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

JOINT APPENDIX

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APPEAL, CLOSED, ECF

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:09-cv-01400-SHS

TradeComet.Com LLC v. Google, Inc.
Assigned to: Judge Sidney H. Stein
Cause: 15:2 Antitrust Litigation

Date Filed: 02/17/2009
Date Terminated: 03/12/2010
Jury Demand: Plaintiff
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

Plaintiff

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Date Filed	#	Docket Text
02/17/2009	1	COMPLAINT against Google, Inc. (Filing Fee $ 350.00, Receipt Number 679502)Document filed by TradeComet.Com LLC.(ama) (Entered: 02/19/2009)
02/17/2009		SUMMONS ISSUED as to Google, Inc. (ama) (Entered: 02/19/2009)
02/17/2009		Magistrate Judge Kevin Nathaniel Fox is so designated. (ama) (Entered: 02/19/2009)
02/17/2009		Case Designated ECF. (ama) (Entered: 02/19/2009)
02/17/2009	2	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by TradeComet.Com LLC.(ama) (Entered: 02/19/2009)
02/20/2009	3	NOTICE OF APPEARANCE by Daniel Joseph Howley, Jr on behalf of TradeComet.Com LLC (Howley, Daniel) (Entered: 02/20/2009)
02/20/2009	4	NOTICE OF APPEARANCE by Joseph J Bial on behalf of TradeComet.Com LLC (Bial, Joseph) (Entered: 02/20/2009)
02/23/2009	5	SUMMONS RETURNED EXECUTED Summons and Complaint served. Google, Inc. served on 2/18/2009, answer due 3/10/2009. Service was accepted by Chad Matice, Clerk, NY State Secretary of State. Document filed by TradeComet.Com LLC. (Howley, Daniel) (Entered: 02/23/2009)
02/26/2009	6	NOTICE OF APPEARANCE by Sara Beth Ciarelli on behalf of Google, Inc. (Ciarelli, Sara) (Entered: 02/26/2009)
02/26/2009	7	NOTICE OF APPEARANCE by Jonathan M. Jacobson on behalf of Google, Inc. (Jacobson, Jonathan) (Entered: 02/26/2009)
02/26/2009	8	NOTICE OF CHANGE OF ADDRESS by Sara Beth Ciarelli on behalf of Google, Inc.. New Address: Wilson Sonsini Goodrich & Rosati, 1301 Avenue of the Americas, 40th Floor, New York, New York, 10019, 212-497-7759. (Ciarelli, Sara) (Entered: 02/26/2009)
02/26/2009	9	NOTICE OF CHANGE OF ADDRESS by Jonathan M. Jacobson on behalf of Google, Inc.. New Address: Wilson Sonsini Goodrich & Rosati, 1301 Avenue of the Americas, 40th Floor, New York, New York, 10019, 212-497-7758. (Jacobson, Jonathan) (Entered: 02/26/2009)
02/27/2009	10	NOTICE OF APPEARANCE by Chul Pak on behalf of Google, Inc. (Pak, Chul) (Entered: 02/27/2009)
02/27/2009	11	NOTICE OF CASE REASSIGNMENT to Judge Sidney H. Stein. Judge Naomi Reice Buchwald is no longer assigned to the case due to a Judge's Recusal. (ama) (Entered: 03/02/2009)

02/27/2009	13	MOTION for Jonathan S. Kanter to Appear Pro Hac Vice. Document filed by TradeComet.Com LLC.(dle) (Entered: 03/05/2009)
03/03/2009	12	STIPULATION AND ORDER For the reasons set forth in this order, Plaintiff and defendant agree that, Google will have until April 7, 2009, to respond to the complaint (a 28-day extension of time). (Signed by Judge Sidney H. Stein on 3/3/09) (mme) (Entered: 03/05/2009)
03/05/2009	14	MOTION for Charles F. Rule to Appear Pro Hac Vice. Document filed by TradeComet.Com LLC.(dle) (Entered: 03/05/2009)
03/09/2009	18	MOTION for Susan A. Creighton to Appear Pro Hac Vice. Document filed by Google, Inc.(dle) (Entered: 03/11/2009)
03/10/2009	15	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Google, Inc..(Jacobson, Jonathan) (Entered: 03/10/2009)
03/10/2009	16	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION, granting 13 Motion for Jonathan S. Kanter to Appear Pro Hac Vice FOR TradeComet.com LLC. (Signed by Judge Sidney H. Stein on 3/9/09) (cd) (Entered: 03/10/2009)
03/10/2009		Transmission to Attorney Admissions Clerk. Transmitted re: 16 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (cd) (Entered: 03/10/2009)
03/10/2009	17	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION granting 14 Motion for Charles F Rule to Appear Pro Hac Vice for TradeComet.com LLC. (Signed by Judge Sidney H. Stein on 3/9/09) (cd) (Entered: 03/10/2009)
03/10/2009		Transmission to Attorney Admissions Clerk. Transmitted re: 17 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (cd) (Entered: 03/10/2009)
03/12/2009		CASHIERS OFFICE REMARK on 14 Motion to Appear Pro Hac Vice, 13 Motion to Appear Pro Hac Vice in the amount of $50.00, paid on 02/27/2009, Receipt Number 680046. (jd) (Entered: 03/12/2009)
03/13/2009	19	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE OF SUSAN A. CREIGHTON: granting 18 Motion for Susan A. Creighton to Appear Pro Hac Vice. (Signed by Judge Sidney H. Stein on 3/13/2009) (jfe) (Entered: 03/13/2009)
03/13/2009		Transmission to Attorney Admissions Clerk. Transmitted re: 19 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (jfe) (Entered: 03/13/2009)
03/17/2009	20	ORDER: IT IS HEREBY ORDERED that: 1. Any document demands plaintiff serves on defendant shall be returnable within 10 days; 2. Defendant shall move to dismiss the complaint for improper venue or lack of jurisdiction based on improper venue on or before March 31, 2009; 3. Plaintiff's opposition to the motion is due on or before April 15, 2009; and 4. Defendant's reply to its motion is due on or before April 22, 2009. So Ordered (Signed by Judge Sidney H. Stein on 3/17/09) (js) (Entered: 03/18/2009)
03/19/2009		CASHIERS OFFICE REMARK on 18 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 03/09/2009, Receipt Number 680700. (jd) (Entered: 03/19/2009)

03/31/2009	21	MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*. Document filed by Google, Inc..(Jacobson, Jonathan) (Entered: 03/31/2009)
03/31/2009	22	MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 03/31/2009)
03/31/2009	23	DECLARATION of Heather Wilburn in Support re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by Google, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Jacobson, Jonathan) (Entered: 03/31/2009)
03/31/2009	24	CERTIFICATE OF SERVICE of Defendant Google Inc.'s Notice of Motion, Memorandum of Law In Support of Its Motion to Dismiss Based on Lack of Subject Matter Jurisdiction and Improper Venue and Declaration of Heather Wilburn in Support of Motion to Dismiss with exhibits served on Charles F. Rule, Joseph Bial, Jonathan Kanter and Daniel Howley on March 31, 2009. Service was made by Electronic Mail. Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 03/31/2009)
04/15/2009	25	MEMORANDUM OF LAW in Opposition re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by TradeComet.Com LLC. (Attachments: # 1 Certificate of Service)(Bial, Joseph) (Entered: 04/15/2009)
04/15/2009	26	DECLARATION of Daniel J. Howley in Opposition re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by TradeComet.Com LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(Howley, Daniel) (Entered: 04/15/2009)
04/22/2009	27	REPLY MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 04/22/2009)
04/22/2009	28	DECLARATION of Sara Ciarelli Walsh in Support re: 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue*.. Document filed by Google, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Jacobson, Jonathan) (Entered: 04/22/2009)
04/22/2009	29	CERTIFICATE OF SERVICE of Reply Memorandum of Law In Support Of Defendant Google Inc.'s Motion to Dismiss and Declaration Of Sara Ciarelli Walsh In Support Of Defendant's Motion To Dismiss served on Charles F. Rule, Joseph J. Bial, Jonathan Kanter, Daniel Howley on April 22, 2009. Service was made by Electronic mail. Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 04/22/2009)
04/24/2009	30	MOTION to Strike Document No. 28 / *Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh.* Document filed by TradeComet.Com LLC.(Bial, Joseph) (Entered: 04/24/2009)
04/24/2009	31	MEMORANDUM OF LAW in Support re: 30 MOTION to Strike Document No. 28 / *Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh.*. Document filed by TradeComet.Com LLC. (Attachments: # 1 Certificate of Service)(Bial, Joseph) (Entered: 04/24/2009)

04/27/2009	32	MEMORANDUM OF LAW in Opposition re: 30 MOTION to Strike Document No. 28 / *Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh. Google Inc.'s MEMORANDUM OF LAW in Opposition to Tradecomet.com LLC's Motion to Strike Exhibits D,E,F,G,and H of the Walsh Declaration.* Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 04/27/2009)
04/27/2009	33	CERTIFICATE OF SERVICE. Document filed by Google, Inc.. (Jacobson, Jonathan) (Entered: 04/27/2009)
04/28/2009	34	REPLY MEMORANDUM OF LAW in Support re: 30 MOTION to Strike Document No. 28 / *Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh.*. Document filed by TradeComet.Com LLC. (Attachments: # 1 Certificate of Service) (Bial, Joseph) (Entered: 04/28/2009)
08/05/2009	35	NOTICE OF CHANGE OF ADDRESS by Daniel Joseph Howley, Jr on behalf of TradeComet.Com LLC. New Address: Cadwalader Wickersham & Taft LLP, 700 Sixth Street, N.W., Washington, DC, USA 20001, (202) 862-2200. (Howley, Daniel) (Entered: 08/05/2009)
08/05/2009	36	NOTICE OF CHANGE OF ADDRESS by Joseph J Bial on behalf of TradeComet.Com LLC. New Address: Cadwalader Wickersham & Taft, 700 Sixth Street, N.W., Washington, DC, USA 20001, (202) 862-2200. (Bial, Joseph) (Entered: 08/05/2009)
08/06/2009	37	NOTICE OF CHANGE OF ADDRESS by Charles F. Rule on behalf of TradeComet.Com LLC. New Address: Cadwalader Wickersham & Taft, 700 Sixth Street, N.W., Washington, DC, USA 20001, (202) 862-2200. (Rule, Charles) (Entered: 08/06/2009)
03/05/2010	38	OPINION & ORDER re: #98627 30 MOTION to Strike Document No. 28 Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh filed by TradeComet.Com LLC, 21 MOTION to Dismiss Based on Lack of Subject Matter Jurisdiction and Improper Venue filed by Google, Inc. 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 l2(b)(1) and l2(b)(3) is granted. The Court also denies TradeComet's motion to strike Exhibits D through H of the Walsh Declaration. SO ORDERED. (Signed by Judge Sidney H. Stein on 3/5/2010) (tve) Modified on 3/8/2010 (ajc). (Entered: 03/05/2010)
03/12/2010	39	CLERK'S JUDGMENT 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. (Signed by J. Michael McMahon, clerk on 3/12/10) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 03/12/2010)
03/15/2010	40	NOTICE OF APPEAL from 39 Clerk's Judgment, 38 Memorandum & Opinion,. Document filed by TradeComet.Com LLC. Filing fee $ 455.00, receipt number E 896979. (nd) (Entered: 03/16/2010)
03/16/2010		Transmission of Notice of Appeal to the District Judge re: 40 Notice of Appeal. (nd) (Entered: 03/16/2010)

03/16/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 40 Notice of Appeal. (nd) (Entered: 03/16/2010)
03/16/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 6 Notice of Appearance filed by Google, Inc., 36 Notice of Change of Address filed by TradeComet.Com LLC, 39 Clerk's Judgment, 7 Notice of Appearance filed by Google, Inc., 31 Memorandum of Law in Support of Motion, filed by TradeComet.Com LLC, 11 Notice of Case Assignment/Reassignment, 17 Order on Motion to Appear Pro Hac Vice, 9 Notice of Change of Address filed by Google, Inc., 27 Reply Memorandum of Law in Support of Motion filed by Google, Inc., 15 Rule 7.1 Corporate Disclosure Statement filed by Google, Inc., 18 MOTION for Susan A. Creighton to Appear Pro Hac Vice. filed by Google, Inc., 4 Notice of Appearance filed by TradeComet.Com LLC, 1 Complaint filed by TradeComet.Com LLC, 40 Notice of Appeal filed by TradeComet.Com LLC, 19 Order on Motion to Appear Pro Hac Vice, 37 Notice of Change of Address filed by TradeComet.Com LLC, 34 Reply Memorandum of Law in Support of Motion, filed by TradeComet.Com LLC, 26 Declaration in Opposition to Motion, filed by TradeComet.Com LLC, 25 Memorandum of Law in Opposition to Motion filed by TradeComet.Com LLC, 24 Certificate of Service Other, filed by Google, Inc., 3 Notice of Appearance filed by TradeComet.Com LLC, 20 Order, Set Deadlines/Hearings,, 5 Summons Returned Executed filed by TradeComet.Com LLC, 14 MOTION for Charles F. Rule to Appear Pro Hac Vice. filed by TradeComet.Com LLC, 32 Memorandum of Law in Opposition to Motion, filed by Google, Inc., 38 Memorandum & Opinion,,, 29 Certificate of Service Other, filed by Google, Inc., 2 Rule 7.1 Corporate Disclosure Statement filed by TradeComet.Com LLC, 30 MOTION to Strike Document No. 28 / *Exhibits D, E, F, G and H of the Declaration of Sara Ciarelli Walsh.* filed by TradeComet.Com LLC, 33 Certificate of Service Other filed by Google, Inc., 21 MOTION to Dismiss *Based on Lack of Subject Matter Jurisdiction and Improper Venue.* filed by Google, Inc., 13 MOTION for Jonathan S. Kanter to Appear Pro Hac Vice. filed by TradeComet.Com LLC, 22 Memorandum of Law in Support of Motion filed by Google, Inc., 10 Notice of Appearance filed by Google, Inc., 35 Notice of Change of Address filed by TradeComet.Com LLC, 23 Declaration in Support of Motion, filed by Google, Inc., 12 Stipulation and Order, Set Deadlines, 8 Notice of Change of Address filed by Google, Inc., 28 Declaration in Support of Motion, filed by Google, Inc., 16 Order on Motion to Appear Pro Hac Vice were transmitted to the U.S. Court of Appeals. (nd) (Entered: 03/16/2010)

PACER Service Center

Transaction Receipt

06/15/2010 10:59:38

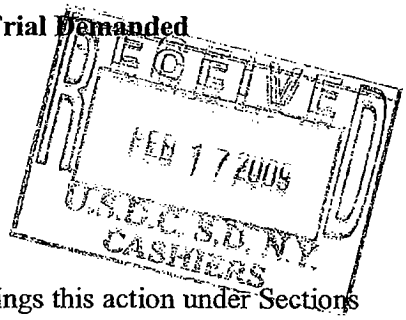
PACER Login:	cw2751	**Client Code:**	99828.001
Description:	Docket Report	**Search Criteria:**	1:09-cv-01400-SHS
Billable Pages:	5	**Cost:**	0.40

JUDGE BUCHWALD

'09 CIV 1400

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM LLC,	CIVIL ACTION NO. _____
Plaintiff	
v.	**COMPLAINT**
GOOGLE INC.,	**Jury Trial Demanded**
Defendant	



NATURE OF THE ACTION

1. Plaintiff TradeComet.com LLC ("TradeComet") brings this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to recover treble damages and the costs of this suit, including reasonable attorneys' fees, against Defendant Google Inc. ("Google") 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. TradeComet demands a trial by jury.

2. Google operates a search website and a search advertising platform on the Internet. In response to search queries – on Google.com or on one of Google's syndicated search boxes on third-party websites – Google returns search-results pages with a list of "natural" or "algorithmic" results (typically on the left-side) and, where applicable, a list of paid search advertising 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 below), search-based ads like Google's "sponsored links" because these ads are displayed at the moment a user is potentially about to purchase a good or service as the result of a search query.

3. Google is the dominant provider of search advertising in the United States and has been investigated in the past 14 months by both United States federal antitrust enforcement agencies, the Department of Justice and the Federal Trade Commission. In fact, in November 2008, according to an attorney (and former Assistant Attorney General of the U.S. Department of Justice) who was working with the Antitrust Division of the Department of Justice, the agency was a mere three hours away from filing a complaint against Google alleging, among other things, that Google has a monopoly in search advertising and that its conduct surrounding its search advertising pact with Yahoo! would have furthered its monopoly.

4. TradeComet operates a competing search website known as "SourceTool.com" (or "SourceTool") that attracts highly-valued search traffic of businesses seeking to buy or sell products and services to other businesses. This form of business-to-business search is commonly referred to as "B2B search" or "B2B exchange." B2B search is one form of Internet search that Internet users may turn to for more specialized search results than those returned by a generic search website such as Google. B2B search, and other forms of specialized search (e.g., video, local search, travel, medical, shopping comparisons and others) are commonly referred to as "vertical" search. Search advertising platforms associated with vertical search websites, such as SourceTool, offer advertisers advertising platforms that compete with generic search websites such as Google.

5. Vertical search sites like SourceTool are attractive to advertisers as an alternative to a generic search site like Google because the advertiser is aware that users will visit vertical search sites to find relevant results more quickly than having to sift through pages of irrelevant results on a generic search site. 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. Vertical search sites can deliver more relevant results because they are specifically catered to certain audiences and, as a result, are attractive to certain groups of search advertisers seeking the highly-valued traffic a self-selected audience brings.

6. Initially, SourceTool was a very successful company, rising to become the second-fastest growing website in the world. It advertised on Google and began to receive considerable search traffic. This success enabled both SourceTool and Google to generate significant revenue. As a result, Google embraced SourceTool's success and the quality of its service, naming it "Site of the Week."

7. Google recognized, however, that sites like SourceTool (individually and collectively with other verticals) posed a substantial threat to Google's dominance in search advertising and would attract highly-valued search traffic from Google and, as a result, advertisers from Google's highly profitable advertising platform (known as "AdWords"). Faced with this threat to its business, Google undertook a variety of actions to exclude vertical search sites from the search advertising market, including imposing exclusivity in its agreements with popular and highly-trafficked websites and targeting and excluding (through its auctions) sites that posed a gathering threat to Google's dominance. These actions were intended to starve nascent competition from vertical search sites, like SourceTool, of the critical search traffic necessary to develop and to compete in the search advertising market.

8. Accordingly, Google unilaterally terminated the voluntary course of dealing it had with SourceTool by, among other things, manipulating its auctions so that SourceTool faced vastly higher prices to acquire search traffic – prices so high that it was completely uneconomical for SourceTool to win auctions that it had routinely won prior to Google's exclusionary strategy. Google's anticompetitive conduct therefore strangled the primary source

of search traffic to SourceTool, resulting in substantial drops in traffic and revenue. Currently, SourceTool averages approximately 1% of the traffic that visited the site prior to falling victim to Google's exclusionary conduct. At the same time, Google sacrificed business arrangements that had been generating significant revenues and profits.

9. Google further disadvantaged SourceTool in its ability to compete and to provide a competitive alternative for search advertisers to Google's dominant advertising platform by entering into "preferred" agreements with Business.com. These agreements were intended artificially to prop up Business.com in the search advertising market and, at the same time, to shield Google by diminishing and eliminating competitors that were not favored search sites of, and therefore not under long-term exclusive agreements with, Google.

10. 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.

PARTIES

11. Plaintiff TradeComet is a Delaware limited liability company with its principal place of business in New York, New York.

12. Defendant Google is a Delaware corporation registered with the State of New York to conduct business therein and has its principal place of business in Mountain View, California.

JURISDICTION AND VENUE

13. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337, Section 4 of the Sherman Act, 15 U.S.C. § 4, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

14. Venue is proper in this district under 15 U.S.C. §§ 15, 22, and 26, and under 28 U.S.C. § 1391(b) and (c) because: (1) Google transacts business and is found within this district,

(2) TradeComet's principal place of business is within this district, and (3) a substantial portion of the events giving rise to the claim herein occurred within this district.

TRADE AND INTERSTATE COMMERCE

15. The activities of Google, individually and in conjunction with others, as described in this Complaint, were within the flow of and substantially affected interstate commerce.

16. During the time period covered by this Complaint, Google sold advertising as a result of online search queries throughout the United States and across state lines.

17. Google's conduct had a direct, substantial and reasonably foreseeable effect on United States commerce.

BACKGROUND FACTS

Natural Search and Search Advertising

18. In response to a search query entered by a user, search websites return a search-results page. Generally, a search-results page displays two different kinds of results: (1) natural or "algorithmic" results; and (2) search advertising results.

19. On many search websites, natural or "algorithmic" results are shown on the left-side of a search-results page. Search websites normally generate their natural results by way of a "search algorithm." Search algorithms are computer programs that review a search website's index of Internet content and aim to return links to information relevant to the query.

20. A search website's index of online content encompasses enormous amounts of information, which is routinely updated and stored on the search website's servers. Some search websites have broad-based or generic indices. Examples of companies that operate broad-based search websites include Google, Yahoo! and Microsoft. "Vertical" or specialized search websites typically focus their indices on specific categories of content. Examples of vertical

search websites include sites for health information, videos, comparison shopping and, as discussed below, sites such as SourceTool.com for business-to-business goods and services.

