

1 Mark Poe (S.B. #223714) – mpoe@gawpoe.com
2 Randolph Gaw (S.B. #223718) – rgaw@gawpoe.com
3 GAW | POE LLP
4 4 Embarcadero, Suite 1400
5 San Francisco, CA 94111
6 Telephone: (415) 766-7451
7 Facsimile: (415) 737-0642

8 Attorneys for Plaintiff Super Cray Inc.

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 SUPER CRAY INC.

12 Plaintiff,

13 v.

14 GOOGLE INC.

15 Defendant.

Case No.

COMPLAINT

DEMAND FOR JURY TRIAL

16
17 Plaintiff Super Cray Inc. (“Super Cray”) hereby makes the following allegations:

18 1. Super Cray is the publisher of a popular entertainment website called
19 SuperCrayCray (www.supercraycray.com). It entered into an agreement with defendant Google
20 Inc. (“Google”) to publish Google’s AdSense advertisements on SuperCrayCray.

21 2. Super Cray fully complied with the requirements of the AdSense program when
22 displaying Google’s advertisements. On multiple occasions, Super Cray reached out to Google
23 AdSense representatives by e-mail and Google’s Internet chat program for confirmation that
24 Super Cray’s ad placements on SuperCrayCray were valid and conformed to all AdSense
25 policies, including those policies designed to ensure that the layout of AdSense advertisements
26 did not encourage “accidental clicks.” Super Cray received written confirmation on each of those
27 occasions from Google that everything was done in accordance with AdSense’s terms of service.
28

1 **JURISDICTIONAL STATEMENT**

2 9. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332 because the
3 parties are all citizens of different states and the amount in controversy exceeds \$75,000.

4 10. The Court has personal jurisdiction over Google because it transacts business in
5 California and because in the Google AdSense Online Terms of Service, it expressly consents to
6 personal jurisdiction in this Court.

7 11. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Google
8 resides and regularly conducts business in this district.

9 **INTRADISTRICT ASSIGNMENT**

10 12. Google’s headquarters is located in Mountain View, California, and therefore
11 assignment to the San Jose division of this Court is appropriate.

12 **FACTUAL ALLEGATIONS**

13 ***Background on AdSense***

14 13. Google is the largest online marketing/advertising business in the world. The
15 AdWords Advertising Program (“AdWords”) is Google’s primary advertising program. AdWord
16 advertisements are displayed in a variety of formats such as text and/or images, alongside or
17 above search results, on webpages, in e-mails, on blogs, and/or in videos.

18 14. The Google AdSense Content program enables online publishers of websites to
19 partner with Google to earn revenue from AdWords advertisements displayed on websites under
20 their ownership, license, registration and/or other control. Google tracks each time Internet users
21 click on advertisements displayed on AdSense publishers’ websites and charges advertisers for
22 each click. Google pays the AdSense publishers a portion of the amount paid by advertisers for
23 the clicks, while retaining the remaining portion for itself.

24 15. According to Google, publishers participating in the AdSense Content program are
25 promised a 68% revenue share. (<https://support.google.com/adsense/answer/180195?hl=en>).
26 Furthermore, Google touts the superiority of its on-line advertising program against programs
27 offered by competitors, as it stated “Another ad network might offer an 80% revenue share, but
28 only collect \$50 from advertisers, so you'd receive \$40. With the vast number of advertisers

1 competing to appear on AdSense sites, our system ensures that you're earning the most possible
2 for every ad impression you receive.”

3 16. The Google AdSense Online Terms of Service (“AdSense Agreement”) governs
4 the relationship between website publishers and Google for the AdSense Content program.
5 Google unilaterally drafts all contracts, policies, procedures, and guidelines governing the
6 relationship between Google and AdSense publishers, as well as any and all amendments and
7 modifications.

8 17. The AdSense Agreement provides the following policies and procedures for
9 payments to publishers:

10 **Section 5: Payments**

11 Subject to this Section 5 and Section 10 of these AdSense Terms, you will receive a
12 payment related to the number of valid clicks on Ads displayed on your Properties, the
13 number of valid impressions of Ads displayed on your Properties, or other valid events
performed in connection with the display of Ads on your Properties, in each case as
determined by Google.

14 ...

