10-0911

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADECOMET.COM LLC,

Plaintiff-Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for the plaintiff-appellant, TradeComet.com LLC, certifies that TradeComet.com LLC is a privately held limited liability company and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

Plaintiff-appellant TradeComet.com, LLC ("TradeComet") appeals from a Civil Judgment entered by the Clerk of the United States District Court for the Southern District of New York on March 12, 2010, dismissing TradeComet's Complaint. [JA 349]. The Judgment was rendered pursuant to an Opinion & Order by the Honorable Sidney H. Stein, dated and entered on March 5, 2010 (the "Opinion"). [SA 1].

TradeComet's Complaint alleged defendant-appellee Google, Inc. ("Google") unlawfully monopolized, attempted to monopolize, and entered into agreements in restraint of trade in the online search advertising market in violation of 15 U.S.C. §§ 1 and 2. [JA 8, 31-35]. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 15 U.S.C. § 4, and 15 U.S.C. §§ 15 and 26. Venue was proper under 15 U.S.C. §§ 15, 22, and 26, and under 28 U.S.C. § 1391(b) and (c).

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, TradeComet timely filed its Notice of Appeal on March 15, 2010. [JA 355]. As the Judgment entered by the district court disposed of all parties' claims, this Court has jurisdiction over the final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by failing to follow clear Supreme Court precedent that dictates that a motion to dismiss must be construed as a motion to transfer under 28 U.S.C. § 1404(a) where the motion is brought pursuant to a forum selection clause that permits suit in a different federal forum.

2. Whether the district court erred by: (1) Violating the axiomatic rule that, in deciding a motion to dismiss, all facts are to be construed in favor of the plaintiff; and (2) deciding factual questions adverse to the plaintiff without first holding an evidentiary hearing.

3. Whether the district court erred by holding that: (1) An online agreement that Google asserted TradeComet had "clicked" applied retroactively to activities that took place prior to the effective date of the agreement; and (2) the same online agreement is enforceable against TradeComet.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a)(1), TradeComet respectfully requests oral argument, as it believes it would assist the Court in reviewing the record.

STATEMENT OF THE CASE

TradeComet commenced this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, seeking relief for injuries sustained by TradeComet by reason of Google's violation of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2.

Both United States federal antitrust enforcement agencies – the Department of Justice and the Federal Trade Commission – have recently recognized that Google is dominant in the relevant market of Internet search advertising. Google has acted to entrench and establish this dominance by, among other things, engaging in a campaign of anticompetitive conduct intended to blunt the competitive threat posed by specialized (or "vertical") search engines.[1] Google acted to starve competing vertical search engines, such as the fast-growing website owned by TradeComet, of the critical search traffic necessary to develop and to compete in the search advertising market. In furtherance of this campaign against vertical search engines, Google unilaterally terminated the voluntary and profitable course of dealing it had with TradeComet by among other things, manipulating its auctions so that TradeComet faced artificial and low "quality" scores, which resulted in prohibitively higher prices to acquire search traffic. Additionally, Google has entered into agreements with chosen competitors, the purpose and effect of which is to maintain and establish Google's dominance. As a result of Google's exclusionary conduct and unlawful agreements, competition in the search advertising market has been harmed and TradeComet has been injured. In fact, TradeComet currently attracts only one percent of the traffic that visited its website prior to falling victim to Google's exclusionary conduct.

On March 31, 2009, Google filed a motion to dismiss for lack of subject matter jurisdiction and improper venue under Rules 12(b)(1) and 12(b)(3), relying on a forum selection clause in a standardized "clickwrap" agreement it has imposed upon many search advertisers. The district court declined to hear oral argument. On March 5, 2010, Judge Sidney H. Stein granted Google's motion to dismiss under Rules 12(b)(1) and 12(b)(3).

[1] The European Commission currently is investigating whether Google's conduct, similar to that alleged in the Complaint, violates European antitrust law. Thomas Catan, et al., EU Opens Google Antitrust Inquiry, Wall St. J., Feb. 25, 2010, at 23, *available at* http://online.wsj.com/article/SB10001424052748704188104575084062149453280.html.

STATEMENT OF FACTS

A. Google: A Monopolist in the Search Advertising Market

Google operates a search engine website and a search advertising platform (known as AdWords) on the Internet. Over the last decade, Google has truly become *the* "gateway" to the Internet, increasingly becoming the starting point for individuals seeking to find information on the Internet and an essential source of traffic for websites and advertisers.

In response to search queries, Google returns search-results pages with a list of "natural" or "algorithmic" results (typically on the left-side) and, at times, a list of paid search advertising results or "sponsored links" (typically on the top and/or right side). Advertisers are drawn to, and willing to pay for (through an auction process described *infra*), search-based ads like Google's "sponsored links" in part because these ads are displayed at the moment a user might purchase a good or service related to his search query. [JA 8 at ¶ 2]. As a result of its advertising revenues from AdWords, Google has become a huge corporation with a market capitalization of nearly $200 billion and annual revenues of over $20 billion.[2] [JA 10 at ¶ 36].

Both United States federal antitrust enforcement agencies have acknowledged Google's dominance in the relevant antitrust market of search advertising. The Department of Justice has stated that an "investigation revealed that Internet search advertising and Internet search syndication are each relevant antitrust markets and that Google is by far the largest provider of such services,

[2] Google, Inc., Annual Report (10-K), at 41, *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312510030774/d10k.htm ("Google's 10-K").

with shares of more than 70 percent in both markets."[3] Meanwhile, the Federal Trade Commission has concluded that "Google, through its [Internet search advertising] business, is the dominant provider of sponsored search advertising, and most of its online advertising revenue is generated by the sale of advertising space on its search engine results pages."[4] As the dominant provider of search advertising on the Internet, Google has become the essential medium for search advertising to over a million advertisers, ranging from the largest companies in the world to the smallest, unsophisticated operations.

Google's search advertising platform, known as "AdWords," purportedly uses an auction to determine the price that advertisers pay for search ads. Through AdWords, advertisers bid on "keywords" in order to have their ads displayed on Google in response to user queries when the specified "keyword" is entered by the user into Google's search engine. Keywords are words or character strings that, when typed into a search engine either alone or along with other search terms, result in the appearance of search advertising results on the search-results page. Typically, the advertiser pays when a user clicks on its ad. However, because the user has launched a search using the keyword, a user that clicks on an ad is predisposed to respond to the advertiser's message. The higher bidding advertisers

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[3] Press Release, Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement, at 2 (Nov. 5, 2008), available at http://www.justice.gov/atr/public/press_releases/ 2008/239167.pdf; *see also* Brief of Dep't of Justice Opposing Settlement, *The Authors Guild v. Google, Inc.*, No. 05 CV 8136-DC (S.D.N.Y. Sept. 4, 2009) (Google "already holds a relatively dominant share in [the online search business]").

[4] Statement of Fed. Trade Comm'n Concerning Google/DoubleClick, FTC File No. 071-070, at 3, available at http://www.ftc.gov/os/caselist/0710170/071220 statement.pdf.

tend to obtain better placement of their ads on the search results page and to realize higher "click through" rates. [JA 15 at ¶ 32].

Google purports to auction keywords onto AdWords using a variation of what is commonly referred to as a "second-price" auction. Advertisers submit bids into AdWords based on the price they would pay if their search ad is shown and "clicked" by the user (i.e., a "price-per- click"). The "second-price" aspect refers to the fact that advertisers on AdWords ostensibly pay based on the bid of the second highest bidder.

Despite being termed "auctions," Google's bidding process is not open and is not transparent to advertisers or users. The price an advertiser pays is not determined solely by the other bidders in the auctions; rather Google uses various mechanisms to influence and, in some cases, alter the price an advertiser ultimately pays. For example, Google establishes minimum pricing thresholds that can differ by advertiser based on intentionally vague criteria, such as Google's purported view about the quality of the advertiser's linked site, known as "Landing Page Quality." Google thus retains control over the identities of the bidders that win its "auctions." Moreover, Google frequently changes its formula for Landing Page Quality, dramatically increasing a website's minimum price threshold. In other words, as a result of a change in its Landing Page Quality, an advertiser's price for a keyword can increase, for example, from five cents to five dollars overnight *without any change in the bid submitted by the second-highest bidder*. As a result, the price for a keyword to the advertiser who values it most can be raised to prohibitive levels. Google does not disclose the specific criteria used to determine Landing Page Quality. [JA 16 at ¶¶ 33-34]. Many in the industry refer to

Google's advertising system as a "Black Box." Google's Chief Economist has explained, however, that by restricting the number of positions displaying ads on its website, Google can force advertisers to pay "far, far higher" amounts and that a "big chunk of revenue at Google" is derived from that strategy. [JA 16 at ¶ 34]. These artificial auctions are made possible by Google's dominance, and Google ensures its position as gatekeeper – and toll collector – of the Internet by excluding rival search sites like TradeComet.

B. TradeComet's Launch and Growth

TradeComet was founded in 2005 by Dan Savage, a graduate of Harvard College and Harvard Business School and a veteran of the publishing and online search industries. Prior to founding TradeComet, Mr. Savage was the founder and CEO of ThomasB2B.com ("ThomasB2B"), a specialized online business to business ("B2B") directory advertising platform. While at ThomasB2B, Mr. Savage developed a search website directed at B2B search. He realized that advertisers seeking to reach Internet users conducting business-oriented searches often considered specialized B2B search websites as a more attractive search advertising option than the predominant generic search websites at the time (Yahoo! and Google) due to the more targeted audiences visiting B2B sites. For example, advertisers understand that a business user searching for "pumps" is more likely to be searching for a mechanical or hydraulic pump than for a style of heeled women's shoes. Mr. Savage therefore developed an advertising platform that blended a free searchable business directory, *i.e.*, the natural search results, with bidding by advertisers for position on the website, *i.e.*, the search advertising results or sponsored links. Thus, Mr. Savage's approach was similar to Google's approach to general search but, rather than seeking to provide answers to all types of search queries, Mr. Savage's venture sought to appeal specifically to B2B users. Mr. Savage's new venture became TradeComet, and the website was called SourceTool.com ("SourceTool"). [JA 18 at ¶ 41]. Although SourceTool.com proved to be an attractive and effective site for specialized or "vertical" B2B search, other vertical search providers exist and many of those perceived by Google to be a competitive threat like SourceTool have been subjected to similar exclusionary conduct.[5]

Mr. Savage realized that attracting users to his site required him to advertise on Google, as AdWords had become the dominant medium for search advertising. Once SourceTool obtained a critical mass of users, they would begin to navigate to SourceTool directly without passing through a general search site first. In October 2005, TradeComet began purchasing several hundreds of thousands of keywords and phrases from Google's AdWords. [JA 19 at ¶ 43]. Initially, SourceTool was remarkably successful. By March 2006, just three months after its launch, SourceTool was the second-fastest growing website in the world, based on a 58% growth rate from February to March 2006. Daily traffic to SourceTool during that time exceeded 600,000 visits. [JA 19 at ¶ 44].

Google embraced SourceTool's initial success, and Mr. Savage was invited to Google's New York office in December 2005 to meet about his upstart business. In January 2006, a Google representative called Mr. Savage to inform him that the

[5] *See* Catan, *supra* note 1.

monetization of SourceTool was successful and that SourceTool had been selected as a "site of the week" at Google. Mr. Savage was again invited to Google's New York office for a second visit in May 2006 to meet with several Google representatives to discuss further growth of SourceTool. At Google's specific request and urging, Mr. Savage, along with other TradeComet officers, shared SourceTool's business plans, strategies, and growth goals. After the meeting, a Google representative stated that she was "excited to continue working with [TradeComet's] accounts to get [SourceTool's] advertising at an even higher level of performance." [JA 19 at ¶ 46].

