

Hon. Marsha J. Pechman

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC.; APPLE, INC.; eBAY, INC.;  
FACEBOOK, INC.; GOOGLE INC.;  
NETFLIX, INC.; OFFICE DEPOT, INC.;  
OFFICEMAX INC.; STAPLES, INC.;  
YAHOO! INC.; AND YOUTUBE, LLC,

Defendants.

Case No. 2:10-cv-01385-MJP

**INTERVAL LICENSING LLC  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS OR SEVER  
FOR MISJOINDER PURSUANT  
TO FED. R. CIV. P. 20 AND 21**

**JURY DEMAND**

Plaintiff Interval Licensing LLC (“Interval”) responds to the motion to dismiss for misjoinder filed by defendants Google Inc. and YouTube LLC. and joined by the other defendants in this litigation (the moving parties are referred to collectively in this brief as “Google.”)

**INTRODUCTION**

Google and its co-defendants seek to sever this patent infringement case into eleven different actions, all involving the same patents and very similar technology. This motion is based on an overly-technical reading of the joinder requirements in Rule 20 and ignores the obvious efficiencies gained by deciding common issues once instead of eleven different times in eleven different proceedings.

1 Google does not deny that the patent claims asserted in this case involve many  
2 common legal and factual questions. In addition to the claim construction and invalidity  
3 issues that would overlap in any group of claims against multiple defendants for infringing  
4 the same patent, the infringement arguments in this litigation are also likely to involve  
5 common issues because the different defendants' accused technology appears to operate in  
6 nearly identical fashion.  
7

8 Google fails to identify any meaningful prejudice it would face from keeping the  
9 cases together at this stage, nor does it argue that the litigation would somehow be more  
10 efficient if the claims were severed. Indeed, the justification for the requested relief is  
11 difficult to identify given that Google and all of its co-defendants (save one) agree to  
12 maintain the litigation in this Court. The motion to sever should not be granted. If,  
13 however, the Court is inclined to sever the litigation into eleven different cases as the  
14 defendants request, then all of the cases should remain consolidated before this Court so that  
15 discovery can be coordinated and common issues can be resolved consistently and  
16 efficiently.  
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### 19 **BACKGROUND**

20 Interval filed its Complaint in this case on August 27, 2010, asserting claims for  
21 patent infringement against eleven defendants. As explained in the Complaint, Plaintiff  
22 Interval Licensing is the assignee of Interval Research, a high-tech research company  
23 founded in 1992 by Paul Allen and David Liddle. Interval Research focused its  
24 development efforts on consumer-oriented applications with a pioneering emphasis on the  
25 Internet.  
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1 Interval's Complaint asserts claims of infringement under four patents, each of  
2 which protects technology developed by engineers at Interval Research in the mid- or late-  
3 1990s. All four of the patents describe advances in methods of displaying information,  
4 typically displaying information to users of computer systems. Since the mid-1990s, when  
5 engineers at Interval first developed these techniques, they have been adopted by a wide-  
6 range of businesses, including the eleven defendants in this case.  
7

8 Interval's Complaint properly joins multiple defendants who infringe the same  
9 claims of the same patents by operating websites that display information in very similar  
10 ways. Although detailed information about the operation of infringing functionality for each  
11 of the defendants will need to be developed in discovery, it is likely that in many cases the  
12 defendants' products all operate similarly and therefore raise identical infringement issues.  
13

14 Interval's claims against all eleven defendants under the '507 patent demonstrate the  
15 nature of the similarities. All of the defendants operate websites that display related  
16 products or related content in response to a user selecting to view a webpage associated with  
17 a particular product or content item. On Office Max's website, for example, when a  
18 customer brings up a particular model of stapler, the website also displays a list of other  
19 items captioned "Related Products." Similar, and in some cases virtually identical,  
20 functionality exists on the websites of each of the eleven defendants.  
21

22 This technology is claimed in the '507 patent. Because the operation of the  
23 defendants' infringing websites are apparently similar, there is every reason to believe that  
24 not only will there be common issues in this case related to invalidity and claim  
25 construction, but also with respect to infringement. Judicial efficiency unquestionably  
26 favors joint resolution of these common issues. Google's attempt to sever these cases and  
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1 potentially require repetitious and possibly inconsistent judicial proceedings addressing the  
2 same issues would be wasteful and is not mandated by the Federal Rules or controlling  
3 precedent.