21. Google's search engine creates and updates its index by continuously sending tools called "crawlers" to scan all the web sites on the Internet and to index the terms they find. Because of Google's dominant market position, it has become common for web site publishers to optimize their sites and content for Google's crawlers. Indeed, many publishers hire third party "Search Engine Optimizers" or "SEOs" that specialize in designing web sites to meet the evolving requirements of Google's algorithm and crawlers.

22. Google's crawlers and algorithms are updated frequently forcing publishers to constantly re-optimize their sites for Google. As a result, Google's proprietary indexing technology has become the de facto standard on the Internet. Moreover, because web sites are optimized for Google's algorithms, they cannot be optimized as effectively for Google's existing and potential competitors, which creates barriers to new competition and reinforces Google's dominant position.

23. As discussed below, search advertising results are returned using different processes than algorithmic results. Often search advertising results appear as "sponsored links" on the top, bottom or right-side of a search-results page.

24. Search advertisements are normally sold on a "cost per click" or "CPC" basis whereby advertisers pay the search website each time their ad is clicked by a user of the search website. If a search ad is shown on a search-results page, but not clicked, then the advertiser generally does not pay. Most other forms of Internet advertising require an advertiser to pay based on how often an ad is shown to users.

Google's Rise to Dominance

25. Google was founded by Larry Page and Sergey Brin in the mid-1990s and began operations in Menlo Park, California, in 1998.

26. By early 1999, the company's search website was receiving over 500,000 search queries per day, and the company had received an infusion of $25 million from venture capital firms in California's "Silicon Valley." (By way of comparison, SourceTool was receiving over 600,000 search queries per day when it became the victim of Google's exclusionary conduct.)

27. Initially, all of Google's search results were natural search results derived from its "PageRank" search algorithm, which, like other search algorithms, purports to return links based on relevance to the search query.

28. Search queries on Google continued to grow in the early 2000s as the company was able to partner exclusively with highly trafficked websites such as AOL/Netscape. By partnering with Google, a website would direct search queries to Google's search engine. The AOL/Netscape collaboration alone helped increase Google's searches to over 3 million per day. Google's growth continued throughout the late 1990s and early 2000s through the acquisition of, or partnering with, third-party websites to ensure Google's exclusive placement on these third-party websites.

29. As Google's Chief Economist recognized, Page and Brin did not have a specific business model in mind for Google when they founded the company. Indeed, throughout much of its early history – and despite attracting significant Internet traffic to its website – Google made very little money. For example, according to Google's Chief Economist, at one point Page and Brin offered to sell their search technology (the "PageRank" algorithm discussed above) to Yahoo! for only $1 million. Yahoo! turned them down.

30. Although Google began generating some revenue by permitting third parties to use its algorithmic search technology, it persisted in its failure to generate significant revenues.

31. In 2001, Google introduced a search advertising platform known as "AdWords," which was based on the business model of GoTo.com (later renamed Overture and purchased by Yahoo!), a rival search platform. AdWords purportedly uses an auction to determine the price for ads displayed in response to queries for specified "keywords." Google's incorporation of its keywords auction soon translated into revenue as Google began to monetize the traffic at its website, which continued to increase due to the skyrocketing popularity of Internet search and through Google's exclusive partnerships with, and acquisitions of, third parties.

32. Through AdWords, Google auctions keywords to advertisers. 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. 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. Typically, the advertiser pays when a user clicks on an ad. However, because the user has launched a search using the keyword, a user that clicks on an ad is particularly likely to respond to the advertiser's message. The higher bidding advertisers tend to obtain better placement of their ads on the search results page and to realize higher "click through" rates. As discussed below, however, Google manipulates its auctions to favor certain advertisers over others.

33. Google purports to auction keywords on AdWords using a form 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 typically

pay based on the ad ranked immediately below their own. The general theory is that the second price aspect of the platform provides more incentive to an advertiser to bid at or near what the ad actually is worth to them, since the advertiser will pay not its value of the ad, but rather the value of the next highest bidder for the keyword. Google's price-per-click auctions, however, are not pure auctions in which buyers and sellers set price without any influence on the part of Google. Google influences the price an advertiser ultimately pays in several ways. For example, Google establishes minimum pricing thresholds that can differ by advertiser based on criteria, such as "Landing Page Quality," that is exclusively in Google's control. Google therefore ultimately determines how many ads to place on its search-results pages, which ads to place and in which order. As a result, the advertiser with the highest bid does not always get the best slots on the page and, in many cases, that advertiser's ads are not shown at all. Google does not disclose the specific criteria used to determine the winners and losers of any particular auction.

34. It is impossible to know how Google actually picks winners and losers of its auctions due to a lack of transparency that has led many in the industry to 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.

35. In 2003, Google spent approximately $102 million to buy the rights to technology that allowed Google to sell advertising that would appear on third-party Internet websites. This service became known as "AdSense." Through AdSense any website operator (or "publisher") can present advertisements in the unused white space of its webpages. Generally, the AdSense advertisements that are displayed on a particular webpage are based upon the keyword content

contained on that webpage. The underlying advertiser must pay for each "click" by an Internet user on their AdSense advertisement. Such payments are then split between Google and the third party website.

36. As a search advertising platform, Google survives solely by generating advertising revenue through traffic visiting, or directed to, its website. Google is a leading Fortune 500 company with a market capitalization of over $100 billion, annual revenue of over $16 billion and net profit of over $4 billion.

History of TradeComet

37. 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 B2B advertising platform. ThomasB2B, like Google, generated revenue from advertiser payments made on a cost-per-click basis. Prior to founding ThomasB2B, Mr. Savage worked as a Vice President for Thomas Publishing Company, a leader in the dissemination of industrial product information for over 100 years.

38. Mr. Savage was an early and frequent user of Google's advertising auction. As early as January 2002, Mr. Savage, through Thomas Publishing Company, began advertising through Google AdWords. In April 2002, a Google representative recognized "that a huge opportunity exist[ed]" between Google and B2B publishers like Thomas Publishing Company.

39. ThomasB2B's website launched in July 2004. Throughout 2004 and 2005, Mr. Savage continued to participate in AdWords auctions and to develop ThomasB2B's search advertising platform, securing significant amounts of money to acquire traffic with affiliates.

ThomasB2B continued operations until September 2005, at which time it ceased its search advertising operations.

40. 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. 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 similar to the approach utilized by Google).

41. Mr. Savage sought to expand the model he initially developed at ThomasB2B by starting a new venture, TradeComet. As part of this effort, Mr. Savage raised significant money in funding for TradeComet, which began operations in September 2005 and went live in November 2005. One of TradeComet's initial investors was a company regulated under the New York State Certified Venture Capital Companies (CAPCO) program, which provides certain investors with state tax credits with the goal of promoting the formation and expansion of New York based businesses, thereby creating jobs and growth in the State's economy. TradeComet has its offices in New York, where a large concentration of advertisers and advertising agencies that rely upon search advertising are located. (These advertisers are adversely impacted by harm to competition in search advertising).

42. As he had done with ThomasB2B, Mr. Savage developed SourceTool to attract B2B search queries by offering a searchable business directory available at no charge to users. SourceTool's directory contains information about more than 750,000 product and service

suppliers around the world indexed according to the United Nations Standard Products and Services Code. SourceTool allowed companies to post information about their businesses, including management and experience, as well as their product and service offerings. Plans for site development included uploading videos of business offerings and other novel methods of displaying products and services to users of the site.

43. Mr. Savage realized that attracting search traffic required using Google's search advertising platform, which was becoming dominant, until SourceTool reached an audience size capable of sustaining the site. In order to attract traffic to SourceTool, in October 2005, TradeComet began purchasing several hundreds of thousands of keywords and phrases from Google's AdWords.

44. Initially, SourceTool was remarkably successful. By March 2006, just three months after its launch, SourceTool was rated by ComScore as 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.

45. Google initially embraced SourceTool's success, and Mr. Savage was invited to Google's New York office in December 2005 to meet about his upstart business. The stated purpose of the meeting, according to Google, was to review SourceTool's placement of advertisements on its website and to discuss strategies to maximize revenue. In January 2006, a Google representative called Mr. Savage to inform him that the monetization of SourceTool was successful and that SourceTool had been selected as a "site of the week" at Google.

46. Mr. Savage was 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." The following day, a Google representative expressed in an email how pleased Google was with SourceTool's increased AdWords usage. The Google representative requested that Mr. Savage be given access to a new beta version of Google's AdWords editor.

47. In the months following the May 2006 meeting, however, Google drastically raised the minimum bids for AdWords keywords on which SourceTool bid. For instance, Google increased prices to SourceTool by approximately 10,000% for many keywords; keywords that previously cost between 5 and 10 cents were increased to $5 and $10.

48. As a result of the inability to obtain keywords and thus search advertising from AdWords, SourceTool was unable to secure traffic to its website. Given the growing dominance of AdWords, there was no realistic alternative to which SourceTool could turn to generate sufficient traffic to return to the growth path on which SourceTool had been prior to Google's exclusionary actions. The loss in traffic over the next several months resulted in a coinciding drop in SourceTool's advertising revenues. SourceTool estimates that from March 2006 to December 2006 it lost approximately 90% of its monthly traffic from Google and millions of dollars in revenue.

49. Mr. Savage raised this issue in August 2006 during another meeting with Google. Google explained that the recent drastic keyword price increase 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 new "Landing Page Quality algorithm" – a concern 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." In fact, prior to the meetings at which Mr. Savage revealed TradeComet's business plan at Google's specific request, Google had extolled the virtues of SourceTool in communications with TradeComet's management. During the meeting in August 2006, however, Google representatives specifically acknowledged Google's concern about competitive threats to its search advertising business.

50. Nonetheless, at Google's suggestion, TradeComet initiated several changes to SourceTool designed to improve (in Google's estimation) the site's landing page quality assessment. These changes were costly and were made in spite of TradeComet's belief that they would not improve the user experience at the SourceTool website. In fact, B2B search marketers had already expressed their praise of SourceTool's original and novel design prior to Google's actions to block traffic to SourceTool.

51. In September 2006, Mr. Savage contacted Google and described the specific actions TradeComet had taken at Google's request. Mr. Savage also explained that TradeComet had planned to raise millions of dollars in additional venture capital funding for SourceTool, but it was becoming impossible to do so because Google's exclusionary actions were now thwarting SourceTool's business success. Google replied through a representative that it would review the situation.

52. Google contacted Mr. Savage in December 2006 to inform him that Google had conducted a manual review of SourceTool and concluded that Google would not make any changes to reverse its actions that had been blocking traffic to SourceTool through the artificially-inflated minimum bids for keywords sought by SourceTool.

53. 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." 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."

54. Search advertising is critical to nascent competitors like SourceTool, which must identify a needle (a B2B search query) in a haystack of web searches. Search advertising permits affirmative targeting of search traffic rather than waiting for those needles to show up from the haystack of natural searches or from far less efficient forms of advertising like display advertising. Over time, as vertical search sites like SourceTool obtain "critical mass" through search advertising, web users initialize their search there.

55. Because of Google's dominance, no other search advertising provider could provide SourceTool with the necessary traffic for the site to continue its growth, which left TradeComet with no viable competitive alternative after being cut off from Google's AdWords.

The Relevant Market

56. The relevant market in this case is the provision of advertising as a result of online search queries in the United States (the "Search Advertising Market").

57. Search advertising platforms tend to be localized by country due to differences in language and geography and other country-specific factors. Many search advertisers therefore, set their advertising campaigns on the basis of country.

58. Search websites compete for advertisers in a variety of ways, including, without limitation, through the ease of use of the advertising platform, the format of ads, the policies and

procedures of the advertising platform, the number of search users or amount of "search traffic," and the rate of return offered to advertisers.

59. Increased search traffic translates into a greater number of clicks on search ads and thus more revenue for the search advertising platform. More search traffic also tends to attract more search advertisers to the search advertising platform. As Google's Chief Economist acknowledged, "advertisers follow the eyeballs." These characteristics contribute to what is commonly referred to as the scale or network effects of online search. Google's Chief Economist has recognized that "search technology exhibits increasing returns to scale" and that "scale is pretty critical to the business." Substantial search traffic draws advertisers desiring to target such traffic. Conversely, with less search traffic, there are fewer clicks and less revenue for the search advertising platform. Search advertisers are far less likely to devote resources to advertising on the search-results page of lightly trafficked search websites. The presence of network effects therefore serves as a barrier to entry.

60. Search websites seek to attract search traffic through a variety of methods, including advertising their search website to potential users and attempting to design appealing user interfaces and better search algorithms. Success in obtaining search traffic is a prerequisite for successfully competing within the Search Advertising Market. As a Google representative stated, "we think that if we get more high quality content online, that improves search, and when you improve search people use search more and that ultimately causes us to sell more ads."

61. Search advertising is a distinct relevant market because there are no effective competitive alternatives to search advertising available for search advertisers. Search advertisers view the placement of advertising on search-result pages to be distinct from other types of advertising. Websites designed to generate advertising in response to search queries allow

advertisers a unique opportunity to have ads displayed in real-time at a point where a user has revealed information that permits the serving of targeted and relevant advertisements. This form of advertising, thus, is more likely to deliver ads in real-time to users desiring to purchase goods and services. As a result, search advertisers do not consider other types of advertising to be close substitutes for search advertising.

62. Search advertising platforms also do not generally consider other types of advertising in determining how to market or price their search advertising. When search advertising platforms consider whether to make changes to their systems, they consider the extent to which search advertisers might switch to other search advertising providers, but they do not focus on the extent to which search advertisers might switch to types of non-search advertising. A Google Vice-President recently acknowledged that "[t]he old way of advertising had no direct interaction with the audience. But now the audience can click. So suddenly advertising is not a sales pitch. It's a response to an expression of intent. This form of advertising is narrowcast, personalized. It has very different properties than the old."

63. Google dominates the Search Advertising Market with a monopoly share (of at least 70%) through its AdWords platform – a share that continues to increase. Both federal antitrust agencies – the U.S. Department of Justice and the U.S. Federal Trade Commission – and more than a dozen state attorneys general have recently had occasion to review Google's business and have found Google to be the dominant supplier of search advertising. According to the F.T.C., "Google, through its AdWords business, is the dominant provider of sponsored search advertising, and most of its online advertising revenue is generated by the sale of advertising." Google's principal rivals in the market for search advertising are Yahoo! and

Microsoft, each of which also provides general purpose search websites; however, those two competitors have far lower shares of the Search Advertising Market than does Google.

64. Vertical search advertising platforms also account for a small percentage of the Search Advertising Market. Although currently much smaller than the larger generic search advertising platforms operated by Google, Yahoo! and Microsoft, vertical search platforms are capable of delivering highly relevant results because they are specifically catered to their self-selected visiting audiences and are a source of potentially significant competition to generic sites like Google. Although vertical search platforms currently present a nascent competitive threat to Google, if they are permitted to develop and grow, those sites individually and collectively represent a threat of attracting substantial amounts of traffic from Google and of providing alternative search advertising platforms to AdWords.

65. As vertical sites reach a critical mass of search queries, they too, like Google, can support keyword auctions for advertisers, as planned by TradeComet. Google's Chief Economist has stated that in situations where "you have a niche or focused market" advertising "is extremely powerful . . . because you are showing ads that people are interested in almost by definition." This is due to the fact that, as one Google representative stated, "even with the most rudimentary user information, search engines can and will provide drastically better search results."

66. As Google learned during the course of its meetings with SourceTool during the first half of 2006, SourceTool planned to compete for B2B search traffic in order to draw advertisers to its site. SourceTool also planned to reinstate the blended directory-keyword auction that Mr. Savage developed and implemented at ThomasB2B once SourceTool reached critical mass in terms of search traffic. At that point, SourceTool would be able to present

advertisers seeking highly valued B2B search traffic a more focused competitive alternative to Google's generic, yet dominant, AdWords platform.

Google's Conduct to Raise Barriers to Entry and to Exclude Competition

67. There are substantial barriers to entry in the Search Advertising Market. The primary barrier to entry facing vertical search websites is the inability to draw enough search traffic to reach the critical mass necessary to become independently sustainable. Google has dramatically raised this barrier to entry in numerous ways.

68. Google has entered into exclusive agreements with many of the most highly trafficked websites on the Internet, guaranteeing that any search generated at those non-search websites (and, increasingly, rival search websites as well) is directed to Google's search advertising platform rather than to rival platforms in the Search Advertising Market. These exclusive agreements establish Google as the website's search provider and deny rival search advertising platforms, including vertical search advertising platforms, the ability to create switching opportunities for users and advertisers to alternative search sites. As just one example of many, Google entered an agreement with AOL having the effect, as described by AOL, of "dedicat[ing] [AOL's] search business to Google on an exclusive basis." AOL expressly acknowledged that the exclusivity requirement could limit AOL's ability to take advantage of competing search technologies in the future.

69. Search syndication agreements like these reinforce Google's dominant position by, among other things, ensuring that web searchers only view Google's platform rather than becoming accustomed to rival platforms. The Department of Justice recently concluded that Google has a dominant share in the relevant market for such search syndication at publisher websites.

70. Google's conduct has deprived rival advertising platforms of the scale necessary to become effective competitors to Google's dominant AdWords platform. Google's own 10-K admits that its exclusive search syndication contracts with an overwhelming number of significant Internet publishers are not always profitable: "Payments to certain of our Google Network members have exceeded the related fees we receive from our advertisers." Yet, locking up that inventory has foreclosed a substantial percentage of the search syndication market to the detriment of Google's search advertising rivals and vertical search rivals who would otherwise benefit from greater entry possibilities and increased competition in the Search Advertising Market.

71. Google also recently sought to raise barriers to entry, to entrench its dominant position and to exclude competition in the Search Advertising Market further by entering into an agreement with Yahoo! whereby Yahoo! would outsource a critical part of its keyword auctions to Google. Under this arrangement, Google advertisements would replace Yahoo! advertisements in a large number of instances. As a result, Google would have dictated the pricing for these ads and would have been further empowered to manipulate keyword auctions (and the subsequent pricing to advertisers) to drive competition from the Search Advertising Market and to protect Google's dominant position. At the same time, the agreement would have eliminated Google's principal competitor and increased Google's "network effects" and scale advantages.

72. The Department of Justice concluded that the agreement between Google and Yahoo! would "harm competition in the markets for Internet search advertising and Internet search syndication." Google abandoned the agreement in response to the Department of Justice's investigation a mere three hours before the Department would have filed a complaint

alleging, among other things, that Google had a monopoly and that the advertising pact would have furthered its monopoly in violation of Section 2 of the Sherman Act.

73. Moreover, there is no basis for Google's requirement that the syndication agreements discussed above include exclusivity, as Google's proposed agreement with Yahoo!, for example, included no such provision.

74. Google has also sought to raise barriers to entry, to exclude competitors and to reinforce its dominant search advertising platform by restricting advertisers' ability to use data generated while using AdWord's Application Programming Interface ("API") to facilitate switching to other search advertising platforms. When an advertiser runs a campaign on AdWords, it sets and routinely adjusts its bids for the auctions of keywords. The number of keywords bid upon by a single advertiser can run into the hundreds of thousands. Through its AdWords API policies, Google effectively restricts the ability of advertisers to transport and use data from AdWords campaigns to perform management and analysis of search campaigns across search advertising platforms. Google's API restriction unnecessarily impedes the ability of advertisers to use competing search advertising platforms and inhibits the development of software that would encourage and enable advertisers to use multiple competing search platforms, rather than being forced to limit their advertising to Google's dominant platform.

75. Google has sought to raise barriers to entry, to exclude competitors and to reinforce its dominant search advertising platform through the use of "default defenders" – restricting the ability of users of Google's "toolbar" to change their default search engine to something other than Google. Initially, Google's toolbar software automatically and without the user's permission resets Google as the default search engine in the event the user tried to change it.

76. On information and belief, Google sought to raise barriers to entry, to exclude competitors and to reinforce its dominant search advertising platform by configuring its natural algorithmic results to favor its own products to the detriment of its competitors. For example, on information and belief, Google has configured its natural search results to disadvantage MapQuest.com, a pioneering provider of maps, by returning links to Google Maps results higher than links to MapQuest.com in Google's natural search results. Similarly, on information and belief, Google has configured its natural search results to the detriment of its competitor Clicksor.com.

77. Google's dominant share of the Search Advertising Market and the high barriers to entry facing entrants evince Google's monopoly power in the relevant market.

78. There is also abundant direct evidence of Google's monopoly power including its ability unilaterally to raise prices (as it did for SourceTool), its ability to exclude competitors, its ability to force advertisers – at Google's whims – to pay higher prices for positioning on its web pages and its ability to erect and to raise barriers to entry in the Search Advertising Market.

The Competitive Threat Vertical Search Poses to Google

79. In addition to the competitive threat posed by other generic search engines and related search advertising platforms, at least by the middle of 2006, Google recognized that vertical search engines, both individually and collectively, represent a nascent threat to Google's dominance in search and search advertising. Vertical search websites offer advantages not available at larger generic search websites like Google. For instance, vertical search websites draw users whose search profile is known even before they enter a query based simply on the fact that such web searchers have chosen a specialized web search destination. These search websites include B2B search, such as SourceTool, as well as other specialized search websites,

including retail shopping comparison sites, travel search sites, automobile search sites, job search sites, real estate search sites and many others.

80. Vertical search websites also are capable of delivering extremely precise, and therefore highly relevant, results because they are customized for a particular item, category of items, or field.