C. <u>The Threat From Vertical Search</u>

By mid-2006, however, Google recognized that sites like SourceTool (individually and collectively with other vertical search sites) posed a substantial threat to Google's dominance in the search advertising market. [JA 27-33 at ¶¶ 70-90]. Vertical search sites by their nature allow searchers to self-select the general area in which they wish to search and are an alternative to doing repeated searches on Google's general search engine. While in 2006, Internet users typically discovered and reached vertical search sites like SourceTool through Google, as searchers become better informed, they will initiate their search query at vertical search sites, rather than at Google, to obtain search results that are more finely tuned to their needs. For example, today travelers often begin their searches for hotels and plane tickets at Kayak.com or Orbitz.com, thus taking substantial advertising revenue away from Google. Indeed, travel search alone is a multi-billion dollar annual business. Similarly, were YouTube still an independent vertical video search site (it has been acquired by Google), it would rank among the leading sources of search queries on the web, ahead of Yahoo! and Microsoft. In fact after this case was filed, Google – for the first time – specifically identified vertical search engines as competitors in its Form 10-K filed with the SEC.[6]

D. Google's Exclusionary Conduct

Once Google recognized the competitive threat posed by vertical search sites generally and SourceTool specifically, Google changed the relationship it had with TradeComet. Following the May 2006 meeting between Google and TradeComet, Google drastically raised the minimum bids for AdWords keywords on which SourceTool bid. Indeed, certain keyword prices were increased by approximately 10,000%; the minimum price threshold for keywords that previously cost TradeComet between five and ten cents were increased to $5 and $10. Google has similarly targeted other vertical sites that were competing, rather than partnering, with Google. In addition to raising keyword prices to certain disfavored vertical search sites, Google also entered into agreements with certain other vertical search sites. Through these agreements, Google supported these partner sites in order to eliminate the disfavored rival search sites by, among other things, artificially propping up its partner sites with the purpose and intent of preserving Google's dominance. [JA 11, 40-42 at ¶¶ 9, 115-120].

In August 2006, during another meeting with Google, Mr. Savage protested Google's conduct. Google explained that the recent drastic keyword price increase

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[6] Google, Inc., Annual Report (10-K), at 15-16, *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312510030774/d10k.htm.

was not due to any increase in demand for the keywords on which SourceTool was bidding, but rather was due to SourceTool's poor "Landing Page Quality," as assessed by Google's "Landing Page Quality algorithm." This was a concern that Google had never raised in its previous meetings with TradeComet's management and that Google expressed mere months after declaring SourceTool a "site of the week." At Google's suggestion, TradeComet initiated several costly changes to SourceTool designed to improve (in Google's estimation) the site's landing page quality assessment.

Ultimately, however, Google contacted Mr. Savage in December 2006 to inform him that Google had conducted a manual review of SourceTool and had concluded that Google would not make any changes to SourceTool's Landing Page Quality. Mr. Savage again pleaded with Google but was tersely informed that "[y]our landing pages will continue to require higher bids in order to display your ads, resulting in a very low return on your investment. Therefore, AdWords may not be the online advertising program for you." [JA 22]. Google also stated that it "realize[s] that we are in a *unique position* and are always mindful of the impact our policy decisions will have before we implement them." [JA 15 at ¶ 53] (emphasis supplied).

E. <u>The Present Lawsuit</u>

On February 17, 2009, TradeComet filed suit against Google alleging that Google violated Sections 1 and 2 of the Sherman Act based upon the foregoing and related conduct. On March 31, 2009, Google filed a motion to dismiss under Rules 12(b)(1) and 12(b)(3) for lack of subject matter jurisdiction and improper venue, relying upon a forum selection clause in one of its "clickwrap" agreements. Google claimed that on August 29, 2006, after Google had begun its campaign of exclusionary conduct against TradeComet, TradeComet "clicked" through a form AdWords agreement, dated August 22, 2006 (the "8/29/06 Agreement"). The 8/29/06 Agreement contains a forum selection clause stating in relevant part that: "[A]ll claims arising out of or relating to this agreement or the Google program(s) shall be litigated exclusively in the federal or state courts of Santa Clara County, California." [JA 67]. Google claimed that TradeComet's action arose out of or was related to the 8/29/06 Agreement and for that reason TradeComet's federal antitrust claims should be dismissed.

On April 15, 2009, TradeComet opposed the motion to dismiss on the ground that controlling Supreme Court precedent dictates that Rules 12(b)(1) and 12(b)(3) are inappropriate procedural mechanisms to address a forum selection clause that preferenced another federal venue. TradeComet explained that, consistent with controlling Supreme Court precedent, the district court should construe Google's motion as a motion to transfer under 28 U.S.C. § 1404(a). This distinction is important in part because, unlike Rule 12, § 1404(a) requires the district court to weigh many different public and private factors, virtually all of which cut against transfer in this case. TradeComet also argued that Google failed to demonstrate that TradeComet assented to the 8/29/06 Agreement and that the forum selection clause in the 8/29/06 Agreement was unenforceable. TradeComet also argued, assuming *arguendo* that TradeComet did assent to the 8/29/06 Agreement and the Agreement is enforceable, the 8/29/06 Agreement should not be read to apply retroactively to anticompetitive conduct that began before the

Agreement was in existence. Moreover, TradeComet argued that if any contract was relevant to this action, it would be the AdWords agreement in place at the time that Google's violations of the antitrust laws first occurred. At that time, the standard-form AdWords contract in place had a much less broad forum selection clause, providing only that "[t]he agreement must be . . . . adjudicated in Santa Clara County, California." TradeComet's antitrust claims arise from Google's exclusionary conduct to cut off search traffic to TradeComet's site and do not require any agreement between Google and TradeComet to be "adjudicated" – as a result, that forum selection clause did not require TradeComet to sue in California.

Finally, TradeComet argued that the forum selection provision of the 8/29/06 AdWords Agreement was unenforceable as a matter of public policy. Because Google has a monopoly in search advertising and is essential to advertisers wishing to reach Internet users at the gateway, AdWords contracts, which Google claims to require any advertiser to click before the advertiser can even bid on keywords, is an archetypical contract of adhesion. Worse still, Google is using its monopoly power to prevent literally any putative antitrust plaintiff who has standing to challenge Google's illegal monopolistic acts from using the broad venue provisions in the federal antitrust laws, which were expressly intended to allow pursuit of antitrust malefactors wherever they do business.

The court declined to hear oral argument.

F. <u>The District Court's Opinion and Order</u>

On March 5, 2010, the district court granted Google's motion to dismiss under Rules 12(b)(1) and 12(b)(3) because the court ruled that TradeComet's claims fell within the scope of the forum selection clause in the 8/29/06 Agreement. The court failed to undertake an analysis under § 1404(a). Furthermore, the court wrongly determined that TradeComet assented to the 8/29/06 Agreement, and did so without holding an evidentiary hearing to decide disputed factual questions. Moreover, the court made errors of law by ruling that the forum selection clause in the 8/29/06 Agreement was enforceable and that it applied retroactively to Google's anticompetitive conduct that took place before August 29, 2006.

SUMMARY OF THE ARGUMENT

The district court committed several legal errors in dismissing TradeComet's suit pursuant to Rules 12(b)(1) and 12(b)(3) based upon a forum selection clause in the 8/29/06 Agreement that directs "all claims arising out of or relating to this agreement or to the Google Program(s) shall be litigated exclusively in the federal or state courts of Santa Clara County, California . . . ." [JA 67].

A. Dismissal Pursuant to Rule 12(b) was Improper

The Supreme Court has held that when a forum selection clause permits jurisdiction in a federal court different from the court presiding over the suit, the district court must decide whether to *transfer* the case pursuant to the standard set forth in 28 U.S.C. § 1404(a), not whether to *dismiss* the case pursuant to Rule 12(b). *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). As *Stewart* teaches, a district court may evaluate whether to dismiss a forum selection clause pursuant to Rule 12(b) only when the forum selection clause restricts venue exclusively to a non-federal venue. *Id.* 31-32. Consequently the district court committed an error of law by dismissing the case rather than considering the relevant transfer factors pursuant to § 1404(a).

The district court's legal error is particularly significant because this Circuit has explicitly held a district court has broader discretion to decide whether to transfer a case to a different federal court under § 1404(a) than it does to decide whether to dismiss the case under Rule 12(b). *Red Bull Assocs. v. Best Western Int'l, Inc.*, 862 F.2d 963, 967 (2d Cir. 1988). Whereas the standard under Rule 12(b) places the burden on TradeComet to make a strong showing to overcome the presumption of enforceability of forum clauses that do not select federal forums as permissible venues, *New Moon Shipping Co. v. MAN B & D Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997), § 1404(a) directs the court to "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Stewart*, 487 U.S. at 30. Because the district court used an improper procedural mechanism and dismissed the case, it failed at all to consider, among other things, whether it serves the "interests of justice" to allow a firm with monopoly power to direct all litigation – even antitrust litigation that arises out of rights bestowed upon the plaintiff by a federal statute and not the contract itself – to its distant home venue via a contract of adhesion.

This Court reviews *de novo* the district court's decision to dismiss TradeComet's Complaint pursuant to Rules 12(b)(1) and 12(b)(3). *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (holding that legal issues presented by a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction are reviewed *de novo*); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384

(2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*.").

B. The District Court Made Factual Determinations Adverse to TradeComet at the Pleading Stage

Even if it were procedurally proper for the district court to decide the validity of the forum selection clause pursuant to a motion to dismiss, "a party seeking to avoid enforcement of [a forum selection] clause is . . . entitled to have the facts viewed in the light most favorable to it." *See New Moon Shipping,* 121 F.3d at 29. Here, the district court held the 8/29/06 Agreement was in force despite TradeComet's assertions that Google failed to communicate reasonably a change in terms from its prior contracts. Given that this litigation is at the pleading stage, the court should have held the 8/29/06 Agreement was not in force. In any event, when evaluating a motion to dismiss, it is axiomatic that "a disputed fact may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing." *Id.* This Court reviews the district court's legal errors *de novo*. *See Phillips*, 494 F.3d at 384 ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*.").

C. The District Court Made Errors of Law in Interpreting the Contracts at Issue

Even if it were permissible for the court to hold the 8/29/06 Agreement was in force, the district court made several errors interpreting the terms of that writing. First, despite no language in the contract evidencing such an intent, the district court held the 8/29/06 Agreement applied retroactively to actions that took place prior to that date. Second, the district court erred by holding the 8/29/06 Agreement is enforceable against TradeComet, despite the fact that it was procured by a monopolist through obfuscation and a contract of adhesion designed to deny TradeComet its congressionally guaranteed right to choose venue under the Sherman Act – and despite the fact that the monopolist imposed the contract of adhesion only after instituting illegal anticompetitive conduct against TradeComet. The Court's review of these issues is *de novo*. *See Phillips*, 494 F.3d at 384 ("Contract interpretation as a question of law is also reviewed *de novo* on appeal.").

LEGAL ARGUMENT

POINT I

DISMISSAL PURSUANT TO RULE 12(B) WAS IMPROPER

Rather than construe Google's motion to dismiss as a motion to transfer under 28 U.S.C. § 1404(a), the district court dismissed TradeComet's Complaint "pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(3)." [SA 16]. Dismissal pursuant to Rules 12(b)(1) and 12(b)(3) is plainly an error of law because, when a forum selection clause permits a case to be brought in a federal district court different from the court presently presiding over the case, "federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause." *Stewart*, 487 U.S. at 32 (1988) (remanding to district court to determine whether to transfer under

§ 1404(a) after district court determined forum selection clause was invalid as a matter of state law). This proposition is firmly established and is accepted by the leading commentators. Thus, "the *Stewart* decision instructs courts to use the Section 1404(a) balancing test, even if, as in *Stewart*, the movants ask for the suit to be dismissed for improper venue pursuant to the forum clause." CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3803.1; *see also* 17 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 111.04[4][c] (3rd ed. 2009) ("Based on *Stewart,* the applicable venue statute, and not a forum selection clause, should control whether venue is proper or not. Thus, a motion to dismiss for improper venue is not the appropriate vehicle by which to give effect to the clause when the forum selection clause designates another federal court, or either a state or federal court in a particular state, as the exclusive forums").

