of content provided by another.” *Id.* Consequently, “courts must  
ask whether the duty that the plaintiff alleges the defendant violated derives  
from the defendant’s status or conduct as a ‘publisher or speaker.’ If it  
does, section 230(c)(1) precludes liability.” *Id.* at 1102.

9 *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, No. 15-CV-02442-LHK, 2015 WL 7075696, at \*5 (N.D.  
10 Cal. Nov. 13, 2015). Accordingly, the Court found that Section 230(c)(1) immunized Facebook for  
11 claims based on its decision to remove the Plaintiff’s Facebook page from its website in India, where  
12 those allegations were—just as here—that Facebook had acted discriminatorily and in bad faith:

13 Plaintiff seeks to hold Defendant liable for Defendant’s decision “whether  
14 to publish” third-party content. In the instant case, Plaintiff argues that  
15 Defendant had a duty under Title II not to discriminate against Plaintiff.  
16 Compl. at 9-12; *see also* Opp. at 11 (“[Defendant’s] conduct was motivated  
17 solely by unlawful discrimination against the national identity of India and  
18 the minority religion of Sikhs in India.”). However, the act that Defendant  
19 allegedly conducted in a discriminatory manner is the removal of the SFJ  
Page in India. *See Barnes*, 570 F.3d at 1103 (examining the conduct  
underlying the plaintiff’s claim of negligent undertaking). “But removing  
content is something publishers do, and to impose liability on the basis of  
such conduct necessarily involves treating the liable party as a  
publisher.” *See id.*

20 *Id.* at \*6 (citation omitted). Similarly, in *Barnes*, the Ninth Circuit rejected SpyPhone’s converse  
21 allegation based on failure to remove competing Apps. There, the plaintiff alleged that Yahoo had been  
22 negligent in failing to remove allegedly offensive content about the plaintiff posted by her ex-boyfriend.  
23 Holding that the alleged “duty that [the plaintiff] claims Yahoo violated derives from Yahoo’s conduct as  
24 a publisher,” the *Barnes* court held that Section 230(c)(1) barred that claim. *Id.* at 1103. Under the  
25 identical analysis, that section bars any claim that Google failed to remove Apps that SpyPhone claimed  
26 violated Google’s anti-spyware policy. And in *Riggs*, the Ninth Circuit found the plaintiff’s negligence  
27 and gross negligence claims were barred by the CDA because the claims arose out of MySpace’s  
28 “decisions to delete [the plaintiff’s] user profiles on its social networking website yet not delete other

1 profiles [the plaintiff] alleged were created by celebrity imposters.” *Riggs*, 444 Fed. App’x at 987; *see*  
2 *also Levitt v. Yelp!, Inc.*, Nos. C-10-1321 EMC, C- 10-1351 EMC, 2011 WL 5079526, at \*6 (N.D. Cal.  
3 Oct. 26, 2011) (holding that the CDA immunized Yelp from allegations of extortion based on Yelp’s  
4 “removing certain reviews and publishing others or changing their order of appearance”).

5 SpyPhone’s state law claims are precisely the sort of claims that the *Barnes*, *Riggs*, *Levitt*, and  
6 *Sikhs for Justice* courts all held to be barred by Section 230(c)(1): a publisher’s decision to publish or  
7 remove content created by another. Google’s decisions regarding the apps identified by SpyPhone, all of  
8 which were created and posted for download by others, fall squarely within the role of publisher, and are  
9 thus also barred by Section 230(c)(1).

#### 10 **F. Post-filing Allegations**

11 Finally, SpyPhone tacks on a section of allegations of post-lawsuit actions by Google. SAC ¶¶  
12 152-167. None of them changes the analysis. First, SpyPhone notes that it identified an App called Spy  
13 Phone 1.0 in its AC. SpyPhone did not, however, file a trademark complaint concerning that app.  
14 Google nonetheless took action based on the identification of the app in pleadings, and took it down  
15 within 18 days. *Id.* at ¶¶ 154-156 & Ex. 5. When another app named Spy Phone 2.0 appeared days later,  
16 Google also removed it, despite having received no new notice from SpyPhone. SpyPhone also alleges  
17 that Google has, on its own, taken down a number of other apps that violate Google’s anti-spyware rules,  
18 and that SpyPhone reported other such apps the week before it filed its SAC. *Id.* at ¶¶ 162, 166.

