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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

GOOGLE INC.,  
  
Plaintiff,  
  
v.  
  
AMERICAN BLIND & WALLPAPER  
FACTORY, INC., et al.,  
  
Defendants.

Case Number C 03-05340 JF  
  
ORDER GRANTING IN PART AND  
DENYING IN PART COUNTER-  
DEFENDANT’S AND THIRD-PARTY  
DEFENDANTS’ MOTIONS TO  
DISMISS  
  
[Docket Nos. 36 and 37]

AMERICAN BLIND & WALLPAPER  
FACTORY, INC.,  
  
Counterclaimant,  
  
v.  
  
GOOGLE INC., et al.,  
  
Counter-Defendant/  
Third-Party Defendants.

Counter-Defendant Google Inc. (“Google”) and Third-Party Defendants Ask Jeeves, Inc.  
 (“Ask Jeeves”), Earthlink, Inc. (“Earthlink”), America Online, Inc. (“AOL”), Netscape  
 Communications Corporation (“Netscape”), and Compuserve Interactive Services, Inc.

1 (“Compuserve”) (collectively “Defendants”) move to dismiss the counterclaims and third-party  
2 claims of Counterclaimant American Blind & Wallpaper Factory, Inc. (“American Blind”) pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief  
3 can be granted.<sup>1</sup> American Blind opposes the motions. The Court has read the moving and  
4 responding papers and has considered the oral arguments of counsel presented on September 17,  
5 2004. For the reasons set forth below, the motions to dismiss will be granted in part and denied  
6 in part.  
7

### 8 I. BACKGROUND

9 Google filed the instant action for declaratory relief on November 26, 2003, seeking a  
10 judicial determination that its “AdWords” advertising program does not infringe American  
11 Blind’s trademarks. On April 12, 2004, the Court denied American Blind’s motion to dismiss the  
12 complaint or, in the alternative, to stay proceedings in the case. On May 4, 2004, American Blind  
13 answered Google’s complaint and asserted counterclaims against Google and third-party claims  
14 against Ask Jeeves, Earthlink, AOL, Netscape, and Compuserve for trademark infringement and  
15 dilution, false representation, injury to business reputation, unfair competition, tortious  
16 interference with prospective business advantage, and, in the alternative, contributory trademark  
17 infringement and dilution. Now before the Court are Defendants’ motions to dismiss American  
18 Blind’s counterclaims and third-party claims. American Blind’s allegations are as follows:

19 American Blind is a direct-to-consumer retailer of custom window treatments and wall  
20 coverings. It sells and promotes its home decorating products and related services across the  
21 United States through a Web site<sup>2</sup> and toll-free telephone numbers. A significant amount of  
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23 <sup>1</sup> Two separate motions to dismiss are before the Court: (1) a motion by Google, Ask  
24 Jeeves, and Earthlink to dismiss American Blind’s counterclaims and third-party claims and (2) a  
25 motion by AOL, Netscape, and Compuserve to dismiss American Blind’s third-party claims.  
26 AOL, Netscape, and Compuserve adopt and incorporate by reference the arguments set forth in  
27 the motion by Google, Ask Jeeves, and Earthlink.

28 <sup>2</sup> American Blind owns over a dozen Internet domain names, including  
<www.americanblind.com>, <www.americanblindandwallpaper.com>, and  
<www.americanblindandwallpaperfactory.com>.

1 American Blind's business is conducted through its Web site, which it has operated since 1997.<sup>3</sup>  
2 It estimates that its Web site receives more than 30,000 visits per day and processes more than  
3 400,000 transactions per year. Since at least 1986, American Blind has used the names and marks  
4 "AMERICAN BLIND" and "AMERICAN BLINDS" in connection with its products and  
5 services. In addition, American Blind is the owner of and has exclusive rights to use the  
6 following trademarks, which are registered with the United States Patent and Trademark Office:  
7 "AMERICAN BLIND & WALLPAPER FACTORY," "AMERICAN BLIND FACTORY," and  
8 "DECORATETODAY."<sup>4</sup> As a result of extensive advertising and promotion and annual  
9 revenues in excess of \$100 million, American Blind alleges that its products and services sold  
10 under the American Blind Marks<sup>5</sup> have acquired a fine reputation and are famous among  
11 prospective purchasers of home decorating products and related services in the United States.

12 Google operates an Internet search engine, which allows Internet users to locate Web sites  
13 that match the "keywords," or search terms, they enter. A search engine uses algorithms to  
14 process the keywords and produce a search-results page that displays links to the Web sites in the  
15 search engine's database that match the keywords. Links to the Web sites usually are displayed in  
16 order of decreasing relevance, with the most relevant Web sites listed first. Google's free search  
17 engine processes hundreds of millions of searches daily and covers billions of Web pages.

18 In addition, Google offers a keyword-triggered advertising program called "AdWords."  
19 AdWords enables advertisers to purchase or bid on certain keywords. Then, when an Internet  
20 user enters those keywords in Google's search engine, the program generates links, known as  
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22 <sup>3</sup> American Blind has spent over \$10 million developing its Web site, spends over \$1  
23 million per year maintaining, enhancing, and updating its Web site, and employs over fifty full-  
24 time employees in connection with its Internet operations.

25 <sup>4</sup> The registration dates for these trademarks are December 17, 1996, November 3, 1987,  
and July 17, 2001, respectively.

26 <sup>5</sup> Hereinafter, the term "American Blind Marks" refers collectively to the names and  
27 marks "AMERICAN BLIND" and "AMERICAN BLINDS" and to American Blind's three  
28 registered trademarks.

1 “Sponsored Links,” to the advertisers’ Web sites. Sponsored Links appear at the top and on the  
2 margins of Google’s search-results pages. American Blind alleges that, in many instances, the  
3 search-results pages “are designed so that the ‘Sponsored Link’ display is inconspicuous or  
4 otherwise not apparent,” and “it is not apparent who exactly ‘sponsors’ these links.”  
5 Counterclaims ¶ 39. Whenever an Internet user clicks on a Sponsored Link, the corresponding  
6 advertiser must pay Google. According to American Blind, Google has reported that ninety-six  
7 percent of its net revenues in the first quarter of 2004 were derived from advertising. Google also  
8 offers a feature called “AdWords Keyword Suggestions,” which recommends additional keyword  
9 purchases to its advertising customers to “help you improve your ad relevance.” *Id.* ¶ 45 & Ex. B.  
10 The suggestions are organized into categories by Google and sometimes are referred to as  
11 “optimization campaigns.”