Notwithstanding the teachings of *Stewart*, the district court dismissed the case pursuant to Rule 12(b)(1) and 12(b)(3) rather than consider the necessary factors pursuant to § 1404(a). This is legal error because the forum selection clause at issue in the district court's decision expressly permits suit to be brought in *federal* court in San Jose, California. [SA 7; JA 67 (emphasis supplied)]. As a result of the court's error, the case must be remanded for consideration under the standard announced in § 1404(a).[7] It is also worth noting that the distinction between a district court's decision whether to dismiss under Rules 12(b)(1) and

7 Section 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

12(b)(3) and whether to transfer under § 1404(a) is of particular import in this Circuit, as this Court has held a district court has broader discretion in deciding a motion to transfer than in deciding a motion to dismiss. *Red Bull Assocs.*, 862 F.2d at 967. By wrongly applying Rule 12(b) to the case at bar, the district court failed to consider the appropriate factors enumerated in § 1404(a). Importantly, the district court did not even address the implications – and inconvenience (to an aggrieved plaintiff) – of permitting a monopolist such as Google: (1) to force plaintiffs to litigate disputes in its home venue (notwithstanding the locus of activity under the agreement occurred in plaintiff's chosen venue); and (2) effectively to terminate the ability of those seeking relief under the antitrust laws as contemplated by Congress.[8]

A. <u>The Law of Forum Selection Clauses</u>

In 1972, the Supreme Court observed that "[f]orum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy or that their effect was to 'oust the jurisdiction' of the court." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972). In *Bremen*, however,

[8] Other factors not considered by the district court and favoring denial of a motion to transfer under § 1404(a) include the fact that the locus of the majority of operative facts is in New York, where TradeComet is based, where Google has a large office, business under the AdWords agreements were transacted and where meetings between Google and TradeComet occurred. Moreover, New York is TradeComet's forum choice, is convenient to all of TradeComet's anticipated witnesses, and is convenient to both parties' counsel – indeed, Google's counsel in this matter is based in New York. The relevant documents from TradeComet are in New York. Furthermore, many of Google's documents relating to this case are presumably either in or readily accessible in New York. Other relevant documents are likely in Washington, D.C., due to the multiple recent federal investigations into Google's monopoly power. Finally, there is no question that Google has much greater means than TradeComet.

the Court announced a new standard in a case involving a forum-selection clause that required disputes to "be treated before the London Court of Justice," *id.* at 2: "[S]uch clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances," *id.* at 10. In the wake of *Bremen*, the federal courts described several factors relevant to whether enforcement was unreasonable under the circumstances. *See, e.g., D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708, 712 (D. R.I. 1983) (describing factors).

In 1988, the Supreme Court considered the law of enforcing a forum selection clause when, like the dispute between TradeComet and Google, the clause permits a federal court – rather than requiring suit in a foreign court or a state court – to have jurisdiction over a dispute arising from the contract. *Stewart*, 487 U.S. 22, 24 n.1 (1988) (considering forum selection clause providing exclusive jurisdiction to "any appropriate state *or federal* district court located in the Borough of Manhattan") (emphasis supplied). In *Stewart* the court of appeals had decided the validity of the forum selection clause based upon "the standards announced in" *Bremen*. 487 U.S. at 28. The Supreme Court affirmed the circuit court's ultimate decision, but "underscore[d] a methodological difference in [its] approach to the question from that taken by the Court of Appeals." 487 U.S. at 28. The Court reasoned:

> Although we agree with the Court of Appeals that the *Bremen* case may prove "instructive" in resolving the parties' dispute, we disagree with the court's articulation of the relevant inquiry as "whether the forum selection clause in this case is unenforceable under the standards

> set forth in *The Bremen*." Rather, the first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court. For the reasons that follow, we hold that it does.

487 U.S. at 28-29. In reaching this result, the Court concluded "[t]he flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Stewart*, 487 U.S. at 29-30; *see also* WRIGHT, MILLER & COOPER § 3803.1 (transfer pursuant to § 1404(a), not dismissal under 12(b), is proper procedure); MOORE § 111.04[4][c] (same).

B. The District Court has Significant Discretion Under § 1404(a)

The proper application of § 1404(a) to this case, as opposed to the *Bremen* standard, which is reserved for cases involving a forum provision that selects a non-federal forum, is no trivial matter. The standard under § 1404(a) provides far greater discretion to the district court and, unlike *Bremen* does not create a presumption in favor of dismissal based upon a forum selection provision alone. As the *Stewart* Court observed, "[t]he forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)." *Stewart*, 487 U.S. at 31. The analysis under *Bremen*, by contrast, places more weight upon the content of the forum selection clause: "The foundational decision of *M/S Bremen* places the burden on the plaintiff, who brought suit in a forum other than the one designated by the forum selection clause, to make a 'strong showing' in order to overcome the presumption of enforceability." *New Moon Shipping*, 121 F.3d at 29.[9]

By contrast, § 1404(a)

> directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.' It is conceivable in a particular case, for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause.

Stewart, 487 U.S. at 30-31. This Court has also recognized that "[s]ection 1404(a) reposes considerable discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Red Bull Assocs.*, 862 F.2d at 967 (quoting *Stewart*, 487 U.S. at

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[9] The district court here followed the approach laid out by this Court in *Phillips*, a recent decision coalescing this Circuit's jurisprudence interpreting *Bremen* and its progeny in the context of a forum provision selecting a non-federal forum:

> Determining whether to dismiss a claim based on a forum selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires [the court] to classify the clause as mandatory or permissive, *i.e.*, to decide whether the parties are *required* to bring any dispute to the designated forum or simply *permitted* to do so. Part three asks whether the claims and parties involved in the suit are subject to the forum selection clause. . . . The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Phillips*, 494 F.3d at 383-84 (internal citations and quotation marks omitted).

See [SA 7-8].

29). Thus, the district court's failure to use the proper procedure resulted in its failure to consider multiple factors. These factors include Google's monopoly power and whether it serves the interests of justice to allow a monopolist to dictate venue through a forum selection clause, which is plainly contrary to Congress's intention to allow parties with limited resources to bring a claim against a monopolist in any federal forum in which the monopolist does business.

Moreover, in *Red Bull Associates*, this Court explicitly recognized "it is clear that a district court has even broader discretion to decide transfer motions under § 1404(a) than was provided by *Bremen*." 862 F.2d at 967. Consequently, a district court's decision to dismiss a complaint based solely upon its analysis of a contractual forum selection clause – even when that analysis is done properly – cannot settle the question whether the case should be transferred under § 1404(a), which, under *Stewart* is the proper procedural vehicle to decide whether a forum selection clause requires a case be heard in a different federal court.

C. The Cases Relied Upon by the District Court are Inapposite

The district court chose not to follow the approach set forth by the Supreme Court in *Stewart*, and asked only whether the forum selection clause is enforceable under the standards elucidated in *Bremen* and its progeny. Indeed, the district court did not cite *Stewart* once in its opinion. Instead, rather than consider the factors in § 1404(a), the district court opined that that the "appropriate procedural mechanism . . . is a motion to dismiss the complaint for either (1) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1); (2) improper venue pursuant to Rule 12(b)(3); or (3) failure to state a claim pursuant to

Rule 12(b)(6)." [SA 5 (internal citations omitted)]. To justify the three alternatives, the district court cited three decisions by this Court, each of which cites *Bremen* and not *Stewart*. *See Phillips*, 494 F.3d at 383-84; *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509 (2d Cir. 1998) ("We are guided in the application of a forum-selection clause in international disputes by [*Bremen*]"); *AVC Nederland B.V. v. Altrium Inv. P'ship*, 740 F.2d 148, 156 (2d Cir. 1984) ("Analysis of the validity of the forum-selection choice-of-law clause must begin with [*Bremen*]").

That these cases cited by the district court followed *Bremen* and did not discuss *Stewart* is not at all surprising given that each of the three cases, like *Bremen* (and unlike this case), bestowed only a foreign court with jurisdiction to adjudicate disputes arising under the agreements at issue. <u>None</u> of the three cases cited by the district court involved a forum selection clause that provided a federal district court with jurisdiction over the suit, as is the case here and as was the case in *Stewart*. *See Phillips*, 494 F.3d at 382 ("this agreement and any or all modifications hereof shall be governed by English Law and any legal proceedings that may arise out of it are to be brought in England"); *Evolution Online Sys.*, 145 F.3d at 507 n.1 ("Any dispute arising out of this Agreement or out of the relationship among the parties hereto shall be brought in any court of competent subject matter jurisdiction in the Netherlands and the parties hereto, by executing this Agreement, consent to personal jurisdiction in any such case"); *AVC Nederland*, 740 F.2d at 151 ("All and any disputes, differences or questions arising from the present Agreement shall be decided and determined by the competent court in Utrecht"). On the other hand, because neither this Court nor the Supreme

Court has ever rendered a decision by applying the *Bremen* analysis to a forum clause selecting a federal court forum, there was no such apposite precedent that the district court could have cited in support of its decision.[10]

This Court has recognized that "no consensus developed as to the proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause." *New Moon Shipping*, 121 F.3d at 28 (discussing enforcement of forum selection clause in the context of a motion to dismiss pursuant to Rule 12(b)). This Court has further observed that "[t]he leading Supreme Court cases have done little to resolve [the] procedural dilemma" regarding the provision of Rule 12(b) under which a court should analyze a motion to dismiss based upon a forum selection clause. *Id.* at 28; *see also Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 822 (2d Cir. 2006) ("[W]e [have] refused to pigeon-hole these claims into a particular clause of Rule 12(b)). But, since the Supreme Court decided *Stewart* in 1989, the "procedural dilemma" described by this Court does not apply to a situation where the forum selection clause provides for jurisdiction in a federal district court. In *Stewart*, the Supreme Court unambiguously stated that the procedural mechanism by which to evaluate the class of cases that involve a forum

[10] In *Klotz v. Xerox Corp*, 519 F. Supp. 2d 430 (S.D.N.Y., 2007), a district court in this circuit rejected the plaintiff's contention that § 1404(a) applied to a case where the forum selection clause permitted venue in another federal district court and instead analyzed the question under *Bremen*. *Klotz*, 519 F. Supp. 2d at 434-35. The court observed that this Circuit "has repeatedly enforced forum selection clauses through motions to dismiss." *Id.* at 435. The district court failed to discuss the distinction between a forum selection clause that permits jurisdiction in another federal district court and one that does not, thus ignoring the key difference between the separate modes of analysis in *Stewart* and *Bremen*. Moreover, the district court failed to cite any case from any federal court of appeals where an action was dismissed based upon a forum selection clause that permits venue in a federal court. The *Klotz* analysis cannot be applied to this case.

selection clause that places jurisdiction in a federal district court is a motion to transfer venue under § 1404(a). The district court therefore erred by highlighting a procedural dilemma that does not apply to the present case.

POINT II

THE DISTRICT COURT COMMITTED AN ERROR OF LAW BY DECIDING FACTS ADVERSE TO TRADECOMET WITHOUT HOLDING AN EVIDENTIARY HEARING

The court committed an additional legal error by resolving a disputed fact against TradeComet when determining which forum selection clause applies. *See New Moon Shipping*, 121 F.3d at 29 ("[A] party seeking to avoid enforcement of [a forum selection] clause is . . . entitled to have the facts viewed in the light most favorable to it, and no disputed fact should be resolved against that party until it has had an opportunity to be heard"). As the Court in *New Moon Shipping* held, "a disputed fact may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing." *Id.* [11]

In opposing Google's motion to dismiss, TradeComet disputed Google's assertion that the 8/29/06 Agreement governed the parties' relationship on the

[11] District courts have consistently interpreted *New Moon Shipping* as requiring an evidentiary hearing when there are factual disputes. *See, e.g.*, *Uniwire Trading LLC v. M/V Wladyslaw Orkan*, 622 F. Supp. 2d 15, 18-19 (S.D.N.Y. 2008) ("If the submissions reveal any material issues of fact, and so long as the plaintiff has made a prima facie showing of the propriety of proceeding with the action, the court should resolve any factual disputes following an evidentiary hearing at which the plaintiff is afforded an adequate opportunity to be heard"). Moreover, even when ruling on a motion to transfer under § 1404(a), district courts often view an evidentiary hearing as a necessity. *See, e.g.*, *Scherillo v. Dun & Bradstreet, Inc.*, 684 F.Supp.2d 313, 317 (E.D.N.Y. 2010) (citing *New Moon* and, prior to transferring the lawsuit under § 1404(a), holding an evidentiary hearing to resolve disputed facts surrounding the forum selection clause).

ground that the writing was not "reasonably communicated" to TradeComet and therefore could not bind TradeComet. In opposing Google's claims that TradeComet was aware of and had assented to the terms of the 8/29/06 Agreement, TradeComet pointed out – and submitted evidence showing – that it was common practice for Google representatives to open new accounts and operate them on behalf of clients. [JA 112-113, 227, 237-238]. Viewing this evidence in the light most favorable to TradeComet, a finder of fact could reasonably infer that TradeComet was one such client and that the terms of the 8/29/06 Agreement were not reasonably communicated to TradeComet. Google never rebutted or explained this evidence. Nevertheless, the district court chose to ignore TradeComet's evidence and held, contrary to TradeComet's factual argument, that TradeComet accepted the 8/29/06 Agreement. [SA 7].