81. Accordingly, there is positive feedback available at vertical search websites like SourceTool. In particular, SourceTool invested in B2B customization because it expected to draw (and did draw) users seeking to purchase goods and services from businesses. Those users were willing to conduct their searches on SourceTool because they understood that the search results were customized to the specific subject area of which they were interested, namely, B2B search. The user therefore avoids having to search page upon page of irrelevant results simply because a generic search engine like Google does not readily distinguish "pumps" to be a hydraulic pump or a heeled shoe. Advertisers seek to display ads on vertical search sites like SourceTool because they understand these sites are capable of attracting focused and highly valued search traffic.

82. Google realizes that vertical search advertising platforms are a threat to Google's revenues and dominant position in the Search Advertising Market. As discussed above, vertical search sites by their nature allow searchers to self-select the general area in which they wish to search. 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, travel search alone is a highly lucrative search advertising business and presently comprises a significant and increasing share of Google's search advertising revenue. Similarly, were YouTube still an independent vertical video search site (it has been acquired by

Google), it would rank second in terms of search site traffic, ahead of Yahoo! and Microsoft, and only behind Google. By acquiring YouTube, Google both extinguished a competitive threat to its dominant advertising platform and increased the barrier to entry in the Search Advertising Market by eliminating a large independent source of potential search traffic. As these examples make clear, Google faces huge losses if vertical search succeeds in drawing highly valued search traffic from Google's generic search engine along with advertisers from Google's dominant AdWords platform.

83. Google's actions indisputably evince its acknowledgment of B2B search as a key area for search advertising. Google has sought to secure B2B advertisers in a number of ways, including by publishing an "AdWords Technology Business-to-Business Newsletter," which is "designed to help Tech B2B advertisers get the most out of Google AdWords and other Google products." As early as March 2002 – when Google accounted only for approximately 28% of Internet searches – Google sought advertising from B2B companies claiming that Google was an "Effective Marketing Tool for . . . Reach[ing] Existing Customers Online . . . Acquiring New Customers" among other things. In fact, at that time, Google noted that there were "[o]ver 2.3 Billion B2B Searches every month" and bragged that "Google Users are Well Educated & B2B Decision Makers."

84. As discussed above, vertical search is a direct threat to Google's highly lucrative AdWords platform (which is the primary source of Google's wealth and profits). A vertical search engine or a collection of vertical search engines attracting highly valued search traffic would soon attract advertisers away from AdWords and lessen Google's grip on search advertisers.

85. Google has acknowledged the threat posed by the proliferation of vertical search websites through other specific actions. For instance, at the time of the May 2006 meeting in New York with Mr. Savage, Google announced that it would launch Google Co-op Custom Search Engine, dubbed a "Vertical Search Killer" by certain industry watchers. At that time, a Google representative stated that with Google Co-op "people can create vertical searches [using Google]" and therefore "provide[] a deeper search experience inside the main search on specific topics." This same Google representative stated that by letting companies and individuals build their own specialized search engines, it will also create competition for the many new vertical search products that have recently been launched on the web.

86. Google further acknowledged the threat vertical search poses to its dominance when it launched its Co-op Custom Search Engine in October 2006. A Google representative made clear the reasons for the launch: "Google has taken a step back and looked at the general issue of vertical search - and as a result has introduced Google Custom Search Engine."

87. As it does with its general purpose search, Google displays AdWords ads alongside the results returned from a Google Co-op Custom Search Engine search. As part of the roll-out of Google Co-op, Google created at least two vertical search engines in health and city guides.

88. Google has also sought to develop or acquire numerous vertical search websites. For example, in April 2002 Google launched Google news, which allows vertical searches of new stories. In December 2002, Google launched Froogle, now known as Google Product Search, a price comparison vertical search website. In November 2004, Google launched Google Scholar, which allows vertical searches of scholarly literature indexed by Google. In October 2005, Google launched Google Code Search, which allows vertical searches of computer

programming code. In March 2006, Google launched Google Finance, which allows vertical searches of financial and business information. In October 2006, Google agreed to buy YouTube, which hosts video content and is a video vertical search website. As mentioned, searches on YouTube alone – were it still owned independently – would make it the second most used search site on the Internet. In December 2006, Google launched Google Patents which allows vertical searches of U.S. patents.

89. More recently and in recognition of the increased attractiveness of vertical searches to search users, Google has completely reconfigured its broad-based web search so as to incorporate various vertical searches into the returns. Google has dubbed this change "Universal Search," to counter the inroads made by vertical search websites. As a result, Google's search website now returns results not only from its natural search results from the Internet, but also results of searches of its various vertical search websites such as video, shopping comparison results, finance information and others. At the same time that Google was developing these strategies for vertical search, as discussed below, it was developing and executing plans to eliminate existing, and nascent, competition from independent vertical search sites like SourceTool.

90. Google's public statements also indicate Google's concern over losing advertising revenue to vertical search advertising platforms. For example, in 2007, a Google representative stated that with respect to vertical search websites "its likely that the innovations are going to come in these smaller side applications and then ultimately those companies will either be acquired or partnered or in some way we will develop that same type of functionality in a one stop shop." As discussed above, Google's Chief Economist has stated that in situations where

"you have a niche or focused market" advertising "is extremely powerful . . . because you are showing ads that people are interested in almost by definition."

Google's Anticompetitive Conduct Directed Toward Vertical Search Competitors

91. Like other search advertising platforms, Google's business model relies upon its ability to monetize search traffic. In Google's case, this traffic predominantly originates from Google.com, affiliates that have syndicated Google search boxes, and Google toolbars on browsers. Given its dominant share of search queries (Google received 63.5% of all search queries on the Internet in November 2008 according to ComScore) and of the Search Advertising Market (at least 70%), Google has positioned itself as the tollbooth of the Internet. Google has acknowledged that any search traffic diverted from its search advertising platform is lost advertising revenue.

92. In defending Google's monopoly position, Google's Chief Economist has acknowledged Google's vulnerability of having traffic diverted to other search websites by repeatedly suggesting that competition is "a click away." In order to avoid competition on the merits, however, Google has exercised its dominance in the Search Advertising Market and engaged in a series of exclusionary conduct intended to eliminate competition from search advertising platforms.

93. Faced with the threat that vertical search advertising platforms may, both individually and in the aggregate, divert qualified search traffic and advertisers from its generic search advertising platform, Google has undertaken steps to exclude the rival vertical search sites, including SourceTool, from the Search Advertising Market. These steps include, foremost, starving rivals and nascent competitors of search traffic by entering exclusive agreements with highly-trafficked websites and by directly eliminating rivals through the application of Google's

"Landing Page Quality" metric, which targets and obstructs traffic to specific rivals that pose a threat to Google's revenues and dominance in the Search Advertising Market.

94. Google invests heavily in efforts to target and remove competitors directly through its "Landing Page Quality" metric. This mechanism allows Google to apply artificial "quality" scores to each ad displayed on its website resulting from the AdWords auctions. The quality score attached to a particular ad is purportedly based upon the amount of money the related keyword is expected to generate as well as the "relevance" of the ad to the searcher's query. Google ascribes a "quality" basis for this plainly exclusionary conduct, but its targeted application (or relaxation) of the algorithm demonstrates that Google is in full control of this "quality" metric and may operate it in a manner that eliminates competition rather than simply as a method to bolster quality. On information and belief, Google began using Landing Page Quality in 2005 to filter ads placed on its search results webpage.

95. On information and belief, Landing Page Quality is determined both by application of an algorithm and by human review. This hybrid approach further affords Google an opportunity to exclude specific rivals and to provide inequitable results, as it did when it excluded SourceTool in 2006, or to rescue favored sites (in which, on information and belief, Google has a special financial or other interest) from application of the exclusionary filter.

96. The use of Landing Page Quality allows Google to cut off search traffic to selected sites by artificially increasing the bids those sites must submit in order to win a keyword auction. Reports of advertisers facing drastic increases in minimum bids necessary to win a keyword auction are common in the industry, with many advertisers reporting increases of 2,000% up to 10,000%, as Google applied to SourceTool.

97. In fact, Google has admitted that vertical sites such as travel aggregators and comparison shopping sites will likely merit low landing page quality scores. On information and belief, Google seeks to prevent advertisements placed on AdWords to link to websites that similarly display advertisements with search results.

98. On information and belief, Google's Landing Page Quality measure is applied only to advertisements to be displayed on its website as part of its AdWords platform; Google applies no similar quality or relevance metrics to advertisements that it displays on publishers' websites under its AdSense platform.

99. Google offers limited and incomplete information for advertisers about its Landing Page Quality methodology. As discussed above, Google refused to provide specific reasons for the dramatic increases SourceTool faced in its minimum bids after Google applied its Landing Page Quality methodology. Google also deprives potential vertical search threats by diverting traffic from their sites in less transparent ways including, on information and belief, unfavorable placement of their ads or distorting natural search results.

100. Google has entered into agreements with "search partners" chosen by Google, such as kellysearch.com and Business.com, that also disadvantage rivals and harm competition. According to a Google representative, these agreements are with "a hand-full [sic] of 'strategic partners' who have been with us from day one and invested in Google when we were unknown, therefore they do receive privileges outside of our other relationships." As part of these agreements, Google provides those partners with preferred treatment in the display of the partners' ads on Google's search results pages. Also as part of these agreements, Google provides preferential treatment with respect to the ads it will serve to the partners' websites.

Also, on information and belief, Google does not engage in the same obstructive conduct to block traffic to these preferred partners as it does with other rival sites like SourceTool.

101. On information and belief, Google relaxes its Landing Page Quality methodology for certain "search partners" that Google selects. The relaxation of the Landing Page Quality methodology for these partners also confirms that quality and relevance is not Google's sole objective. At the same time, the relaxation of the Landing Page Quality methodology for certain of Google's partner's – and for Google's own sites – provides them with an unfair and anticompetitive advantage over rival advertisers offering similar services.

102. The actions described above, and Google's decision unilaterally to terminate its voluntary course of dealing with TradeComet, blocked SourceTool's primary source of traffic through exclusionary means. At the same time, Google ensured that its "search partners" continued to receive the critical search traffic necessary to survive. As a result of its conduct, Google decimated the traffic to SourceTool and terminated profitable dealings. Google has discontinued, and (or) refused to enter into these profitable arrangements in order to exclude potential and nascent competitive threats like TradeComet from the market.

103. Because appearing on Google is critical for any Internet business, Google's exclusionary conduct in maintaining its monopoly power in the Search Advertising Market has unreasonably harmed competition, injured advertisers and ruined competitors. Google's exclusionary conduct entrenching Google's search as a "must buy" for advertisers has hastened dwindling competition in the Search Advertising Market to the detriment of vertical search competitors in particular. Innovation and the development of new and more efficient search advertising has been retarded, and entrants have seen the consequences of Google's exclusionary

conduct, smothering competition in the Search Advertising Market that poses a threat to Google's dominance.

Count I
Monopolization of the Search Advertising Market
***in Violation of Section 2 of the Sherman Act,* 15 U.S.C. § 2**

104. Plaintiff repeats the allegations above as if fully set forth herein.

105. Google possesses monopoly power in the Search Advertising Market. Through the anticompetitive conduct described herein, Google has willfully maintained, and unless restrained by the Court will continue willfully to maintain, that power by anticompetitive and unreasonably exclusionary conduct. Google has acted with an intent illegally to maintain its monopoly power in the Search Advertising Market, and its illegal conduct has enabled it do so, in violation of Section 2 of the Sherman Act.

106. As a direct and proximate result of the acts and practices alleged above, TradeComet is being and will continue to be immediately and irreparably injured through the following:

A. The loss of profits that otherwise would have been earned in the Search Advertising Market;

B. The loss of market presence for SourceTool, as well as the loss of market share that would otherwise have been achieved had Google not acted unlawfully to harm competition, and to seek to eliminate SourceTool from the Search Advertising Market;

C. The substantial reduction in the value of the assets associated with SourceTool;

D. The loss of good will in the Search Advertising Market; and

E. The loss to TradeComet of skilled engineering, product development and marketing personnel.

107. The precise amount of damages that TradeComet is entitled to recover as a result of the foregoing injuries is substantial and will be fully ascertained at trial.

108. In addition, Google's monopolization of the Search Advertising Market is an ongoing wrong causing incalculable and irreparable injury for which there is no adequate remedy at law. Unless Google is restrained by an appropriate Order of this Court, TradeComet will be unable to compete fully and fairly in the Search Advertising Market.

Count II
***Attempted Monopolization of the Search Advertising Market in Violation of Section 2 of the Sherman Act,* 15 U.S.C. § 2**

109. Plaintiff repeats the allegations above as if fully set forth herein.

110. On information and belief, by the mid-2000's, the Defendants attempted to monopolize the Search Advertising Market in violation of Section Two of the Sherman Act, 15 U.S.C. § 2.

111. Defendant Google is the dominant competitor in the Search Advertising Market and even as of 2005 held a market share in search advertising in excess of 50%. Google engaged in a number of anticompetitive acts to increase barriers to entry in the Search Advertising Market and to provide it with monopoly power in that market. At least as early as 2005, Google attempted to become a monopolist through various exclusionary acts described above including, but not limited to, entering into exclusive agreements with highly trafficked websites to deny competitors the ability to attract search traffic as well as to initiate targeted strategies to eliminate competition such as the development and implementation of its Landing Page Quality metric, which Google also used to block nascent competitors from obtaining needed search traffic. After

learning about TradeComet's business plan, Google also took specific actions to eliminate TradeComet as discussed above.

112. Through its exclusionary acts, Google specifically intended to monopolize the Search Advertising Market.

113. Given Google's dominance with regard to the Search Advertising Market, Google's ability to erect barriers to entry, Google's proven ability to eliminate competition and the exclusionary conduct described above, there is a dangerous probability that Google will succeed (or has already succeeded) in acquiring monopoly power in the market for Search Advertising.

114. By reason of Google's illegal attempt to monopolize, TradeComet has been and is threatened with being injured in its business and property and is entitled to damages under Section Four of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section Sixteen of the Clayton Act, 15 U.S.C. § 26.

Count III
Unreasonable Agreements in Restraint of Trade
***in Violation of Section 1 of the Sherman Act,* 15 U.S.C. § 1**

115. Plaintiff repeats the allegations above as if fully set forth herein.

116. The relevant market is the Search Advertising Market. Google and Business.com are both participants in the relevant market. Google dominates and controls this market through its dominant market share and its actions, as described above, to raise the barriers to entry in this market and exclude competitors. Business.com is a vertical search site that specializes in B2B search and attracts advertisers desiring to display ads to the highly valued B2B search traffic drawn to Business.com and other B2B sites, including SourceTool.

117. On information and belief, Google and Business.com have entered into an agreement (or agreements) that grants Business.com preferential treatment by, among other things, relaxing many of the limitations that Google imposes upon competitors, including SourceTool. Through this agreement with Business.com, Google avoids enhanced competition in the Search Advertising Market and the diminishment of its lucrative AdWords platform; it also maintains control over a key vertical through its relationship with Business.com.

118. On information and belief, the agreement between Google and Business.com allows Google to sell advertisements for Business.com's search queries. In effect, this allows Google to extend its position in B2B search by selling ads for its direct competitor. Moreover, because Google has not starved Business.com of traffic like it has for TradeComet, Business.com has a significant advantage over TradeComet and other B2B vertical search engines that have not entered into preferential agreements with Google.

119. The purpose of the agreement between Google and Business.com is to diminish and eliminate the competitive threat that vertical search sites such as SourceTool pose to Google's dominant position in the Search Advertising Market and artificially to prop up Business.com as the predominant search site in this key vertical with the intent and effect of preserving Google's control over the Search Advertising Market. By diminishing the ability of rivals like SourceTool to enhance their search capabilities on equal footing with Google's preferred partners – like Business.com – barriers to entry are raised, competition is harmed and choice and quality are impaired. As a result, advertisers are less likely to gravitate to rival vertical search sites like SourceTool.

120. As a result of these illegal contracts, combinations, agreements, and conduct, competition in the Search Advertising Market has been or is threatened to be restrained in

violation of Section One of the Sherman Act, 15 U.S.C. § 1. TradeComet has been injured in its business property by reason of these illegal contracts, combinations, agreements, and conduct and is therefore entitled to damages under Section Four of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section Sixteen of the Clayton Act, 15 U.S.C. § 26.

JURY DEMAND

121. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury of all of the claims asserted in this Complaint so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

a. That Google's willful acquisition, maintenance and use of monopoly power, and its attempt to acquire such monopoly power, by exclusionary means discussed herein violates Section 2 of the Sherman Act, 15 U.S.C. § 2;

b. That Google's agreement with Business.com unreasonably harms competition and injures TradeComet in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. That judgment be entered for Plaintiff against Google for three times the amount of damages sustained by Plaintiff as allowed by law, together with the costs of this action, including reasonable attorneys' fees, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26;

d. That Plaintiff be awarded pre-judgment and post-judgment interest at the highest legal rate from and after the date of service of this Complaint to the extent provided by law;

e. That equitable relief be issued in the form of an injunction prohibiting the ongoing exclusionary conduct, and unreasonable agreements entered into, by Defendant;

f. That Plaintiff have such other, further or different relief as the case may require and the Court deems just and proper under the circumstances.

Respectfully Submitted,

February 17, 2009

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United States District Court
Southern District of New York

TRADECOMET.COM LLC, Plaintiff, v. GOOGLE INC., Defendant.	)	Docket No.: 09-CV-1400 (SHS)

DEFENDANT GOOGLE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION AND IMPROPER VENUE

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March 31, 2009

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STATUTES

Defendant Google Inc. ("Google") respectfully submits this memorandum of law in support of its motion to dismiss the complaint filed by Plaintiff TradeComet.com LLC ("TradeComet") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(3).[1]

PRELIMINARY STATEMENT

The Complaint in this case was filed in the wrong forum. Plaintiff's business relationship with Google is governed by terms and conditions dated August 22, 2006 ("Agreement") that require "all claims arising out of or relating to this Agreement or the Google program(s)" to be brought in Santa Clara County, California. Because Plaintiff has assented to this Agreement, the only proper forum for this suit is the United States District Court for the Northern District of California, San Jose Division. The Complaint should therefore be dismissed.

STATEMENT OF THE CASE[2]

A. THE PARTIES

Plaintiff TradeComet is a Delaware limited liability company with its principal place of business in New York, New York. Complaint ("Cplt.") ¶ 11. TradeComet was founded in 2005 by Dan Savage, a "veteran of the publishing and online search industries," and graduate of Harvard College and Harvard Business School. *Id.* ¶ 37. TradeComet operates a website called SourceTool.com that, according to the Complaint, attracts "highly-valued search traffic of

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[1] On March 17, 2009, the Court granted Google's request to file this motion, based on Fed. R. Civ. P. 12(b)(1) and 12(b)(3), separately from its anticipated motion to dismiss for failure to state a claim under Rule 12(b)(6). In omitting arguments based on Rule 12(b)(6) from this memorandum, Google in no way waives its right to submit a subsequent motion to dismiss for failure to state a claim.

[2] For the purpose of this motion, this statement of the facts conforms to the recitation in the Complaint. Plaintiff's allegations are, in many instances, misleading or inaccurate. By reciting them in this memorandum, Google does not adopt these facts as true.

businesses seeking to buy or sell products and service to other businesses," and provides what is commonly referred to as a "B2B" directory. *Id.* ¶ 4.

Google is a Delaware corporation headquartered in Mountain View, California. *Id.* ¶ 12. According to the Complaint, Google "operates a search website and a search advertising platform on the Internet." *Id.* ¶ 2.

B. GOOGLE'S ADWORDS PROGRAM

Google's AdWords program is the core of Google's relationship with Plaintiff and the focus of this lawsuit. Through AdWords, Google auctions keywords to advertisers. *Id.* ¶ 32. Keywords are words or character strings that, when typed into a search engine, result in the appearance of advertised links alongside or above "natural" search results. *Id.* ¶¶ 2, 32. To have an ad associated with a keyword, an advertiser submits a bid based on the maximum price it would be willing to pay if its ad was displayed and "clicked" on by the user. *Id.* ¶ 33.

The per-click price that an advertiser bids is not necessarily what the advertiser pays if a user clicks on its ad. *Id.* One way that Google determines the per-click price is through an analysis of the quality of each advertiser's landing page. *Id.* According to the Complaint, this "Landing Page Quality" metric is part of the "Quality Score" that Google assigns to an ad based on the amount of money the keyword is expected to generate as well as the relevance of the ad to the keyword. *Id.* ¶ 94. The advertiser with the highest bid (but low Quality Score) does not always get the best position on the page, and in some cases, the ad is not shown. *Id.* ¶ 33. Thus, the Quality Score influences the price that an advertiser ultimately pays; and an advertiser of a site that has a low "Landing Page Quality" may have a minimum price threshold. *Id.* ¶¶ 33, 49. The Complaint alleges that Google began implementing its AdWords Landing Page Quality analysis in 2005. *Id.* ¶ 94.