## 4 ARGUMENT

### 5 A. Federal Rules and Ninth Circuit Precedent Strongly Favor Joinder.

6  
7 Federal Courts recognize that permissive joinder promotes fairness and judicial  
8 efficiency. In an early case interpreting the modern Federal Rules, the Supreme Court made  
9 the policy clear:

10 Under the rules, the impulse is toward entertaining the broadest possible  
11 scope of action consistent with fairness to the parties; joinder of claims,  
12 parties, and remedies is strongly encouraged.

13 *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). Consistent with this  
14 mandate, the Ninth Circuit holds that “Rule 20 regarding permissive joinder is to be  
15 construed liberally in order to promote trial convenience and to expedite the final  
16 determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake*  
17 *Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977).

18  
19 Under the Federal Rules, a plaintiff may join multiple defendants if the claims  
20 against both satisfy two elements: (1) “any question of law or fact common to all  
21 defendants will arise in the action;” and (2) “any right to relief is asserted against them  
22 jointly, severally, or in the alternative with respect to or arising out of the same transaction,  
23 occurrence, or series of transactions or occurrences.” Fed. R. Civ. P. 20. Interval’s claims  
24 against the eleven defendants in this case satisfy both elements.  
25

### 26 B. Interval’s Claims Against Different Defendants Involve a Host of 27 Common Issues.

1 Google does not dispute that the claims against it and the other defendants involve  
2 common issues. Although there are eleven defendants in this case, there are only four  
3 patents being asserted. Two of the patents are being asserted against four defendants, one is  
4 being asserted against ten defendants, and one is being asserted against all eleven. There  
5 will be claim construction issues for each patent and, particularly given the similarity of  
6 many of the defendants' infringing products, those claim construction issues are likely to be  
7 repeated from one defendant to the next.  
8

9 Google and the other defendants will inevitably challenge the validity of the patents  
10 in suit. The issues relevant to an invalidity defense are, of course, all based on the patent-in-  
11 suit, not on accused product, and so these issues too will repeat from one defendant to the  
12 next.  
13

14 There is also reason to believe that there will be common issues related to  
15 infringement by different defendants. Based on the information currently available to  
16 Interval about the infringing products and devices, there appears to be substantial similarity  
17 among the defendants' infringing products, and therefore likely substantial commonality in  
18 the infringement arguments. For example, as discussed above, all eleven defendants  
19 infringe claims of the '507 patent by displaying information on their websites in a format  
20 equivalent to Office Max's "Related Products" lists.<sup>1</sup> Repetition of infringement arguments  
21 in addition to claim construction and invalidity would render every aspect of the claims  
22 against different defendants the same, apart from damages.  
23  
24

25 **C. Interval Satisfies the "Common Series of Transactions" Requirement**  
26 **Because of the Logical Relationship Between the Claims.**

27  
28 <sup>1</sup> Additional information about the similarities among the different defendants' accused products will be clear from Interval's initial infringement contentions.

1 Google mischaracterizes the second prong of the permissive joinder rule by  
2 suggesting that it requires allegations that all defendants conspired or cooperated in  
3 producing the same infringing product. (Br. at 4:8-9.) Consistent with the general mandate  
4 favoring joinder, courts have not interpreted the phrase “same transaction or series of  
5 transactions” so strictly, but instead require allegations showing a logical relationship  
6 between the claims against different defendants. *See, e.g., Alexander v. Fulton County, Ga.*,  
7 207 F.3d 1303, 1323 (11th Cir. 2000); *Fisher v. CIBA Specialty Chemicals Corp.*, 245  
8 F.R.D. 539, 542 (S.D. Ala. 2007); *Cf.* 4 James Wm. Moore et al., *Moore’s Federal Practice*  
9 § 20.05[3] (3d ed. 2010) (“same transaction” test met if “claims involve enough related  
10 operative facts to make joinder in a single case fair.”)  
11