12 Through AdWords, Google has sold to American Blind’s competitors keywords  
13 comprised, in whole or part, of the American Blind Marks, including “American Blind,”  
14 “American Blinds,” and “Americanblinds.com,” and these sales have continued over American  
15 Blind’s objections. Thus, when an Internet user enters these keywords in Google’s search engine,  
16 Sponsored Links to the competitors’ Web sites appear on the search-results page. Moreover,  
17 through its AdWords Keyword Suggestions feature, Google actively and deliberately encourages  
18 American Blind’s competitors to purchase as keywords both the American Blind Marks and  
19 “virtually every conceivable, though indistinguishable, iteration of those marks.” *Id.* ¶ 45. For  
20 example, an advertiser who is considering purchasing the keyword “American Blind” is  
21 encouraged also to purchase the keywords “american blinds,” “american blinds and wallpaper,”  
22 and “american blinds and wallpaper factory,” among others. Google has labeled the optimization  
23 campaign containing these suggestions as the “American Blind optimization campaign.”

24 American Blind alleges that the intended result of AdWords is to divert consumers who  
25 wish to find American Blind’s products and services to search-results pages that list the Web  
26 sites of American Blind’s competitors. That is, Google sells and its advertisers purchase the  
27 possibility of intercepting American Blind’s potential customers, who may click on the links to  
28

1 the Web sites of American Blind’s competitors without realizing that they are being directed to a  
2 competitor’s Web site or who may eventually recognize the diversion but either fail to search for  
3 or be forced to spend time and energy searching for American Blind’s Web site. Google has the  
4 technological capacity to block the purchase of keywords and in fact, for over four years,  
5 operated under a policy pursuant to which it would exercise its discretion to block the purchase  
6 of certain keywords once it was advised that a company had purchased as a keyword another  
7 company’s trademark.<sup>6</sup> Google changed its policy sometime after January 27, 2004, when  
8 American Blind filed a lawsuit against Google in the United States District Court for the  
9 Southern District of New York. According to American Blind, Google’s new policy is not to  
10 disable Sponsored Links when advertisers have purchased keyword triggers that are trademarked  
11 terms.

12 Ask Jeeves, Earthlink, AOL, Netscape, and Compuserve (collectively “the non-Google  
13 Defendants”) operate Web sites that include an Internet search engine. They pay Google to access  
14 its Web-searching platform and thus display “similar, if not virtually the same, results of search  
15 queries as those displayed by Google.” *Id.* ¶ 68. They also profit each time an Internet user clicks  
16 on “any of the links provided by these search results.”<sup>7</sup> *Id.*

17 Although American Blind has not given Defendants permission or a license to use the  
18 American Blind Marks for the promotion or sale of the products and services of its competitors,  
19 it alleges that Defendants are capitalizing illegally on the American Blind Marks by permitting  
20 and encouraging American Blind’s competitors to purchase keywords<sup>8</sup> that cause links to the

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22 <sup>6</sup> American Blind alleges that Google falsely represented at one point that it was blocking  
23 competitors from purchasing American Blind’s registered trademarks as keywords.

24 <sup>7</sup> Although the meaning of this statement is not entirely clear, it reasonably may be  
25 inferred from the broader context of the counterclaims, including the specific allegations against  
26 Google, that American Blind alleges that the non-Google Defendants profit when Internet users  
click on the Sponsored Links or their equivalent and not when they click on literally “any of the  
links” displayed on a given search-results page.

27 <sup>8</sup> Although American Blind levels this particular allegation against all Defendants, its  
28 *specific* factual allegations regarding the sale of and profit from the American Blind Marks as

1 competitors' Web sites to be listed "in a position above or next to" the link to American Blind's  
 2 Web site when Internet users enter search terms "identical or substantially similar to the  
 3 American Blind Marks." *Id.* ¶ 71. American Blind further alleges that "confusion" regarding  
 4 sponsorship, authorization, and/or source of the links<sup>9</sup> and "diversion" of Internet users to the  
 5 Web sites of American Blind's competitors are the "intended result[s]" of Defendants' manner of  
 6 listing search results. *Id.* ¶ 73. Internet users' ability to distinguish between Sponsored Links and  
 7 links to American Blind's Web site allegedly is compromised not only by Defendants' use of the  
 8 label "Sponsored Links,"<sup>10</sup> without explanation that the Sponsored Links actually are paid  
 9 advertisements unaffiliated with American Blind, but also by Defendants' failure to display  
 10 Sponsored Links in a different color, typeface, or font size from that used to display other links.  
 11 Defendants and their advertisers—rather than American Blind—are said to be profiting from  
 12 their use of the American Blind Marks, while American Blind suffers harm to its sales,  
 13 reputation, customer relationships, and marks.

## 14 II. LEGAL STANDARD

15 A complaint may be dismissed for failure to state a claim upon which relief can be  
 16 granted for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under  
 17 a cognizable legal theory. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Robertson v. Dean*  
 18 *Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). For purposes of a motion to dismiss,

19 \_\_\_\_\_  
 20 keywords are much more detailed with respect to Google than they are with respect to the non-  
 21 Google Defendants.

22 <sup>9</sup> American Blind elaborates that "Defendants' search engines are deceptive and mislead  
 23 consumers into believing falsely that the website links to which they are directed via manipulated  
 24 search 'results' links are sponsored or authorized by and/or originating from American Blind"  
 25 and that the "manipulated search 'results' engineered by the Defendants fail to inform the  
 26 consumers that the companies listed therein may have no relationship with—and, indeed, may  
 27 directly compete with American Blind—the trademark owner for which the user was searching."  
 28 *Id.* ¶¶ 75-76.

<sup>10</sup> Although Defendants explain that some of them use a different term to label their  
 keyword-triggered advertisements, the Court will use the term "Sponsored Links" to refer to all  
 such links displayed by all Defendants.