15 Payments will be calculated solely based on our accounting. Payments to you may be
16 withheld to reflect or adjusted to exclude any amounts refunded or credited to advertisers
and any amounts arising from invalid activity, as determined by Google in its sole
17 discretion. Invalid activity is determined by Google in all cases and includes, but is not
18 limited to, (i) spam, invalid queries, invalid impressions or invalid clicks on Ads
generated by any person, bot, automated program or similar device, including through any
19 clicks or impressions originating from your IP addresses or computers under your control;
or requests for end users to click on Ads or take other actions; (iii) Ads served to end users
20 whose browsers have JavaScript disabled; and (iv) clicks or impressions co-mingled with
a significant amount of the activity described in (i, ii, and iii) above...

21 18. Further, the AdSense Agreement contains the following policies and procedures
22 for termination or suspension of AdSense publisher accounts:

23 **Section 10: Termination**

24 You may terminate the Agreement at any time by completing the account cancellation
25 process. The Agreement will be considered terminated within 10 business days of
26 Google’s receipt of your notice. If you terminate the Agreement and your earned balance
equals or exceeds the applicable threshold, we will pay you your earned balance within
27 approximately 90 days after the end of the calendar month in which the Agreement is
terminated. Any earned balance below the applicable threshold will remain unpaid.

28

1 Google may at any time terminate the Agreement, or suspend or terminate the
2 participation of any Property in the Services for any reason. If we terminate the
3 Agreement due to your breach or due to invalid activity, we may withhold unpaid amounts
4 or charge back your account...

5 19. Under California law, Google is contractually obligated to act in good faith and
6 deal fairly with AdSense publishers in implementing its stated policies and guidelines in the
7 AdSense Agreement.

8 20. In particular, Google is obligated, pursuant to the terms of Section 5 of the
9 AdSense Agreement, to act in good faith and deal fairly with AdWords publishers in: (a)
10 determining the validity of clicks, impressions, and other activities/events performed in
11 connection with the display of advertisements on the publisher's websites; (b) accounting for the
12 payments owed to publishers under the AdSense Agreement; (c) and withholding payments
13 arising from activity Google deems invalid.

14 21. Additionally, Google is obligated, pursuant to the terms of Section 10, to act in
15 good faith and deal fairly with AdSense publishers in: (a) suspending or terminating the AdSense
16 Agreement; (b) suspending or terminating the participation of any website in the AdSense
17 program; (c) determining that an AdSense publisher breached the AdSense Agreement; (4)
18 determining that an AdSense publisher engaged in invalid activity; and (5) withholding or
19 charging back payments earned by an AdSense publisher under the AdSense Agreement.

20 ***Background on Super Cray***

21 22. Super Cray completed an application to participate as a publisher in the Google
22 AdSense program for its SuperCrayCray website.

23 23. SuperCrayCray is a humorous website with the tagline "Where Ridiculous Meets
24 Entertainment." Its founders spend time assembling photographs in the public domain of
25 celebrities and other famous people and then crafting "lists" and writing original content to
26 provide information about the featured personages designed to amuse the viewer or provoke
27 thoughtful discussion.

28 24. One example is a post on SuperCrayCray titled "7 Startups You Didn't Know
Were Funded By A-List Celebrities," which can be found at <http://supercraycray.com/7-startups->

1 you-didnt-know-were-funded-by-a-list-celebrities/. The post – broken up over several pages in a
2 style similar to other websites such as BuzzFeed or Cracked – features on each page a photograph
3 of a popular celebrity, such as Justin Bieber, Jared Leto, Lady Gaga and Ashton Kutcher.
4 Accompanying each photograph is an explanation of the startup company that counts that
5 celebrity as an early investor – viewers are informed that Justin Lieber is an investor in a
6 photograph-based startup called Shots, Jared Leto is an investor in the recently-acquired-by-
7 Google-for-\$3.2 billion startup called Nest, Lady Gaga is an investor in a social network called
8 Backplane and Ashton Kutcher is an investor in Airbnb.

9 25. Google granted Super Cray’s application to participate in the AdSense program
10 and provided it with hypertext mark-up language (“HTML”) to insert in SuperCrayCray’s source
11 code to display the AdSense advertisements. SuperCray inserted the supplied HTML into
12 SuperCrayCray’s source code and the website began displaying targeted advertisements to its
13 viewers through the AdSense program in early September 2014.