12  
13 The Ninth Circuit has not addressed joinder of multiple defendants under Rule 20 in  
14 a patent case. Opinions discussing joinder in other contexts indicate that “same transaction  
15 or series of transactions” should be given a flexible meaning to promote judicial economy  
16 and fairness. *See League to Save Lake Tahoe*, 588 F.2d at 917 (finding that claims against  
17 Lake Tahoe authority and several developers for allegedly improper approvals of different  
18 projects initiated by the different developers satisfied the “same transaction or occurrence”  
19 prong of Rule 20 and could be joined in a single action); *Coughlin v. Rogers*, 130 F.3d 1348,  
20 1350 (9th Cir. 1997) (“the ‘same transaction’ requirement refers to similarity in the factual  
21 background of a claim.”) (internal punctuation omitted.)  
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25 Particularly given the paucity of decisions interpreting Rule 20, courts have  
26 frequently sought guidance in the interpretation of the “same transaction” requirement of  
27 Rule 13 concerning mandatory counterclaims. *See, e.g., Alexander*, 207 F.3d at 1323;  
28 *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974); *see also* 4 James

1 Wm. Moore et al., *Moore's Federal Practice* § 20.05[2] (3d ed. 2010). In this context, the  
2 Ninth Circuit has unequivocally endorsed a very broad and liberal interpretation of "same  
3 transaction:"

4 We apply the "logical relationship" test to determine whether two claims  
5 arise out of the same transaction or occurrence." *Pochiro v. Prudential Ins.*  
6 *Co. of America*, 827 F.2d 1246, 1249 (9th Cir.1987) " 'This flexible approach  
7 to Rule 13 problems attempts to analyze whether the essential facts of the  
8 various claims are so logically connected that considerations of judicial  
9 economy and fairness dictate that all the issues be resolved in one lawsuit.' "  
10 *Id.* (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir.1978)); *see also*  
11 *Albright v. Gates*, 362 F.2d 928, 929 (9th Cir.1966) (noting that we have  
12 given Rule 13 an "increasingly liberal construction").

13 *Johnson v. Swinney*, 1993 WL 230192 \*3 (9th Cir. 1993).

14 Other District Courts have relied upon this interpretation of "same transaction" to  
15 support joinder of multiple defendants allegedly infringing the same patent with different  
16 accused devices. *See, e.g., Manatech, Inc. v. Country Life LLC*, 2010 WL 2944574 at \*1-2  
17 (N.D. Tex.) (finding that claims against different defendants for infringing the same patent  
18 by manufacturing similar products satisfied the same transaction prong of Rule 20); *My*  
19 *Mail Ltd. v. America Online, Inc., et al.*, 223 F.R.D. 455, 457 (E.D. Tex. 2004) (upholding  
20 joinder against multiple defendants based on its finding "that there is a nucleus of operative  
21 facts or law in the claims against all the defendants and, therefore, the claims against [the  
22 defendants moving to sever] do arise out of the same series of transactions or occurrences as  
23 the claims against the other defendants.") The *My Mail* Court emphasized the importance of  
24 flexibility and criticized a "per se" rule that different defendants manufacturing different  
25 products did not satisfy Rule 20 as "a hypertechnical [interpretation of the rule] that perhaps  
26 fails to recognize the realities of complex, and particularly patent, litigation." *Id.*  
27  
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1 Google relies on a series of district court cases that apply a *per se* rule against joinder  
2 of multiple defendants in a patent case for infringing the same patent by manufacturing  
3 different products. *Philips Electronics North Amer. Corp. v. Contec Corp.*, 220 F.R.D. 415,  
4 417 (D. Del. 2004) (severing claims against different defendants after discovery and before  
5 trial because “[a]llegations of infringement against two unrelated parties based on different  
6 acts do not arise from the same transaction”); *New Jersey Machine v. Alford*  
7 *Inddustries*, 1991 WL 340196 \*2 (D. N.J. 1991) (holding that intellectual property claims  
8 against different defendants should be tried separately); *Reid v. General Motors Corp.*, 240  
9 F.R.D. 260, 263 (E.D. Tex. 2007) (finding patents claims against multiple defendants do not  
10 satisfy Rule 20 and relying on *Philips* and *New Jersey Machine*); *Androphy v. Smith &*  
11 *Nephew, Inc.*, 31 F.Supp. 2d 620, 623 (N.D. Ill. 1998) (applying a *per se* rule against joinder  
12 of claims against multiple defendants who infringed the same patent with different products  
13 as “clearly” not satisfying Rule 20); *Spread Spectrum v. Eastman Kodak Co.*, 2010 WL  
14 3516106 \*2 (N.D. Ill.) (same); *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch,*  
15 *Pierce, Fenner & Smith, Inc.*, 564 F.Supp. 1358, 1371 (D. Del. 1983).