C. TRADECOMET'S COMPLAINT

According to the Complaint, "[i]n order to attract traffic to SourceTool, . . . TradeComet began purchasing several hundreds of thousands of keywords and phrases from Google's AdWords." Cplt. ¶ 43. By utilizing AdWords, the Complaint asserts, SourceTool became "remarkably successful" within three months of its launch. *Id.* ¶ 44. As Google's quality analyses evolved, however, SourceTool's minimum bids for some of its keywords were increased as a result of its poor landing page quality. *Id.* ¶¶ 49, 96. The increase in minimum bid requirements for AdWords forms the basis of TradeComet's Complaint. *See, e.g., id.* ¶¶ 47-48.

TradeComet's Complaint asserts three claims. The first and second are that Google has monopolized or attempted to monopolize the asserted "search advertising" market in violation of Section 2 of the Sherman Act. The theory is that, by making successful bids on AdWords for SourceTool more difficult as a result of the Quality Score adjustments, and by entering into various "exclusive" arrangements with "highly-trafficked websites," Google has acted to acquire or maintain monopoly power in a purported "search advertising market." *Id.* ¶¶ 93, 104-14. The third claim is asserted under Section 1 of the Sherman Act. It is based on allegations that Google has entered into an agreement with Business.com that provides it with "preferred treatment" in the minimum bids required for the partners' AdWords ads. *Id.* ¶¶ 100, 115-20.

D. TRADECOMET'S ASSENT TO GOOGLE'S FORUM SELECTION CLAUSE

The terms and conditions that govern AdWords accounts are accessible to advertisers by a link in their online AdWords account interface. *See* Declaration of Heather Wilburn ("Wilburn

Dec."), dated March 31, 2009, ¶ 3, Ex. A.[3] ("These Terms govern Customer's participation in Google's advertising program(s)"). The current Agreement expressly supersedes and replaces all prior agreements. The Agreement states, in relevant part:

> 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. The Agreement constitutes the entire and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof.

Wilburn Dec., Ex. A, ¶ 9. There is no doubt that Plaintiff assented to this Agreement, which was released in August of 2006. Plaintiff electronically accepted the Agreement on August 29, 2006 for ten of its AdWords accounts that were created prior to that point. *Id.* ¶¶ 5-6, Exs. B-K. On November 28, 2006, Plaintiff accepted the Agreement for the account that it created that same day.[4] *Id.* ¶¶ 5, 7, Ex. L.

Google brings this motion to dismiss because, as dictated by the current Agreement between Plaintiff and Google, this Complaint should have been filed in the United States District Court for the Northern District of California, San Jose Division, which is located in Santa Clara

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[3] In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(3), a court may consider evidentiary matter outside the pleadings regarding the existence of jurisdiction. *CFirstclass v. Silverjet PLC*, 560 F. Supp. 324, 327 n.1 (S.D.N.Y. 2008) (citing *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)); *see also Person v. Google Inc.*, 456 F. Supp. 2d 488, 496-97 (S.D.N.Y. 2006) (considering terms of contract and evidence pertaining to assent in deciding motion under Fed. R. Civ. P. 12(b)(3)).

[4] The accounts referenced herein and in the Declaration of Heather Wilburn were identified in Plaintiff's First Request for Production of Documents. Google reserves its rights to challenge the relevance of any of these accounts. In the event that Plaintiff asserts that other AdWords accounts are relevant to this litigation, Google reserves the right to introduce evidence of consent to any governing terms and conditions.

County, California. Venue is therefore improper under Fed. R. Civ. P. 12(b)(3), and the Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

ARGUMENT

TradeComet's Complaint should be dismissed because it was filed in the wrong court. A complaint may be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) or 12(b)(3) if venue is improper. *See CFirstClass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 327 (S.D.N.Y. 2008) (deciding motion to dismiss based on forum selection clause under Fed. R. Civ. P. 12(b)(1)); *Phillips v. Audio Active Ltd.*, 494 F. 3d 378, 382 (2d Cir. 2007) (affirming dismissal based on forum selection clause under Fed. R. Civ. P. 12(b)(3)); *New Moon Shipping Co. v. MAN B & W Diesel, AG*, 121 F.3d 24, 29 (2d Cir. 1997) (noting "no existing mechanism with which forum selection enforcement is a perfect fit.") (citation omitted). Based on the express and unequivocal terms of the Agreement into which Plaintiff entered, it is required to litigate any disputes stemming from the AdWords program in Santa Clara County, California.

In *Phillips*, the Second Circuit set forth a four-part analysis for deciding whether to dismiss a claim based on a forum selection clause: (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive; (3) whether the claims and parties involved in the suits are subject to the forum selection clause; and (4) whether, assuming the clause was communicated, mandatory, and covers the claims in dispute, the presumption of enforceability is rebutted by a strong showing that enforcement would be unreasonable, unjust, or that the clause is invalid. *Phillips*, 494 F.3d at 383-84. As discussed below, Google's forum selection clause is enforceable under the *Phillips* inquiries, as well as this Court's prior precedent. Accordingly, this case should be dismissed.

I. GOOGLE'S FORUM SELECTION CLAUSE HAS BEEN ENFORCED BY THIS COURT

Google's forum selection clause was enforced by this Court under virtually identical facts in a prior decision. *Person v. Google Inc.*, 456 F. Supp. 2d 488 (S.D.N.Y. 2006) (Patterson, J.) (transferring action under 28 U.S.C. § 1406(a) to Santa Clara County). The *Person* complaint, like the Complaint here, alleged that Google used its Quality Score to raise AdWords minimum bid prices for advertisers like plaintiff to reduce traffic to their sites. 456 F. Supp. 2d at 491-92. Like the Complaint here, plaintiff in *Person* alleged that Google entered agreements with more favored advertisers that provided these advertisers with preferential pricing. *Id.* The *Person* case involved a (somewhat less broad) forum selection clause that stated, "[any] dispute or claim arising out of or in connection with this Agreement shall be adjudicated in Santa Clara County, California." *Id.* at 493-94. Given that the conduct complained of here closely tracks the conduct complained of in *Person* and involves a similar (and broader) forum selection clause, the Court should follow the precedent set in *Person* and hold that venue in this Court is improper.

II. THE FORUM SELECTION CLAUSE WAS REASONABLY COMMUNICATED TO TRADECOMET

There can be no genuine dispute that the forum selection clause here "was reasonably communicated to the party resisting enforcement." *Phillips*, 494 F.3d at 383 (citing *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006)). If a forum selection clause is stated in clear and unambiguous language, it is considered reasonably communicated. *See Effron v. Sun Line Cruises, Inc.* 67 F.3d 7, 9 (2d Cir. 1995). A forum selection clause is considered reasonably communicated to a party even if the party "clicked-through" a contract on the Internet in order to assent to it. *Novak v. Tucows, Inc.*, No. 06 Civ. 1909 (JFB) (ARL), 2007 WL 922306, at *11 (E.D.N.Y. Mar. 26, 2007); *Person*, 456 F. Supp. 2d at 493; *see also Weingrad v. Telepathy, Inc.*,

No. 05 Civ. 2024 (MBM), 2005 WL 2990645, *3-4 (S.D.N.Y. Nov. 7, 2005) (holding a party bound to a forum selection clause where assent was clicked); *Feldman v. Google Inc.*, 513 F. Supp. 2d 229, 236-38 (E.D. Pa. 2007) (same).

The current text of the forum selection clause was released in August, 2006. Wilburn Dec. ¶ 6. Plaintiff assented to that text some ten separate times on August 29, 2006. *Id.* ¶ 6. It assented yet again on November 28, 2006. *Id* ¶ 7.

The forum selection clause is presented in all-capital letters in plain language within a nine-paragraph contract. Thus, the forum selection clause was reasonably communicated to TradeComet. *See Person*, 456 F. Supp. 2d at 496-97 ("[T]here is no indication that Plaintiff did not have notice that the forum for suits against Defendant were to be brought in Santa Clara County. In order to do business with AdWords, Plaintiff had to assent to the terms of the contract."); *see also Feldman v. Google Inc.*, 513 F. Supp. 2d at 236-38.

III. THE FORUM SELECTION CLAUSE IS MANDATORY

The forum selection clause at issue here is mandatory. A forum selection clause is mandatory, as opposed to permissive, "when it confers exclusive jurisdiction on the designated forum or incorporates obligatory venue language." *Phillips*, 494 F.3d at 386 (citing *Boutari & Son, Wines and Spirits, S.A. v. Attiki Importers & Distributors, Inc.*, 22 F.3d 51, 52 (2d Cir. 1994)). The forum selection clause at issue here says that claims "shall be litigated exclusively in the federal or state courts of Santa Clara County, California, USA" and is mandatory on its face. *See Phillips*, 494 F.3d at 386 ("The parties' use of the phrase 'are to be brought' establishes England as an obligatory venue"); *Person*, 456 F. Supp. 2d at 494 (emphasizing the word *shall* in finding it "clear that the venue clause at issue was meant to be mandatory rather than permissive").

IV. THE CLAIMS IN THIS SUIT ARE SUBJECT TO THE FORUM SELECTION CLAUSE

The allegations here fall squarely under the forum selection clause, which governs "all claims arising out of or relating to this Agreement or the Google program(s)." A forum selection clause "is not limited solely to the claims for breach of the contract that contains it." *CFirstclass Corp.*, 560 F. Supp. 2d at 329 (citing *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993)); *see also Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720 (2d Cir. 1982) (forum selection clause covered federal antitrust actions); *Olnick v. BMG Entm't*, 138 Cal. App. 4th 1286, 1296-1300, 42 Cal. Rptr. 3d 268, 276-279 (Cal. Ct. App. 2006) (holding that a forum selection clause applied to tort claims that were not predicated on the existence of the agreement at issue where the "legal relationship between the[ ] parties emanates from th[e] Agreement").[5] As this Court has held, "a contractually-based forum selection clause will also encompass tort claims if the tort claims ultimately depend on the existence of a contractual relationship between the parties[.]" *CFirstclass Corp.*, 560 F. Supp. 2d at 329 (citing *Direct Mail Production Servs. Ltd. v. MBNA Corp.*, No. 99 Civ. 10550 (SHS), 2007 WL 1277597, at *6 (S.D.N.Y. Sept. 7, 2000)).

The Agreement here requires that "all claims arising out of or relating to this agreement" be brought in Santa Clara County. The language of the Agreement unquestionably covers the claims at issue here. *Phillips*, 494 F.3d at 389 (stating that to "arise out of" means "to

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[5] The enforceability of a forum selection clause is a procedural issue to which federal law is applied. *See Phillips*, 494 F.3d at 384-86. In the event that the Court finds it appropriate to construe the legal meaning of the specific language of the forum selection clause, the Agreement specifies that California law applies. *See id.*; Wilburn Dec., Ex. A, ¶ 9.

originate from a specified source") (citing Webster's Third New International Dictionary 117 (1981)); *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-129 (2d Cir. 2001) (stating that the term "relating to" is broader – "[it] is not necessarily tied to the concept of a causal connection").

The fundamental basis of all of Plaintiff's claims is that the alleged increase in the minimum bid prices for AdWords advertising reduced traffic to Plaintiff's website and, in that way, impaired Plaintiff's ability to expand its presence on the Internet. Cplt. ¶¶ 6-9, 31-55, 93-103, 106, 111, 117-19. Plaintiff asserts repeatedly that the Quality Score adjustments that allegedly raised its AdWords advertising costs meant that "SourceTool faced vastly higher prices to acquire search traffic," *id.* ¶ 8, had the effect of "blocking traffic to SourceTool," *id.* ¶ 52, amounted to a "cut off from Google's AdWords," *id.* ¶ 55, and amounted to a "unilateral terminat[ion of] the voluntary course of dealing [Google had] had with SourceTool," *id.* ¶¶ 8, 102. But for Plaintiff's repeated assertions that "Google's 'Landing Page Quality' metric [for AdWords] . . . targets and obstructs traffic" to Plaintiff's site, *id.* ¶ 93, there is no injury to Plaintiff – and no case.

Hence, the Agreement, with its forum selection clause, "was the source of the right, duty and injury" asserted by Plaintiff and should be held to govern its claims. *Phillips*, 494 F.3d at 392; *see also Roby*, 996 F.2d at 1361, 1363 (reasoning that the misconduct alleged would not have occurred but for the contractual relationship between the parties; the misconduct necessarily "relate[d] to" the required agreements); *Olnick*, 138 Cal. App. 4th at 1300, 42 Cal. Rptr. 3d at 279.

Google is aware of no authority that would support any outcome here other than dismissal or transfer. The one case Plaintiff cited at the status conference, *Phillips*, in fact

supports dismissal. In *Phillips*, plaintiff entered into a recording contract with one of the defendants. *Id.* at 381. Plaintiff claimed that the first album was authorized under the contract, but that a second album produced over plaintiff's objections was not. *Id.* at 381-82. Plaintiff sued several defendants for copyright violations based on publication by them of works from the second, unauthorized album. The Second Circuit held that the copyright claims were not governed by the venue clause, which only applied to claims that "arise out of" the agreement. *Id.* at 382. The copyright claims did not "arise out of" the agreement because the copyright infringement alleged had nothing to do with the agreement. Unauthorized publication of the works would have been copyright infringement had no agreement ever existed, and so the identical claims could have been brought whether there was an agreement or not. *Id.* at 390. As the court reasoned, the plaintiff asserted no "rights or duties" under the contract. Instead, "[b]ecause the recording contract is only relevant as a defense in this suit, we cannot say that Phillips' copyright claims originate from, and therefore 'arise out of,' the contract." *Id.* at 391. The court, moreover, carefully distinguished a Seventh Circuit case with language similar to that at issue here – *Abbot Laboratories v. Takeda Pharm. Co.*, 476 F.3d 421, 422 (7th Cir. 2007) ("arising from, concerning, or in any way related to") – and cautioned that analogies to other cases are "useful only to the extent those other cases address contract language that is the same or substantially similar." *Phillips*, 494 F.3d at 390 (quoting *Wyeth & Brother Ltd v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1075 (3d Cir. 1997)).

The forum selection clause at issue here more than survives the inquiry conducted by the court in *Phillips*. As explained above, the AdWords agreement is precisely the source of the "rights or duties" at issue in the Complaint – the terms at which Google provided AdWords to Plaintiff. Without the Agreement – and thus, without AdWords – Plaintiff's particular claim

against Google would not exist, and Google would owe Plaintiff none of the alleged duties that form the basis of the Complaint. Moreover, as mentioned, the forum clause at issue here is broader than that in *Phillips*. *Id.* at 389.

The claims in this lawsuit are thus unequivocally subject to Google's forum selection clause and were improperly filed in this district.

V. ENFORCEMENT OF THE FORUM SELECTION CLAUSE IS NOT UNFAIR, UNREASONABLE, UNJUST, OR INVALID FOR FRAUD OR OVERREACHING

The forum selection clause in the Agreement is not unfair, unreasonable, unjust or invalid. *See Feldman*, 513 F. Supp. 2d at 235-243 (holding AdWords forum selection clause fair, reasonable, valid, and enforceable). As the Supreme Court has held, forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-597 (1991) (upholding validity of forum selection clause in a form contract). A party "claiming unreasonableness of a forum selection clause bears a heavy burden: in order to escape the contractual clause, he must show that 'the 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.'" *New Moon Shipping Co., Inc.*, 121 F.3d at 32 (quoting *M/S Bremen*, 407 U.S. at 18).

Plaintiff can make no allegation that the enforcement of the forum selection clause to which it agreed would be unreasonable or unjust. TradeComet is a sophisticated plaintiff led by an experienced, educated business person who had met in person with Google representatives on multiple occasions, Cplt. ¶¶ 49, 51-53 – hardly "the picture of a victim of a contract of adhesion painted by the Second Circuit." *Person*, 456 F. Supp. 2d at 495-96 (referencing language in *Klos*

v. Polskie Linie Lotnicze, 133 F.3d 164, 168 (2d Cir. 1997)). Indeed, Plaintiff here assented to the Agreement no less than eleven times, Wilburn Dec. ¶¶ 6-7, and therefore had ample "opportunity to view and reject [Google's] terms before spending any [additional] money with AdWords." *Person*, 456 F. Supp. 2d at 497 (holding that "[s]crutiny of the contract between Plaintiff and Defendant does not uphold Plaintiff's allegations of unfairness").

Moreover, the clause appropriately asserts venue where Google's headquarters is located. *Id.* at 496 ("The fact that [Google] is located in California suggests another, highly plausible reason why it would include a forum selection clause – in order to locate the myriad suits inevitably brought against such a sizeable company in a single, convenient, forum") (citing *Carnival Cruise Lines*, 499 U.S. at 595). Plaintiff's argument at the March 17 status conference that New York is "more convenient" than California is thus inaccurate as well as unavailing. "[A] forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel." *Effron*, 67 F.3d at 10-11 (ordering dismissal in favor of the agreed-upon forum – Athens, Greece – because allegations of inconvenience failed to "meet the heavy burden of proof" required to set aside a forum-selection clause). Finally, there is no allegation that the forum selection clause was the product of fraud or overreaching.

Because Plaintiff filed this action in the wrong forum, the Court should dismiss the Complaint. *See CFirstclass*, 560 F. Supp. 2d at 324 (dismissing claims for improper venue under Rule 12(b)(1) in light of forum selection clause); *Phillips*, 494 F.3d at 393 (affirming dismissal of claim under Rule 12(b)(3) in light of forum selection clause); *Person*, 456 F. Supp. 2d at 497-98 (transferring action under 28 U.S.C. § 1406 in light of forum selection clause).

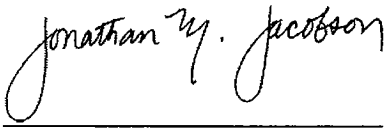
CONCLUSION

For the reasons stated above, the Complaint should be dismissed.

Dated: March 31, 2009

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION



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Attorneys for Defendant, Google Inc.

United States District Court

Southern District Of New York

TRADECOMET.COM LLC, Plaintiff, v. GOOGLE INC., Defendant.	)	Docket No.: 09-CV-1400 (SHS) DECLARATION OF HEATHER WILBURN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICION AND IMPROPER VENUE

I, Heather Wilburn, declare as follows:

1. I am an employee of Google Inc. ("Google"). My current title is Account Manager, Google TV Ads. From March 2002 to January 2008, I was employed as an AdWords Account Strategist at Google. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. As an AdWords Account Strategist, my responsibilities included but were not limited to: responding to customer emails and phone inquiries pertaining to the management, structure, and function of the AdWords program, managing accounts of high spending advertisers in the Travel and Retail verticals, training new team members, and evaluating peers. As a result of my duties as an AdWords Account Strategist, I am and have become familiar with the electronic acceptance of terms and conditions for the AdWords program.

3. The current operative terms and conditions, entitled Google Inc. Advertising Program Terms, dated August 22, 2006, are attached as Exhibit A. These terms and conditions are accessible to advertisers by clicking on a link in their online AdWords account interface.

4. I am informed that Plaintiff has indicated that AdWords accounts 549-100-6859, 356-439-1741, 758-713-4047, 943-546-8800, 544-065-9645, 259-964-0096, 338-794-1045, 736-728-0431, 832-287-9582, 906-559-3984, and 521-108-8939 are associated with Plaintiff.

5. According to Google's records, accounts 549-100-6859, 356-439-1741, 758-713-4047, 943-546-8800, 544-065-9645, 259-964-0096, 338-794-1045, 736-728-0431, 832-287-9582, and 906-559-3984 were created before August 2006. According to Google's records, account 521-108-8939 was created on November 28, 2006.

6. Based on my understanding of Google's AdWords program, for the accounts created before August 2006, the current terms and conditions were accepted electronically after they were released in August 2006. Google's records indicate that the current terms and conditions for these accounts were accepted electronically on August 29, 2006 by the email address (which is associated with each account as a valid log-in email address) listed under the August 29, 2006 date. These records are attached as Exhibits B through K.

7. Based on my understanding of Google's AdWords program, for the account created on November 28, 2006, the current terms and conditions were accepted electronically at the time the account was activated. Google's record indicates that the current terms and conditions for this account were accepted electronically on November 28, 2006 by the email address (which is associated with the account as a valid log-in email address) listed under the November 28, 2006 date. This record is attached as Exhibit L.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 30, 2009, at Mountain View, California.

Heather Wilburn

EXHIBIT A

Google Inc. Advertising Program Terms

These Google Inc. Advertising Program Terms ("**Terms**") are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically ("**Customer**") and Google Inc. ("**Google**"). These Terms govern Customer's participation in Google's advertising program(s) ("**Program**") and, as applicable, any insertion orders or service agreements ("**IO**") executed by and between the parties and/or Customer's online management of any advertising campaigns. These Terms and any applicable IO are collectively referred to as the "**Agreement.**" Google and Customer hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html), and Google and Partner ad specification requirements (collectively, "**Policies**"). Policies may be modified at any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as "**Beta,**" "**Ad Experiment,**" or otherwise unsupported ("**Beta Features**"). To the fullest extent permitted by law, Beta Features are provided "**as is**" and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may modify ads to comply with any Policies.