14 26. Substantial time and resources were spent in developing SuperCrayCray and its
15 content for purposes of monetizing the website through advertising.

16 ***Google Affirms SuperCrayCray’s Compliance with AdSense Requirements and Policies***

17 27. SuperCrayCray, and its formatting of Google’s AdSense advertisements, complied
18 with all of Google’s Ad Placement Policies, which are available to publishers at
19 <https://support.google.com/adsense/answer/1346295?hl=en>.

20 28. In particular, SuperCrayCray did not encourage accidental clicks. SuperCrayCray
21 did not display ads in such a way that they might have been mistaken for other website content.
22 SuperCrayCray did not place ads under misleading headers or titles. SuperCrayCray did not use
23 language to encourage users to click on ads. SuperCrayCray did not bring unnecessary or
24 unnatural attention to its ads. SuperCrayCray did not place ads on pages or sites where dynamic
25 content was the primary focus. SuperCrayCray did not place links, play buttons, download
26 buttons, games, drop-down boxes, or applications near ads. SuperCrayCray did not place ads on
27 noncontent-based pages. SuperCrayCray did not offer users compensation for clicking ads.
28 SuperCrayCray did not disguise ads on its webpages. SuperCrayCray did not attempt to associate

1 specific images with individual ads appearing on their sites. SuperCrayCray did not display its
2 content below the fold. SuperCrayCray did not display ads in software applications.
3 SuperCrayCray did not display ads in e-mail messages. SuperCrayCray displayed ads only from
4 Google's AdSense network. SuperCrayCray did not display ads from any other publishers.
5 SuperCrayCray did not display more than the maximum of three standard ad units, three link
6 units, and two search boxes on one webpage. SuperCrayCray did not display ads on password-
7 protected pages. SuperCrayCray websites did not have more than three pop-ups. SuperCrayCray
8 did not display ads in pop-up windows.

9 29. Furthermore, Google expressly affirmed to Super Cray on multiple occasions that
10 the advertisements it was displaying on its website fully conformed with Google's AdSense
11 policies.

12 30. Google AdSense allows a publisher to "self-report" its website to Google so that
13 Google could verify that the website was fully compliant with AdSense policies. Publishers
14 might do this because, for example, they see a spike in their click-thru-rate ("CTR") (i.e., the
15 percentage of website viewers that click on advertisements) and want Google to verify that the
16 increased CTR was not due to "click fraud," improper advertisement, website formatting or other
17 factors that could cause Google to find an AdSense advertisement to be invalid.

18 31. Google encourages publishers to self-report so that those publishers can make any
19 necessary corrections to their website far in advance of the payout date. This benefits Google as
20 well, because advertisers are not likely to pay Google for advertisements that featured an
21 unusually high CTR.

22 32. On September 29, 2014, Super Cray co-founder Denis Ganev participated in an
23 Internet chat carried out on Google's proprietary chat program with a Google AdSense
24 representative named "Ryan J" after Super Cray had performed a self-report on itself to Google.
25 In that conversation, the parties stated:

26 Denis: We reported our selves previously in the month asking to verify if our site is fully
27 complaint (sic) with all TOS [Terms of Service]. We never received a response, does that
28 normally mean that it was checked and no issues were found?

1 Ryan J: Correct, warnings are resolved once you mark them as such. If there is a future
2 issue the policy team will get back to you.

3 Denis: Honestly, our biggest concern was our CTR on our ads. We wanted to confirm if it
4 was inline with whats normal. We wanted to double check that the CTR was not in
5 anyway a result of accidental clicks, or what not. Is that something that's checked
6 periodically when a site scales quickly? Or is that something checked in the 2 week
7 period?

8 Ryan J: We do validate all clicks and impressions and are monitoring it constantly.
9 **The CTR you are seeing is within the normal range. I'm also not seeing any**
10 **concerns are you site, ex. implementation that could cause a high amount of**
11 **accidental clicks.**

12 33. By the end of September 2014, SuperCrayCray had accrued \$197,045.69 in
13 AdSense earnings according to Google. That number had been slightly reduced compared to
14 previous figures estimated by Google, so on October 1, 2014, Super Cray co-founder Ryan
15 Kalscheuer contacted Google with questions. In another Internet chat with "Ryan J," Ryan J
16 explained that the estimated earnings had been reduced compared to the final earnings because of
17 CTR that Google determined to be invalid. In addition:

18 Ryan K: Is there any other reason for further adjustments for the month of Sept? Can I
19 count on receiving this amount, \$197,045.69 later in the month?