1 all allegations of material fact in the complaint are taken as true and construed in the light most  
 2 favorable to the nonmoving party. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir.  
 3 1994). Although the Court generally may not consider any material beyond the pleadings when  
 4 ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), *Cooper v.*  
 5 *Pickett*, 137 F.3d 616, 622 (9th Cir. 1997), it may consider documents that are attached to and  
 6 part of the complaint, *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). A  
 7 complaint should not be dismissed “unless it appears beyond doubt the plaintiff can prove no set  
 8 of facts in support of his claim that would entitle him to relief.” *Clegg*, 18 F.3d at 754. However,  
 9 the Court “is not required to accept legal conclusions cast in the form of factual allegations if  
 10 those conclusions cannot reasonably be drawn from the facts alleged.” *Id.* at 754-55. Motions to  
 11 dismiss generally are viewed with disfavor under this liberal standard and are granted rarely. *See*  
 12 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

### 13 III. DISCUSSION

#### 14 A. Trademark Infringement, Dilution, False Representation, Unfair Competition, and 15 Injury to Business Reputation

16 Defendants move to dismiss American Blind’s claims of trademark infringement,<sup>11</sup> false  
 17 representation,<sup>12</sup> and dilution<sup>13</sup> under the Lanham Act, dilution and injury to business reputation<sup>14</sup>  
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19 <sup>11</sup> Section 32(1) of the Lanham Act creates civil liability for “[a]ny person who shall,  
 20 without the consent of the registrant . . . , use in commerce any reproduction, counterfeit, copy, or  
 21 colorable imitation of a registered mark in connection with the sale, offering for sale,  
 22 distribution, or advertising of any goods or services on or in connection with which such use is  
 23 likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1)(a). American  
 24 Blind alleges that “the unauthorized and willful use of copies, variations, reproductions,  
 simulations or colorable imitations of [its] registered marks in connection with the sale of  
 keyword advertising” constitutes such trademark infringement. Counterclaims ¶ 91.

25 <sup>12</sup> Section 43(a) of the Lanham Act creates civil liability for “[a]ny person who, on or in  
 26 connection with any goods or services, . . . uses in commerce . . . any false designation of origin,  
 27 false or misleading description of fact, or false or misleading representation of fact” that “is  
 28 likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or  
 association of such person with another person, or as to the origin, sponsorship, or approval of  
 his or her goods, services, or commercial activities by another person.” 15 U.S.C. § 1125(a)(1).

1 and unfair competition<sup>15</sup> under the California Business and Professions Code, and trademark  
 2 infringement and unfair competition under California common law on the ground that American  
 3 Blind has not alleged actionable trademark “use.” *See* 15 U.S.C. § 1114(1)(a) (proscribing  
 4 particular “use in commerce” of registered mark); 15 U.S.C. § 1125(a)(1) (proscribing particular

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5  
 6 American Blind alleges that “the use of copies, variations, reproductions, simulations or  
 7 colorable imitations of the American Blind Marks on and in connection with keyword  
 8 advertising” constitutes a false designation of origin and false description and representation.  
 9 Counterclaims ¶ 96. Specifically, Defendants’ use is alleged to “convey[] the misleading  
 10 commercial impression to the public that the advertisers other than American Blind listed in the  
 11 Defendants’ manipulated search ‘results’ pages, or their products, are approved by, sponsored by  
 12 or are [sic] somehow affiliated or connected with American Blind.” *Id.* ¶ 95.

13 <sup>13</sup> Section 43(c) of the Lanham Act provides civil remedies for a “person’s commercial  
 14 use in commerce of a mark or trade name, if such use begins after the mark has become famous  
 15 and causes dilution of the distinctive quality of the mark.” 15 U.S.C. § 1125(c). American Blind  
 16 alleges that Defendants’ use of “copies, variations, reproductions, simulations or colorable  
 17 imitations of the American Blind Marks in connection with the advertising, offering for sale and  
 18 sale of Defendants’ keyword advertising services” constitutes dilution. Counterclaims ¶ 100.  
 19 Specifically, Defendants’ use is alleged to have lessened the capacity of the American Blind  
 20 Marks to distinguish American Blind’s products and services from those of others and to have  
 21 diluted the distinctive quality of the American Blind Marks.

22 <sup>14</sup> Section 14330 of the California Business and Professions Code provides a civil remedy  
 23 for “[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark  
 24 registered under this chapter, or a mark valid at common law, . . . notwithstanding the absence of  
 25 competition between the parties or the absence of confusion as to the source of goods or  
 26 services.” Cal. Bus. & Prof. Code § 14330. American Blind alleges that Defendants’  
 27 “unauthorized use . . . of copies, variations, reproductions, simulations or colorable imitations of  
 28 . . . the American Blind Marks in connection with the advertising, offering for sale and sale of  
 Defendants’ keyword advertising services” constitutes dilution and injury to American Blind’s  
 business reputation. Counterclaims ¶ 105.

<sup>15</sup> Section 17200 of the California Business and Professions Code prohibits “any  
 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading  
 advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of  
 Division 7 of the Business and Professions Code.” Cal. Bus. & Prof. Code § 17200. American  
 Blind alleges that Defendants’ “unauthorized use . . . of copies, variations, reproductions,  
 simulations or colorable imitations of . . . the American Blind Marks in connection with the  
 advertising, offering for sale and sale of Defendants’ keyword advertising services” constitutes  
 unfair competition. Counterclaims ¶ 110. Specifically, Defendants’ use is alleged to be  
 “misleading in a material respect” and to “dilute or tarnish American Blind’s business reputation  
 and/or the effectiveness of the . . . American Blind Marks.” *Id.* ¶¶ 110-11.



1 “use[] in commerce” of false designation of origin, false or misleading description of fact, or  
2 false or misleading representation of fact); 15 U.S.C. § 1125(c) (proscribing particular  
3 “commercial use in commerce” of famous mark); *Playboy Enters., Inc. v. Netscape*  
4 *Communications Corp.*, 354 F.3d 1020, 1024 n.10 (9th Cir. 2004) (declining to examine  
5 California trademark claims separately because they are ““substantially congruent”” to trademark  
6 claims under the Lanham Act); *Brookfield Communications, Inc. v. West Coast Entm’t Corp.*,  
7 174 F.3d 1036, 1047 n.8 (9th Cir. 1999) (observing that analysis under sections 32 and 43(a) of  
8 the Lanham Act oftentimes is identical, even though the latter provision protects against a wider  
9 range of practices than the former); *Sunset House Distrib. Corp. v. Coffee Dan’s, Inc.*, 50 Cal.  
10 Rptr. 49, 52 (Ct. App. 1966) (requiring, among other things, allegation of defendant’s “use of a  
11 confusingly similar tradename” to state claim for trade name unfair competition under California  
12 law).

13 In support of their argument that American Blind has not alleged—and cannot  
14 allege—that they have used the American Blind Marks in a manner that is cognizable under the  
15 trademark laws, Defendants cite a number of authorities from other circuits that either state or  
16 can be read to suggest that a defendant is not engaged in the requisite “use” of a trademark or  
17 other mark unless the defendant uses the mark to identify the source of *its own* goods or services.  
18 Among them are (1) *Interactive Products Corp. v. a2z Mobile Office Solutions, Inc.*, in which the  
19 United States Court of Appeals for the Sixth Circuit identified as a “preliminary question” in a  
20 trademark case “whether defendants are using the challenged mark in a way that identifies the  
21 source of *their* goods” and held that if the defendants are using the trademark only “in a  
22 ‘non-trademark’ way—that is, in a way that does not identify the source of a product—then  
23 trademark infringement and false designation of origin laws do not apply,”<sup>16</sup> *Interactive Prods.*

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25 <sup>16</sup> Although *Interactive Products* involved a question as to whether the defendant’s use of  
26 the plaintiff’s trademark in the post-domain path of one of the defendant’s Web pages signified  
27 the source of either the Web page or the product offered for sale therein, the court ultimately  
28 decided the case on the basis of lack of evidence of likelihood of confusion rather than on the  
basis of trademark “use.” See *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326  
F.3d 687, 698 (6th Cir. 2003).