2 **The Program.** Customer is solely responsible for all: (a) ad targeting options and keywords (collectively "**Targets**") and all ad content, ad information, and ad URLs ("**Creative**"), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively "**Services**"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any Customer accounts. Customer understands and agrees that ads may be placed on (y) any content or property provided by Google ("**Google Property**"), and, unless Customer opts out of such placement in the manner specified by Google, (z) any other content or property provided by a third party ("**Partner**") upon which Google places ads ("**Partner Property**"). Customer authorizes and consents to all such placements. With respect to AdWords online auction-based advertising, Google may send Customer an email notifying Customer it has 72 hours ("**Modification Period**") to modify keywords and settings as posted. The account (as modified by Customer, or if not modified, as initially posted) is deemed approved by Customer in all respects after the Modification Period. Customer agrees that all placements of Customer's ads shall conclusively be deemed to have been approved by Customer unless Customer produces contemporaneous documentary evidence showing that Customer disapproved such placements in the manner specified by Google. With respect to all other advertising, Customer must provide Google with all relevant Creative by the due date set forth in that Program's applicable frequently asked questions at www.google.com ("FAQ") or as otherwise communicated by Google. Customer grants Google permission to utilize an automated software program to retrieve and analyze websites associated with the Services for ad quality and serving purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google may modify any of its Programs at any time without liability. Google also may modify these Terms at any time without liability, and Customer's use of the Program after notice that these Terms have changed constitutes Customer's acceptance of the new Terms. Google or Partners may reject or remove any ad or Target for any or no reason.

3 **Cancellation.** Customer may cancel advertising online through Customer's account if online cancellation functionality is available, or, if not available, with prior written notice to Google, including without limitation electronic mail. AdWords online auction-based advertising cancelled online will cease serving shortly after cancellation. The cancellation of all other advertising may be subject to Program policies or Google's ability to re-schedule reserved inventory or cancel ads already in production. Cancelled ads may be published despite cancellation if cancellation of those ads occurs after any applicable commitment date as set forth in advance by the Partner or Google, in which case Customer must pay for those ads. Google may cancel immediately any IO, any of its Programs, or these Terms at any time with notice, in which case Customer will be responsible for any ads already run. Sections 1, 2, 3, 5, 6, 7, 8, and 9 will survive any expiration or termination of this Agreement.

4 **Prohibited Uses; License Grant; Representations and Warranties.** Customer shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions, inquiries, conversions, clicks or other actions; (b) use any automated means or form of scraping or data extraction to access, query or

otherwise collect Google advertising related information from any Program website or property except as expressly permitted by Google; or (c) advertise anything illegal or engage in any illegal or fraudulent business practice. Customer represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative, Services and Targets needed for Google and Partner to operate Programs (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of Creative or Targets) in connection with this Agreement ("**Use**"). Customer represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including without limitation intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

5 **Disclaimer and Limitation of Liability.** To the fullest extent permitted by law, GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, SATISFACTORY QUALITY, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. To the fullest extent permitted by law, Google disclaims all guarantees regarding positioning, levels, quality, or timing of: (i) costs per click; (ii) click through rates; (iii) availability and delivery of any impressions, Creative, or Targets on any Partner Property, Google Property, or section thereof; (iv) clicks; (v) conversions or other results for any ads or Targets; (vi) the accuracy of Partner data (e.g. reach, size of audience, demographics or other purported characteristics of audience); and (vii) the adjacency or placement of ads within a Program. Customer understands that third parties may generate impressions or clicks on Customer's ads for prohibited or improper purposes, and Customer accepts the risk of any such impressions and clicks. Customer's exclusive remedy, and Google's exclusive liability, for suspected invalid impressions or clicks is for Customer to make a claim for a refund in the form of advertising credits for Google Properties within the time period required under Section 7 below. Any refunds for suspected invalid impressions or clicks are within Google's sole discretion. EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND CUSTOMER'S BREACHES OF SECTION 1, TO THE FULLEST EXTENT PERMITTED BY LAW: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OR INTERRUPTION TO CUSTOMER'S BUSINESS) WHETHER IN CONTRACT, TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY CUSTOMER FOR THE AD GIVING RISE TO THE CLAIM. Except for payment obligations, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including without limitation to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

6 **Agency.** Customer represents and warrants that (a) it is authorized to act on behalf of and has bound to this Agreement any third party for which Customer advertises (a "**Principal**"), (b) as between Principal and Customer, the Principal owns any rights to Program Information in connection with those ads, and (c) Customer shall not disclose Principal's Program information to any other party without Principal's consent.

7 **Payment.** Customer shall be responsible for all charges up to the amount of each IO, or as set in an online account, and shall pay all charges in U.S. Dollars or in such other currency as agreed to in writing by the parties. Unless agreed to by the parties in writing, Customer shall pay all charges in accordance with the payment terms in the applicable IO or Program FAQ. Late payments bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less). Charges are exclusive of taxes. Customer is responsible for paying (y) all taxes, government charges, and (z) reasonable expenses and attorneys fees Google incurs collecting late amounts. To the fullest extent permitted by law, Customer waives all claims relating to charges (including without limitation any claims for charges based on suspected invalid clicks) unless claimed within 60 days after the charge (this does not affect Customer's credit card issuer rights). Charges are solely based on Google's measurements for the applicable Program, unless otherwise agreed to in writing. To the fullest extent permitted by law, refunds (if any) are at the discretion of Google and only in the form of advertising credit for only Google Properties. Nothing in these Terms or an IO may obligate Google to extend credit to any party. Customer acknowledges and agrees that any credit card and related billing and payment information that Customer provides to Google may be shared by Google with

companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing Customer's account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

8 **Indemnification.** Customer shall indemnify and defend Google, its Partners, agents, affiliates, and licensors from any third party claim or liability (collectively, "**Liabilities**"), arising out of Use, Customer's Program use, Targets, Creative and Services and breach of the Agreement. Partners shall be deemed third party beneficiaries of the above Partner indemnity.

9 **Miscellaneous.** 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. The Agreement constitutes the entire and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof. No statements or promises have been relied upon in entering into this Agreement except as expressly set forth herein, and any conflicting or additional terms contained in any other documents (e.g. reference to a purchase order number) or oral discussions are void. Each party shall not disclose the terms or conditions of these Terms to any third party, except to its professional advisors under a strict duty of confidentiality or as necessary to comply with a government law, rule or regulation. Customer may grant approvals, permissions, extensions and consents by email, but any modifications by Customer to the Agreement must be made in a writing executed by both parties. Any notices to Google must be sent to Google Inc., Advertising Programs, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA, with a copy to Legal Department, via confirmed facsimile, with a copy sent via first class or air mail or overnight courier, and are deemed given upon receipt. A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention and only to the extent necessary to make them enforceable, and remaining provisions of the Agreement will remain in full effect. Customer may not assign any of its rights hereunder and any such attempt is void. Google and Customer and Google and Partners are not legal partners or agents, but are independent contractors. In the event that these Terms or a Program expire or is terminated, Google shall not be obligated to return any materials to Customer. Notice to Customer may be effected by sending an email to the email address specified in Customer's account, or by posting a message to Customer's account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in Customer's AdWords interface).

August 22, 2006

EXHIBIT B

Google AdWords

dan@thomasb2b.com (Admin - Legacy) ·
· 549-100-6859 ·
Managed by dan@sourcetool.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

| New Interface (Beta) | 1 New Feature! | Help | Si
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: ☑ All ☐ Budget

Made by: All external users

Filter change history

▸ Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▾ / User / IP - Change ID	Campaign	Ad Group	Description	☆ = changed; ✚ = added; ✕=removed
Aug 29, 2006 9:20:09 AM dan@sourcetool.com REDACTED			Terms and conditions accepted REDACTED	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT C

Google AdWords

dansavage@gmail.com
• 356-439-1741 •
Managed by dan@sourcetool.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

| New Interface (Beta) | 1 New Feature! | Hel
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	= changed; + = added; × =removed
Aug 29, 2006 9:20:09 AM dan@sourcetool.com REDACTED			Terms and conditions accepted REDACTED	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT D

Google AdWords

dan001@tradecomet.com · REDACTED
· 758-713-4047 ·
Managed by dan@sourcetool.com (UI) · Clickable, Inc. (API)
Customer time zone: Pacific Time
REDACTED

New Interface (Beta) | 1 New Feature! | Help | Sign out
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	= changed; + = added; × =removed
Aug 29, 2006 9:20:11 AM dan@sourcetool.com REDACTED		REDACTED	Terms and conditions accepted	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT E

Google AdWords

dan002@tradecomet.com -
- 943-546-8800 -
Managed by dan@sourcetool.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

| New Interface (Beta) | 1 New Feature! | Help | Sign out
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

Affecting level: Account only REDACTED

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	= changed; + = added; - =removed
Aug 29, 2006 9:20:10 AM dan@sourcetool.com REDACTED			Terms and conditions accepted REDACTED	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT F

Google AdWords

dan003@tradecomet.com -
• 544-065-9645 •
Managed by dan@sourcetool.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

New Interface (Beta) | 1 New Feature! | Help | Sign out
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

Affecting level: Account only

REDACTED

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	= changed; + = added; × =removed
Aug 29, 2006 9:20:12 AM dan@sourcetool.com REDACTED			Terms and conditions accepted REDACTED	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT G

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

Affecting level: Account only REDACTED

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description (~ = changed; + = added; - =removed)
Aug 29, 2006 9:20:09 AM dan@sourcetool.com REDACTED		REDACTED	~ Terms and conditions accepted

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT H

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description (= changed; + = added; - =removed)
Aug 29, 2006 9:20:10 AM dan@sourcetool.com REDACTED		REDACTED	Terms and conditions accepted

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT I

Google AdWords

dan006@tradecomet.com ·
· 736-728-0431 ·
Managed by dan@sourcetool.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

| New interface (Beta) | 1 New Feature! | Help | Sign out
Jump to previous customer...

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: ☑ All ☐ Budget

Made by: All external users

Filter change history

▸ Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	~ = changed; + = added; × =removed
Aug 29, 2006 9:20:11 AM dan@sourcetool.com REDACTED		REDACTED	Terms and conditions accepted	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT J

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	= changed; + = added; ✓=removed
Aug 29, 2006 9:20:10 AM dan@sourcetool.com REDACTED			Terms and conditions accepted REDACTED	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT K

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	△ = changed; + = added; × =removed
Aug 29, 2006 9:20:11 AM dan@sourcetool.com REDACTED		REDACTED	Terms and conditions accepted	

Time zone for all statistics in this account: (GMT-08:00) Pacific Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

EXHIBIT L

Google AdWords

dan030@tradecomet.com • REDACTED
521-108-8939 •
Managed by dan@sourcetool.com (UI) • ClickTracks Analytics, Inc. (API)
Customer time zone: Eastern Time (PDT +03:00)
REDACTED

Change History

Show only changes that match the following criteria:

Within date range: Nov 28, 2006 - Nov 28, 2006 Select quick date range

REDACTED

Affecting level: Account only

Change type: All Budget

Made by: All external users

Filter change history

Chart view

Show all details | Show all protocol buffer details | Download as .csv

Showing 1 - 9

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description (~ = changed; + = added; × =removed)
Nov 28, 2006 10:45:32 AM dan030@tradecomet.com REDACTED			Customer's Account was Activated. REDACTED
Nov 28, 2006 10:45:23 AM dan030@tradecomet.com REDACTED			+ Address (Address Id = 19188275) was created. + Payment Source (Payment Source Id = 6848735) was created. Timezone Update enabled Updates to Customer: Address Id changed from 19188215 to 19188275 Updates to Account: Billing Address Id changed from 19188215 to 19188275 Payment Source Id changed from 0 to 6848735 REDACTED
Nov 28, 2006 10:45:23 AM dan030@tradecomet.com REDACTED			Updates to Account: Timezone changed from (GMT-08:00) Pacific Time to (GMT-05:00) Eastern Time Timezone Effective Date is Nov 28, 2006 10:45:23 AM EST REDACTED
Nov 28, 2006 10:42:14 AM dan030@tradecomet.com REDACTED			Terms and conditions accepted REDACTED
Nov 28, 2006 10:41:14 AM dan030@tradecomet.com REDACTED			Updates to Account: Account created in Moneta with account ID 54727111 MonetaAccount (AccountId = 10556615,MonetaServiceType = 7) was updated. Moneta Account Id changed from 0 to 54727111 REDACTED
Nov 28, 2006 10:41:13 AM dan030@tradecomet.com REDACTED			Updates to Account: Request created with ID 58917931878187544 to sync account to Moneta. + MonetaAccount (AccountId = 10556615,MonetaServiceType = 7) was created. REDACTED
Nov 28, 2006 10:40:39 AM dan030@tradecomet.com REDACTED			+ Customer Note (Customer Note Id = 2536835) was created. REDACTED
Nov 28, 2006 10:40:39 AM dan030@tradecomet.com REDACTED			Updates to Account: Daily Spending Limit changed from no account-level daily

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

	spending limit to $10.00 REDACTED
Nov 28, 2006 10:40:36 AM dan030@tradecomet.com REDACTED	⊹ Customer was created. ⊹ Account was created. ⊹ Google Account dan030@tradecomet.com associated with account ⊹ Address (Address Id = 19188215) was created. ⊹ AdWords Account Info (Account Id = 10556615) was created. Updates to Customer: Gala Customer Id changed from 0 to 56865411 External Customer Id changed from 0 to 5211088939 REDACTED

Time zone for all statistics in this account: (GMT-05:00) Eastern Time. Learn more.

Redactions have removed information not available to advertiser on the advertiser's on-line AdWords account interface.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM LLC,	CIVIL ACTION NO. 09-1400 (SHS)
Plaintiff	
v.	
GOOGLE INC.,	
Defendant	

TRADECOMET.COM LLC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(3)

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MISCELLANEOUS

Plaintiff TradeComet.com LLC ("TradeComet") respectfully submits this memorandum in opposition to the Motion to Dismiss Based on Lack of Subject Matter Jurisdiction and Improper Venue filed on March 31, 2009 by Defendant Google Inc. ("Google" or "Defendant"). For the reasons set forth below, Defendant's motion should be denied.

PRELIMINARY STATEMENT

Google attempts to drag TradeComet across the country to litigate this case by trying to expand a forum selection provision in its AdWords agreement to cover antitrust claims that have no grounding in the terms of the underlying agreement. Google also attempts to conceal the fact that the agreement actually at issue in this case – namely, the one that was in effect at the time Google initiated the unlawful anticompetitive conduct alleged in TradeComet's complaint – contains a completely different forum provision from the one Google cites. Critically, the provision that was actually operative has none of the "related to" or "arising from" language upon which Google exclusively relies in its attempt to prevent TradeComet from availing itself of the venue provisions of the federal antitrust laws.

It is also notable that Google's approach in this case is directly contrary to its approach in *Person v. Google*, 456 F. Supp. 2d 488 (S.D.N.Y. 2006) (the case upon which Google primarily relies in seeking dismissal). Indeed, in *Person*, Google relied on a broader venue provision in an earlier AdWords agreement that had been followed by a subsequent version that included the same narrow venue provision that it seeks to avoid here. In a classic case of "heads I win, tails you lose," where (in *Person*) it was disadvantaged by a subsequent, narrow venue provision, Google simply ignored the intervening change, but here where it thinks it is advantaged by an intervening change, it makes a novel and legally unsupported argument to claim disingenuously

that the subsequent AdWords agreement supersedes the one in effect when TradeComet opened its accounts. Google's outcome-driven change in views should not be permitted to dictate venue.

In addition to pointing the Court to the wrong AdWords agreement, Google also fails to satisfy its burden of demonstrating that it "reasonably communicated" its desired change to the AdWords terms and conditions to TradeComet. The only "evidence" Google cites is a screen shot containing narrowly selected information that was provided by a Google employee who never heard of TradeComet prior to this litigation. Google includes no mention of the Google representative tasked with servicing TradeComet, who had routine access to TradeComet's account and even opened an account on at least one occasion.

Moreover, as a monopolist, Google's attempt to force nascent competitors like TradeComet, which Google undisputedly destroyed, to litigate antitrust claims against Google only in a single county in California (i.e., in Google's backyard) should not be permitted. Google's selective enforcement of its forum provision for litigation and strategic advantage underscores the fundamental unfairness of its actions.

FACTUAL BACKGROUND

A. Google's Unlawful Conduct Is Unrelated to the AdWords Agreements

As alleged in TradeComet's complaint, Google is a monopolist in the relevant market for search advertising. Both United States federal antitrust enforcement agencies recently have investigated Google and concluded that it dominates the search-advertising market. Compl. ¶¶ 3, 56-66, 104-108. TradeComet operates a competing search website known as "Sourcetool.com" (or "SourceTool") that attracts highly-valued search traffic of businesses seeking to buy or sell products and services to other businesses. *Id.* ¶¶ 4-6, 37-55. TradeComet began operations in 2005 and initially met with great success; SourceTool rose to become the second-fastest growing

website in the world. *Id.* It advertised on Google and began to receive considerable search traffic, generating significant revenue both for TradeComet and for Google. *Id.* Indeed, Google embraced SourceTool's success and the quality of its service, naming it "Site of the Week." *Id.* However, by mid-2006 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. *Id.* ¶¶ 70-90. As a result, Google unilaterally took steps to block the competitive threat of vertical search sites. As part of that effort, Google changed its voluntary course of dealing with SourceTool and effectively refused to deal further with the plaintiff by, among other things, manipulating its auctions so that SourceTool faced vastly higher prices, thereby strangling the primary source of search traffic to SourceTool. *Id.* ¶¶ 46-55. Google also entered into "preferred" agreements with certain of its competitors, including "Business.com." Through these agreements, Google supported these sites in order to eliminate rival search sites by, among other things, artificially propping up its chosen sites with the purpose and intent of preserving Google's market dominance. *Id.* ¶¶ 9, 115-120. On February 17, 2009, TradeComet filed suit against Google alleging that Google violated Section 1 and Section 2 of the Sherman Act based upon the foregoing and related conduct.

B. Google Relies Upon the Wrong AdWords Agreement In Seeking Dismissal

Google has stated both in correspondence with the Court and in its brief that venue is improper under the "terms and conditions" of an AdWords agreement that Google contends TradeComet agreed to on August 29, 2006 (the "8/29/06 Agreement"). The 8/29/06 Agreement includes a forum selection provision that states:

> 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.

Howley Decl., Ex. 1 at 3. In this case, Google contends that this agreement has retroactive effect and replaces earlier versions of its AdWords Agreement. Google fails to mention that it took a directly contrary stance with regard to the supposed retroactive effect of its forum provision in the *Person* case upon which it relies here. In *Person*, Google relied upon an earlier version of its AdWords agreement from 2003 (the "2003 Agreement"), ignoring intervening versions of its agreement dated April 19, 2005 and May 23, 2006 – each of which had the same narrower-scope forum clause, which replaced the clause in the 2003 Agreement. 456 F. Supp. 2d 493. In *Person*, unlike this case, Google did not argue that these later agreements superseded conduct occurring under the 2003 Agreement.[1] 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).[2]

Here, the conduct alleged in the Complaint began in mid-2006 while earlier versions of the AdWords agreement were in effect. Compl. ¶¶ 46-49; Howley Decl., Ex. 2, 3. By citing only the 8/29/06 Agreement, Google seeks to evade the plainly narrower language of the forum selection provision in the AdWords agreements dated April 19, 2005 and May 23, 2006, which

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[1] In its briefing in *Person*, Google argued that Mr. Person's claims arose out of the 2003 Agreement. Howley Decl., Ex. 6 at 1; Howley Decl., Ex. 7 at ¶¶ 6-8.

[2] The plaintiff in *Person* (*i.e.*, the party resisting Google's Rule 12 motion there) did not raise the issue of the intervening AdWords agreement. Interestingly, Google's own AdWords representative apparently thought that new agreements have only prospective, rather than retroactive, effect. *See* Howley Decl., Ex. 10 at 47:14-48:10, 74:2-75:10.

were in effect when the relevant TradeComet accounts were opened and when Google's initiated its alleged illegal conduct (collectively the "Operative Agreements").[3] In particular, the forum provisions contained in the "terms and conditions" of those two previous AdWords agreements that extend back to 2005 did not include the broad "arising out of" or "relating to" language, which are the touchstones of Google's attempt to sweep its exclusionary conduct within the 8/29/06 Agreement. Instead, the earlier versions of the forum provision merely state that "The 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." Howley Decl., Exs. 2 at 1-2; 3 at 2.

The broad "arising out of or relating to" language Google quoted to the Court was only added *after* Google acted to drive TradeComet from the market, and only *after* Google could anticipate that competitors like TradeComet would contest Google's anticompetitive conduct in the courts. Moreover, the 8/29/06 Agreement – which reinstated language similar to the "arising out of" language of the 2003 Agreement – took effect only 2 days before Google filed its reply in *Person*. Howley Decl., Ex. 6 at 1, 10.

ARGUMENT

I. The AdWords Forum Selection Clause Does Not Encompass TradeComet's Antitrust Claims.

Google seeks to avoid venue in this jurisdiction by attempting to link its relationship with TradeComet pursuant to its AdWords contract with the *antitrust* claims alleged in TradeComet's complaint. TradeComet's antitrust claims, however, are not grounded in allegations that Google

[3] The Operative Agreements produced by Google in discovery contain identical forum selection clauses. Therefore, regardless of which of the two Operative Agreements Google contends was actually in effect at the time of Google's anticompetitive conduct, the narrow language and the coinciding effect of the forum clause is the same.

breached its AdWords agreement as part of its ordinary business relationship with TradeComet.[4] Nor is TradeComet (contrary to Google's attempt to argue otherwise) claiming Google's ability to charge varying prices – or even "high" prices – to advertisers as part of its keyword auctions amounts to a breach of the AdWords contract.[5] Rather, TradeComet alleges that Google engaged in a campaign of willful monopolistic conduct, including intentionally manipulating its auctions to eliminate competitive threats from vertical search sites like TradeComet. Such a claim has no basis in, and is not even related to, a claim arising from the underlying AdWords agreement.[6] Moreover, even legally-acquired *contractual* rights – including its forum provision – as a matter of law provide no defense for (and are simply irrelevant to) Google's *antitrust* liability. *See United States v. Microsoft*, 253 F.3d 34, 63 (D.C. Cir. 2001) (explaining that defendant's position that use of lawfully-acquired intellectual property rights cannot give rise to antitrust liability "is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability").