19 None of these cases are binding on this Court and none of them apply the sort of  
20 flexible, case-by-case analysis of “same transaction” set out in Ninth Circuit case law. The  
21 one case cited by Google from this Circuit is a recent Northern District of California  
22 decision in which the plaintiff sued *sixty-eight* different defendants for infringing two  
23 patents. *WIAV Networks, Inc. v. 3COM Corp.*, 2010 WL 3895047 \*1 (N.D. Cal). After the  
24 plaintiff agreed to drop all but twelve of the defendants which were to be divided into seven  
25 groups, Judge Alsop analyzed the issues that would arise in the case and determined that the  
26 common issues were “overwhelmed” by individual issues, in the areas of claim construction  
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1 and validity as well as infringement. *Id.* at \*3. Here, by contrast, the similarity between  
2 different defendants' infringing products, as well as common issues in claim construction  
3 and invalidity support continued consolidation rather than severance.

4 Interval's claims against multiple defendants satisfy the "logical relationship" test  
5 endorsed by the Ninth Circuit's interpretation of "same transaction" in the context of Rule  
6 13. Interval has sued multiple defendants, each of whom operates a website that infringes  
7 Interval's patents in closely related ways. These claims will raise a series of identical or  
8 very closely related issues against each of the defendants. Severance of these claims into  
9 different cases would be inefficient and contrary to the policies embodied in the Federal  
10 Rules.  
11

12  
13 **D. Severance Now Would Be Premature and Serves No Immediate**  
14 **Purpose.**

15 Google fails to identify any pressing need for immediate severance.<sup>2</sup> On the  
16 contrary, apparently conceding that the overwhelming number of common issues in this case  
17 justifies a consolidated proceeding, Google indicates that it does not oppose this Court's  
18 continuing jurisdiction over this case and states that it will not seek to transfer to another  
19 Court. (Br. at p. 6 n.2) With the exception of Apple, each of the other defendants joined  
20 this portion of Google's brief. And even Apple has not filed a motion to transfer to another  
21 Court.  
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<sup>2</sup> Google's motion seeks alternative remedies of dismissal or severance. Severance is  
26 unquestionably the proper remedy, should the Court find that the cases against different  
27 defendants improperly joined. Google and all of the other defendants except Apple indicate  
28 that they have no objection to continuing to proceed in this Court. Dismissal, then, would  
simply force Interval to file a new Complaint against each defendant for no purpose other  
than obtaining a new case number, generating needless delay.

1 The only prejudice Google identifies as a justification for severance is potential jury  
2 confusion at trial. (Br. at 5-6.) There is no need to address the question of potentially  
3 separate trials at this point; after discovery (which Google apparently agrees should remain  
4 consolidated or at least coordinated) the parties and the Court will have more information  
5 with which to determine whether the risk of confusion outweighs the benefits of a single  
6 trial. However, based on the defendants' length of trial proposal submitted in the Joint  
7 Status Report, even they acknowledge that there are substantial overlapping issues at the  
8 trial stage. The defendants' propose eleven individual trials of 7 to 10 days each, for a total  
9 of between 77 and 110 total trial days. By contrast, they propose only 20 to 30 days for a  
10 consolidated trial addressing all eleven defendants. The efficiencies gained by proceeding  
11 together are clear even to the defendants.  
12