Additionally, the district court erred in drawing inferences favorable only to Google based upon the deposition testimony of a Google witness whose personal knowledge and credibility were plainly in dispute, which in the absence of an evidentiary hearing is prohibited. *See New Moon Shipping*, 121 F.3d at 30, 32 (holding that if the court's decision turns on the credibility of witnesses, then "at a minimum, a hearing should have been held at which they could have presented the testimony [of the plaintiff's witness] and cross-examined [the defendant's witness]"). *Id.* Here, the court inexplicably and erroneously drew inferences favorable to Google from the deposition testimony of Google employee Heather Wilburn when in fact her testimony contradicted objective facts presented to her by TradeComet. [SA 7; JA 112-13]. At deposition, Ms. Wilburn explained that the terms and conditions of the AdWords click-through agreement had to be accepted *separately* for each AdWords account. [JA 241]. However, she was unable to explain the timestamps on screenshots provided by Google purporting to show acceptance of the 8/29/06 Agreement by TradeComet, which indicated that, in the span of only three seconds, a user would have had to assent to the 8/29/06 Agreement for each of at least ten AdWords accounts. Ms. Wilburn testified that she "wouldn't know" how an individual could log on to all of these accounts serially and accept the terms and conditions for ten different accounts in only three seconds. [JA 245].

Indeed, the only inference (not just the one most favorable to TradeComet, as is only required) that may be drawn from these objective facts is that such an occurrence would be impossible. Because of the factual dispute created by Google's own witness, the district court should have viewed the facts in the light most favorable to TradeComet, which plainly compels the conclusion for purposes of a motion to dismiss that TradeComet did not assent to the 8/29/06 Agreement. Moreover, by crediting Google's evidence without an evidentiary hearing, the district court deprived TradeComet of an opportunity to cross-examine Google's witness and to test the basis of her knowledge and credibility.

POINT III

THE DISTRICT COURT ERRED IN INTERPRETING THE VARIOUS ADWORDS AGREEMENTS

In addition to using the incorrect procedural mechanism, the district court wrongly interpreted the various AdWords agreements as a matter of law. It is important that the Court should review the district court's interpretation of the contract at this time – even if the Court were to remand to the district court for an analysis under § 1404(a) – because the district court (in the absence of a contrary instruction) would interpret the agreements at issue in the same erroneous manner as before. In other words, while the forum selection clause is not dispositive under a proper analysis pursuant to § 1404(a), the forum selection clause is a relevant factor to be considered. To the extent that, on remand, the district court continued to consider an inapplicable and legally unenforceable forum selection provision, it would infect the § 1404(a) analysis with legal error.

At the time that Google violated the antitrust laws, *i.e.*, when Google artificially decreased the "quality" assessment it applied to TradeComet's keywords, the standard-form AdWords contract (which Google purports TradeComet clicked through) contained a forum selection clause stating that "[t]he agreement must be . . . adjudicated in Santa Clara County, California." [JA 132]. If any forum selection clause is relevant to TradeComet's antitrust claims, it is this clause – the clause that was in place when Google instituted its anticompetitive conduct that harmed TradeComet. This clause is significantly narrower than the forum clause in the 8/29/06 Agreement, which Google now claims applies. Moreover, the narrower agreement that TradeComet is alleged to have clicked through cannot possibly be interpreted to encompass the antitrust claims at issue in this lawsuit. Importantly, unlike the 8/29/06 Agreement that Google invoked before the district court, the version that is actually alleged to have been in place at the time did not require that "all claims arising out of or relating to this agreement or the Google program(s)" are to be litigated in Google's favored forum in California. Indeed, Google's decision to expand the coverage of its AdWords agreement to include broader "arising out of and relating to" language plainly was an attempt to avoid the restrictive nature of the agreement that is alleged to have been in place at the time Google instituted its exclusionary conduct.[12]

The district court never considered the version of the AdWords agreement that was in place at the time that Google instituted its anticompetitive conduct because the court wrongly applied the forum selection clause from the 8/29/06 Agreement retroactively to cover all of Google's acts against TradeComet – including those that occurred well before Google adopted the expansive language contained in the 8/29/06 Agreement. This is legal error, and the district court's interpretation must be corrected so that it may properly apply the relevant factors pursuant to § 1404(a) on remand.

A. The District Court Committed Legal Error by Applying the Forum Selection Clause From the 8/29/06 Agreement Retroactively to Encompass Conduct Prior to August 29, 2006

There can be no dispute that Google instituted the anticompetitive conduct alleged by TradeComet prior to the date of the 8/29/06 Agreement. Nonetheless, even if – contrary to the facts (*see* Point II, *supra*) – the district court properly determined that TradeComet assented to the 8/29/06 Agreement, the district court erred by holding that the 8/29/06 Agreement applied *retroactively* to Google's anticompetitive conduct that occurred prior to August 29, 2006. The forum selection clause from the 8/29/06 Agreement provides that "all claims arising out

[12] *See, e.g., Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) ("[W]hen parties to the same contract use such different language to address parallel issues..., it is reasonable to infer that they intend this language to mean different things"). *See also* [JA 103-107].

of or relating to this agreement or the Google program(s) shall be litigated exclusively in the federal or state courts of Santa Clara County, California." [JA 67]. The district court concluded that TradeComet's claims, regardless of when the underlying harm occurred, were "subject to the forum selection clause" apparently due to the supposed breadth of the "or the Google program(s)" language. [SA 12-15].

As a general matter, California courts[13] have been hostile toward interpretations of contractual provisions that eliminate prior rights of parties without a clear and express statement in the agreement of doing so, as the 8/29/06 Agreement would do here under the district court's interpretation. *See Bancomer, S.A. v. Super. Ct. Los Angeles*, 44 Cal. App. 4th 1450, 1461 (Cal. App. Ct. 1996) (concluding that claims were not within the forum selection clause where the "alleged offending conduct preceded formation of the . . . agreement"); *Allez Med. Applications, Inc. v. Allez Spine, LLC*, No. G037314, 2007 WL 927905, at *7 (Cal. App. Ct. Mar. 29, 2007) (declining to apply retroactively an arbitration clause because there was no "affirmative evidence" that the change "was intended to operate retroactively"); *see also Thomas v. Carnival Corp.*, 573 F.3d 1113, 1119 (11th Cir. 2009) (refusing to apply arbitration clause retroactively where plaintiff "could have brought the exact same . . . claims had he never executed the New Agreement" and concluding that "if the parties had intended retroactivity, they would have explicitly said so"). This is not to say that parties are unable to

[13] California law controls the interpretation of any potentially applicable AdWords agreement, including the 8/29/06 Agreement. [JA 67, 128-29, 132].

eliminate prior rights if they so choose; rather, in order to do so, the parties must make a clear statement demonstrating that intent. Neither Google, nor the district court, identified a clear expression of intent to eliminate the prior rights of the parties within the four corners of the 8/29/06 Agreement.

There are numerous examples in the case law of the sorts of language that parties may use to express the intent that a contract is to be applied retroactively to cover "prior" transactions that would otherwise be covered by a previous agreement between parties. *See Dean Witter Reynolds Inc. v. Prouse*, 831 F. Supp. 328, 331 (S.D.N.Y. 1993) (provision that required arbitration for disputes "prior, on or subsequent" to the agreement was applied to a dispute that arose under an earlier agreement); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 804 F. Supp. 1512, 1514 (M.D. Fla. 1992) (same).[14] Alternatively, parties can include specific "Retroactive Effect" clauses. *See, e.g., Coon v. Nicola*, 17 Cal. App. 4th 1225, 1230 (Cal. Ct. App. 1993) (clause providing as follows: "Retroactive Effect: If patient intends this agreement to cover services rendered before the date it is signed . . . patient should initial below").

The forum selection clause in the 8/29/06 Agreement is silent as to its temporal scope; in particular, the contract includes no plain expression that prior

[14] *See also San Francisco Cnty Coll. Dist. v. Keenan & Assoc.*, A115994, 2007 WL 4099543, at *8-9 (Cal. Ct. App. Nov. 14, 2007) (refusing to apply arbitration clause to an existing dispute despite contractual language stating that clause applied to actions "whether occurring prior to, as part of, or after the signing of this Agreement" because the language did not specify existing disputes). Furthermore, as discussed at length below, public policy disfavors allowing monopolies such as Google to use their monopoly power to force their victims to accept an expansion of the scope of, and make retroactive, forum selection clauses in an effort to foreclose those victims' access to the most convenient fora provided by the federal antitrust laws.

rights of the parties were to be eliminated under the 8/29/06 Agreement. The contract is not ambiguous on this issue because there is nothing in the 8/29/06 Agreement that resembles the sort of clear statement that would put TradeComet on notice of retroactive application of the forum selection clause. In other words, without a clear statement as to retroactive application, there is no retroactivity. Accordingly, the district court erred by holding that the clause applied retroactively.

Even putting aside the lack of a clear statement as to retroactivity, the district court failed to follow basic California contract law. As a general matter under California law, when a dispute arises over the meaning of contract language, the court must decide whether the language is ambiguous, *i.e.*, whether it is "reasonably susceptible" to two different interpretations. *Oceanside 84, Ltd. v. Fid. Fed. Bank*, 56 Cal. App. 4th 1441, 1448 (Cal. Ct. App. 1997). Furthermore, "[w]hether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself . . . or from extrinsic evidence of the parties' intent." *S. Cal. Edison Co. v. Super. Ct.*, 37 Cal. App. 4th 839, 848 (Cal. Ct. App. 1995). Importantly, when ambiguities are involved, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." CAL. CIV. CODE § 1654 (West 2010); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 1112 (Cal. Ct. App. 1997). In this case, that party is Google.

At worst, the language in the forum selection clause of the 8/29/06 Agreement is capable of at least two different interpretations: (1) It applies to conduct relating to Google Programs taking place after the 8/29/06 Agreement was effectuated; or (2) it applies to conduct relating to Google Programs both after the 8/29/06 Agreement was effectuated *and* before the 8/29/06 Agreement was effectuated.[15] By applying the clause retroactively, the district court also apparently failed to weigh these alternate interpretations. Consequently, the district court failed to consider the "extrinsic evidence of the parties' intent," and failed to consider "the language of the contract itself," including language that indicates that the 8/29/06 Agreement as a whole is forward looking and its terms are prospective. Moreover, the court failed to interpret the ambiguity against Google, the drafter.

Importantly, the extrinsic evidence here is clear – neither party believed that the "or the Google Program(s)" language caused the forum selection clause to apply retroactively. Indeed, Google did not even make this argument before the district court. Moreover, as discussed in TradeComet's brief to the district court, Google's arguments in prior litigation have made clear that Google does not view new versions of its AdWords agreement to apply retroactively.[16] [JA 100-01]. Similarly, the fact that TradeComet sued in New York evidences that TradeComet

[15] The latter interpretation would result in the broad forum selection clause in the 8/29/06 Agreement encompassing conduct relating to the Google programs at any point in time, regardless of any temporal relation to the 8/29/06 Agreement. Indeed, such an interpretation would encompass claims where the underlying conduct took place ten years before the 8/29/06 Agreement was signed.

[16] In *Person v. Google, Inc.*, 456 F. Supp. 2d 493 (S.D.N.Y. 2006), Google relied upon an earlier version of its AdWords agreement from 2003 (the "2003 Agreement"), ignoring intervening versions of its standard-form AdWords agreement dated April 19, 2005 and May 23, 2006 – each of which had a narrower forum clause. In *Person*, unlike in this case, Google did not argue that these later agreements superseded conduct occurring under the 2003 Agreement. In fact, in its briefing in *Person*, Google argued that Mr. Person's claims arose out of the 2003 Agreement. [JA 204, 217]. The reason, no doubt, is due to the fact that in *Person* the intervening AdWords agreement narrowed the venue provision (thus eviscerating Google's arguments for dismissing the *Person* complaint on venue grounds).

did not read the 8/29/06 Agreement as a waiver of its right to avail itself of the federal antitrust venue statutes for antitrust injuries caused by Google prior to August 29, 2006.