1 *Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 695 (6th Cir. 2003) (emphasis added);  
 2 (2) *U-Haul International, Inc. v. WhenU.com, Inc.*, in which the United States District Court for  
 3 the Eastern District of Virginia found that there was no trademark “use” under the Lanham Act,  
 4 because, among other things, there was no evidence that the defendant “use[d] [the plaintiff’s]  
 5 trademarks to identify the source of its goods or services,” *U-Haul Int’l, Inc. v. WhenU.com, Inc.*,  
 6 279 F. Supp. 2d 723, 728 (E.D. Va. 2003) (emphasis added); and (3) *Wells Fargo & Co. v.*  
 7 *WhenU.com, Inc.*, in which the United States District Court for the Eastern District of Michigan  
 8 held that “[t]here can be no liability under the Lanham Act absent the use of a trademark in a way  
 9 that identifies the products and services being advertised by the defendant,” *Wells Fargo & Co. v.*  
 10 *WhenU.com, Inc.*, 293 F. Supp. 2d 734, 757 (E.D. Mich. 2003) (emphasis added).<sup>17</sup> Relying on

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11  
 12 <sup>17</sup> Both *U-Haul* and *Wells Fargo*, as well as a third case, *1-800 Contacts, Inc. v.*  
 13 *WhenU.com*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003), involved trademark disputes arising from the  
 14 pop-up advertisements generated by WhenU.com’s computer software program, “SaveNow.”  
 15 SaveNow contained a “directory of commonly used search phrases, commonly visited web  
 16 addresses, and various keyword algorithms,” and it functioned by scanning an Internet user’s  
 17 activity to “determine whether any of the terms, web addresses, or content match[ed] the  
 18 information in the directory.” *U-Haul*, 279 F. Supp. 2d at 725-26. When it found a match,  
 19 SaveNow “identifie[d] an associated product or service category” and then, if appropriate,  
 20 displayed a pop-up advertisement on the user’s computer screen. *Id.* at 726. The particular  
 21 advertisement that was displayed was selected at random from the advertisements that matched  
 22 the “category of the user’s activity.” *Id.* WhenU.com (“WhenU”) sold “advertising space and  
 23 opportunities” to merchants but did not sell “individual web addresses” or “guarantee to any  
 24 advertiser that its ad [would] be shown when a consumer visit[ed] a particular website.” *Id.* The  
 25 plaintiffs in *U-Haul*, *Wells Fargo*, and *1-800 Contacts* brought claims for trademark violations  
 26 under the Lanham Act, among other things, based on SaveNow’s display of competitors’ pop-up  
 27 advertisements when Internet users searched for the plaintiffs’ Web sites.

22 The *U-Haul* court granted summary judgment in favor of WhenU as to the trademark  
 23 claims, finding that WhenU’s pop-up advertisements did not constitute “use in commerce” of the  
 24 plaintiff’s trademarks. *See id.* at 727. It reasoned that WhenU’s incorporation of the plaintiff’s  
 25 trademarks into the SaveNow directory did not constitute trademark “use” under the Lanham  
 26 Act, because, among other things, there was no evidence that WhenU “use[d] [the plaintiff’s]  
 27 trademarks to identify the source of its goods or services,” and WhenU “merely use[d] the marks  
 28 for the ‘pure machine-linking function’ and in no way advertise[d] or promote[d]” the plaintiff’s  
 trademarks. *Id.* at 728. Similarly, the *Wells Fargo* court denied the plaintiffs’ motion for a  
 preliminary injunction, in part based on its conclusion that WhenU did not “use” the plaintiffs’  
 marks in commerce. *See Wells Fargo*, 293 F. Supp. 2d at 757. It found that the inclusion of the  
 plaintiffs’ marks in the SaveNow directory did not constitute trademark “use,” because WhenU

1 these authorities,<sup>18</sup> Defendants argue that American Blind’s claims that are premised on  
 2 trademark “use” must be dismissed, because American Blind does not—and cannot—allege that  
 3 Defendants use the American Blind Marks to identify the source of *their own* search engines or  
 4 advertising products.

5 The Court has given careful consideration to the arguments and authorities presented by  
 6 Defendants, as well as to their attempts to analogize this case to non-Internet situations in which

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7 did not “use any of the plaintiffs’ trademarks to indicate anything about the source of the  
 8 products and services it advertise[d].” *Id.* at 762. In contrast, the *1-800 Contacts* court, in ruling  
 9 on the plaintiff’s motion for a preliminary injunction, concluded that WhenU had used the  
 10 plaintiff’s mark. *See 1-800 Contacts*, 309 F. Supp. 2d at 489. Among other things, it found that  
 11 inclusion of a version of the plaintiff’s mark in the SaveNow directory was a “use” of the mark  
 12 “to advertise and publicize companies that are in direct competition with Plaintiff.” *Id.* The *1-800*  
*Contacts* court disposed of the contrary findings on “use” in *U-Haul* and *Wells Fargo* in a brief  
 13 footnote, stating simply that it disagreed with and was not bound by those decisions. *See id.* at  
 14 490 n.43.