14 Whether proceeding under a single case number or severed into multiple cases, there  
15 is no doubt that at this preliminary stage of the litigation, the claims against the eleven  
16 defendants should be consolidated so that common issues can be resolved together, avoiding  
17 wasteful duplication and the risk of inconsistent findings. The Federal Rules authorize  
18 consolidation of any matters involving common issues "to avoid unnecessary cost or delay."  
19 Fed. R. Civ. P. 42(a)(3). The prospect of eleven different claim construction hearings  
20 addressing identical terms, or of multiple, un-coordinated discovery investigations into  
21 invalidity issues for the same patent, plainly justify the consolidation of these cases under  
22 this rule.  
23

25 Under the local patent rules, the parties will be addressing claim construction first, an  
26 area where there is very likely to be substantial overlap between defendants. The Court  
27 should consider these overlapping issues together, providing a uniform resolution for each  
28

1 common claim construction issue, a procedure to which the defendants (with the possible  
2 exception of Apple) apparently do not object.

3 Given that the claims against the different defendants will be proceeding jointly at  
4 least through claim construction, severance into multiple cases at this early stage would be  
5 premature. If the Court is inclined to consider severance into different matters for purposes  
6 of addressing issues unique to the individual defendants, it should do so when those unique  
7 issues have been more clearly identified and can be balanced against the benefits from  
8 proceeding jointly.  
9

### 10 CONCLUSION

11 For the reasons stated above, Interval respectfully requests that Google's motion to  
12 dismiss for misjoinder be denied.  
13

14 Dated: November 8, 2010

/s/ Edgar Sargent

15 Justin A. Nelson

16 WA Bar No. 31864

17 E-Mail: [jnelson@susmangodfrey.com](mailto:jnelson@susmangodfrey.com)

18 Matthew R. Berry

19 WA Bar No. 37364

20 E-Mail: [mberry@susmangodfrey.com](mailto:mberry@susmangodfrey.com)

21 Edgar Sargent

22 WA Bar No. 28283

23 E-Mail: [esargent@susmangodfrey.com](mailto:esargent@susmangodfrey.com)

24 SUSMAN GODFREY L.L.P.

25 1201 Third Ave, Suite 3800

26 Seattle, WA 98101

27 Telephone: (206) 516-3880

28 Facsimile: (206) 516-3883

Max L. Tribble, Jr.

E-Mail: [mtribble@susmangodfrey.com](mailto:mtribble@susmangodfrey.com)

SUSMAN GODFREY L.L.P.

1000 Louisiana Street, Suite 5100

Houston, Texas 77002

Telephone: (713) 651-9366

Facsimile: (713) 654-6666

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Michael F. Heim  
E-mail: [mheim@hpcllp.com](mailto:mheim@hpcllp.com)  
Eric J. Enger  
E-mail: [eenger@hpcllp.com](mailto:eenger@hpcllp.com)  
Nate Davis  
E-mail: [ndavis@hpcllp.com](mailto:ndavis@hpcllp.com)  
HEIM, PAYNE & CHORUSH, L.L.P.  
600 Travis, Suite 6710  
Houston, Texas 77002  
Telephone: (713) 221-2000  
Facsimile: (713) 221-2021

Attorneys for INTERVAL LICENSING LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

**Attorneys for AOL, Inc.**

Aneelah Afzali [aneelah.afzali@stokeslaw.com](mailto:aneelah.afzali@stokeslaw.com)  
Cortney Alexander [cortney.alexander@finnegan.com](mailto:cortney.alexander@finnegan.com)  
Robert Burns [robert.burns@finnegan.com](mailto:robert.burns@finnegan.com)  
Elliot Cook [elliott.cook@finnegan.com](mailto:elliott.cook@finnegan.com)  
Gerald Ivey [gerald.ivey@finnegan.com](mailto:gerald.ivey@finnegan.com)  
Scott Johnson [scott.johnson@stokeslaw.com](mailto:scott.johnson@stokeslaw.com)  
Shannon Jost [shannon.jost@stokeslaw.com](mailto:shannon.jost@stokeslaw.com)