Moreover, when read as a whole, "the language of the contract itself," indicates that the "Google Program(s)" language is a forward-looking provision.[17] In addition to the fact that the forward-looking words "shall" or "will" are used in the 8/29/06 Agreement over twenty times, and in each of the agreement's nine paragraphs, forward-looking language is specifically used to define the "Program."[18] Courts have relied on similar language to bar retroactive application of contractual terms. *See Gardiner, Kamya & Assocs. v. Jackson*, 467 F.3d 1348, 1353 (Fed. Cir. 2006) (concluding that a contract modification was not retroactive, because as a whole, the modification included forward-looking language such as "continue" and "extend"); *Sec. Watch, Inc.*, 176 F.3d at 373 (considering contractual language to be "essentially forward-looking"); *Hendrick v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 535-37 (E.D. Va. 1999) (employment contract

[17] It is axiomatic that a contract must "be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." *Adams v. Suozzi*, 433 F.3d 220, 228 (2d Cir. 2005) (quotations omitted); *see* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each helping to interpret the other").

[18] In paragraph two, which defines "Program", the future tense is regularly applied to the rights and obligations of the parties – "Customer *shall* protect any Customer passwords" and "Customer agrees that . . . ads *shall* conclusively be deemed to have been approved" and "Customer grants Google permission *to utilize* . . . software" and "Google *may modify* any of its Programs." [JA 65]. The inclusion of additional language that the agreement is limited to "the subject matter hereof" indicates that prior transactions or business between the parties falls outside the provision. There would be no need to include this language if the parties contemplated retroactive application of terms in the agreement.

found not to be retroactive due to the use of forward-looking language, such as "will be bound").[19]

Furthermore, the prospective nature of the forum selection clause is also supported by the fact that courts typically hold boilerplate merger clauses, such as the one in the 8/29/06 Agreement,[20] as applying only prospectively. *See Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 283 (2d Cir. 2005) (declining to find that a later enacted merger clause that provided that it "supersedes all prior agreements" repudiated prior agreements between the parties because "as a legal matter, that is not the way that merger clauses are typically understood"); *Sec. Watch, Inc. v. Sentinel Sys. Inc.*, 176 F.3d 369, 372-74 (6th Cir. 1999) (reversing district court decision to apply a 1994 contract provision to conduct taking place prior to 1994 where the provision was not included in the party's prior contracts); *Choice Sec. Sys.*, 1998 WL 153254, at *1 (rejecting defendant's argument that "the run-of-the-mill integration clause [defendant] aggrandizes as a 'supersedure' clause" had retroactive effect).

Finally, if an ambiguity exists, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." CAL. CIV. CODE § 1654 (West 2010). Here, Google was clearly the party that

[19] *See also Choice Sec. Sys., Inc. v. AT&T Corp.*, No. 97-1774, 1998 WL 153254, at *1 (1st Cir. Feb. 25, 1998) (considering contract's prospective language in refusing to retroactively apply arbitration clause); *Prim Sec., Inc. v. McCarthy,* No. 05-CV-783, 2006 WL 2334836, at *5-6 (N.D. Ohio, August 10, 2006) (indemnity clause found not to be retroactive because of frequent use of phrases such as "will become" throughout the agreement).

[20] As explained by TradeComet in its brief to the district court, merger clauses are included in agreements to ensure that parole evidence of contractual intent is not admissible to controvert the plain terms of the agreement. [JA 108].

caused the uncertainty to exist as Google prepared the 8/29/06 Agreement. In resolving any ambiguity, the Court should interpret the "Google Program(s)" language to apply only to conduct that occurred after the 8/29/06 Agreement.

B. The District Court Committed Legal Error by Concluding that the 8/29/06 Agreement Was Enforceable Against TradeComet

The lower court also erred by ruling that the forum selection clause in the 8/29/06 Agreement was enforceable against TradeComet. [SA 15-16]. It is strongly contrary to public policy to allow a monopolist such as Google to use its monopoly power to force a victim of its illegal conduct to accept a contract of adhesion that deprives that victim of its Congressionally-granted rights under the federal antitrust statutes to sue the monopolist in whatever federal district that the victim chooses (so long, of course, as the monopolist does business there). It is an even more egregious breach of public policy to permit a monopolist to violate the antitrust laws and thereafter to use its monopoly power to retroactively eviscerate the Congressionally mandated venue rights of the aggrieved party through an unavoidable contract of adhesion.

In adopting the private right of action for antitrust plaintiffs, Congress made a considered decision to permit private plaintiffs to "sue . . . in any district court of the United States in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15(a); *see also* 15 U.S.C. § 22 ("Any suit . . . under the antitrust laws against a corporation may be brought . . . in any district wherein it may be found or transacts business"). During the debate on these venue provisions, Representative Sumners stated that "this matter of venue is one of the most important connected with the whole subject of antitrust legislation."

2 FEDERAL ANTITRUST LAWS AND RELATED STATUTES: THE LEGISLATIVE HISTORY 1451 (Earl W. Kintner ed. 1978). Rep. Sumners recognized that the purpose of the broad venue provisions was "so that a man who suffers in his goods or his business in a given locality may bring the man or the corporation that inflicts the injury before the court in that locality." *Id.*

Consistent with the "venue" being "one of the most important [matters] connected with the whole subject of antitrust legislation," the Second Circuit long ago acknowledged that "it is . . . proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we think that Congress would hardly have intended that." *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968); *see also* CAL. CIV. CODE § 3513 (West 2010) ("Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."). Although the Supreme Court limited the reach of *American Safety* in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), it certainly did not scrub it from the books, as would necessarily follow from the district court's Opinion. *Mitsubishi* involved international arbitration between sophisticated corporations of claims arising under Section 1, not monopolization claims under Section 2. *Id.* at 620. Indeed, the Supreme Court expressly stated that courts should "remain attuned to well-supported claims that the agreement . . . resulted from the sort of . . . overwhelming economic power that would provide grounds for the revocation of any contract." *Id.* at 627. Such reasoning applies forcefully to a contract of adhesion imposed by a monopolist on rivals such as

TradeComet that the monopolist, here Google, is actively seeking to drive from the market.[21]

Both the Department of Justice and the Federal Trade Commission have repeatedly recognized Google's dominance after performing multiple extensive investigations involving teams of government lawyers and economists reviewing hundreds of thousands of documents from Google and its few ineffectual remaining competitors.[22]

To the extent the district court also relied on language from prior AdWords Agreements that stated that "Google may modify the [AdWords] Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms," [SA 3], such reliance was in error. Courts have found that even in light of such a promise, subsequent modifications are unenforceable to the extent overwhelming bargaining power is used to expand the scope of the agreement into areas (such as antitrust) not contemplated by the original agreement. *See, e.g.*, *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 796 (Cal. App. Ct. 1998) (where a party has the unilateral right to

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[21] This Court's decision in *Bense v. Interstate Battery System of America*, 683 F.2d 718 (2d Cir. 1982) (holding claims under Sec. 1 of the Sherman Act subject to forum selection provision) does not apply to TradeComet's suit against Google. The antitrust claims at issue in *Bense* did not concern a firm with monopoly power or a contract of adhesion. Rather, the case involved a forum provision in a negotiated agreement between a franchisor and a franchisee. *Id.* at 719. Moreover there was no claim the defendant's monopoly power played a role in the formation or content of the contract.

[22] *See* DOJ Press Release, *supra* n. 2, at 2; FTC Statement, *supra* n. 3, at 3; Brief of Dep't of Justice Opposing Settlement, *The Authors Guild v. Google, Inc.*, No. 05 CV 8136-DC (S.D.N.Y. Sept. 4, 2009) (Google "already holds a relatively dominant share in [the online search business]"). TradeComet alleged both direct and circumstantial evidence of Google's monopoly power (i.e., the actual exclusion of competitors and a high market share) and Google has not contested its monopoly power for purposes of its venue motion. [JA 290].

change the terms of a contract, it would be unreasonable to allow it "to 'recapture' a foregone opportunity by adding an entirely new term . . . where the new term deprives the other party of the right . . . to select a judicial forum for dispute resolution").[23]

Furthermore, where the party with stronger bargaining power has restricted the weaker party to a less desirable forum, but reserved for itself the ability to seek redress in multiple fora, courts have found substantive unconscionability. *See*, *e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) (collecting cases and refusing to enforce arbitration clause); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693-94 (Cal. 2000) ("an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party" is unconscionable). This is precisely the type of agreement that Google has instituted. Although Google claims to "consistently enforce[] its forum selection clause," [JA 296], the facts are undisputed: Google actually files suit for breach of the 8/29/06 Agreement outside of Santa Clara County, California. Indeed, Google recently brought suit against a company for an alleged breach of a standard-form AdWords agreement identical to the 8/29/06 Agreement in the Franklin County, Ohio Common Pleas Court.[24] When

23 The broader forum selection clause was added to the form AdWords agreement only after Google's anticompetitive campaign against vertical search engines, including TradeComet, was already underway, perhaps in part as a belated effort to erect impediments in the paths of victims seeking legal redress.

24 The district court wrongly claimed that TradeComet "does not demonstrate" that Google's actions outside California "fell within the scope of a forum selection clause similar to the one at issue here." [SA 15 n.5]. In fact, TradeComet did demonstrate (and Google has admitted) that Google sued for an alleged breach of the <u>same</u> 8/29/06 Agreement in state court in Ohio. *See* Second Amended Complaint, *Google v. myTriggers.com LLC*, 09 CV 014836 (Ohio Ct. of C.P., Franklin County, April 12, 2010) (complaint filed by Google against myTriggers.com LLC alleging breach of a form AdWords Agreements) (docket

TradeComet pointed this out to the district court, Google made clear its understanding that the forum selection clause applies to Google only so long as it is convenient for Google. More specifically, Google represented that it could sue outside of California under the AdWords Agreement if that streamlines a debt collection process for Google and that the clause exists so that either party could elect to use it.[25]

For these reasons the present attempt by Google, a monopolist, to enforce a burdensome forum provision from a contract of adhesion imposed upon its beleaguered competition *after* Google has acted to eliminate that competition is in direct contravention of the public policy identified by the Supreme Court, Congress, the Second Circuit and the State of California.[26]

CONCLUSION

For the foregoing reasons, plaintiff-appellant TradeComet respectfully submits that the judgment entered below should be REVERSED.

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available at http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/); *see also* Amended Complaint, *myTriggers*, 09 CV 014836 (Jan. 20, 2010).

[25] The district court also failed to consider whether Google's admission in this regard rendered the forum selection clause permissive rather than mandatory.

[26] *See also Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007) (a monopolist may not artificially maintain or establish barriers to entry).

Respectfully submitted this 18th day of June, 2010.

By: s/ Charles F. Rule

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,326 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Respectfully submitted this 18th day of June, 2010.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRADECOMET.COM LLC Plaintiff-Appellant, -against- GOOGLE, INC. Defendants-Appellees,	**Case No. 10-911** **<u>DECLARATION OF SERVICE</u>**

Daniel J. Howley, being duly sworn, deposes and says:

1. I am over the age of eighteen and not a party to this action.

2. On June 18, 2010, I caused to be served two copies of the BRIEF OF DEFENDANT-APPELLEE by delivering true and correct copies via Federal Express to each named person below at address indicated:

Jonathan M. Jacobson, Esq
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1301 Avenue of the Americas
New York, NY 10019

s/ Daniel Howley

I declare under penalty of perjury that the foregoing is true and correct.
Executed on June 18, 2010

Daniel J. Howley
Counsel for TradeComet.com LLC, Appellant

SPECIAL APPENDIX

10-0911

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADECOMET.COM LLC ,

Plaintiff-Appellant,

v.

GOOGLE, INC.,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM LLC, Plaintiff,	:	09 Civ. 1400 (SHS)
-against-	:	OPINION & ORDER
GOOGLE, INC., Defendant.	:	

SIDNEY H. STEIN, U.S. District Judge.

The parties to this action—TradeComet.com LLC and Google, Inc.—own and operate competing internet search engines. TradeComet purchased advertising on Google's website through Google's AdWords program and now alleges that Google attempted to reduce traffic at TradeComet's own website both by increasing the cost of TradeComet's advertising and by entering into exclusive agreements with other websites, all allegedly in violation of the Sherman Antitrust Act. Google has now moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(3) for improper venue based on a forum selection clause in the parties' advertising contracts. Because TradeComet's claims fall within the scope of the relevant forum selection clause that requires that this action be brought in California, and because enforcing that clause would be neither unreasonable nor unjust, Google's motion to dismiss is granted.