15 <sup>18</sup> In addition to urging the Court to adopt the reasoning of the aforementioned cases,  
 16 Defendants also make more general arguments for dismissal drawn from the source-identifying  
 17 function of trademarks, *see* 15 U.S.C. § 1127 (defining the term “trademark” to include “any  
 18 word, name, symbol, or device, or any combination thereof” that is used by a person “to identify  
 19 and distinguish his or her goods . . . from those manufactured or sold by others and to indicate  
 20 the source of the goods”); *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308  
 21 (9th Cir. 1992) (stating that the “purpose of trademark” is a “source-identification function”), and  
 22 the policies behind the trademark laws, *see Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924)  
 23 (holding that a trademark “only gives the right to prohibit the use of it so far as to protect the  
 24 owner’s good will against the sale of another’s product as his”). More recent decisions from the  
 25 United States Supreme Court and the United States Court of Appeals for the Ninth Circuit  
 26 provide a fuller explanation of the policies and objectives of the trademark laws. *See, e.g.*,  
 27 *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995) (stating that the “basic  
 28 objectives” of trademark law are, “by preventing others from copying a source-identifying mark,  
 [to] ‘reduce[] the customer’s costs of shopping and making purchasing decisions,’ for it quickly  
 and easily assures a potential customer that *this* item—the item with this mark—is made by the  
 same producer as other similarly marked items that he or she liked (or disliked) in the past. . . .  
 [and to] help[] assure a producer that it (and not an imitating competitor) will reap the financial,  
 reputation-related rewards associated with a desirable product”) (internal citation omitted); *Intel*  
*Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (stating that “[t]rademark policies  
 are designed (1) to protect consumers from being misled as to the enterprise, or enterprises, from  
 which the goods or services emanate or with which they are associated; (2) to prevent an  
 impairment of the value of the enterprise which owns the trademark; and (3) to achieve these  
 ends in a manner consistent with the objectives of free competition”) (internal quotation marks  
 omitted).

1 they assert that there would be no question as to the absence of any viable trademark claims.<sup>19</sup>  
2 However, in light of the uncertain state of the law, the Court does not find Defendants'  
3 arguments sufficient to warrant dismissal of American Blind's counterclaims and third-party  
4 claims at the pleading stage. In particular, given the most relevant Ninth Circuit  
5 decision—*Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir.  
6 2004)—it does not appear “beyond doubt” that American Blind “can prove no set of facts in  
7 support of [its] claim[s] that would entitle [it] to relief,” *Clegg*, 18 F.3d at 754.

8 In *Playboy*, the Ninth Circuit reversed a summary judgment in favor of two companies  
9 that operate Internet search engines, Netscape and Excite, Inc., finding that genuine issues of  
10 material fact precluded summary judgment on the plaintiff's claims of trademark infringement  
11 and dilution. *See Playboy*, 354 F.3d at 1022. The case involved a practice called “keying,”  
12 whereby advertisers could target Internet users with particular interests by linking their  
13 advertisements to certain search terms that were grouped into lists by the defendants. *See id.* at  
14 1022-23. When a user entered one or more of those terms into the search engines, advertisements  
15 that were “keyed” to the terms would appear as “banner ads” running along the top or side of the  
16 search-results page. *Id.* at 1023. The defendants were paid a fee by the advertisers for the  
17 “keying” service. *Id.* The list containing terms related to sex and adult-oriented entertainment, to  
18 which the defendants required adult-oriented companies to link their advertisements, contained  
19 two of the plaintiff's trademarks: “playboy” and “playmate.” *Id.* The adult-oriented banner ads  
20 often were graphic in nature, were confusingly labeled or not labeled at all, and contained buttons  
21 reading “click here” that, when clicked, made the search-results page disappear and opened the  
22 advertiser's Web site. *Id.*

23 //

24 \_\_\_\_\_  
25 <sup>19</sup> Defendants analogize the instant case to Ford's payment to have *Car and Driver*  
26 magazine run Ford advertisements facing every Toyota advertisement in order to target Toyota's  
27 customers or a pizzeria owner's handing flyers to customers on their way to Domino's. While it  
28 is of no consequence to the outcome of the instant motions, the Court notes that, as alleged by  
American Blind, Defendants themselves would not be the analogs to Ford and the pizzeria  
owner, because they are not alleged to be the advertisers.

1 In concluding that a genuine issue of material fact precluded summary judgment as to the  
 2 claim of trademark infringement, the *Playboy* court focused on the element of likelihood of  
 3 confusion.<sup>20</sup> *See id.* at 1024-29. It found adequate evidence of initial interest confusion<sup>21</sup> in the  
 4 appearance of unlabeled banner ads—many of which took users to the advertisers’ Web sites  
 5 when they accepted the invitation to “click here”—immediately after users entered the plaintiff’s  
 6 trademarks as search terms in the defendants’ search engines. *See id.* at 1025-26. The court  
 7 further concluded that the defendants’ alleged “use” of the plaintiff’s trademarks—a  
 8 “misappropriat[ion]” of the goodwill of the plaintiff’s marks by defendants “in conjunction with  
 9 advertisers,” whereby Internet users were led to the Web sites of the plaintiff’s competitors—was  
 10 “actionable.” *Id.* Accordingly, the court allowed the case to proceed under theories of direct and  
 11 contributory liability, because the defendants were “potentially liable” under one theory or the  
 12 other.<sup>22</sup> *Id.* at 1024 (observing that the question of “[w]hether the defendants are directly or

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13  
 14 <sup>20</sup> Likelihood of confusion is the “core element of trademark infringement.” *Id.* at 1024  
 15 (quoting *Brookfield Communications, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1053 (9th  
 Cir. 1999)).

16 <sup>21</sup> The term “initial interest confusion” describes a situation in which, although the  
 17 consumer does not experience confusion as to the source of goods or services, the defendant, by  
 18 diverting or capturing the consumer’s initial attention, improperly benefits from the goodwill that  
 19 the plaintiff developed in its mark. *Brookfield Communications*, 174 F.3d at 1062-63; *see also*  
 20 *Playboy*, 354 F.3d at 1025 (discussing *Brookfield Communications* and reaffirming that initial  
 21 interest confusion—“customer confusion that creates initial interest in a competitor’s product . . .  
 22 [a]lthough dispelled before an actual sale occurs”—is actionable trademark infringement). The  
 23 existence of initial interest confusion does not depend on whether a sale is completed as a result  
 24 of the confusion. *Brookfield Communications*, 174 F.3d at 1062. In *Brookfield Communications*,  
 the Ninth Circuit, reviewing the district court’s denial of the plaintiff’s motion for a preliminary  
 injunction, concluded that the defendant’s use of its competitor’s trademark in the metatags of its  
 Web site was likely to cause initial interest confusion. *See id.* at 1066. Metatags are “HTML code  
 not visible to Web users but used by search engines in determining which sites correspond to the  
 keywords entered by a Web user.” *Id.* at 1061 n.23.

25 <sup>22</sup> The *Playboy* court also concluded that genuine issues of material fact precluded  
 26 summary judgment as to the claim of dilution. *See id.* at 1031. As relevant to the instant case, the  
 27 court rejected the defendants’ argument that dilution could not be found because they did not  
 28 “label their own goods with [the plaintiff’s] marks,” observing that, “[a]ccording to [the  
 plaintiff’s] evidence, in the minds of consumers, defendants implicitly label the goods of [the  
 plaintiff’s] competitors with its marks.” *Id.* at 1033.