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[4] This is one of many factual departures from *Person* – the case upon which Defendant primarily relies. Mr. Person's claim, for example, "call[ed] for interpretation and application of the Agreement" because he complained specifically about the "policies and procedures under the AdWords program," which – unlike here – Google relied upon for certain defenses. Howley Decl. Ex. 5 at 5. In fact, Mr. Person's complaint specifically cites the web addresses for certain Google policies and asserts that those particular policies are fraudulent. Howley Decl., Ex. 4 at ¶¶ 13, 13A. TradeComet does not allege any such fraud.

[5] Google wrongly contends that dismissal is appropriate because "[t]he fundamental basis of all of Plaintiff's claims is that the alleged increase in ... prices ... impaired Plaintiff's ability to expand," and that "[b]ut for [the price increase] there is no injury to Plaintiff." Def's Br. at 9. A substantially similar argument was rejected as "completely untenable" in *E & J Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148, 1162 (E.D. Cal. 2005) (refusing to apply forum selection clause to plaintiff's antitrust claims despite the fact that "the damages ... suffered were the result of prices charged by Defendants under the agreement") (emphasis omitted). Accordingly, the fact that there is *some* linkage between the AdWords agreement and pricing – it could not be otherwise – does not convert the substance of the antitrust claim into a contractual claim.

[6] The allegations in this complaint also do not amount to "dealer termination" claims under Section 1 of the Sherman Act of the sort that the Second Circuit found to be included within the forum selection provision in *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720 (2d Cir. 1982). Moreover, as explained, the venue provision in *Bense* was much broader than the one in the Operative Agreements.

Google cites *Phillips v. Audio Active Ltd.* 494 F.3d 378, 386-90 (2d Cir. 2007), in requesting that this Court dismiss TradeComet's complaint. As Google states in its brief, the Second Circuit set forth a four-part analysis in *Phillips* to determine whether to dismiss the claims because of the forum selection clause:

> The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires us 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. If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. 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 and overreaching.'

Id. at 383-84.

As mentioned above, Google places the entire weight of its argument on its claim that the 8/29/06 Agreement and its forum provision is the operative agreement for all of the conduct at issue in this case. If this is proven to be wrong (which it is), then Google has no other argument that saves it from having to proceed in this Court. Accordingly, this Section I starts with the third element of the *Phillips* analysis, which addresses the scope of the forum selection provision, before moving to the other elements of the *Phillips* analysis in Sections II and III.

A. The 8/29/06 AdWords Agreement is Not Operative for the Conduct at Issue

TradeComet had several AdWords accounts open from the time that Google engaged in the anticompetitive conduct alleged in the complaint until August 29, 2006, which is the date Google alleges that TradeComet entered into the AdWords agreement that Google has exclusively cited in this case. The 8/29/06 version of the AdWords agreement contains a forum selection provision that specifically references "all claims arising out of or relating to" the agreement. Howley Decl., Ex. 1. As this Court noted at the status hearing, forum provisions that

include "arising out of or relating to" are "just about as broad as you can get." Howley Decl., Ex. 9 at 12. The version of AdWords in effect during the time of the primary anticompetitive conduct alleged in the complaint, however, did *not* include any of that broad language. Rather, the Operative Agreements that TradeComet "clicked through" state only that "[t]he Agreement must be ... adjudicated in Santa Clara County, California." Howley Decl., Exs. 2, 3. The broader "arising out of" language was added to Google's terms and conditions only after its anticompetitive campaign against TradeComet and other vertical search engines was underway, perhaps in part as a belated and retroactive effort to erect impediments in the paths of victims seeking legal redress.[7]

The gulf between the version of the forum provision in the AdWords agreements actually at issue – i.e., the Operative Agreements – and the version Google cited to this Court at the status hearing and in its brief could not be wider. This is seen most plainly in Google's own argument in its brief where it repeatedly cites to the importance of the inclusion of the language "arising out of or relating to." *See generally* Def's Br. at 8-11; *id.* at 10 (Google "caution[ing] that analogies to other cases are 'useful only to the extent those other cases address contract language that is the same or substantially similar'" to the "arising out of or relating to" language upon which Google relies in this case); *see also Williams v. Deutsche Bank Securities, Inc.*, No. 04 Civ. 7588 (GEL), 2005 WL 1414435, at *4-6 (S.D.N.Y. June 13, 2005) (discussing, in the context of choice of law provisions, the importance of the absence of "magic words" such as "arising out of or relating to" or "in connection with").

[7] *See also* the discussion at 10, *infra*, noting the contemporaneity of the August 2006 change in the AdWords contract to the venue dispute in *Person*.

Moreover, ***all of the cases*** cited by Google in arguing that TradeComet's antitrust claims are subject to the forum selection clause (Def's Br. at 8-11) are distinguishable on this same basis – i.e., they ***all*** involve forum selection clauses that include references to "**arising out of**," "**relating to**," "***all* claims**" or other clear indications of breadth beyond the more narrow "adjudicated" language in either of the Operative Agreements:

- *Cfirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 329 (S.D.N.Y. 2008), concerned a clause that read "**all disputes arising hereunder**";
- *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 720 (2d Cir. 1982), concerned a clause that read "**any suits or causes of action arising directly or indirectly from**" the agreement;[8]
- *Olinick v. BMG Entm't*, 138 Cal. App. 4th 1386, 1291, 42 Cal. Rptr. 3d 268, 272 (Cal. Ct. App. 2006), concerned a clause that read "**all dispute arising from**" the agreement;
- *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 382, 386-87, 389 (2d Cir. 2007), concerned a clause that read "**any legal proceedings that may arise out of**" the agreement;
- *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993), concerned an arbitration clause that read "**dispute[s], difference[s], question[s] or claim[s] relating to**" the agreement and a forum selection clause that read "**all purposes of and in connection with**" the agreement.[9]
- *Abbott Laboratories v. Takeda Pharm. Co.*, 476 F.3d 421, 422 (7th Cir. 2007), concerned a clause that read "**dispute[s] between [the parties] arising from, concerning or in any way related to**" the agreement.

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[8] *Bense* and *Cfirstclass* are also distinguishable for the additional reason that the plaintiffs in those cases were alleging that the defendant breached the contract. *See Bense*, 683 F.2d at 720 ("the gist of Bense's claim is that Interstate wrongfully terminated the agreement thereby damaging Bense"); *Cfirstclass Corp*, 560 F. Supp. 2d at 330 (claims were for "failure to deliver . . . aircraft" that "are expressly premised on assertions regarding [plaintiff's] rights involving the aircraft pursuant to the two agreements").

[9] Defendant also cites *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123 (2d Cir. 2001), which does not even involve a forum selection clause; the case interprets the words "relating to" and "arising out of" under Connecticut and Ohio law in order to determine whether insurance coverage is provided by a contract.

As an initial matter, basic principles of contractual interpretation hold that parties' choice of words – and, importantly, their decision to choose *different* words – must be accounted for in interpreting a contract.[10] Here, Google decided to choose different words in the 8/29/06 Agreement in order to expand the coverage of its forum selection provision. This deliberate use of broader language (only days before filing its reply in *Person*) at a minimum indicates that Google felt the provision in its then-existing agreement (i.e., the Operative Agreements) did not cover all conduct that would be swept into the forum selection provision in the 8/29/06 Agreement.[11] This interpretation is bolstered by the canons of contractual interpretation in California which, like the Court in *Phillips*, require that the interpretation of forum selection clauses be based on the plain meaning of the language used. *See, e.g.*, *Hunt v. Superior Court*, 81 Cal. App. 4th 901, 908-09, 97 Cal. Rptr. 2d 215, 220 (Cal. Ct. App. 2000).[12]

Indeed, under California law, TradeComet's claims would fall outside even the broader language of the 8/29/06 Agreement. California courts have held, for example, that forum selection clauses containing the "arising from" language may still require interpretation of the underlying contract to determine whether the claim actually is grounded in the contract in order for the clause to have legal effect. *See B&H Manufacturing Co., v. Bright*, F038408, 2002 WL

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[10] *See, e.g.*, *Great American Ins. Co. v. Norwin School Dist.*, 544 F.3d 229, 246 (3d Cir. 2008) ("we must assume that the choice of different words was deliberate"); *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) ("when 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"); *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 287 (4th Cir. 1984) (recognizing as "a generality" that "broad changes in phraseology signify differences in meaning").

[11] Moreover, under California law, the rule that an ambiguous contract term must be interpreted against the party who prepared it, applies with particular force in cases where, as here, there are adhesion contracts. *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 780, 79 Cal. Rptr. 2d 273, 287 (Cal. Ct. App. 1998).

[12] Google concedes that California law applies to the Court's analysis of the scope of the forum selection clause. Def's Br. at 8 n.5.

31820963 (Cal. Ct. App. Dec. 17, 2002) (interpreting clause that read "any dispute arising from or in connection with the by-laws"); *Bancomer, S.A. v. Superior Court*, 44 Cal. App. 4th 1450, 1453, 52 Cal. Rptr.2d 435, 438 (Cal. Ct. App. 1996) (interpreting clause that read "[a]ny conflict which may arise regarding the interpretation or fulfillment of this contract").[13]

Finally, the plain meaning of "adjudicate" is "[t]o rule upon judicially." BLACK'S LAW DICTIONARY 45 (8th ed. 2004); *see also Barker v. Estelle*, 913 F.2d 1433, 1440 n.12 (9th Cir. 1989) (case citing Black's Dictionary in holding "adjudicate" to mean "'to determine finally' or 'adjudge,' which means 'to decide, settle or decree'" in context of double jeopardy analysis). No ruling upon the contract is necessary in this case in order for TradeComet to succeed on its antitrust claims and, therefore, no "adjudication" of the contract is required. Accordingly, the forum selection provision is not operative for TradeComet's antitrust claims.

B. Google's Boilerplate Merger Clause Cannot Be Extended Retroactively to Eliminate TradeComet's Choice of Venue for Its Antitrust Claims

Google also asserts *without any argument or analysis* that the 8/29/06 Agreement is operative rather than the prior AdWords agreement that was in effect at the time Google initiated the conduct giving rise to this lawsuit. As an initial matter, as discussed in the Factual

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[13] *See generally Gen. Envtl. Sci. Corp. v. Horsfall*, 25 F.3d 1048, 1994 WL 228256, *8-9 (6th Cir. 1994) (forum clause did not encompass plaintiff's RICO and state law claims arising from parties' business relationships where agreement was "merely one of the final manifestations" of those relationships); *Light v. Taylor*, No. 05 Civ. 5003 WHP, 2007 WL 274798, at *6 (S.D.N.Y. Jan. 29, 2007) (clause that read "[a]ny dispute regarding this Agreement" was applicable only to disputes "directly concerning the underlying contract"); *Coalition for ICANN Transparency v. Verisign*, 452 F. Supp. 2d 924, 932 (N.D. Cal. 2006) (refusing to apply clause to antitrust claims because claims did not involve agreement and relationship to the agreement was too "attenuated"); *Imation Corp. v. Quantum Corp.*, No. Civ. 01-1798, 2002 WL 385550, at *2, 5-6 (D. Minn. March 8, 2002) (antitrust claims not covered by clause requiring "[a]ll disputes arising hereunder shall be adjudicated ... in Santa Clara County, California" where claims involve "conduct of [the defendants] that occurred prior to the signing of the ... agreement and... conduct of [one defendant] in relation to" others not part of agreement).

Background above, Google's position in this case regarding the supposed retroactive effect of changes to its AdWords agreement is directly contrary to its argument in *Person*. *See infra* at 3.

In addition to Google's outcome-driven change in views regarding the retroactive effect of changes to the terms and conditions, it also argues that the language "expressly supersedes and replaces all prior agreements" in the 8/29/06 Agreement should be taken to mean that all claims an advertiser may have as a result of Google's prior conduct must now be subject to the terms of the 8/29/06 Agreement. Def's Br. at 4. This language, however, amounts to nothing more than a boilerplate "merger" or "integration" provision. Such provisions are typically included in agreements to ensure that parole evidence of contractual intent is not admissible to controvert the plain terms of the agreement. *See, e.g., Amtower v. Photon Dynamic, Inc.,* 158 Cal. App. 4th 1582, 1609, 71 Cal. Rptr. 3d 361, 384 (Cal. Ct. App. 2008) ("The purpose of an integration clause is to preclude the introduction of evidence which varies or contradicts the terms of the written instruments. It does not function to meld the documents it mentions.") (citations omitted).

In its brief, Google simply asserts without argument that its expansive interpretation of its boilerplate merger clause has retroactive effect. In so doing, Google completely overlooks the mass of cases holding that such boilerplate merger clauses are prospective only. *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 (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., Inc. v. AT&T Corp.*, 141 F.3d 1149, 1998 WL 153254, at *1 (1st Cir. 1998) (rejecting

defendant's argument that "the run-of-the-mill integration clause [defendant] aggrandizes as a 'supersedure' clause" had retroactive effect).

There simply is no basis for this Court to extend the standard merger provision in Google's 8/29/06 Agreement to cover prior conduct that was the subject of the previous versions of Google's AdWords agreement. Indeed, the inclusion of additional language that the agreement is limited to "the subject matter hereof" is an unambiguous statement that prior transactions or business between the parties falls outside the provision. *See, e.g., Choice Sec. Sys., Inc.*, 1998 WL 153254, at *1 (rejecting argument that "subject matter" of agreement was a retroactive renegotiation).

It is not surprising that Courts are hostile toward contract provisions that eliminate prior rights of parties without a clear and express statement in the agreement of doing so. *See 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 Bancomer*, 44 Cal. App. 4th at 1461, 52 Cal. Rptr. 2d at 442 (concluding that claims were not within forum selection clause where the "alleged offending conduct preceded formation of the ... agreement"). This is not to say that parties are unable to eliminate prior rights if they so choose; rather, in order to do so, the parties must make that intent express. For example, an express statement in a provision that "prior" transactions are covered under a subsequent agreement is a common method of eliminating prior rights between parties. *See Arista Films, Inc. v. Gilford Securities, Inc.*, 43 Cal. App. 4th 495, 498, 51 Cal. Rptr. 2d 35, 37 (Cal. App. Ct. 1996) (provision requiring arbitration of "all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us,

whether entered into prior, on or subsequent to the date hereof" required arbitration of a claim resulting from conduct before the agreement was signed); *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, 21 Cal. Rptr. 2d 846, 848 (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: Effect as of date of first medical services"). Such language is decidedly not simply a merger clause like the one included in Google's AdWords contract. In fact, the absence of such a plain expression of intent in Google's AdWords agreement is sufficient to exclude Google's (unsupportable) assumption that its boilerplate merger provision has some additional unstated meaning that eliminates TradeComet's rights under the previous AdWords agreements. The inclusion of the additional limiting language "subject matter hereof" leaves no room whatsoever for Google to argue that its boilerplate merger clause has any retroactive application to its conduct under prior AdWords agreements.[15]

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[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).

[15] In light of Google's burden under the first prong of *Phillips*, which requires that the venue provision be "reasonably communicated" to parties such as TradeComet, it would be particularly inappropriate to interpret the integration clause in the novel, expansive manner for which Google argues. Indeed, the plain language of these provisions does not provide sufficient notice of any retroactive effect. *See Nagrampa v.*

C. The Forum Selection Clauses in the Operative Agreements Fail to Encompass TradeComet's Section 1 Claim.

Google also ignores the fact that the Section 1 claim does not involve its AdWords agreement at all. TradeComet alleges that Google entered into a contract, combination or conspiracy with Business.com that had the purpose and effect of unreasonably restraining trade in violation of Section 1 of the Sherman Act. Compl. ¶¶ 116-120. As alleged in the Complaint, "the agreement between Google and Business.com allows Google to sell advertisements for Business.com's search queries. In effect this allows Google to extend its position ... by selling ads for its direct competitor." Compl. ¶ 118. Google attempts to flip this claim on its head by arguing that that the claim is not about Google's illegal agreement with Business.com, but in fact is "fundamentally bas[ed]" on TradeComet's AdWords agreement with Google. Def's Br. at 9. However, Google fails to explain how its separate and illegal agreement with Business.com is somehow encompassed by a forum selection clause in an agreement between TradeComet and Google. *See, e.g.*, *Credit Suisse Securities*, 469 F. Supp. 2d 103, 107-08 (S.D.N.Y. 2007) ("the argument that a forum selection clause in one contract should be applied to a different, separately negotiated contract lacking such a clause requires a much broader reading of 'arising out of' and 'related to' than [the] cases support").

II. Google Has Not Submitted Evidence Sufficient to Show that Google "Reasonably Communicated" the Terms and Conditions in the 8/29/06 Agreement to TradeComet.

Google has failed to satisfy its burden of presenting evidence sufficient to demonstrate that it "reasonably communicated" the 8/29/06 Agreement to TradeComet. *See Private One of New York v. JMRL Sales & Serv.*, 471 F. Supp. 2d 216, 222 (E.D.N.Y. 2007) (burden on

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MailCoups, Inc., 469 F.3d 1257, 1291 (9th Cir. 2006) (language of arbitration clause did not provide notice that claims were subject to clause); *Mason v. CreditAnswers, LLC*, Civ. No. 07cv1919-L (POR), 2008 WL 4165155, at *3 (S.D. Cal. Sept. 5, 2008) (refusing to enforce a forum selection clause where context made it "confusing so as not to provide adequate notice").

movant). The only evidence Google cites is contained in a declaration of Heather Wilburn (a Google AdWords representative) in which she lists eleven TradeComet accounts and claims that for each account TradeComet accepted the terms and conditions of the 8/29/09 Agreement. Howley Decl., Ex. 11. As support for her statements, Ms. Wilburn attaches screen shots purportedly of each account. *Id.* Each screen shot includes a description with the words "Terms and conditions accepted." *Id.* There is no other information in Ms. Wilburn's declaration or in the screen shots that provides independent confirmation that an authorized TradeComet user actually accepted the terms and conditions of the 8/29/09 Agreement upon which Google's motion exclusively relies.

TradeComet deposed Ms. Wilburn on April 13, 2009, in an attempt to assess the veracity of the claims in her declaration and supporting materials. During her deposition, Ms. Wilburn admitted that, despite testifying on the basis of "personal knowledge," she had never heard of TradeComet prior to submitting her declaration in this matter. Howley Decl., Ex. 10 at 12:16-13:4. Ms. Wilburn was also unable to address key facts surrounding TradeComet's relationship with Google and, in particular, she had no knowledge of the fact that Google's representatives not only routinely operated TradeComet's accounts but also actually opened new accounts in TradeComet's name. Howley Decl., Ex. 8. She acknowledged that "Google representatives" may "create an account" for "some large advertisers" but admitted that she "didn't know how" an advertiser would agree to terms and conditions in such instances. Howley Decl., Ex. 10 at 16:13-17:8, 19:25-20:9.[16]

[16] Wilburn's testimony on this point is consistent with the Declaration of Annie Hsu, which Google submitted in *Feldman v. Google*, 513 F. Supp. 2d 229 (E.D. Pa. 2007). In her declaration, Ms. Hsu stated that normally AdWords advertisers were required to enter an AdWords contract before placing ads or incurring charges, but that "[s]ome very large advertisers do not use this on-line process, and instead

Ms. Wilburn's inability to address the specific facts of TradeComet's purported acceptance of the terms and conditions of the 8/29/06 Agreement, along with evidence that plainly indicates Google's deep involvement in TradeComet's accounts, casts doubt on Google's claim that an authorized TradeComet user assented to those terms and conditions. This conclusion is further bolstered by the fact that Google's records (provided by Ms. Wilburn) show that TradeComet would have had to assent to (apparently by separately logging on and clicking through) the terms and conditions of each of at least ten AdWords accounts in only three seconds. Howley Decl., Ex. 11. Ms. Wilburn was unable to explain how accomplishing this task would be possible by an external user such as an authorized TradeComet employee. *See* Howley Decl., Ex. 10 at 33:23-25 ("where terms and conditions are updated . . . you do have to log in individually to each . . . account" and individually accept the new terms and conditions); *id.* at 57:10-24 (Wilburn "wouldn't know" how an individual could log into all of these accounts serially and accept terms and conditions within three seconds). The absence by Google of any explicable accounting of TradeComet's purported acceptance of the terms and conditions of the 8/29/06 Agreement cannot be evidence of such acceptance. *See Waters v. Earthlink, Inc.*, 91 Fed. App'x 697, 698 (1st Cir. 2003) (finding "[c]onspicuously absent" evidence showing "that it is reasonable to assume that plaintiff" assented to agreement where defendant's evidence did not address "potentially relevant issues," including "Were ... customers only able to access the internet through these websites? How prominently were the links displayed? How were they labeled or explained?").

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interact direct with Google representatives." Howley Decl., Ex. 12. TradeComet, prior to its demise as a result of Google's conduct, was one of Google's fastest growing advertisers.