I. Background

The following facts are taken from the complaint; the declarations of Heather Wilburn, Daniel J. Howley, and Sara Ciarelli Walsh; and the attachments thereto, and are presumed to be true for purposes of this motion.

A. The Advertising Relationship between TradeComet and Google

TradeComet operates the website SourceTool.com, which attracts "highly-valued search traffic of businesses seeking to buy or sell products and service to other businesses," and provides what is commonly referred to as a "B2B" (for "business to business") directory. (Compl. ¶ 4.) TradeComet alleges that since its start in 2005, its website has experienced significant growth, in part based on the search traffic and advertising revenue that it generated as a result of placing advertisements for its website on Google's competing website. (*Id.* ¶¶ 6, 41-44.)

Dan Savage, the founder of TradeComet, met with Google representatives in December 2005 and May 2006 to discuss use of Google's AdWords advertising program to maximize TradeComet's revenue.[1] TradeComet alleges that following the May 2006 meeting, Google "drastically" increased the minimum price of the keywords that SourceTool.com had purchased through the AdWords program, thus making those keywords effectively unavailable to TradeComet and depriving its website—SourceTool.com—of traffic that the use of those keywords would drive to the SourceTool.com website. This in turn caused a drop in the revenue that TradeComet derived from advertisements on its website. (*Id.* ¶¶ 45-48.) Google claims that it increased the price of the relevant keywords due to its use of an algorithm that adjusts advertising prices to reflect the quality of the page to which the advertisement linked. (*Id.* ¶¶ 49-52.) TradeComet contends that Google dominates the market for online search, and that

[1] The U.S. Court of Appeals for the Second Circuit has described Google's AdWords program as follows:

> AdWords is Google's program through which advertisers purchase terms (or keywords). When entered as a search term, the keyword triggers the appearance of the advertiser's ad and link. An advertiser's purchase of a particular term causes the advertiser's ad and link to be displayed on the user's screen whenever a searcher launches a Google search based on the purchased search term. Advertisers pay Google based on the number of times Internet users 'click' on the advertisement, so as to link to the advertiser's website.

Rescuecom Corp. v. Google Inc., 562 F.3d 123, 125 (2d Cir. 2009); *see also* Compl. ¶¶ 31-34.

Google's effective exclusion of SourceTool.com from its AdWords program starved SourceTool.com of the traffic it needed to grow, in violation of the Sherman Antitrust Act. (*Id.* ¶¶ 3, 21-22, 54-55.)

TradeComet also alleges that Google has entered into exclusive agreements with other popular websites and with rival search engines in a further effort to consolidate online search at Google.com and exclude other search engines—such as SourceTool.com—from the relevant market, also allegedly violating the Sherman Antitrust Act. (*Id.* ¶¶ 68-74, 100-01.)

B. The Relevant Forum Selection Clauses

Users of Google's AdWords program must accept a set of terms and conditions in order to activate an AdWords account and they must subsequently accept any additional terms and conditions that Google later implements if the user wants to continue using its existing AdWords account. (Dep. of Heather Wilburn dated April 13, 2009 ("Wilburn Dep.") at 13:9-11, 34:21-35:6, Ex. B to Dec. of Sara Ciarelli Walsh dated April 22, 2009 ("Walsh Dec.").) The terms and conditions that went into effect on April 19, 2005 and May 23, 2006 include provisions stating that "[t]he Agreement must be construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and adjudicated in Santa Clara County, California." (Google Inc. AdWords Program Terms dated April 19, 2005 (the "April 2005 Agreement") ¶ 7, Ex. 2 to Dec. of Daniel J. Howley dated April 15, 2009 ("Howley Dec."); Google Inc. AdWords Program Terms dated May 23, 2006 (the "May 2006 Agreement") ¶ 9, Ex. 3 to Howley Dec.) They also include identical language directing that "Google may modify the [AdWords] Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms." (April 2005 Agreement ¶ 2; May 2006 Agreement ¶ 2.)

Effective August 22, 2006, Google issued a revised set of terms and conditions that contains the same language regarding modifications to the terms along with a broader forum selection clause as follows:

> THE AGREEMENT MUST BE CONSTRUED AS IF BOTH PARTIES JOINTLY WROTE IT AND GOVERNED BY CALIFORNIA LAW EXCEPT FOR ITS CONFLICTS OF LAWS PRINCIPLES. ALL CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE GOOGLE PROGRAM(S) SHALL BE LITIGATED EXCLUSIVELY IN THE FEDERAL OR STATE COURTS OF SANTA CLARA COUNTY, CALIFORNIA, USA, AND GOOGLE AND CUSTOMER CONSENT TO PERSONAL JURISDICTION IN THOSE COURTS.

(Google Inc. Advertising Program Terms dated August 22, 2006 (the "August 2006 Agreement") ¶ 9, Ex. 1 to Howley Dec. (capitalization in original).) Representatives for TradeComet have accepted those terms and conditions. (*See* Dec. of Heather Wilburn dated March 30, 2009 ("Wilburn Dec.") ¶¶ 6-7; Ex. D-F to Walsh Dec.)

As noted, Google has now moved to dismiss the complaint on the grounds that the August 2006 forum selection clause requires TradeComet to bring its claims in a court located in Santa Clara County, California, not in the U.S. District Court for the Southern District of New York. TradeComet, on the other hand, contends that the forum selection clause contained in the April 2005 and May 2006 Agreements—not the August 2006 Agreement—governs because it was in effect at the time of Google's alleged violations of the Sherman Antitrust Act. Because Google is correct that the August 2006 forum selection clause governs and because TradeComet's claims "relat[e] to . . . the Google Program(s)," Google's motion to dismiss the complaint is granted.[2]

[2] TradeComet has moved to strike Exhibits D through H of the Walsh Declaration submitted in reply by Google because those exhibits allegedly present new material that Google should have submitted with its opening brief. These exhibits contain screenshots—images that record the visible content displayed on a computer's monitor—on which Google relies to show that TradeComet accepted the August 2006 Agreement for its Google AdWords Accounts. Because these exhibits simply respond to TradeComet's suggestion in its papers in opposition to the motion that it never accepted the August 2006 Agreement, the Court will consider these materials. *See Niv v. Hilton*

II. Standard of Review

There is a split of authority in the Second Circuit regarding the appropriate procedural mechanism by which to enforce a forum selection clause. The proper vehicle is a motion to dismiss the complaint for either (1) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), *see AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 152 (2d Cir. 1984); (2) improper venue pursuant to Rule 12(b)(3), *see Phillips v. Audio Active Ltd.*, 494 F.3d 378, 382 (2d Cir. 2007); or (3) failure to state a claim pursuant to Rule 12(b)(6), *see Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.6 (2d Cir. 1998). *But see New Moon Shipping Co. v. MAN B & W Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997) ("[T]here is no existing mechanism with which forum selection enforcement is a perfect fit."). Hedging its bet, Google brings its motion pursuant to both Rule 12(b)(1) and 12(b)(3).[3] *See Cfirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 327 (S.D.N.Y. 2008).

The burden on a plaintiff opposing enforcement of a forum selection clause is similar to that "imposed on a plaintiff to prove that the federal court has subject matter jurisdiction over his suit or personal jurisdiction over the defendant." *New Moon Shipping*, 121 F.3d at 29. Thus, courts apply the standard of review applicable to motions to dismiss for lack of jurisdiction, taking the facts in the light most favorable to the party resisting enforcement of the forum selection clause. *See id.*

Hotels Corp., --- F. Supp. 2d ---, 2008 WL 4849334, at *8 n.4 (S.D.N.Y. Nov. 10, 2008); *see also Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005).

[3] In deciding a motion to dismiss pursuant to either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(3), a court may consider evidentiary matters outside the pleadings, "by affidavit or otherwise," regarding the existence of jurisdiction. *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *see also State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007); *Altvater Gessler-J.A. Baczewski Intern. (USA) Inc. v. Sobieski Destylarnia S.A.*, 572 F.3d 86, 89 (2d Cir. 2009). Accordingly, the Court will consider the several declarations submitted by the parties, along with their attachments—including the three agreements between TradeComet and Google—because they are germane to the question of the Court's subject matter jurisdiction.

III. Analysis

The parties contest both which forum selection clause applies to this action and whether either forum selection clause requires dismissal or transfer.

A. Which Forum Selection Clause Applies

The parties contest which forum selection clause—i.e., that found in the April 2005 and May 2006 Agreements or the clause found in the August 2006 Agreement—governs this motion. TradeComet contends that, because the conduct alleged in the complaint began in mid-2006, when the narrower forum selection clause found in the April 2005 and May 2006 Agreements was in effect, that clause governs. Google responds by pointing to the language in those earlier agreements that "Google may modify the [AdWords] Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms" to argue that the forum selection clause in the August 2006 Agreement replaced and superseded those found in the earlier agreements. (April 2005 Agreement ¶ 2; May 2006 Agreement ¶ 2.) Google also notes that the August 2006 Agreement specifically states that it "supersedes and replaces any other agreement, terms and conditions applicable to the subject matter hereof." (August 2006 Agreement ¶ 9.) The Court applies California state law to resolve this question, as all agreements between the parties include choice of law provisions requiring the application of California law.

Under California state law, the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting. Cal. Civ. Code § 1636; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 474 (Cal. Ct. App. 1998). When a contract is reduced to writing, this intent "is to be ascertained from the writing alone, if possible." Cal. Civ. Code § 1639; *see also Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 559 (Cal. Ct. App. 1999).

Furthermore, "the fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice." *Asmus v. Pacific Bell*, 23 Cal. 4th 1, 16 (2000); *see also MySpace, Inc. v. Globe.com, Inc.*, No. 06 Civ. 3391, 2007 WL 1686966, at *10 (C.D. Cal. Feb. 27, 2007).

The plain language of the agreements indicates that TradeComet accepted the modifications to the forum selection clause found in the August 2006 Agreement when it accepted that agreement. *See Stute v. Burinda*, 123 Cal. App. 3d Supp. 11, 16 (Cal. App. Dep't Super. Ct. 1981). Accordingly, the Court assesses whether the forum selection clause found in the August 2006 Agreement requires the dismissal of the complaint or transfer of this action.

B. Dismissal Based on a Forum Selection Clause

"The scope of the forum selection clause is a contractual question that requires the courts to interpret the clause and, where ambiguous, to consider the intent of the parties." *New Moon Shipping*, 121 F.3d at 33. "Plaintiff's choice of forum in bringing his suit in federal court in New York will not be disregarded unless the contract evinces agreement by the parties that his claims cannot be heard there." *Phillips*, 494 F.3d at 387. Thus, the court must "examine the substance of [a plaintiff's] claims as they relate to the precise language" of the specific clause at issue. *Id.* at 389.

To obtain dismissal based on a forum selection clause, the party seeking enforcement of the clause must demonstrate that: (1) the clause was reasonably communicated to the party resisting enforcement, (2) the clause was mandatory and not merely permissive, and (3) the claims and parties involved in the suit are subject to the forum selection clause. *Id.* at 383-84. After the party seeking enforcement has established these three conditions, the burden shifts to the party resisting enforcement to rebut the presumption of enforceability by "making a sufficiently strong showing that 'enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

The U.S. Court of Appeals for the Second Circuit has discussed—but not decided—what law to apply to a forum selection clause when the contract also contains a choice of law provision. *See Phillips*, 494 F.3d at 384. In the *Phillips* decision, the court was clear that the first and fourth steps of the analysis—whether the clause was communicated to the non-moving party and whether enforcement would be reasonable—are procedural in nature and should be analyzed under federal law. *See id.*; *see also Diesel Props S.r.L. v. Greystone Business Credit II LLC*, No. 07 Civ. 9580, 2008 WL 4833001, at *7 (S.D.N.Y. Nov. 5, 2008). However, it was troubled by the application of federal law to the second and third prongs of the inquiry, which concern the meaning and scope of the forum selection clause, noting that it could not "understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole." *Phillips*, 494 F.3d at 385-86 (citing *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006)). Because the parties here rely on both federal and California state law in their submissions, and because application of either body of law to the second and third *Phillips* prongs results in the same outcome, the Court need not decide that issue at this time.

1. *The forum selection clause was reasonably communicated to plaintiff.*

The Second Circuit "regularly enforce[s]" forum selection clauses as long as "the existence of the clause was reasonably communicated to the parties." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). The agreements at issue here are "clickwrap arrangements" in which users of Google's AdWords program are required to agree to the proffered terms in order to use the program.[4] *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004); *see also* Wilburn Dep. at 13:9-11, 34:21-35:6.