1 merely contributorily liable proves to be a tricky question”).

2 Defendants attempt to distinguish *Playboy* on two grounds, neither of which is persuasive  
3 for present purposes. First, they argue that, because the “issue raised by the instant  
4 motion—whether the use of a trademark as a keyword to trigger advertising can be actionable  
5 under trademark law—was not before the *Playboy* court,” Mot. by Google, Ask Jeeves, &  
6 Earthlink to Dismiss Countercls. & Third-Party Claims at 6 n.8, the case is inapposite.  
7 Defendants are correct that the *Playboy* court did not undertake a separate discussion of the  
8 element of trademark “use” and that the court observed that there was “[n]o dispute” as to  
9 whether the defendants had “used the marks in commerce.” *Playboy*, 354 F.3d at 1024. However,  
10 it is not at all clear that the court’s ultimate conclusion that the defendants’ alleged “use” of the  
11 plaintiff’s trademarks was “actionable,” *id.* at 1026, was not based on an implicit, preliminary  
12 determination of actionable trademark “use” in the sense discussed by Defendants. If the use  
13 were not actionable in the latter sense, it is unclear why the court would have undertaken a  
14 lengthy and, by Defendants’ apparent reading of the case, wholly unnecessary likelihood-of-  
15 confusion analysis.<sup>23</sup> Moreover, the possibility of such an implicit determination does not appear  
16 to have been precluded by the court’s observation that there was “[n]o dispute” as to whether the  
17 defendants had “used the marks in commerce,” as the accompanying footnote suggests that the  
18 observation concerned only the jurisdictional requirement of use “*in commerce*” and not the  
19 separate requirement of trademark “use.” *Id.* at 1024 (emphasis added); *see id.* at 1024 n.11  
20 (“Federal jurisdiction over trademark cases rests on the Commerce Clause, sweeps as broadly as  
21 possible, and clearly encompasses the circumstances of this case.”).

22 Second, Defendants attempt to distinguish *Playboy* on the ground that its holding was  
23 limited to facts not present in the instant case. The *Playboy* court noted that, “if a banner  
24 advertisement clearly identified its source or, even better, overtly compared [the plaintiff’s]  
25

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26 <sup>23</sup> Indeed, Defendants themselves, in the midst of presenting arguments to distinguish  
27 *Playboy*, appear inadvertently to acknowledge this point: “Instead of addressing trademark use,  
28 the *Playboy* case involved a classic analysis of likelihood of confusion—an issue that need only  
be addressed if, in fact, there is a trademark use.” Reply by Google, Ask Jeeves, & Earthlink at 7.

1 products to the sponsor’s own, no confusion would occur under [the plaintiff’s] theory.” *Id.* at  
2 1025 n.16. Elsewhere, the court reiterated that it was “not addressing a situation in which a  
3 banner advertisement clearly identifies its source with its sponsor’s name, or in which a search  
4 engine clearly identifies a banner advertisement’s source,” noting that those clear identifications  
5 “might eliminate the likelihood of initial interest confusion,” and it emphasized that it was  
6 “evaluating a situation in which defendants display competitors’ unlabeled banner  
7 advertisements, with no label or overt comparison to [the plaintiff], after Internet users type in  
8 [the plaintiff’s] trademarks.” *Id.* at 1030 & n.43. Defendants assert that, unlike the banner ads in  
9 *Playboy*, the Sponsored Links clearly identify the sources of the advertisements and thus cannot  
10 result in confusion. However, the distinctions Defendants attempt to draw between *Playboy* and  
11 the instant case in order to justify dismissal would require the Court to make factual findings and  
12 draw legal conclusions, particularly with regard to likelihood of confusion, that are inappropriate  
13 when it is ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) (“Rule  
14 12(b)(6)”). In light of the very liberal standard applicable to Rule 12(b)(6) motions, the Ninth  
15 Circuit’s expansive holding in *Playboy*,<sup>24</sup> and the obvious commercial importance of this case to  
16

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17 <sup>24</sup> Defendants call the Court’s attention to Judge Berzon’s concurrence in *Playboy*, which  
18 suggests that the majority opinion is “fully consistent with the applicable precedents” but  
19 “express[es] concern” that one of those precedents—*Brookfield Communications*—was “wrongly  
20 decided” and may need to be reconsidered. *Id.* at 1034. Noting the analytical similarity between  
21 keyword advertisements and the metatags found to be infringing in *Brookfield Communications*,  
22 Judge Berzon disagrees with any application of *Brookfield Communications* that might suggest  
23 that there could be a Lanham Act violation even if banner advertisements were “clearly labeled,  
24 either by the advertiser or by the search engine.” *Id.* She opines that it is not reasonable “to find  
25 initial interest confusion when a consumer is never confused as to source or affiliation, but  
26 instead knows, or should know, from the outset that a product or web link is not related to that of  
27 the trademark holder because the list produced by the search engine so informs him.” *Id.* at 1034-  
28 35. Her reasoning is based non-Internet examples where “distracting a potential customer with  
another *choice*, when it is clear that it is a choice,” clearly does not constitute trademark  
infringement. *Id.* at 1035. The examples include a department store’s displaying its own brand of  
clothing more prominently than a designer brand that customers may be seeking and a bookstore  
owner’s accepting money from one adult magazine to display that magazine in front of another  
such magazine. *See id.* Although Judge Berzon’s concurrence raises interesting questions for  
another day, it does not alter the result the Court must reach in ruling on the instant motions to  
dismiss.

1 the parties and others similarly situated, the Court concludes that resolution of the novel legal  
2 questions presented by this case should await the development of a full factual record.

3 Accordingly, Defendants' motions to dismiss American Blind's claims of trademark  
4 infringement, false representation, and dilution under the Lanham Act, dilution and injury to  
5 business reputation and unfair competition under the California Business and Professions Code,  
6 and trademark infringement and unfair competition under California common law are DENIED.<sup>25</sup>

7 In so ruling, the Court emphasizes that it expresses no opinion as to whether Defendants  
8 ultimately will prevail in trying to prove that they are not liable to American Blind on these  
9 claims. This Order should be understood only as allowing American Blind's counterclaims and  
10 third-party claims to proceed beyond the motion-to-dismiss stage, which will enable the Court to  
11 consider both the relevant facts and the applicable law in the context of a fuller record.<sup>26</sup>

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12  
13 <sup>25</sup> AOL, Netscape, and Compuserve appear to advance an independent ground for  
14 dismissal of the third-party claims asserted against them. They argue that American Blind's  
15 allegation that they are using Google's Web-searching platform but not that they are "engaging in  
16 the other business practices alleged against Google . . . [or] any other independent wrongdoing"  
17 does not "provide a sufficient basis to state a claim against [them]." Mot. by AOL, Netscape, &  
18 Compuserve to Dismiss Third-Party Claims at 1. Their briefs, however, devote virtually no space  
19 to this assertion. The Court declines to dismiss the third-party claims on a basis that has not been  
20 briefed adequately.