19 The point, apparently, is that Google has the ability to police its own website and enforce its own  
20 policies. Of course: Section 7.2 of the DDA makes clear that “[while] Google does not undertake an  
21 obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes  
22 aware and determines in its sole discretion that a Product or any portion thereof [violates its policies or  
23 infringes the rights of others] . . . Google may remove the Product from the Market or reclassify the  
24 Product at its sole discretion.” SAC Ex. A at 20.

25 But that has nothing to do with SpyPhone’s claims: If anything, SpyPhone’s added allegation  
26 that Google has removed numerous other apps that violate its anti-spyware rules directly contradicts its  
27 own claim that Google is enforcing those same rules only against SpyPhone, in aid of some shadowy  
28 conspiracy. The post-litigation allegations added to the SAC carry no weight.



**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2016 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

*/s/ Michael H. Page*  
MICHAEL H. PAGE

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# **Exhibit C**

## Section 7 Request Form

**The table below presents the data as entered.**

Input Field	Entered
<b>REGISTRATION NUMBER</b>	3948486
<b>LAW OFFICE ASSIGNED</b>	LAW OFFICE 102
<b>SERIAL NUMBER</b>	77777312
<b>MARK SECTION</b>	
<b>MARK</b>	<a href="http://tmng-al.uspto.gov/resting2/api/img/77777312/large">http://tmng-al.uspto.gov/resting2/api/img/77777312/large</a>
<b>LITERAL ELEMENT</b>	SPY PHONE
<b>STANDARD CHARACTERS</b>	YES
<b>USPTO-GENERATED IMAGE</b>	YES
<b>MARK STATEMENT</b>	The mark consists of standard characters, without claim to any particular font style, size or color.
<b>OWNER SECTION (current)</b>	
<b>NAME</b>	SPY PHONE LABS LLC
<b>INTERNAL ADDRESS</b>	1465 ROUTE 23 SOUTH
<b>STREET</b>	#139
<b>CITY</b>	WAYNE
<b>STATE</b>	New Jersey
<b>ZIP/POSTAL CODE</b>	07470
<b>COUNTRY</b>	United States
<b>LEGAL ENTITY SECTION (current)</b>	
<b>TYPE</b>	limited liability company
<b>STATE/COUNTRY WHERE LEGALLY ORGANIZED</b>	New Jersey
<b>EXPLANATION OF FILING</b>	
<p>The following statement is by Dan Parisi, sole member of registrant Spy Phone Labs LLC:</p> <ol style="list-style-type: none"> <li>I am the sole member of registrant Spy Phone Labs LLC (“Spy Phone Labs”). The information contained herein is based on my own personal knowledge.</li> <li>I submit this declaration in support of Spy Phone Labs’ application, pursuant to Lanham Act § 7(h), 15 U.S.C. § 1057(h), and Trademark Manual of Examining Procedure 1201.02(c), to correct a mistake in the identity of the registrant appearing on the Registration Certificate for the trademark SPY PHONE, Registration No. 3,948,486 (the “Mark”).</li> <li>For the reasons set forth below, the registrant of the Mark should be identified on the Registration Certificate as “Internet Source LLC (New Jersey Limited Liability Company),” but is mistakenly listed as “Internet Source Communications LLC (New Jersey Corporation).”</li> </ol>	

4. As of July 9, 2009, when I filed to register the Mark, I was the sole owner and chief officer of at least seven companies that were in the business of purchasing and developing domain names. Two of these companies were Internet Source Communications, Inc., a corporation formed under the laws of Panama, and Internet Source LLC, a limited liability company formed under the laws of New Jersey.
5. On July 9, 2009, without assistance from an attorney, I filed the application for the Mark under § 1(b) on behalf of my New Jersey company Internet Source LLC.
6. At the time of filing, I intended to have my company develop a software application (an “app”) that could be downloaded onto a mobile phone and to use the Mark to identify and market the app.
7. When filling out the applicant information on the online trademark registration form, I confused the names of two of my companies – Internet Source Communications, Inc. and Internet Source LLC – and inadvertently listed the applicant as “Internet Source Communications LLC,” the name of an entity that did not exist at the time.
8. My intention was to list the applicant of the Mark as Internet Source LLC, an existing company with the same address as the one that I wrote on the application.
9. I also mistakenly identified the applicant on the registration form as a “corporation” instead of a “limited liability company.”
10. As a result of my mistakes on the application, the current Registration Certificate for the Mark identifies the registrant as “Internet Source Communications LLC (New Jersey Corporation).” This is erroneous, as the Registration Certificate should identify the registrant as “Internet Source LLC (New Jersey Limited Liability Company).”
11. Adding to the confusion, for reasons having nothing to do with my mistake on the application, a couple of years later, in May 2012, I formed another limited liability company in New Jersey called Internet Source Communications LLC, which is the name listed on the Registration Certificate for the Mark.
12. In October 2014, I executed a written assignment transferring ownership of the Mark to Spy Phone Labs. This written assignment memorialized an oral assignment that occurred in August 2012, when Spy Phone Labs started using the Mark to identify the app in an online marketplace called Google Play.
13. Due to the mistaken identification of the applicant on the application and resulting Registration Certificate, however, Internet Source Communications LLC was listed as the owner of the Mark in the assignment, when, in fact, the actual owner was Internet Source LLC.
14. Upon approval of the Director’s issuance of a certificate of correction or a new certificate reflecting the correct registrant of the Mark, I will cause a new assignment to issue reflecting assignment of the Mark from Internet Source LLC to Spy Phone Labs.
15. The errors that appear on the Registration Certificate for the Mark occurred in good faith through my own the fault due to errors on the application that I prepared.
16. I was unaware of this naming error until just last month when it was brought to my attention in a Petition to Cancel the registration for the Mark filed by a party against whom Spy Phone Labs has brought a federal lawsuit for trademark infringement, and I have acted diligently to correct this error.
17. If the registration certificate is corrected, there will be no harm and no prejudice to any person since I am the sole owner of all the affected entities.