District courts in this Circuit have found that clickwrap agreements that require a user to accept the agreement before proceeding are "reasonably communicated" to the user for purposes of this analysis. *See, e.g., Person v. Google Inc.*, 456 F. Supp. 2d 488, 496-97 (S.D.N.Y. 2006) (finding that Google's AdWords agreement provided the plaintiff with sufficient notice of the terms of the user agreement to enforce its forum selection clause); *Universal Grading Service v. eBay, Inc.*, No. 08 Civ. 3557, 2009 WL 2029796, at *11 (E.D.N.Y. June 10, 2009); *Novak v. Tucows, Inc.*, No. 06 Civ. 1909, 2007 WL 922306, at *7-9 (E.D.N.Y. Mar. 26, 2007).

Google bears the burden of demonstrating that it reasonably communicated the forum selection provision to TradeComet, *Phillips*, 494 F.3d at 383-84, and the Court must consider the facts in the light most favorable to TradeComet as the party resisting enforcement of the forum selection clause, *New Moon Shipping*, 121 F.3d at 29. Google offers testimony and screenshots

[4] A "clickwrap" license is one that

> presents the potential licensee (i.e., the end-user) with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. Essentially, under a clickwrap arrangement, potential licensees are presented with the proposed license terms and forced to expressly and unambiguously manifest either assent or rejection prior to being given access to the product.

Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir. 2004) (quotation and citation omitted); *see also Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (describing the clickwrap agreement containing the terms and conditions of Google's AdWords program).

showing the status of TradeComet's AdWords accounts to support its contention that TradeComet accepted the August 2006 Agreement and that it had to click through the text of that agreement to do so. (*See, e.g.*, Wilburn Dep. at 13:9-11, 34:21-35:6; Wilburn Dec. ¶¶ 6-7; Ex. D-F to Walsh Dec.) TradeComet neither denies that its representatives agreed to the user agreement that contained the forum selection clause nor offers any evidence to the contrary. Thus, TradeComet has not overcome Google's prima facie showing that representatives of TradeComet accepted the forum selection clause at issue in this action.

2. *The forum selection clause is mandatory.*

The relevant forum selection clause requires that claims "shall be litigated exclusively in the federal or state courts of Santa Clara County, California." (August 2006 Agreement ¶ 9.) "A forum selection clause is viewed as mandatory when it confers exclusive jurisdiction on the designated forum or incorporates obligatory venue language." *Phillips*, 494 F.3d at 386; *see also Olinick v. BMG Entertainment*, 138 Cal. App. 4th 1286, 1294 (2006) ("The clause in question contains express language of exclusivity of jurisdiction, specifying a mandatory location for litigation. This constitutes a mandatory forum selection clause." (citation omitted)).

Here, the forum selection clause clearly contains compulsory language specifying venue, which is sufficient to make the clause mandatory for purposes of this analysis.

3. *Plaintiff's claims are subject to the forum selection clause.*

TradeComet contends that its antitrust claims do not fall within the scope of the forum selection clause, whereas Google argues that the claims stem from Google's pricing and administration of its AdWords program, and thus fall within the scope of the Agreement. The August 2006 Agreement provides that "[a]ll claims arising out of or relating to this agreement or the Google Program(s)" shall be litigated in Santa Clara County, California. (August 2006

Agreement ¶ 9.) The Court need not determine whether TradeComet's antitrust claims arise out of or relate to the agreement because they clearly arise out of and relate to Google's AdWords program.

The Second Circuit has held consistently that forum selection clauses are to be interpreted broadly and are not restricted to pure breaches of the contracts containing the clauses. *See, e.g.*, *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993) (finding that a forum selection clause applicable to controversies arising "in connection with" a set of contracts detailing the rights and duties of investors and marketers encompassed investors' securities and RICO claims); *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720-21 (2d Cir. 1982) (finding that a forum selection clause applicable to controversies "arising directly or indirectly" from a franchise agreement encompassed the franchisee's antitrust suit against franchisor); *see also Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles County*, 17 Cal. 3d 491, 495 (1976). Nonetheless, this expansive interpretation is not without limits, as the Second Circuit articulated in *Phillips*.

In *Phillips*, the court found that a plaintiff's claim for breach of copyright did not "arise out of" his licensing agreement with the defendant because the rights he sought to enforce did not originate from the recording contract. *Phillips*, 494 F.3d at 390. In reaching this conclusion, the Second Circuit focused on the specific language of the forum selection clause, which directed that "any legal proceedings that may arise out of [this agreement] are to be brought in England." *Id.* at 382. The court found the meaning of "arise out of" to be narrower than "all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or 'arise in connection with' the contract," particularly in light of the fact that the parties to the agreement could have used such broader terms if they so chose. *Id.* at 389.

Applying this logic, the court found that, because the plaintiff's rights at issue did not originate from the recording contract, his effort to enforce those rights did not "arise out of" the contract. *Id.*

Both the language of the forum selection clause found in the August 2006 Agreement and the factual allegations of the complaint distinguish this action from *Phillips*. As noted above, the agreement here requires that "[a]ll claims arising out of or relating to this agreement or the Google Program(s)" shall be litigated in Santa Clara County, California. (August 2006 Agreement ¶ 9.) Thus, the clause at issue here specifically employs one of the broader terms that the *Phillips* court noted—i.e., "all claims . . . that . . . 'relate to'"—in contrast to the narrower "aris[ing] out of" provision at issue in that case. *See Phillips*, 494 F.3d at 389. Of even greater significance, this forum selection clause does not limit its reach merely to claims that relate to the agreement, but rather encompasses claims that relate to "the Google Program(s)," which it defines as "Google's advertising Program(s)." (August 2006 Agreement ¶ 9, preamble.) Thus, if TradeComet's antitrust claims "arise out of" or "relate to" either the August 2006 Agreement or Google's advertising programs, they are subject to the forum selection clause.

TradeComet sets forth three counts in its complaint. By their plain language, each claim "relat[es] to" Google's advertising programs. *See generally Universal Grading Serv. v. eBay, Inc.*, No. 08 Civ. 3557, 2009 WL 2029796, at *11 (E.D.N.Y. June 10, 2009) (Plaintiffs' antitrust claims alleging conspiracy to restrain trade arise out of eBay's services and thus fall within the forum selection clause.); *Freedman v. Am. Online, Inc.*, 294 F. Supp. 2d 238, 241-42 (D. Conn. 2003); *see also Brodsky v. Match.com LLC*, No. 09 Civ. 5328, 2009 WL 3490277 (S.D.N.Y. 2009) (finding that the plaintiffs' claims regarding website users' inability to communicate via email on the Match website are subject to a forum selection clause governing "any dispute arising out of the Website and/or the Service").

First, TradeComet alleges that Google has violated Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by excluding TradeComet from the market for online search in order to protect Google's own monopoly. (Compl. ¶¶ 105-08.) While Count One does not identify the specific behavior that Google engaged in to maintain its purported monopoly and exclude SourceTool.com from the online search market, this count incorporates previous allegations, including those regarding Google's manipulation of the AdWords pricing formula to prevent SourceTool.com from advertising on Google's website. Thus, the facts alleged in support of Count One "relat[e] to" Google's advertising programs.

Second, TradeComet contends that Google has attempted to monopolize the online search market by increasing barriers to entry through the use of preferential agreements and manipulation of its advertising program to starve competitors such as SourceTool.com of search traffic, also in violation of Section 2 of the Sherman Antitrust Act. (*Id.* ¶¶ 110-14.) Count Two specifically alleges that Google has attempted to monopolize the online search market by, *inter alia*, using the pricing metrics within the AdWords program to prevent SourceTool.com from obtaining search traffic. Again, this allegation "relat[es] to" Google's administration of its advertising programs.

Finally, TradeComet alleges that Google has entered into unreasonable agreements that restrain trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by partnering with Business.com. (*Id.* ¶¶ 116-20.) Count Three alleges that Google's agreement with Business.com improperly relaxes requirements that it imposes on SourceTool.com and other competitors, thereby both providing search traffic to Business.com that it denies to

SourceTool.com and effectively selling advertisements for Business.com's own search queries. While TradeComet again does not specify the requirements for which Google gives Business.com preferential treatment, the only interaction that it has alleged between TradeComet and Google—and thus the only requirements imposed on TradeComet that Google could relax for Business.com—stems from the AdWords program, and so this count, too, "relat[es] to" Google's advertising program.

Application of California state law does not dictate a different outcome. State "courts have placed a substantial burden on a plaintiff seeking to defeat [a forum selection] clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case. That is, that the forum selected would be unavailable or unable to accomplish substantial justice." *CQL Original Prods., Inc. v. Nat'l Hockey League Players' Assn.*, 39 Cal. App. 4th 1347, 1354 (Cal. Ct. App. 1995) (citations omitted). Courts in California—as do those in the Second Circuit—turn first to the objective intent of a written agreement, as evidenced by its plain language. *See Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, 164 Cal. App. 3d 1122, 1127 (Cal. Ct. App. 1985).

Furthermore, in considering whether a plaintiff's claims are subject to a choice of law provision, the California Supreme Court has determined that a clause that "provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all causes of action arising from or related to that agreement." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 470 (1992). In reaching this conclusion, the court was skeptical that "any rational businessperson . . . would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship." *Id.* at 469. It wrote that if such a result were desired, the parties should "negotiate and obtain the assent of their fellow parties to explicit contract language specifying what jurisdiction's law applies to what issues." *Id.* at 470. This logic parallels that of the Second Circuit in *Phillips* and applies here, as the parties agreed to litigate all claims relating to their agreement or to Google's advertising program in Santa Clara County. On its face, such an encompassing forum selection clause demonstrates the parties' objective intent to litigate claims such as those brought by TradeComet in California, rather than in New York.

4. *Enforcement of the forum selection clause is neither unreasonable nor unjust.*

TradeComet contends that the forum selection clause is unconscionable because—it claims—Google enforces it selectively, it is found within a contract of adhesion, and it would force TradeComet to litigate its claims in Google's "backyard."

As an initial matter, TradeComet bears the burden of showing that the forum selection clause is unreasonable or unjust. *See Phillips*, 494 F.3d at 383-84. However, TradeComet offers neither evidence to support its allegation of selective prosecution[5] nor legal authority indicating that such behavior—if true—would make a forum selection clause unconscionable and thus unenforceable. Additionally, the fact that the August 2006 Agreement may or may not be a contract of adhesion does not invalidate its forum selection provision. *See Brodsky*, 2009 WL 3490277, at *7-8 ("[A] forum selection clause is not unenforceable even if it appears in a contract of adhesion, including so-called 'click wrap' contracts . . . ." (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991))).

Finally, although litigating these claims in California rather than New York likely will be more burdensome for TradeComet, which has its principal place of business in New York, there is no suggestion that it would be so difficult as to deprive TradeComet of a fair opportunity to

[5] TradeComet cites to cases that Google has litigated outside of Santa Clara County, California but does not demonstrate that those actions fell within the scope of a forum selection clause similar to the one at issue here.

litigate its claims. *See M/S Bremen*, 407 U.S. at 18 ("[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."); *see also Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d at 452 (rejecting the contention that a Google forum selection clause encompassing "any claims or causes of action arising out of or relating to your use of this service" was unconscionable); *Brodsky*, 2009 WL 3490277, at *4.

IV. Conclusion

Google has demonstrated that the August 2006 Agreement provides the forum selection clause at issue in this action, that the clause was reasonably communicated to TradeComet, that the clause is mandatory, and that TradeComet's antitrust claims are subject to it. TradeComet has not shown that enforcement of the clause would be unconscionable. Accordingly, Google's motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(3) is granted. The Court also denies TradeComet's motion to strike Exhibits D through H of the Walsh Declaration.

Dated: New York, New York
March 5, 2010

SO ORDERED:

Sidney H. Stein, U.S.D.J.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #
DATE FILED: 3/12/10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TRADECOMET.COM LLC,

Plaintiff,

-against-

GOOGLE, INC.,

Defendant.