21 <sup>26</sup> Although the Court does not rely upon it—and thus need not discuss Defendants'  
22 attempt to distinguish it—the Court notes that its approach is consistent with the approach taken  
23 by the United States District Court for the Eastern District of Virginia in *Government Employees*  
24 *Insurance Co. v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004) (hereinafter "*GEICO*"), a  
25 case very similar to this one in which the plaintiff sued Google and Overture Services, Inc., both  
26 search engine operators, for trademark infringement, false representation, dilution, and unfair  
27 competition, among other things, based on allegations that the defendants are selling its  
28 trademarks as keywords that trigger Sponsored Links. *See GEICO*, 330 F. Supp. 2d at 701-02.  
The defendants in *GEICO* appear to have made the same arguments regarding failure to allege  
actionable trademark "use" as Defendants make in the instant case, and the *GEICO* court appears  
to have considered many of the same authorities considered by this Court. *See id.* at 702-03. The  
*GEICO* court found sufficient allegations of trademark "use" and denied the defendants' motion  
to dismiss the corresponding claims. *See id.* at 703-04 (observing that a "fair reading of the  
complaint reveals that plaintiff alleges that defendants have unlawfully used its trademarks by  
allowing advertisers to bid on the trademarks and pay defendants to be linked to the  
trademarks"). In so ruling, the court explained that the fact-specific issues of whether the  
defendants are making fair use of the plaintiff's trademarks and whether there is a likelihood of



1 **B. Contributory Trademark Infringement and Contributory Dilution**

2 Defendants move to dismiss American Blind’s alternative claims of contributory  
3 trademark infringement<sup>27</sup> and contributory dilution<sup>28</sup> under the Lanham Act. As above,  
4 Defendants’ arguments are based on a claimed absence of allegations of the requisite “use” of the  
5 American Blind Marks—in this context, by Defendants’ advertisers.<sup>29</sup> Defendants reason that,  
6 because their advertisers are alleged to use the American Blind Marks only as a trigger for the

7 \_\_\_\_\_  
8 confusion are not properly resolved through a motion to dismiss. *See id.* at 704. Approximately  
9 four months later, on December 15, 2004, the *GEICO* court entered an oral ruling granting  
10 Google’s motion for judgment as a matter of law, finding that the plaintiff had not established  
11 that “the mere use of its trademark by Google as a search word or keyword or even using it in  
12 their AdWord program standing alone violates the Lanham Act because . . . there’s no evidence  
13 that that activity *standing alone* causes confusion.” Statement of Recent Decision by Google,  
14 Ask Jeeves, and Earthlink (Dec. 21, 2004), Ex. A at 16 (emphasis added). Portions of the case  
15 still remain pending, and the court has yet to issue a written decision regarding its oral ruling.

16 <sup>27</sup> “Contributory infringement occurs when the defendant either intentionally induces a  
17 third party to infringe the plaintiff’s mark or supplies a product to a third party with actual or  
18 constructive knowledge that the product is being used to infringe the service mark.” *Lockheed*  
19 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 983 (9th Cir. 1999). American Blind  
20 alleges, in the alternative, that “Defendants’ acts, namely the inducement of American Blinds’  
21 [sic] competitors to purchase the American Blind Marks as keywords and the refusal to block or  
22 otherwise disable American Blind’s competitors’ advertisements that result from searches for the  
23 American Blind Marks (despite Defendants’ knowledge that such advertisements infringe the  
24 American Blind Marks)” constitute contributory trademark infringement. Counterclaims ¶ 129.

25 <sup>28</sup> American Blind alleges, in the alternative, that “Defendants’ acts, namely the  
26 inducement of American Blinds’ [sic] competitors to purchase the American Blind Marks as  
27 keywords and the refusal to block or otherwise disable American Blind’s competitors’  
28 advertisements that result from searches for the American Blind Marks (despite Defendants’  
29 knowledge that such advertisements were being used to dilute the American Blind Marks)”  
30 constitute contributory trademark dilution. Counterclaims ¶ 135. The Ninth Circuit has observed  
31 that, “[a]lthough courts have discussed contributory dilution, no appellate court or statute has yet  
32 established the cause of action,” and that, where it has been recognized, it has been defined as  
33 “encouraging others to dilute.” *Lockheed Martin*, 194 F.3d at 986. In light of its disposition of  
34 Defendants’ motions and in the absence of any contrary authority, the Court declines to reach the  
35 issue at this time.

36 <sup>29</sup> The Court does not address Defendants’ argument that American Blind also has failed  
37 to allege that Defendants have done anything “that would qualify as contributory liability,” as the  
38 argument was raised for the first time in their reply brief. Reply by Google, Ask Jeeves, &  
Earthlink at 13.

1 display of their advertisements and not as an identification of the source of their products, they  
2 do not engage in trademark “use” of the American Blind Marks, and therefore, with no direct  
3 violation of the trademark laws, Defendants cannot be contributorily liable. However, in light of  
4 the foregoing discussion, the Court concludes that American Blind’s failure to allege that  
5 Defendants’ advertisers have used the American Blind Marks to identify the source of their own  
6 products is not fatal to American Blind’s claims at this stage of the case.

7 This result finds support in *Brookfield Communications*, where the Ninth Circuit  
8 concluded that the defendant’s use of its competitor’s trademark in the metatags of its Web site  
9 was likely to cause initial interest confusion. *See Brookfield Communications*, 174 F.3d at 1066.  
10 As in *Playboy*, the court’s analysis of likelihood of confusion seems to have presumed a  
11 preliminary, if implicit, determination of actionable trademark “use” in the sense discussed by  
12 Defendants. *See supra* note 23 and accompanying text. The purchase of trademarks as keywords  
13 for a Web site and the insertion of trademarks as metatags in the code of a Web site, both of  
14 which are employed as means of having links to that Web site appear on a search-results page,  
15 are sufficiently analogous that it cannot be said that American Blind has failed to allege  
16 actionable trademark “use” by Defendants’ advertisers. In sum, given the current state of the  
17 governing law, American Blind has made sufficient allegations of direct infringement and  
18 dilution by Defendants’ advertisers and contributory liability on the part of Defendants such that  
19 it does not appear “beyond doubt” that American Blind “can prove no set of facts in support of  
20 [its] claim[s] that would entitle [it] to relief.” *Clegg*, 18 F.3d at 754. Accordingly, Defendants’  
21 motions to dismiss American Blind’s alternative claims of contributory trademark infringement  
22 and contributory dilution are DENIED.<sup>30</sup>

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27 <sup>30</sup> As above, the Court emphasizes that it expresses no opinion as to whether Defendants  
28 ultimately will prevail on these alternative claims.