**Attorneys for Apple, Inc.**

David Almeling [dalmeling@omm.com](mailto:dalmeling@omm.com)  
Brian Berliner [bberliner@omm.com](mailto:bberliner@omm.com)  
George Riley [griley@omm.com](mailto:griley@omm.com)  
Jeremy Roller [jroller@yarmuth.com](mailto:jroller@yarmuth.com)  
Scott Wilsdon [wilsdon@yarmuth.com](mailto:wilsdon@yarmuth.com)  
Neil Yang [nyang@omm.com](mailto:nyang@omm.com)

**Attorneys for eBay, Inc., Netflix, Inc., and Staples, Inc.**

Chris Carraway [chris.carraway@klarquist.com](mailto:chris.carraway@klarquist.com)  
Arthur Harrigan, Jr. [arthurh@dhl.com](mailto:arthurh@dhl.com)  
John Vandenberg [john.vandenberg@klarquist.com](mailto:john.vandenberg@klarquist.com)  
Christopher Wion [chrisw@dhl.com](mailto:chrisw@dhl.com)

**Attorneys for Facebook, Inc.**

Christen Dubois [cdubois@cooley.com](mailto:cdubois@cooley.com)  
Heidi Keefe [hkeefe@cooley.com](mailto:hkeefe@cooley.com)  
Michael Rhodes [mrhodes@cooley.com](mailto:mrhodes@cooley.com)  
Elizabeth Stameshkin [lstameshkin@cooley.com](mailto:lstameshkin@cooley.com)  
Mark Weinstein [mweinstein@cooley.com](mailto:mweinstein@cooley.com)

**Attorneys for Google, Inc. and YouTube, LLC**

Aneelah Afzali [aneelah.afzali@stokeslaw.com](mailto:aneelah.afzali@stokeslaw.com)  
Aaron Chase [achase@whitecase.com](mailto:achase@whitecase.com)  
Dimitrios Drivas [ddrivas@whitecase.com](mailto:ddrivas@whitecase.com)  
John Handy [jhandy@whitecase.com](mailto:jhandy@whitecase.com)  
Warren Heit [wheit@whitecase.com](mailto:wheit@whitecase.com)  
Scott Johnson [scott.johnson@stokeslaw.com](mailto:scott.johnson@stokeslaw.com)  
Shannon Jost [shannon.jost@stokeslaw.com](mailto:shannon.jost@stokeslaw.com)  
Kevin McGann [kmcgann@whitecase.com](mailto:kmcgann@whitecase.com)  
Wendi Schepler [wschepler@whitecase.com](mailto:wschepler@whitecase.com)

1 **Attorneys for Office Depot, Inc.**

2 Chris Carraway

[chris.carraway@klarquist.com](mailto:chris.carraway@klarquist.com)

3 John Vandenberg

[john.vandenberg@klarquist.com](mailto:john.vandenberg@klarquist.com)

4 Arthur Harrigan, Jr.

[arthurh@dhl.com](mailto:arthurh@dhl.com)

5 Christopher Wion

[chrisw@dhl.com](mailto:chrisw@dhl.com)

6 **Attorneys for OfficeMax, Inc.**

7 Kevin Baumgardner

[kbaumgardner@corrchronin.com](mailto:kbaumgardner@corrchronin.com)

8 Steven Fogg

[sfogg@corrchronin.com](mailto:sfogg@corrchronin.com)

9 John Letchinger

[letchinger@wildman.com](mailto:letchinger@wildman.com)

10 Douglas Rupert

[rupert@wildman.com](mailto:rupert@wildman.com)

11 **Attorneys for Yahoo! Inc.**

12 Francis Ho

[fho@mofo.com](mailto:fho@mofo.com)

13 Richard S.J. Hung

[rhung@mofo.com](mailto:rhung@mofo.com)

14 Michael Jacobs

[mjacobs@mofo.com](mailto:mjacobs@mofo.com)

15 Matthew Kreeger

[mkreeger@mofo.com](mailto:mkreeger@mofo.com)

16 Dario Machleidt

[dmachleidt@flhlaw.com](mailto:dmachleidt@flhlaw.com)

17 Eric Ow

[eow@mofo.com](mailto:eow@mofo.com)

18 Mark Walters

[mwalters@flhlaw.com](mailto:mwalters@flhlaw.com)

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
By:           /s/ Edgar Sargent            
Edgar Sargent