---X

09 **CIVIL** 1400 (SHS)

JUDGMENT

Google having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(3), and the matter having come before the Honorable Sidney H. Stein, United States District Judge, and the Court, on March 5, 2010, having rendered its Opinion and Order granting Google's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(3), and denying TradeComet's motion to strike Exhibits D through H of the Walsh Declaration, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 5, 2010, Google's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(3) is granted, and TradeComet's motion to strike Exhibits D through H of the Walsh Declaration is denied.

Dated: New York, New York
March 12, 2010

J. MICHAEL McMAHON

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON __________

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

J. Michael McMahon, Clerk of Court

by: ______________________________

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

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NOTICE OF APPEAL

civ. ( )

Notice is hereby given that ____
(party)

hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the __________ day of ________________ , __________ .
(day) (month) (year)

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ________________

( ) __________- ______________
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York

Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

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-V-

---X

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

Pursuant to Fed. R. App. P. 4(a)(5), ______________________ (party) respectfully requests leave to file the within notice of appeal out of time. ______________________ (party) desires to appeal the judgment in this action entered on ______________ (day) but failed to file a notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________________

( ) ________-______________
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

FORM 2

United States District Court
Southern District of New York

Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

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NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

1. Notice is hereby given that ______________________________ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on __________.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time
______________________ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, ______________________________ states that
(party)
this Court's judgment was received on ________________ and that this form was mailed to the
(date)
court on ______________ .
(date)

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________

( ) ________- ______________
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

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-V-

---X

AFFIRMATION OF SERVICE

civ. ( )

I, ________________________________, declare under penalty of perjury that I have

served a copy of the attached ____

____

upon ____

____

whose address is: ____

____

Date: ____________________
New York, New York

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

(Oct. 15, 1914, ch. 323, §2, 38 Stat. 730; June 19, 1936, ch. 592, §1, 49 Stat. 1526.)

AMENDMENTS

1936—Act June 19, 1936, amended section generally.

SHORT TITLE

Act June 19, 1936, which amended this section and added sections 13a, 13b, and 21a of this title, is popularly known as the Robinson-Patman Act, as the Robinson-Patman Antidiscrimination Act, and also as the Robinson-Patman Price Discrimination Act.

§ 13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

(June 19, 1936, ch. 592, §3, 49 Stat. 1528.)

§ 13b. Cooperative association; return of net earnings or surplus

Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

(June 19, 1936, ch. 592, §4, 49 Stat. 1528.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 19, 1936, ch. 592, 49 Stat. 1526, popularly known as the Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act, which enacted sections 13a, 13b, and 21a of this title and amended section 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 13 of this title and Tables.

§ 13c. Exemption of non-profit institutions from price discrimination provisions

Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

(May 26, 1938, ch. 283, 52 Stat. 446.)

REFERENCES IN TEXT

The Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, referred to in text, is act June 19, 1936, ch. 592, 49 Stat. 1526, also known as the Robinson-Patman Price Discrimination Act, which enacted sections 13a, 13b, and 21a of this title and amended section 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 13 of this title and Tables.

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 15, 1914, ch. 323, §3, 38 Stat. 731.)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28.

(Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731; Pub. L. 96-349, § 4(a)(1), Sept. 12, 1980, 94 Stat. 1156; Pub. L. 97-393, Dec. 29, 1982, 96 Stat. 1964.)

REFERENCES IN TEXT

The antitrust laws, referred to in subsec. (a), are defined in section 12 of this title.

PRIOR PROVISIONS

Section supersedes two former similar sections enacted by act July 2, 1890, ch. 647, § 7, 26 Stat. 210, and act Aug. 27, 1894, ch. 349, § 77, 28 Stat. 570, each of which were restricted in operation to the particular act cited. Section 7 of act July 2, 1890, was repealed by act July 7, 1955, ch. 283, § 3, 69 Stat. 283, effective six months after July 7, 1955. Section 77 of act Aug. 27, 1894, was repealed by Pub. L. 107-273, div. C, title IV, §§ 14102(c)(1)(A), 14103, Nov. 2, 2002, 116 Stat. 1921, 1922, effective Nov. 2, 2002, and applicable only with respect to cases commenced on or after Nov. 2, 2002.

AMENDMENTS

1982—Pub. L. 97-393 designated existing provisions as subsec. (a), inserted "Except as provided in subsection (b) of this section,", and added subsecs. (b) and (c).

1980—Pub. L. 96-349 inserted provisions respecting award of prejudgment interest including considerations for the court in determining whether an award is just under the circumstances.

EFFECTIVE DATE OF 1980 AMENDMENT

Section 4(b) of Pub. L. 96-349 provided that: "The amendments made by this section [amending this section and sections 15a and 15c of this title] shall apply only with respect to actions commenced after the date of the enactment of this Act [Sept 12, 1980]."

§ 15a. Suits by United States; amount of recovery; prejudgment interest

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 21 of this title, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 21 of this title the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

(June 19, 1936, ch. 592, § 2, 49 Stat. 1527.)

REFERENCES IN TEXT

Nothing herein contained, referred to in text, probably means nothing contained in act June 19, 1936, ch. 592, 49 Stat. 1526, popularly known as the Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act, which enacted sections 13a, 13b, and 21a of this title and amended section 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 13 of this title and Tables.

TRANSFER OF FUNCTIONS

For transfer of functions of Federal Trade Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 8 of 1950, § 1, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1264, set out under section 41 of this title.

§ 22. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

(Oct. 15, 1914, ch. 323, § 12, 38 Stat. 736.)

REFERENCES IN TEXT

The antitrust laws, referred to in text, are defined in section 12 of this title.

§ 23. Suits by United States; subpoenas for witnesses

In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

(Oct. 15, 1914, ch. 323, § 13, 38 Stat. 736.)

REFERENCES IN TEXT

The antitrust laws, referred to in text, are defined in section 12 of this title.

§ 24. Liability of directors and agents of corporation

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

(Oct. 15, 1914, ch. 323, § 14, 38 Stat. 736.)

REFERENCES IN TEXT

The antitrust laws, referred to in text, are defined in section 12 of this title.

§ 25. Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

(Oct. 15, 1914, ch. 323, § 15, 38 Stat. 736; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

REFERENCES IN TEXT

This Act, referred to in text, is act Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended, which is classified generally to sections 12, 13, 14 to 19, 20, 21, and 22 to 27 of this title, and sections 52 and 53 of Title 29, Labor. For further details and complete classification of this Act to the Code, see References in Text note set out under section 12 of this title and Tables.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, substituted "United States attorneys" for "district attorneys of the United States". See section 541 et seq. of Title 28, Judiciary and Judicial Procedure.

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

(Oct. 15, 1914, ch. 323, §16, 38 Stat. 737; Pub. L. 94-435, title III, §302(3), Sept. 30, 1976, 90 Stat. 1396; Pub. L. 104-88, title III, §318(3), Dec. 29, 1995, 109 Stat. 949.)

REFERENCES IN TEXT

The antitrust laws, referred to in text, are defined in section 12 of this title.

AMENDMENTS

1995—Pub. L. 104-88 substituted "for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49" for "in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

1976—Pub. L. 94-435 inserted provision authorizing court to award costs, including attorneys' fees, to a successful plaintiff.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-88 effective Jan. 1, 1996, see section 2 of Pub. L. 104-88, set out as an Effective Date note under section 701 of Title 49, Transportation.

§ 26a. Restrictions on the purchase of gasohol and synthetic motor fuel

(a) Limitations on the use of credit instruments; sales, resales, and transfers

Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that—

(1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or

(2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States.

(b) Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities

(1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit.

(2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available.

(3) Nothing in this section shall—

(A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person;

(B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel;

(C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or

(D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.

(c) "United States" defined

As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States, and any insular possession or other place under the jurisdiction of the United States.

(Oct. 15, 1914, ch. 323, §26, as added Pub. L. 96-493, §2, Dec. 2, 1980, 94 Stat. 2568.)

SHORT TITLE

For short title of Pub. L. 96-493 as the "Gasohol Competition Act of 1980", see section 1 of Pub. L. 96-493, set out as a Short Title of 1980 Amendment note under section 1 of this title.

§ 26b. Application of antitrust laws to professional major league baseball

(a) Major league baseball subject to antitrust laws

Subject to subsections (b) through (d) of this section, the conduct, acts, practices, or agree-filed against the United States were omitted as unnecessary. Section 265 of title 28, U.S.C., 1940 ed., relative to the petition in cases filed in the Court of Claims was also omitted from the revised title. (See, also, Rule 11 of the Federal Rules of Civil Procedure.)

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

AMENDMENTS

1982—Subsec. (a). Pub. L. 97-164 inserted "in a district court" after "civil action" in introductory provisions preceding par. (1). The phrase "civil action" also appeared in par. (2), but no change was made to reflect the probable intent of Congress as indicated on page 79 of House Report No. 97-312.

1972—Subsec. (d). Pub. L. 92-562 added subsec. (d).

1966—Subsec. (c). Pub. L. 89-719 added subsec. (c).

1958—Subsec. (a). Pub. L. 85-920 provided for venue and change of venue in tax refund suits by corporation.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-719 applicable after Nov. 2, 1966, see section 203 of Pub. L. 89-719, set out as a note under section 1346 of this title.

§ 1403. Eminent domain

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts.

(June 25, 1948, ch. 646, 62 Stat. 937.)

HISTORICAL AND REVISION NOTES

Based on section 257 of title 40, U.S.C., 1940 ed., Public Buildings, Property, and Works (Aug. 1, 1888, ch. 728, §1, 25 Stat. 357; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167).

Section constitutes the first clause of the second sentence of section 257, of title 40, U.S.C., 1940 ed. The revised section is expressive of the purpose of such section 257 with necessary changes in phraseology.

The jurisdiction provision of section 257 of title 40, U.S.C., 1940 ed., is incorporated in section 1358 of this title.

The remainder of section 257 of title 40, U.S.C., 1940 ed., is retained in said title 40.

Provision with respect to property in different districts was added to conform with section 1392 of this title.

See, also, section 1392 of this title which fixes venue of an action involving property in different districts in the same State.

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

(June 25, 1948, ch. 646, 62 Stat. 937; Pub. L. 87-845, §9, Oct. 18, 1962, 76A Stat. 699; Pub. L. 104-317, title VI, §610(a), Oct. 19, 1996, 110 Stat. 3860.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§119, 163 (Mar. 3, 1911, ch. 231, §58, 36 Stat. 1103; Sept. 8, 1916, ch. 475, §5, 39 Stat. 851).

Section consolidates sections 119 and 163 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology and substance.

Section 119 of title 28, U.S.C., 1940 ed., related only to transfer of cases from one division to another on stipulation of the parties.

Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

Sections 143, 172, 177, and 181 of title 28, U.S.C., 1940 ed., relating to the district courts of Arizona, Montana, New Mexico, and Ohio, contained special provisions similar to subsection (b), applicable to those States. To establish uniformity, the general language of such subsection has been drafted and the special provisions of those sections omitted.

Subsection (b) is based upon section 163 of title 28, U.S.C., 1940 ed., which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfer of cases between divisions. Criminal cases may be transferred pursuant to Rules 19-21 of the new Federal Rules of Criminal Procedure, and the criminal provisions of said section 163 are therefore omitted.

AMENDMENTS

1996—Subsec. (d). Pub. L. 104-317 amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "As used in this section, 'district court' includes the United States District Court for the District of the Canal Zone; and 'district' includes the territorial jurisdiction of that court."

1962—Subsec. (d). Pub. L. 87-845 added subsec. (d).

EFFECTIVE DATE OF 1996 AMENDMENT

Section 610(c) of Pub. L. 104-317 provided that: "The amendments made by this section [amending this section and section 1406 of this title] apply to cases pending on the date of the enactment of this Act [Oct. 19, 1996] and to cases commenced on or after such date."

EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87-845 effective Jan. 2, 1963, see section 25 of Pub. L. 87-845, set out as a note under section 414 of this title.

§ 1405. Creation or alteration of district or division

Actions or proceedings pending at the time of the creation of a new district or division or

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contract (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)
→ **§ 1641. Whole contract, effect to be given**

EFFECT TO BE GIVEN TO EVERY PART OF CONTRACT. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

CREDIT(S)

(Enacted 1872.)

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contract (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)
§ 1654. Uncertainty; interpretation against person causing

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.

CREDIT(S)

(Enacted 1872. Amended by Stats.1982, c. 1120, p. 4045, § 1.)

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 4. Maxims of Jurisprudence (Refs & Annos)
→ **§ 3513. Waiver of advantage; law established for public reason**

Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

CREDIT(S)

(Enacted 1872.)