20 Ryan J: Yes, those earnings have finalized and **will be paid out** on the 21st of the month.
21 Then you will receive it a few days later.

22 34. Also on October 1, 2014, another Google AdSense representative called "Roy"
23 responded by e-mail to a separate query by Super Cray co-founder Kirill Fuchs. In Kirill's e-
24 mail, he had asked:

25 Hello,

26 My question is regarding an ad placement we currently have. Our 336x280 (desktop) and
27 300x250 (mobile) both have a significant click through rate on the first page of some of
28 our articles. I wanted to verify that our ad placement is not generating invalid activity such
as accidental clicks. Is there anyway to tell if our conversion rate for those ads are below
normal ranges? Thank you in advance, I understand it's difficult to accommodate every
publishers request to verify such things.

An example page would be:

<http://supercraycray.com/15celebritiesthatreallyhateeachother/>

1 35. Roy responded:

2 Hi Kirill,

3 Happy to help. I reviewed your account and website supercraycray.com , and found
4 correct implementations for both 336x280 (desktop), and 300x250 (mobile). We definitely
5 appreciate your honesty and your efforts to keep your account in good standing.

6 For your reference, you can find tips and guidelines for keeping your account in good
7 standing by visiting
8 <https://www.google.com/support/adsense/bin/answer.py?answer=23921>. Hope this is
9 useful. Feel free to write me for any further clarifications.

10 Thanks,

11 Roy
12 The Google AdSense Team

13 36. Attached as Exhibit 1 and incorporated by reference in this Complaint is a true and
14 correct copy of the October 1, 2014 e-mail from Roy (adsense-support@google.com) to Kirill
15 which includes Kirill's original e-mail to Google AdSense.

16 37. On October 6, 2014, Kirill contacted Google with questions regarding SuperCray's
17 declining cost-per-click ("CPC") that it was earning from its AdSense advertisers. In an Internet
18 chat with Google AdSense representative "Jacky G," the parties stated:

19 Kirill: We tend to see higher CTR at the bottom of the page. But for some reason the CPC
20 is higher for the first unit of th page. We originally ran the 300x250 at the top but
21 switched positions about a week ago since that one has higher CPC.

22 Jacky G: The ad unit at the top of a page will generally perform better because it's above
23 the fold and users will always see the ad. Ads further down a page are not guaranteed the
24 same visibility. **It's great that you've labeled your ads because this will reduce invalid
25 clicks.** It's also possible that the 300x100 performed better because it doesn't take up as
26 much space. Placing the 300x250 right below the article title would have pushed your
27 content below the fold and likely caused more accidental clicks.

28 **I'd stick with your current implementation.**

My only suggestion would be to increase the size of your navigation buttons just so
they're obvious to your users.

**Actually I just navigated past the first page and the previous and next buttons are
bright and obvious.**

My suggestion would be to keep this implementation and monitor it's performance over
the next few weeks. CPCs should adjust for the change soon and you'll likely start seeing
a boost because of the holidays.

Google's Motivations for Defrauding Super Cray

1
2 45. On April 29, 2014, an anonymous whistleblower purporting to be a former Google
3 AdSense employee published on the Internet a detailed exposé about Google's systemic practices
4 in defrauding AdSense publishers (the publication of which can be found at
5 <http://pastebin.com/qh6Tta3h>).

6 46. According to this whistleblower, beginning in 2009, Google executives were
7 unhappy with the amount of revenue shared with its AdSense publishers and thus began a process
8 of banning high-earning AdSense accounts close to their payout period (notably bans never took
9 place after payouts were made). Google would pocket all of the AdSense earnings for those
10 banned accounts and thereby eliminate any revenue-sharing whatsoever.

11 47. According to this whistleblower, Google AdSense employees were instructed to
12 provide any reason for a ban of an account, no matter how unsubstantiated or unprovable the
13 reason could be.

14 48. According to this whistleblower, certain AdSense accounts were exempted from
15 this practice based on the likelihood that they could generate media attention or public outrage
16 following an arbitrary termination. This meant that nascent publishers, such as Super Cray, were
17 vulnerable because they were not yet sufficiently well-known to attract a dedicated following or
18 significant media attention.

