

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

\_\_\_\_\_  
AARON C. BORING and CHRISTINE BORING, )  
husband and wife respectively, )

*Plaintiffs,* )

v. )

GOOGLE INC., a Delaware corporation, )

*Defendant.* )  
\_\_\_\_\_

Civil Action No. 08-cv-694 (ARH)

**DEFENDANT GOOGLE INC.'S RESPONSE TO PLAINTIFFS' MOTION  
TO STAY PENDING PETITION FOR WRIT OF CERTIORARI  
FROM THE UNITED STATES SUPREME COURT**

Defendant Google Inc. hereby responds to Plaintiffs' Motion to Stay Pending Petition for Writ of Certiorari from the United States Supreme Court, which was submitted by plaintiffs Aaron C. Boring and Christine Boring on May 6, 2010. *See* docket entry nos. 66, 67. In the interest of economy for both the Court and the parties, Google does not oppose the requested stay, which, if granted, would stay this action until either: (1) the United States Supreme Court has denied Plaintiffs' application for a Writ of Certiorari; or (2) in the event that the Supreme Court issues the Writ, until the merits of Plaintiffs' appeal have been adjudicated.

While Google does not oppose the requested stay, it does not concede *any* point, whether legal or factual, asserted by the Plaintiffs in their motion papers. To the contrary, Google disputes the assertions of fact and law contained therein, and expressly reserves the right to contest any and all such assertions at any phase of this litigation. Google also requests that the Court disregard Plaintiffs' submission of material outside the record. *See, e.g., Lee v. McCue*, No. 04-civ-6077 (CM), 2007 WL 2230100, at \*4 (S.D.N.Y. July 25, 2007) (disregarding newspaper article filed in support of post-verdict motion for judgment as a matter of law on the grounds that "[t]he article is inadmissible, and its only apparent purpose is to revive the tired leitmotif that runs through the defendants' motion").

Finally, Google notes that Plaintiffs have improperly filed Google's Offer of Judgment, dated April 6, 2010, as an exhibit in support of their motion, *see* docket entry no. 67-3, and they have referred to the Offer of Judgment in footnote 4 of their brief, *see* docket entry no. 67 at p. 4. Under Federal Rule 68, an Offer of Judgment may be filed *only* if it is accepted, Fed. R. Civ. P. 68(a), or, in the event that the Offer of Judgment is

rejected, during a post-judgment proceeding to determine costs, *see* Fed. R. Civ. P. 68(b). And it is well established that a party generally may not even *reference* an unaccepted offer of judgment in its court submissions. *See, e.g., Logan v. Pena*, Civ. A. No. 91-2389-JWL, 1993 WL 62316, at \*5 (D. Kan. Feb. 9, 1993) (ruling that affidavit improperly referenced unaccepted offer of judgment). Google respectfully requests that this Court strike Plaintiffs' references to Google's Offer of Judgment,<sup>1</sup> and order such other relief as the Court may deem appropriate. *See, e.g., Scottsdale Ins. Co. v. Tolliver*, 262 F.R.D. 606, 610 (N.D. Okla. 2009) ("Rule 68 exhibits a strong federal policy against filing [offers of judgment] with the court and a party may incur a significant sanction for filing an unaccepted offer of judgment.") (citations omitted).

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<sup>1</sup> Specifically, Google respectfully requests that the Court strike Docket Entry No. 67-3 (Offer of Judgment) and footnote 4 of Plaintiffs' brief (Docket Entry No. 67 at p. 4). The Court's power to take these remedial steps is well established. *See* 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 3002 (2d ed. 1997) (remedy for erroneously filed offer of judgment "is to strike the offer from the court's file"); *see also Bechtol v. Marsh & McLennan Cos.*, No. C07-1246 MJP, 2008 WL 2074046, at \*1 (W.D. Wash. May 14, 2008) (granting defendant's motion to strike from court record improperly filed offer of judgment); *Logan*, 1993 WL 62316, at \*5 (striking affidavit that improperly referenced unaccepted offer of judgment).

Respectfully submitted,

Dated: April 21, 2010

s/ Tonia Ouellette Klausner

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of April 2010, I caused the foregoing  
**Response to Plaintiffs' Motion to Stay Pending Petition for Writ of Certiorari from  
the United States Supreme Court** of Defendant Google Inc. to be served on the below-  
identified counsel for the Plaintiffs via ECF:

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