1 **C. Tortious Interference with Prospective Business Advantage**

2 Defendants move to dismiss American Blind’s state law claim of tortious interference  
 3 with prospective business advantage.<sup>31</sup> The elements of tortious interference with prospective  
 4 business advantage are as follows: (1) an economic relationship between the plaintiff and some  
 5 third party, with the probability of future economic benefit to the plaintiff, (2) the defendant’s  
 6 knowledge of the relationship, (3) intentional acts on the part of the defendant designed to disrupt  
 7 the relationship, which acts are wrongful by some legal measure other than the fact of  
 8 interference itself,<sup>32</sup> (4) actual disruption of the relationship, and (5) economic harm to the  
 9 plaintiff proximately caused by the defendant’s acts. *Korea Supply Co. v. Lockheed Martin*  
 10 *Corp.*, 63 P.3d 937, 950-51 (Cal. 2003). Defendants argue that American Blind fails to allege an  
 11 independently wrongful act, as required by the third element, or probability of future economic  
 12 benefit from existing economic relationships, as required by the first element.

13 Defendants’ first asserted ground for dismissal of this claim fails, because it rests solely  
 14 on their argument that American Blind has not alleged actionable trademark “use,” an argument  
 15 that the Court already has rejected. As American Blind’s claims of trademark violations, unfair  
 16 competition, false representation, and injury to business reputation will proceed past the motion-  
 17 to-dismiss stage, so too can those claims serve, for present purposes, as allegations that satisfy

18 \_\_\_\_\_  
 19 <sup>31</sup> American Blind alleges that (1) “[m]any” of its customers are “repeat customers” and  
 20 “regularly” purchase products from its Web site, (2) it is probable that “such customers and  
 21 others” will “continue to seek to visit” the Web site and purchase products and services “in the  
 22 future,” (3) Defendants were aware of American Blind’s “reasonable expectation of future  
 23 transactions” with its “returning customers,” as well as with customers who “may be attracted” to  
 24 its goods and services because of its goodwill, advertising, and promotion, (4) “[a]bsent  
 25 Defendants’ intentional and improper interference through their deceptive and manipulated  
 26 search engine ‘results,’ it is reasonably certain that American Blind would realize additional sales  
 27 from existing customers and/or new customers,” (5) Defendants “intentionally and improperly  
 28 interfered with American Blind’s future and prospective sales,” and (6) American Blind has  
 suffered and will continue to suffer irreparable injury as a result of Defendants’ actions.  
 Counterclaims ¶¶ 120-24.

<sup>32</sup> An act is independently wrongful if it is “unlawful, that is, if it is proscribed by some  
 constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Korea*  
*Supply Co.*, 63 P.3d at 954.

1 the pleading requirements for the third element of tortious interference with prospective business  
2 advantage.

3           However, the Court agrees with Defendants that American Blind’s allegations with  
4 respect to the first element of the claim are insufficient. The tort of interference with prospective  
5 business advantage applies to “interference with *existing* noncontractual relations which hold the  
6 promise of future economic advantage. In other words, it protects the expectation that the  
7 relationship eventually will yield the desired benefit, not necessarily the more speculative  
8 expectation that a potentially beneficial relationship will eventually arise.” *Westside Ctr. Assocs.*  
9 *v. Safeway Stores 23, Inc.*, 49 Cal. Rptr. 2d 793, 804, 806 (Ct. App. 1996) (holding that,  
10 “[w]ithout an existing relationship with an identifiable buyer, [the plaintiff’s] expectation of a  
11 future sale was ‘at most a hope for an economic relationship and a desire for future benefit’”);  
12 *see also Roth v. Rhodes*, 30 Cal. Rptr. 2d 706, 715 (Ct. App. 1994) (holding that, in doctor’s  
13 lawsuit based on defendants’ refusal to lease offices to him, doctor failed to allege requisite  
14 “existing relationship,” because future patients were merely “speculative”). Allegations that  
15 amount to a mere “hope for an economic relationship and a desire for future benefit” are  
16 inadequate to satisfy the pleading requirements of the first element of the tort. *Blank v. Kirwan*,  
17 703 P.2d 58, 70 (Cal. 1985).

18           Even though American Blind has alleged relationships with “repeat customers” who  
19 “probabl[y]” will “continue to seek to visit” its Web site and purchase its goods and services,  
20 Counterclaims ¶ 120, American Blind’s alleged expectation of “future and prospective sales” to  
21 these customers, *id.* ¶ 123, with which Defendants are alleged to have interfered, is too  
22 speculative to support this claim. It does not rise to the level of the requisite “*promise* of future  
23 economic advantage,” *Westside Ctr. Assocs.*, 49 Cal. Rptr. 2d at 804 (emphasis added), instead  
24 expressing merely a “hope . . . and a desire” for unspecified future sales to unspecified returning  
25 customers, *Blank*, 703 P.2d at 70, in the form of a legal conclusion. Moreover, it goes without  
26 saying that American Blind’s even more speculative allegations regarding “new” customers with  
27 whom it cannot claim any past or present interactions, however insubstantial, also are inadequate  
28 to support this claim. American Blind has failed to point to any case law suggesting that its

1 allegations regarding the probability of future economic benefit from its existing economic  
2 relationships with third parties are sufficient. Accordingly, Defendants' motions to dismiss  
3 American Blind's claim of tortious interference with prospective business advantage are  
4 GRANTED.<sup>33</sup>

5 **IV. ORDER**

6 Good cause therefore appearing, IT IS HEREBY ORDERED that the motions to dismiss  
7 by Counter-Defendant Google and Third-Party Defendants Ask Jeeves, Earthlink, AOL,  
8 Netscape, and Compuserve are (1) GRANTED as to American Blind's claim of tortious  
9 interference with prospective business advantage and (2) DENIED as to American Blind's other  
10 claims.

11  
12  
13 DATED: March 30, 2005

14  
15 /s/ (electronic signature authorized)  
16 JEREMY FOGEL  
17 United States District Judge  
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26 \_\_\_\_\_  
27 <sup>33</sup> Because the Court has granted Defendants' motions to dismiss on this ground, it need  
28 not address their argument that the claim is barred by section 230 of the Communications  
Decency Act.

1 This Order has been served upon the following persons:

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