19 49. In addition to Super Cray, other examples of Google's conduct supporting the
20 whistleblower's account abounds. For example, a former AdSense publisher called PubShare
21 (www.pubshare.com) had accrued nearly \$1 million in AdSense earnings when Google abruptly
22 terminated PubShare's account in November 2013 and refused to pay out any amount of that \$1
23 million.

24 50. Similar to Super Cray, Google provided the following explanation to PubShare for
25 its account termination: "Layout Encourages Accidental Clicks." PubShare, however, displayed
26 its Google AdSense advertisements in a format approved by Google. And similar to Super Cray,
27 Google has refused to have any in-depth, substantive discussions with PubShare regarding its
28 decision to terminate that account.

1 Cray's AdSense advertisements were actually improper, but because these Google AdSense
2 employees knew or should have known that Google had planned to arbitrarily ban Super Cray for
3 having an improper layout in order to avoid paying Super Cray its accrued earnings, thereby
4 allowing Google to keep all the AdSense revenue for itself.

5 57. On information and belief, Ryan J, Roy and Jacky G knew or should have known
6 their statements were false because as AdSense employees, they knew about Google's AdSense
7 practices that had been in existence since sometime in 2009.

8 58. On information and belief, Ryan J, Roy and Jacky G were following Google's
9 internal directives to reassure nascent but high-earning AdSense publishers that their website
10 layouts were fine, even though Google planned to cite those same layouts as a reason for
11 terminating their accounts in the future. Such reassurances would encourage those publishers to
12 drive additional traffic to their AdSense advertisements which, in turn, would increase Google's
13 AdSense revenue.

14 59. On information and belief, Google had little concern about defrauding a nascent
15 publisher such as Super Cray because Super Cray, like other publishers such as PubShare, had no
16 media attention and no dedicated following. It was unlikely there would be any significant outcry
17 should Super Cray publicize the fact of Google's wrongdoing.

18 60. Super Cray justifiably relied upon Ryan J, Roy and Jacky G's assurances. After
19 all, Google expressly directed AdSense publishers to pose such queries with its AdSense
20 representatives and to take direction from those representatives on how to organize the layout of
21 AdSense advertisements.

22 61. Super Cray was damaged by Google's deception because it did not receive any of
23 the \$535,000 it had accrued in AdSense earnings.

24 62. Even if Super Cray is somehow not entitled to its \$535,000 in AdSense earnings
25 for any reason, it was still damaged by justifiably relying on Google's deceptive statements
26 because it incurred over \$300,000 in costs in efforts to increase user traffic to SuperCrayCray.

27 63. Super Cray was also damaged because it lost future profits due to Google's
28 deception. Had Super Cray been aware of the nature of Google's deceptive statement, it would

1 have halted its participation in the AdSense program and partnered up instead with other on-line
2 advertising programs such as Adversal or Bidvertiser known to be honest and scrupulous with its
3 publishers. The \$300,000 in costs spent by Super Cray would have led to increased user traffic
4 for those alternate programs and Super Cray would be earning substantial monthly advertising
5 revenue today from those programs instead of being on the verge of bankruptcy.

6 **SECOND CAUSE OF ACTION**

7 **(Negligent Misrepresentation – Cal. Civ. Code § 1710(2))**

8 64. Super Cray hereby re-incorporates and re-alleges paragraphs 1-61.

9 65. As alleged herein, on September 29, 2014, twice on October 1, 2014 and on
10 October 6, 2014, Google AdSense representatives Ryan J, Roy and Jacky G reassured Super
11 Cray's co-founders in writing that Super Cray's AdSense advertisements were correctly
12 implemented and did not encourage accidental, invalid clicks.

13 66. Ryan J, Roy and Jacky G's statements were false and misleading at the time they
14 were made. Pleading strictly in the alternative, Super Cray alleges that these statements were
15 false and misleading because Super Cray's advertisements were later found by Google to have an
16 improper layout that encourages accidental clicks and caused Google to ban Super Cray.

17 67. Ryan J, Roy and Jacky G knew or should have known their statements were false
18 because their specific jobs as AdSense customer service representatives was to know whether
19 AdSense layouts for a particular publisher were valid and to assist publishers in formatting proper
20 layouts for AdSense.