<b>FIRM NAME</b>	Greenberg Freeman LLP
<b>INTERNAL ADDRESS</b>	Fl. 22

<b>STREET</b>	110 E. 59th St.
<b>CITY</b>	New York
<b>STATE</b>	New York
<b>ZIP/POSTAL CODE</b>	10022
<b>COUNTRY</b>	United States
<b>PHONE</b>	212-838-3121
<b>EMAIL</b>	freeman@greenbergfreeman.com
<b>AUTHORIZED EMAIL COMMUNICATION</b>	Yes
<b>CORRESPONDENCE SECTION</b>	
<b>ORIGINAL ADDRESS</b>	SPY PHONE LABS LLC 1465 ROUTE 23 SOUTH #139 WAYNE New Jersey United States 07470
<b>NEW CORRESPONDENCE SECTION</b>	
<b>NAME</b>	Michael Freeman
<b>FIRM NAME</b>	Greenberg Freeman LLP
<b>INTERNAL ADDRESS</b>	Fl. 22
<b>STREET</b>	110 E. 59th St.
<b>CITY</b>	New York
<b>STATE</b>	New York
<b>ZIP/POSTAL CODE</b>	10022
<b>COUNTRY</b>	United States
<b>PHONE</b>	212-838-3121
<b>EMAIL</b>	freeman@greenbergfreeman.com
<b>AUTHORIZED EMAIL COMMUNICATION</b>	Yes
<b>PAYMENT SECTION</b>	
<b>TOTAL AMOUNT</b>	100
<b>TOTAL FEES DUE</b>	100
<b>SIGNATURE SECTION</b>	
<b>DECLARATION SIGNATURE</b>	/dan parisi/
<b>SIGNATORY'S NAME</b>	Dan Parisi
<b>SIGNATORY'S POSITION</b>	Principal
<b>DATE SIGNED</b>	05/27/2016
<b>REQUEST SIGNATURE</b>	/michael freeman/
<b>SIGNATORY'S NAME</b>	Michael Freeman
<b>SIGNATORY'S POSITION</b>	Attorney of record, New York bar
<b>DATE SIGNED</b>	05/27/2016
<b>AUTHORIZED SIGNATORY</b>	YES

CONCURRENT § 8, 8 &15, OR 8 &9 FILED	NO
<b>FILING INFORMATION SECTION</b>	
SUBMIT DATE	Fri May 27 13:05:37 EDT 2016
TEAS STAMP	USPTO/S7R-XX.XX.XX.XX-201 60527130537098540-3948486 -550c2f64a7923eb8f5579a6d 61e4edc40af7c56634527da49 e5595d144403ba6-CC-299-20 160527125141778070

Under the Paperwork Reduction Act of 1995 no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PTO Form 1597 (Rev 11/2007)

OMB No. 0651-0055 (Exp 07/31/2018)

## Section 7 Request Form

### To the Commissioner for Trademarks:

The registrant requests the following amendment(s) to registration no. **3948486** SPY PHONE(Standard Characters, see <http://tmng-al.uspto.gov/resting2/api/img/77777312/large>) has been amended as follows:

### EXPLANATION OF FILING

The following statement is by Dan Parisi, sole member of registrant Spy Phone Labs LLC:

1. I am the sole member of registrant Spy Phone Labs LLC (“Spy Phone Labs”). The information contained herein is based on my own personal knowledge.
2. I submit this declaration in support of Spy Phone Labs’ application, pursuant to Lanham Act § 7(h), 15 U.S.C. § 1057(h), and Trademark Manual of Examining Procedure 1201.02(c), to correct a mistake in the identity of the registrant appearing on the Registration Certificate for the trademark SPY PHONE, Registration No. 3,948,486 (the “Mark”).
3. For the reasons set forth below, the registrant of the Mark should be identified on the Registration Certificate as “Internet Source LLC (New Jersey Limited Liability Company),” but is mistakenly listed as “Internet Source Communications LLC (New Jersey Corporation).”
4. As of July 9, 2009, when I filed to register the Mark, I was the sole owner and chief officer of at least seven companies that were in the business of purchasing and developing domain names. Two of these companies were Internet Source Communications, Inc., a corporation formed under the laws of Panama, and Internet Source LLC, a limited liability company formed under the laws of New Jersey.
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14. Upon approval of the Director’s issuance of a certificate of correction or a new certificate reflecting the correct registrant of the Mark, I will cause a new assignment to issue reflecting assignment of the Mark from Internet Source LLC to Spy Phone Labs.
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17. If the registration certificate is corrected, there will be no harm and no prejudice to any person since I am the sole owner of all the affected entities.

#### **ATTORNEY INFORMATION**

Registrant proposes to amend the following:

**Current:**

**Proposed:** Michael Freeman of Greenberg Freeman LLP, having an address of 110 E. 59th St. Fl. 22 New York, New York United States 10022, whose e-mail address is freeman@greenbergfreeman.com, whose phone number is 212-838-3121.

#### **CORRESPONDENCE ADDRESS CHANGE**

Registrant proposes to amend the following:

**Current:** SPY PHONE LABS LLC 1465 ROUTE 23 SOUTH #139 WAYNE New Jersey United States 07470

**Proposed:** Michael Freeman of Greenberg Freeman LLP, having an address of 110 E. 59th St. Fl. 22 New York, New York United States 10022, whose e-mail address is freeman@greenbergfreeman.com, whose phone number is 212-838-3121.

#### **FEE(S)**

Fee(s) in the amount of \$100 is being submitted.

#### **SIGNATURE(S)**

**Declaration Signature**

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all statements made of his/her own

knowledge are true and all statements made on information and belief are believed to be true.

Signature: /dan parisi/ Date: 05/27/2016

Signatory's Name: Dan Parisi

Signatory's Position: Principal

**Request Signature**

Signature: /michael freeman/ Date: 05/27/2016

Signatory's Name: Michael Freeman

Signatory's Position: Attorney of record, New York bar

Signatory's Phone: 212-838-3121

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the registrant in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The registrant is NOT filing a Declaration of Use of Mark under Section 8; a Combined Declaration of Use of Mark under Sections 8 & 15; or a Combined Declaration of Use of Mark/Application for Renewal of Registration of Mark under Sections 8 & 9 in conjunction with this Section 7 Request.

Mailing Address: Michael Freeman

Greenberg Freeman LLP

Fl. 22

110 E. 59th St.

New York, New York 10022

RAM Sale Number: 3948486

RAM Accounting Date: 05/31/2016

Serial Number: 77777312

Internet Transmission Date: Fri May 27 13:05:37 EDT 2016

TEAS Stamp: USPTO/S7R-XX.XX.XX.XX-201605271305370985

40-3948486-550c2f64a7923eb8f5579a6d61e4e

dc40af7c56634527da49e5595d144403ba6-CC-2

99-20160527125141778070

**ROUTING SHEET TO POST REGISTRATION (PRU)**

**Registration Number:** 3948486



**Serial Number:** 77777312



**RAM Sale Number:** 3948486

**RAM Accounting Date:** 20160531

**Total Fees:** \$100

Note: Process in accordance with Post Registration Standard Operating Procedure (SOP)

<u>Transaction</u>	<u>Fee Code</u>	<u>Transaction Date</u>	<u>Fee per Class</u>	<u>Number of Classes</u>	<u>Total Fee</u>	
§7 request		20160527	\$0	0	0	\$100

Physical Location: MADCD- ALEX. CENTRAL DOCKET

Lost Case Flag: False

In TICRS (AM-FLG-IN-TICRS): True

**Transaction Date:** 20160527