III. The Forum Selection Clause in the 8/29/06 Agreement is Unenforceable.

This Court should not enforce Google's forum selection clause for the additional reason that it is plainly unconscionable. This is witnessed, for example, by Google's selective enforcement of the provision where Google perceives a litigation or other strategic advantage (rather than for the claimed purpose of "convenience" for a dominant company with ubiquitous reach). The "place and manner" restrictions in a forum selection clause are unconscionable where they are procedurally and substantively unconscionable. *See Bolter v. Superior Court*, 87 Cal. App. 4th 900, 906-09, 104 Cal. Rptr. 2d 888, 893-94 (Cal. Ct. App. 2001) (finding clause requiring arbitration in Utah to be unconscionable). "A contract or clause is procedurally unconscionable if it is a contract of adhesion." *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (finding clause that required arbitration to take place in Santa Clara County, California to be unconscionable). In considering substantive unconscionability, courts consider among other things, "the practical effects" of the challenged clause. *Id.* at 1173; *see also id.* at 1177 ("a forum selection clause may be unconscionable if the 'place or manner' ... is unreasonable taking into account the 'respective circumstances of the parties'").

Here, as the *Person* court concluded, Google's contract is a contract of adhesion. *See Person*, 456 F. Supp. 2d at 496 ("it is appropriate in this dispute to treat this contract as one of adhesion"). The Operative Agreements here are classic contracts of adhesion because each is a "standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Comb*, 218 F. Supp. 2d at 1172 (*citing Armendariz v. Foundation Health Psychcare Serv.*, 90 Cal. Rptr. 2d 745 (Cal. 2000)); *see also* Howley Decl., Ex. 10 at 46:16-46:24 (AdWords users "have the option to accept the terms and conditions and continue advertising with us or if ... they don't accept the new terms and conditions, the account will automatically shut off"). It is

uncontested for the purposes of this motion that Google is a monopolist. As a result, there are no available alternatives that could defeat a finding of procedural unconscionability.[17]

Google's forum selection clauses are also substantively unconscionable because "[l]imiting venue to [defendant's] backyard appears to be yet one more means by which the . . . clause serves to shield [defendant] from liability." *Comb*, 218 F. Supp. 2d at 1177. This is particularly so where one of the wealthiest corporations in America, which according to both the Department of Justice and the Federal Trade Commission has monopoly power, seeks to exert its monopoly power through an egregious contract of adhesion to force all its victims, regardless of their financial condition or location, to trek to Santa Clara County, Google's "backyard," in order to seek redress under the federal antitrust statutes.[18] In *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1212-13 (N.D. Cal. 2003), the court concluded that a venue provision in an arbitration agreement that required plaintiffs to resolve their dispute in a geographically distant state was unconscionable. The *Wilmot* court stated that the defendant "does business through the United States but requires individual customers from across the country to travel to one locale to arbitrate their disputes. Accordingly, the Court concludes that the venue provision is substantively unconscionable." *Id.* at 1211; *see also Comb*, 218 F. Supp. 2d at 1172 (applying the same reasoning to invalidate a forum selection clause that was part of an arbitration provision in a PayPal online clickwrap agreement); *Bolter*, 87 Cal. App. 4th at 910, 104 Cal. Rptr. 2d at 895 (invalidating a forum selection clause that is part of franchise arbitration agreement). Here,

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[17] Defendants cite *Feldman v. Google*, 513 F. Supp. 2d 229 (E.D. Pa. 2007), in arguing that the forum selection clause in its AdWords agreement is not "unfair" or "unreasonable," but Google neglects to note that the present case – unlike *Feldman* – is on a motion to dismiss and TradeComet specifically alleges that there are no reasonable alternatives available to Google.

[18] In such situations 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." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

the same reasoning applies. Google's forum selection clause is substantively unconscionable because it requires advertisers and others, including TradeComet (which Google financially decimated), from around the country to go to California to litigate against the monopolist in its backyard.[19]

Finally, Google argues that its forum selection provision "appropriately asserts venue where Google's headquarters is located."[20] Def. Br. at 12; *see also* Howley Decl., Ex. 10 at 76:8-21. In fact, Google routinely litigates around the country at its pleasure – in many instances without even attempting to enforce its forum selection provision. *See, e.g., Rescuecom v. Google*, No. 06-4881-cv, 2009 WL 875447 (2d Cir. Apr. 3, 2009); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007). This selective enforcement reveals the true purpose of the provision is not for "convenience," as Google argues in its brief, but rather for perceived strategic or litigation advantage due to Google's monopoly power.

IV. Dismissal Pursuant to Either Rule 12(b)(1) or Rule 12(b)(3) is Procedurally Improper Here and Transfer Under § 1404 is Unwarranted.

Venue is proper in this Court under 15 U.S.C. § 22, the broad statutory venue provision applicable to federal antitrust actions. Compl. ¶ 14 (venue is also proper under 15 U.S.C. §§ 15,

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[19] It should also be noted that Google's forum selection clause is unenforceable to the extent it requires suit in a particular county in California. California law prohibits private parties from selecting the "county or other territory" in which the case will be heard. *See Alexander v. Superior Court*, 1114 Cal. App. 4th 723, 732, 8 Cal. Rptr. 3d 111, 117 (Cal. Ct. App. 2003) (refusing to enforce a clause selecting Santa Clara County as the venue for contractual disputes between two California parties). It would be a bizarre result indeed if this Court were to require TradeComet, a New York party asserting federal antitrust claims, to litigate in Santa Clara County, California, while a Los Angeles party to an identical agreement with Google would not be forced to litigate in Google's backyard.

[20] It bears noting that notwithstanding Google may think it appropriate only to litigate where it is headquartered, Congress in enacting the antitrust venue statute decided it appropriate to require monopolists such as Google to answer for their antitrust violations in any and all districts in which they do business.

26 and 28 U.S.C. § 1391).[21] Similarly, this Court has subject matter jurisdiction over TradeComet's federal antitrust claims under 28 U.S.C. §§ 1331, 1337, and 15 U.S.C. §§ 4, 15, and 26. Compl. ¶ 13. Google does not dispute the fact that all of these statutes apply here. Instead, in moving to dismiss under Rules 12(b)(1) and 12(b)(3), Google contends that a forum selection clause found in one version (of many) of its AdWords agreements makes venue improper and deprives the court of subject matter jurisdiction. The Supreme Court, however, has held that 28 U.S.C. § 1404 "controls" requests to "give effect to the parties contractual choice of venue" where a forum clause selects another federal district.[22] *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27-32 (1988) ("federal law, specifically 28 U.S.C. § 1404(a), governs the parties venue dispute" because "a district court ... must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers"); *see also* 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 3803.1 (where a forum selection clause selects another federal district "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"); 17 JAMES WM. MOORE, ET AL., MOORE'S FED. PRAC. § 111.04[4][c] (3d ed. 2009) (same).[23]

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[21] The legislative history makes plan the fact that 15 U.S.C. § 22 was intended to broaden the venue options available to antitrust plaintiffs. *See United States v. Nat. City Lines, Inc.*, 334 U.S. 573, 582-86 (1948) (discussing legislative history), *superseded in part by statute*, 28 U.S.C. § 1404.

[22] 28 U.S.C. § 1404(a) provides: "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."

[23] The *Stewart* case involved a mandatory forum selection clause selecting courts in Manhattan. 487 U.S. at 24 & n.1. This Court's opinion in *Cfirstclass Corp.*, 560 F. Supp. 2d 324, involved a situation where § 1404 was inapplicable because the forum selection clause in that case selected England. In other words, where as in *Stewart* the district court could transfer venue to another federal court; such a transfer was not possible in Cfirstclass Corp.

"The 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. In *D.H. Blair & Co., Inc. v. Gottdiener*, the Second Circuit observed that:

> Some of the factors a district court is to consider are, inter alia: (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties.

462 F.3d 95, 106-07 (2d Cir. 2006) (internal citations omitted). As the Supreme Court noted, "[i]t is conceivable in a particular case ... 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. Indeed, a number of courts have refused to transfer to another venue despite the presence of a forum selection clause that encompassed the claims.[24] Here, the § 1404 convenience factors plainly cut in TradeComet's favor and transfer is unwarranted.[25]

In an apparent recognition that § 1404 convenience factors weigh on its motion, Google makes a half-hearted effort to claim that California is "more convenient" because, according to

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[24] *See, e.g., Marel Corp. v. Encad Inc.*, 178 F. Supp. 2d 56 (D.P.R. 2001) (motion to transfer venue denied despite applicable forum selection clause); *Fibra-Steel, Inc. v. Astoria Industries, Inc.*, 708 F. Supp. 255 (E.D. Mo. 1989) (same).

[25] The locus of the majority of operative facts is in New York, where TradeComet is based, Google has a large office, and the meeting occurred at which Google reviewed TradeComet's business plans. Compl. ¶¶ 11, 41, 45, 46, 85. New York is TradeComet's forum choice, is convenient to all of TradeComet's anticipated witnesses, and is convenient to both parties' counsel. The relevant documents from TradeComet are in New York. Presumably, many of Google's documents relating to this case are either in or readily accessible in New York. Other relevant documents are likely in Washington, D.C., due to the Department of Justice's recent investigation into Google's monopoly power. Finally, there is no question that Google has much greater means than TradeComet. Google is a monopolist that has previously litigated in New York against AdWords advertisers; TradeComet is a start-up business whose financial well-being was destroyed by Google's anticompetitive conduct.

Google, *if* it had to litigate a "myriad" of suits outside of California that would not be convenient.[26] This speculative conclusion is defied by the fact that Google actually – and routinely – chooses *not* to enforce it forum provision in many jurisdictions. Google's selective enforcement of its clauses amounts to defensive forum shopping and should not be countenanced, much less distorted into a factor favoring transfer.[27] In any event, inconvenience to Google – which has profited handsomely from its illegal deeds – is at best a secondary concern, particularly where the relevant venue statute reflects a considered Congressional decision to require antitrust defendants to answer in any federal district in which they do business.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied and this case should not be transferred.

Dated: April 15, 2009

Respectfully Submitted,

s/ Joseph J. Bial

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[26] Hypothetical suits by other parties is not a factor Courts consider under § 1404. *See, e.g., D.H. Blair & Co.*, 462 F.3d at 106-107 (naming factors related to the present case, the present parties, and public policy); *Am. Eagle Oufitters, Inc. v. Tala Bros. Corp* ., 457 F. Supp. 2d 474 (S.D.N.Y. 2006) (same).

[27] Of course, improper forum shopping is not limited to plaintiffs. *See, e.g., E & J Gallo Winery*, 388 F. Supp. 2d at 1161-62 (defendant engaged in "forum shopping" by invoking forum selection clause late).

CERTIFICATE OF SERVICE

The undersigned, a member of good standing in this court, hereby certifies that on April 15, 2009, served the individuals set forth below pursuant to an agreement between the parties. Such service includes a copy of Plaintiff Tradecomet.com LLC's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and supporting documents and exhibits to be served by electronic mail.

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Dated: April 15, 2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM LLC,	CIVIL ACTION NO. 09-cv-1400(SHS)
Plaintiff	
v.	
GOOGLE INC.,	
Defendant	

Declaration of Daniel J. Howley

I, Daniel J. Howley, being over 21 years of age, and under penalty of perjury, declare as follows:

1. I am an associate in the law firm of Cadwalader, Wickersham & Taft LLP, which represents the plaintiff, TradeComet.com LLC ("TradeComet") in the above captioned matter. I submit this declaration in support of TradeComet's opposition to Defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(3). I make this declaration on the basis of personal information.

2. Attached hereto as Exhibit 1 is a true and correct copy of the AdWords Agreement, dated August 22, 2006, that Google alleges that TradeComet assented to on August 29, 2006 (the "8/29/06 Agreement");

3. Attached hereto as Exhibit 2 is a true and correct copy of the standard AdWords Agreement, dated April 19, 2005;

4. Attached hereto as Exhibit 3 is a true and correct copy of the standard AdWords Agreement, dated May 23, 2006;

5. Attached hereto as Exhibit 4 is a true and correct copy of the complaint, dated June 19, 2006, filed by Carl Person against Google in *Person v. Google*, 06-CV-4683 (S.D.N.Y.);

6. Attached hereto as Exhibit 5 is a true and correct copy of Google's Memorandum of Law in Support of Its Motion to Dismiss, dated July 27, 2006, as filed in *Person v. Google*, 06-CV-4683 (S.D.N.Y.);

7. Attached hereto as Exhibit 6 is a true and correct copy of Google's Reply Memorandum of Law In Support of Its Motion to Dismiss, dated August 31, 2006, as filed in *Person v. Google*, 06-CV-4683 (S.D.N.Y.);

8. Attached hereto as Exhibit 7 is a true and correct copy (with exhibits) of the Declaration of David DiNucci in Support of Defendant's Motion to Dismiss, dated August 28, 2006, as filed in *Person v. Google*, 06-CV-4683 (S.D.N.Y.);

9. Attached hereto as Exhibit 8 is a true and correct copy of email correspondence, dated January 24-25, 2006, between Dan Savage of TradeComet and Tina Parris of Google;

10. Attached hereto as Exhibit 9 is a true and correct copy of an excerpt from the transcript of the March 17, 2009 status conference in above captioned matter;

11. Attached hereto as Exhibit 10 is a true and correct copy of excerpts from the transcript of the April 13, 2009 deposition of Heather Wilburn in the above captioned matter;

12. Attached hereto as Exhibit 11 is a true and correct copy (with exhibits) of the Declaration of Heather Wilburn, filed March 31, 2009 in the above captioned matter;

13. Attached hereto as Exhibit 12 is a true and correct copy (without exhibits) of the Declaration of Annie Hsu as filed in *Feldman v. Google*, No 06-cv-2540 (E.D. Pa.).

Date: April 15, 2009

s/ Daniel J. Howley
Daniel J. Howley

EXHIBIT 1

Google Inc. Advertising Program Terms

These Google Inc. Advertising Program Terms ("**Terms**") are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically ("**Customer**") and Google Inc. ("**Google**"). These Terms govern Customer's participation in Google's advertising program(s) ("**Program**") and, as applicable, any insertion orders or service agreements ("IO") executed by and between the parties and/or Customer's online management of any advertising campaigns. These Terms and any applicable IO are collectively referred to as the "**Agreement.**" Google and Customer hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html), and Google and Partner ad specification requirements (collectively, "**Policies**"). Policies may be modified at any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as "**Beta,**" "**Ad Experiment,**" or otherwise unsupported ("**Beta Features**"). To the fullest extent permitted by law, Beta Features are provided "**as is**" and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may modify ads to comply with any Policies.

2 **The Program.** Customer is solely responsible for all: (a) ad targeting options and keywords (collectively "**Targets**") and all ad content, ad information, and ad URLs ("**Creative**"), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively "Services"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any Customer accounts. Customer understands and agrees that ads may be placed on (y) any content or property provided by Google ("**Google Property**"), and, unless Customer opts out of such placement in the manner specified by Google, (z) any other content or property provided by a third party ("**Partner**") upon which Google places ads ("**Partner Property**"). Customer authorizes and consents to all such placements. With respect to AdWords online auction-based advertising, Google may send Customer an email notifying Customer it has 72 hours ("**Modification Period**") to modify keywords and settings as posted. The account (as modified by Customer, or if not modified, as initially posted) is deemed approved by Customer in all respects after the Modification Period. Customer agrees that all placements of Customer's ads shall conclusively be deemed to have been approved by Customer unless Customer produces contemporaneous documentary evidence showing that Customer disapproved such placements in the manner specified by Google. With respect to all other advertising, Customer must provide Google with all relevant Creative by the due date set forth in that Program's applicable frequently asked questions at www.google.com ("FAQ") or as otherwise communicated by Google. Customer grants Google permission to utilize an automated software program to retrieve and analyze websites associated with the Services for ad quality and serving purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google may modify any of its Programs at any time without liability. Google also may modify these Terms at any time without liability, and Customer's use of the Program after notice that these Terms have changed constitutes Customer's acceptance of the new Terms. Google or Partners may reject or remove any ad or Target for any or no reason.

3 **Cancellation.** Customer may cancel advertising online through Customer's account if online cancellation functionality is available, or, if not available, with prior written notice to Google, including without limitation electronic mail. AdWords online auction-based advertising cancelled online will cease serving shortly after cancellation. The cancellation of all other advertising may be subject to Program policies or Google's ability to re-schedule reserved inventory or cancel ads already in production. Cancelled ads may be published despite cancellation if cancellation of those ads occurs after any applicable commitment date as set forth in advance by the Partner or Google, in which case Customer must pay for those ads. Google may cancel immediately any IO, any of its Programs, or these Terms at any time with notice, in which case Customer will be responsible for any ads already run. Sections 1, 2, 3, 5, 6, 7, 8, and 9 will survive any expiration or termination of this Agreement.

4 **Prohibited Uses; License Grant; Representations and Warranties.** Customer shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions, inquiries, conversions, clicks or other actions; (b) use any automated means or form of scraping or data extraction to access, query or

otherwise collect Google advertising related information from any Program website or property except as expressly permitted by Google; or (c) advertise anything illegal or engage in any illegal or fraudulent business practice. Customer represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative, Services and Targets needed for Google and Partner to operate Programs (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of Creative or Targets) in connection with this Agreement ("Use"). Customer represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including without limitation intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

5 **Disclaimer and Limitation of Liability.** To the fullest extent permitted by law, GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, SATISFACTORY QUALITY, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. To the fullest extent permitted by law, Google disclaims all guarantees regarding positioning, levels, quality, or timing of: (i) costs per click; (ii) click through rates; (iii) availability and delivery of any impressions, Creative, or Targets on any Partner Property, Google Property, or section thereof; (iv) clicks; (v) conversions or other results for any ads or Targets; (vi) the accuracy of Partner data (e.g. reach, size of audience, demographics or other purported characteristics of audience); and (vii) the adjacency or placement of ads within a Program. Customer understands that third parties may generate impressions or clicks on Customer's ads for prohibited or improper purposes, and Customer accepts the risk of any such impressions and clicks. Customer's exclusive remedy, and Google's exclusive liability, for suspected invalid impressions or clicks is for Customer to make a claim for a refund in the form of advertising credits for Google Properties within the time period required under Section 7 below. Any refunds for suspected invalid impressions or clicks are within Google's sole discretion. EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND CUSTOMER'S BREACHES OF SECTION 1, TO THE FULLEST EXTENT PERMITTED BY LAW: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OR INTERRUPTION TO CUSTOMER'S BUSINESS) WHETHER IN CONTRACT, TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY CUSTOMER FOR THE AD GIVING RISE TO THE CLAIM. Except for payment obligations, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including without limitation to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

6 **Agency.** Customer represents and warrants that (a) it is authorized to act on behalf of and has bound to this Agreement any third party for which Customer advertises (a "**Principal**"), (b) as between Principal and Customer, the Principal owns any rights to Program Information in connection with those ads, and (c) Customer shall not disclose Principal's Program Information to any other party without Principal's consent.

7 **Payment.** Customer shall be responsible for all charges up to the amount of each IO, or as set in an online account, and shall pay all charges in U.S. Dollars or in such other currency as agreed to in writing by the parties. Unless agreed to by the parties in writing, Customer shall pay all charges in accordance with the payment terms in the applicable IO or Program FAQ. Late payments bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less). Charges are exclusive of taxes. Customer is responsible for paying (y) all taxes, government charges, and (z) reasonable expenses and attorneys fees Google incurs collecting late amounts. To the fullest extent permitted by law, Customer waives all claims relating to charges (including without limitation any claims for charges based on suspected invalid clicks) unless claimed within 60 days after the charge (this does not affect Customer's credit card issuer rights). Charges are solely based on Google's measurements for the applicable Program, unless otherwise agreed to in writing. To the fullest extent permitted by law, refunds (if any) are at the discretion of Google and only in the form of advertising credit for only Google Properties. Nothing in these Terms or an IO may obligate Google to extend credit to any party. Customer acknowledges and agrees that any credit card and related billing and payment information that Customer provides to Google may be shared by Google with

companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing Customer's account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

8 Indemnification. Customer shall indemnify and defend Google, its Partners, agents, affiliates, and licensors from any third party claim or liability (collectively, "Liabilities"), arising out of Use, Customer's Program use, Targets, Creative and Services and breach of the Agreement. Partners shall be deemed third party beneficiaries of the above Partner indemnity.

9 **Miscellaneous.** 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. The Agreement constitutes the entire and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof. No statements or promises have been relied upon in entering into this Agreement except as expressly set forth herein, and any conflicting or additional terms contained in any other documents (e.g. reference to a purchase order number) or oral discussions are void. Each party shall not disclose the terms or conditions of these Terms to any third party, except to its professional advisors under a strict duty of confidentiality or as necessary to comply with a government law, rule or regulation. Customer may grant approvals, permissions, extensions and consents by email, but any modifications by Customer to the Agreement must be made in a writing executed by both parties. Any notices to Google must be sent to Google Inc., Advertising Programs, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA, with a copy to Legal Department, via confirmed facsimile, with a copy sent via first class or air mail or overnight courier, and are deemed given upon receipt. A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention and only to the extent necessary to make them enforceable, and remaining provisions of the Agreement will remain in full effect. Customer may not assign any of its rights hereunder and any such attempt is void. Google and Customer and Google and Partners are not legal partners or agents, but are independent contractors. In the event that these Terms or a Program expire or is terminated, Google shall not be obligated to return any materials to Customer. Notice to Customer may be effected by sending an email to the email address specified in Customer's account, or by posting a message to Customer's account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in Customer's AdWords interface).