21 68. Super Cray justifiably relied upon Ryan J, Roy and Jacky G's assurances. After
22 all, Google expressly directed AdSense publishers to pose such queries with its AdSense
23 representatives and to take direction from those representatives on how to organize the layout of
24 AdSense advertisements.

25 69. Super Cray was damaged by Google's negligent misrepresentations because it did
26 not receive any of the \$535,000 it had accrued in AdSense earnings.

27 70. Even if Super Cray is somehow not entitled to its \$535,000 in AdSense earnings
28 for any reason, it was still damaged by justifiably relying on Google's negligent

1 misrepresentations because it incurred over \$300,000 in costs in efforts to increase user traffic to
2 SuperCrayCray.

3 71. Super Cray was also damaged because it lost future profits due to Google's
4 negligent misrepresentation. Had Super Cray been aware of the nature of Google's negligent
5 misrepresentations, it would have immediately corrected any problems that existed. Super Cray
6 would have received its earnout, re-invested those earnings into driving even more user traffic to
7 its website and would be earning substantial monthly advertising revenue today from those
8 programs instead of being on the verge of bankruptcy.

9 **THIRD CAUSE OF ACTION**
10 **(Breach of Contract)**

11 72. Super Cray hereby re-incorporates and re-alleges paragraphs 1-69.

12 73. Super Cray entered into the AdSense Agreement with Google.

13 74. Super Cray fully performed all of its obligations under the AdSense Agreement, as
14 confirmed by Google AdSense representatives Ryan J, Roy and Jacky G on September 29, 2014,
15 twice on October 1, 2014 and on October 6, 2014.

16 75. In breach of the AdSense Agreement, Google: (a) failed to pay Super Cray for the
17 number of valid clicks on advertisements displayed on SuperCrayCray, the number of valid
18 impressions of advertisements displayed on SuperCrayCray, and/or other valid events performed
19 in connection with the display of advertisements on SuperCrayCray using Google's AdSense
20 program; and (b) terminated the AdSense Agreement with Super Cray without reason.

21 76. As a proximate result of Google's breach of contract, Super Cray has been
22 damaged of no less than \$535,000.

23 77. In addition, Google's breach of contract damaged Super Cray because it lost future
24 profits as a result. Had Super Cray received its earnout as Google was contractually obligated to
25 pay, it would have re-invested those earnings into driving even more user traffic to its website and
26 would be earning substantial monthly advertising revenue today from those programs instead of
27 being on the verge of bankruptcy.
28

1 advertising or partnering with traffic sites. Such efforts obviously come at a financial cost to the
2 publisher and cannot be sustained if Google does not pay out the earnings derived from such
3 investment of funds by the publisher.

4 **FIFTH CAUSE OF ACTION**
5 **(Cal. Bus. & Prof. Code §§ 17200, et seq.)**

6 86. Super Cray hereby re-incorporates and re-alleges paragraphs 1-83.

7 87. Google’s practices, as alleged herein, violate California Civil Code sections 1709
8 and 1710.

9 88. Google engaged in these unlawful practices to the detriment of Super Cray for the
10 purpose of increasing its profits.

11 89. As a result of such unlawful actions, Super Cray has suffered and continues to
12 suffer injury in fact and has lost money as a result of these practices.

13 90. Super Cray seeks full restitution of monies, according to proof, acquired by
14 Google from Super Cray by means of the unlawful practices alleged herein.

15 91. Super Cray seeks an injunction to prohibit Google from continuing to engage in
16 the unlawful practices alleged herein.

17 **PRAYER**

18 **WHEREFORE**, Plaintiff Super Cray Inc. prays for judgment as follows:

- 19 1. For judgment against defendant Google Inc.;
- 20 2. For compensatory damages;
- 21 3. For punitive damages;
- 22 4. For permanent injunctive relief;
- 23 6. For restitution;
- 24 7. For pre-judgment interest;
- 25 8. For costs; and
- 26 9. For such other and further relief as the Court deems just and proper.

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Dated: January 8, 2015

GAW | POE LLP

By: 

Mark Poe
Attorneys for Plaintiff Super Cray Inc.

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JURY DEMAND

Plaintiff Super Cray Inc. hereby demands a jury trial for its claims against defendant Google Inc.

Dated: January 8, 2015

GAW | POE LLP

By: 

Mark Poe
Attorneys for Plaintiff Super Cray Inc.