August 22, 2006

EXHIBIT 2

Google Inc. AdWords Program Terms

These Google Inc. AdWords Program Terms ("Terms") are entered into by you and Google Inc. ("Google") regarding the Google AdWords Program ("Program") as further described in the Program's frequently asked questions at https://adwords.google.com/support/bin/index.py?fulldump=1 (the "FAQs") (collectively, the "Agreement"). "You" or "you" means the party listed on the account you create and you represent you have the authority to agree to this Agreement for that party. You represent and warrant that you are authorized to act on behalf of, and bind to this Agreement, any third party for which you generate ads. You hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html). Policies may be modified any time. You shall direct only to Google communications regarding your ads on Partner Properties. Some Program features are identified as "Beta," "Ad Experiment," or otherwise unsupported ("Beta Features"). Beta Features are provided "as is" and at your option and risk. You shall not disclose to any third party any information from, existence of or access to Beta Features. Google may modify ads to comply with any Google Property or Partner Property policies.

2 **The Program.** You are solely responsible for all: (a) keywords and ad targeting options (collectively "Targets") and all ad content and ad URLs ("Creative"), whether generated by or for you; and (b) web sites proximately reachable from Creative URLs and your services and products (collectively "Services"). You shall protect your passwords and take full responsibility for your own, and third party, use of your accounts. Ads may be placed on (y) any content or property provided by Google ("Google Property"), and unless opted-out by you (z) any other content or property provided by a third party ("Partner") upon which Google places ads ("Partner Property"). Google or Partners may reject or remove any ad or Target for any or no reason. You may independently cancel online any campaign at any time (such cancellation is generally effective within 24 hours). Google may cancel immediately any IO, the Program or these Terms at any time with notice (additional notice is not required to cancel a reactivated account). Google may modify the 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. Sections 1, 2, 4, 5, 6 and 7 will survive any expiration or termination of this Agreement.

3 **Prohibited Uses.** You shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions or clicks; or (b) advertise anything illegal or engage in any illegal or fraudulent business practice in any state or country where your ad is displayed. You represent and warrant that (x) all your information is correct and current; (y) you hold and grant Google and Partners all rights to copy, distribute and display your ads and Targets ("Use"); and (z) such Use and websites linked from your ads (including services or products therein) will not violate or encourage violation of any applicable laws. Violation of these policies may result in immediate termination of this Agreement or your account without notice and may subject you to legal penalties and consequences.

4 **Disclaimer and Limitation of Liability.** GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. Google disclaims all guarantees regarding positioning or the levels or timing of: (i) costs per click, (ii) click through rates, (iii) delivery of any impressions on any Partner Property or Google Property or sections of such properties, (iv) clicks or (v) conversions for any ads or Targets. EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND YOUR BREACHES OF SECTION 1, TO THE FULLEST EXTENT PERMITTED BY LAW: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, PUNITIVE, OR OTHER DAMAGES WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY YOU FOR THE AD GIVING RISE TO THE CLAIM. Except for payment, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including but not limited to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

5 **Payment.** You shall be charged based on actual clicks or other billing methods you may choose online (e.g. cost per impression). You shall pay all charges in the currency selected by you via your online AdWords account, or in such other currency as is agreed to in writing by the parties. Charges are exclusive of taxes. You are responsible for paying (y) all taxes and government charges, and (z) reasonable expenses and attorney fees Google incurs collecting late amounts. You waive all claims relating to charges unless claimed within 60 days after the charge (this does not affect your credit card issuer rights). Charges are solely based on Google's click measurements. Refunds (if any) are at the discretion of Google and only in the form of advertising credit for Google Properties. You acknowledge and agree that any credit card and related billing and payment information that you provide to Google may be shared by Google with companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing your account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

6 **Indemnification.** You shall indemnify and defend Google, its Partners, its agents, affiliates, and licensors from any third party claim or liability (including without limitation reasonable legal fees) arising out of your Program use, Targets, Creative and Services and breach of the Agreement.

7 **Miscellaneous.** The 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. The Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. You may grant approvals, permissions and consents by email, but any modifications by you to the Agreement must be made in a writing (not including email) executed by both parties. Any notices to Google must be sent to: Google Inc., AdWords Program, 1600 Amphitheatre Parkway, Mountain View, CA 94043, USA, with a copy to Legal Department, via first class or air mail or overnight courier, and are deemed given upon receipt. Notice to you may be effected by sending email to the email address specified in your account, or by posting a message to your account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in your AdWords interface). A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention, and remaining provisions of the Agreement will remain in full effect. You may not assign any of your rights hereunder and any such attempt is void. Google and you and Google and Partners are not legal partners or agents, but are independent contractors.

April 19, 2005

EXHIBIT 3

Google Inc. Advertising Program Terms

These Google Inc. Advertising Program Terms **("Terms")** are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically **("Customer")** and Google Inc. **("Google")**. These Terms govern Google's advertising program(s) **("Program")** as further described in the applicable Program's frequently asked questions at www.google.com **(the "FAQs")** and, as applicable, Customer's participation in any such Program(s), Customer's online management of any advertising campaigns **("Online Management")** and/or any insertion orders or service agreements **("IO")** executed by and between the parties (together the **"Agreement"**). Google and Customer hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner ad specification requirements and policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html) (collectively, **"Policies"**). Policies may be modified any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as **"Beta," "Ad Experiment,"** or otherwise unsupported **("Beta Features")**. To the fullest extent permitted by law, Beta Features are provided **"as is"** and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may modify ads to comply with any Policies.

2 **The Program.** Customer is solely responsible for all: (a) ad targeting options and keywords (collectively **"Targets"**) and all ad content, ad information, and ad URLs **("Creative")**, whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively "Services"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any Customer accounts. Ads may be placed on (y) any content or property provided by Google **("Google Property")**, and unless opted-out by Customer (z) any other content or property provided by a third party **("Partner")** upon which Google places ads **("Partner Property")**. With respect to AdWords online auction-based advertising, Google may send Customer an email notifying Customer it has 72 hours **("Modification Period")** to modify keywords and settings as posted. The account (as modified by Customer otherwise as initially posted) is deemed approved by Customer after the Modification Period, and Google is only liable to Customer for discrepancies if Customer can certify by contemporaneous documentary evidence that Google posted ads not approved by Customer. With respect to all other advertising, Customer must provide Google with all relevant Creative by the due date set forth in that advertising Program's applicable FAQ or as otherwise communicated by Google. Customer grants Google permission to utilize an automated software program to retrieve and analyze websites associated with the Services for ad quality and serving purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google may modify the 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. Google or Partners may reject or remove any ad or Target for any or no reason.

3 **Cancellation.** Customer may independently cancel advertising itself online through Customer's account, if any, or, if such online cancellation functionality is not available, with prior written notice to Google, including electronic mail. AdWords online auction-based advertising cancelled online will cease serving shortly after cancellation. All other advertising may be subject to Google's ability to re-schedule reserved inventory or cancel advertisements already in production. Cancelled advertisements may be published despite cancellation if cancellation of those ads occurs after any applicable commitment date as set forth in advance by the Partner or Google, in which case Customer must pay for those ads. Google may cancel immediately any IO, any of its advertising Programs, or these Terms at any time with notice, in which case Customer will be responsible for any ads already run. Google may modify any of its advertising Programs at any time without liability. Sections 1, 2, 3, 5, 6, 7, and 8 will survive any expiration or termination of this Agreement.

4 **Prohibited Uses; License Grant; Representations and Warranties.** Customer shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions, inquiries, conversions, clicks or other actions; (b) use any automated means or form of scraping or data extraction to access, query or otherwise collect Google advertising related information from any AdWords website or property except as expressly permitted by Google; or (c) advertise anything illegal or engage in any illegal or fraudulent business practice. Customer represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative, Services and Targets needed for Google and Partner to operate Google's advertising programs for Customer (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of Creative or Targets) in connection with this Agreement **("Use")**. Customer represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

5 **Disclaimer and Limitation of Liability.** To the fullest extent permitted by law, GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, SATISFACTORY QUALITY, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. To the fullest extent permitted by law, Google disclaims all guarantees regarding positioning or the levels or timing of: (i) costs per click, (ii) click through rates, (iii) availability and delivery of any impressions, Creative, or Targets on any Partner Property, Google Property, or section thereof , (iv) clicks,(v) conversions or other results for any ads or Targets (vi) the accuracy of Partner data (e.g. reach, size of audience, demographics or other purported characteristics of audience), and (vii) the adjacency or placement of

advertisements within a Program. EXCEPT FOR INDEMNIFICATION AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND CUSTOMER'S BREACHES OF SECTION 1, to the fullest extent permitted by law: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OR INTERRUPTION TO CUSTOMER'S BUSINESS) WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY CUSTOMER FOR THE AD GIVING RISE TO THE CLAIM. Except for payment obligations, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including but not limited to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

6 Agency. Customer represents and warrants that (a) it is authorized to act on behalf of and has bound to this Agreement any third party for which Customer advertises (a "Principal"), (b) as between Principals and Customer, the Principal owns any rights to Program information in connection with those advertisements, and (c) Customer shall not disclose Principal's Program information to any other party without Principal's consent.

7 Payment. Customer shall be responsible for all charges up to the amount of each IO, or as set in an online account, and shall pay all charges in U.S. Dollars or in such other currency as agreed to in writing by the parties. Unless agreed to by the parties in writing, Customer shall pay all charges in accordance with the applicable IO or Program FAQ. Late payments bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less). Charges are exclusive of taxes. Customer is responsible for paying (y) all taxes, government charges, and (z) reasonable expenses and attorneys fees Google incurs collecting late amounts. To the fullest extent permitted by law, Customer waives all claims relating to charges unless claimed within 60 days after the charge (this does not affect Customer's credit card issuer rights). Charges are solely based on Google's measurements for the applicable Program, unless otherwise agreed in writing. To the fullest extent permitted by law, refunds (if any) are at the discretion of Google and only in the form of advertising credit for only Google Properties. Nothing in these Terms or an IO may obligate Google to extend credit to any party. Customer acknowledges and agrees that any credit card and related billing and payment information that Customer provides to Google may be shared by Google with companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing Customer's account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

8 Indemnification. Customer shall indemnify and defend Google, its Partners, agents, affiliates, and licensors from any third party claim or liability (collectively, "Liabilities"), arising out of Use, Customer's Program use, Targets, Creative and Services and breach of the Agreement. Partners shall be deemed third party beneficiaries of the above Partner indemnity.

9 Miscellaneous. The 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. The Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any other applicable agreements, terms and conditions applicable to the subject matter hereof. Any conflicting or additional terms contained in additional documents (e.g. reference to a purchase order number) or oral discussions are void. Each party shall not disclose the terms or conditions of these Terms to any third party, except to its professional advisors under a strict duty of confidentiality or as necessary to comply with a government law, rule or regulation. Customer may grant approvals, permissions, extensions and consents by email, but any modifications by Customer to the Agreement must be made in a writing executed by both parties. Any notices to Google must be sent to Google Inc., Advertising Programs, 1600 Amphitheatre Parkway, Mountain View, CA 94043 , USA, with a copy to Legal Department, via confirmed facsimile, with a copy sent via first class or air mail or overnight courier, and are deemed given upon receipt. A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention and only to the extent necessary to make them enforceable, and remaining provisions of the Agreement will remain in full effect. Customer may not assign any of its rights hereunder and any such attempt is void. Google and Customer and Google and Partners are not legal partners or agents, but are independent contractors. In the event that these Terms or an Advertising Program expire or is terminated, Google shall not be obligated to return any materials to Customer. Notice to Customer may be effected by sending email to the email address specified in Customer's account, or by posting a message to Customer's account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in your AdWords interface).

May 23, 2006

EXHIBIT 4

JUDGE PATTERSON

06 CV 4685

GO_Compl.Doc 6/18/06F01

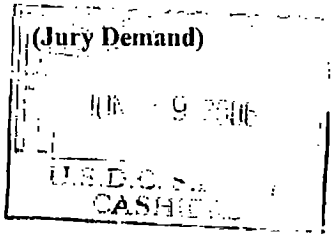
ECM FILING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL E. PERSON, Plaintiff, -against- GOOGLE INC., Defendant.	Index No.

COMPLAINT

(Jury Demand)



COUNT I

[Violation of Sherman Act, § 2 - Monopolizing, Attempting to Monopolize, and Combining or Conspiring to Monopolize the Keyword-Targeted Internet Advertising Market]

Plaintiff, an attorney acting *pro se*, as and for his complaint, respectfully alleges:

Jurisdiction and Venue

1. This controversy involves §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2); §§ 1, 4, 4B, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15(a). 15b, 22 and 26); and 28 U.S.C. § 1337.

2. This Court has original jurisdiction over the antitrust claims under 28 U.S.C. § 1337(a) and 15 U.S.C. § 15(a), and supplemental jurisdiction as to the state claims alleged in Count III through Count VI, as hereinafter more fully appears. Also, jurisdiction for the state claims exist under 28 U.S.C. § 1332, with diversity of citizenship between the parties, and the amount in controversy exceeding $75,000.

3. The defendant is doing business (and, alternatively, "transacting business") in New York State and in the Southern District of New York, which gives this Court personal jurisdiction over the defendant, and venue in the Southern District of New York is appropriate under 15 U.S.C. §§ 15(a) and 22, and 28 U.S.C. § 1391(b).

Plaintiff

4. Plaintiff, **Carl E. Person** ("Person" or the "Plaintiff"). is an attorney and businessperson residing in New York, New York, with his offices at 325 W. 45th Street. New York, NY 10036-3803.

5. Person is over age 65 (a condition for application of New York General Business Law Section 349-c).

6. Person has used Google's AdWords to (a) market each of three books written and published by Person in 2004: (b) market various websites written and owned by Person. including websites designed to create legal business for Person and to sell books written and published by Person; (c) to create permissive email mailing lists as a marketing medium for the foregoing and other activities by Person: and (d) to market his candidacy for elective office.

7. Person seeks to be elected as Attorney General of New York State during the elections to be held in November, 2006. On May 20, 2006. Person received 40% of the Green Party nominating convention vote for the Attorney General nomination.

8. Person's activities as an attorney, businessperson and candidate for statewide public office in New York have made him (since November, 2003) a customer (no. 894-537-6549) of defendant Google Inc. as to Google's "AdWords" advertising services offered by Google in its website, at www.adwords.google.com.

Defendant

9. Defendant, **Google Inc.** ("Google"), is a Delaware corporation incorporated in 2002 with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043.

10. Google is doing business in New York, with a place of business in the Southern District of New York at 437 Fifth Avenue - 8th Floor. New York, New York 10016; and, alternatively. Google is "transacting business" in New York State and in the Southern District of New York.

11. A description of Google's business, as described at page 57 (under "Business - Overview") in its Form S-1 Registration Statement filed with the Securities and Exchange Commission on April 29, 2004, follows:

> Google is a global technology leader focused on improving the ways people connect with information. Our innovations in web search and advertising have made our web site a top Internet destination and our brand one of the most recognized in the world. We maintain the world's largest online index of web sites and other content, and we make this information freely available to anyone with an Internet connection. Our automated search technology helps people obtain nearly instant access to relevant information from our vast online index.
>
> We generate revenue by delivering relevant, cost-effective online advertising. Businesses use our AdWords program to promote their products and services with targeted advertising. In addition, the thousands of third-party web sites that comprise our Google Network use our Google AdSense program to deliver relevant ads that generate revenue and enhance the user experience.

Summary

12. Google has created a monopoly in the United States market for keyword-targeted Internet advertising (with Pay-Per-Click or "PPC" pricing) and is unlawfully using its monopoly power, through predatory pricing practices, in violation of §§ 1-2 of the Sherman Act, 15 U.S.C.A. §§ 1-2, by

(i) refusing to accept advertising by the Plaintiff and other small-business advertisers unless they pay usually 5 to 100 times or more per click than monopolizing and other large companies are charged per click by Google when bidding for use of the same keyword;

(ii) giving special deals to monopolizing and other major advertisers at reduced advertising rates without announcing or making available any of these special deals to the Plaintiff or other small-business advertisers (including the use of some of the removed keywords, not available to the Plaintiff or other small-business advertisers).

(iii) denying the Plaintiff and other small-business advertisers the right to use AdWords as to advertisements containing wholly lawful copy but not meeting Google's impersonal, automated review procedure that requires advertisers to rewrite, and often adversely change, their perfectly lawful copy; and

(iiv) removing a high percentage of all English words from the list of available keywords to force Plaintiff and other small-business advertisers to compete for and use the higher-cost keywords being used by monopolizing and other large companies: such companies are able to bid higher amounts because of their more profitable use of the per-click lead and their ability through their name and trademarks to obtain a higher clickthrough rate ("CTR").

13.. Google's states that AdWords pricing is derived through an "auction process" [Source: https://adwords.google.com/select/afc/pricing.html under "Bidding" heading] but such description is fraudulent because it fails to tell advertisers that most advertisers with the highest bid per click for a specific keyword are rejected by Google's secret bid system "analyzing your site content. the content of the page displaying your ad, and other relevant factors" with favored advertisers allowed to advertise at substantially lower prices per click than the rejected advertisers were willing to pay.

13A.. Google's evaluation process, according to Google [Source: https://adwords.google.com/select/afc/pricing.html under "Calculating Price" heading] winds up giving the lowest price - of 1 cent per click - to the last ad (herein 5th ad) displayed by Google. even if the Plaintiff or other small business advertiser bid 100 times more than any of the 5 advertisers selected by Google. The result is that Google's "auctions" are a multi-billion dollar fraud being practiced upon advertisers. Google investors. and the public.

13B.. In effect. Google is selling seats on the same Internet bus to hundreds of major corporate advertisers for 1 cent per seat and to the Plaintiff and an estimated one million other small-business advertisers at $1.00 per seat (if willing to sell a ticket at all) - fully aware that the major corporations are to do business at the end of the bus ride 100 times more profitable than the business hoped to be done by the Plaintiff and other small-business advertisers.

14. A 1-cent click for one of Google's college advertisers, for example, could produce revenues to the college of $120.000 (or $30.000 per year for 4 years). whereas a $1.00 click for a small business advertiser selling a $3.00 gasoline tank cap could produce only losses, using Google's discriminatory, predatory. monopolistic pricing system. With 2.700 colleges and universities in the U.S., the

annual college advertising potential for Google, when colleges increase their bid for desired keywords, is many multiples of $194,400,000 ($72,000 x 2,700).

BACKGROUND - ADWORDS AND PAY-PER-CLICK ADVERTISING

15. Overture Services, Inc., founded in 1997, pioneered "Pay-Per-Click" or "PPC" Internet advertising. Overture was acquired by Yahoo in July, 2003, and in 2005 Overture's name was changed to Yahoo! Search Marketing Solutions. Yahoo's PPC website is at http://searchmarketing.yahoo.com/. Yahoo paid $1.52 billion (after deducting Overture's cash position) for Overture.

16. As of the Overture acquisition in July. 2003 (closing a few months later), upon information and belief, Yahoo had a 70% or dominant or monopoly interest in the developing United States market and New York submarket for PPC or keyword-targeted Internet advertising.

17. Google created its initial AdWords service in 2000 (starting off by managing the ad campaigns for its customers) and then added software to allow customers to manage their own campaigns; and in 2005 AdWords extended its advertising to targeted websites.

18. By 2005, AdWords became very complicated for advertisers to handle directly because of numerous tracking and analytical tools, options and "standards" requirements which caused a substantial number of consultants or advertising agencies to enter the field to manage the AdWords campaigns for AdWords advertisers.

19. Somewhere along the way, AdWords was able to start overcharging its smaller customers such as Plaintiff by imposing requirements that increased the cost to Plaintiff and other small-business advertisers and made advertising by them unprofitable, while at the same time reducing the cost to high-volume advertisers (generally large corporations) to increase their profitability and use of AdWords.

20. Google's main source of revenue comes from its AdWords business, in which Plaintiff and other advertisers are charged on a Pay Per Click (or PPC) basis each time a searcher using the Google search engine (and using in the search term a keyword designated by a Google advertiser) clicks on the ad (hyperlink) and jumps to the advertiser's website.

21. Keyword-targeted Internet advertising was revolutionary for advertisers because it allowed advertisers to wait until potential customers were seeking information on the advertiser's product or service before the advertiser had its advertisement displayed, and further (as to PPC advertising) that the advertiser only paid if the website searcher clicked on the ad and jumped to the advertiser's website. AdWords and Overture/Yahoo enabled advertisers to reach potential customers at the precise moment of their demonstrated interest and charge the advertiser only if the searcher clicked on the advertiser's ad. in comparison to newspaper, radio, television, cable, magazine and billboard advertising in which millions of impressions are made in the hope that 1 out of a 1,000 may be interested enough to respond to the ad.

22.. No other advertising medium provided such a targeted audience, and Yahoo/Overture, soon followed by Google's AdWords became near instant financial successes, with one small college, for example, spending $6,000 per month (or $72,000 per year) with AdWords.

23. The Google and Yahoo targeted ads (when displayed in the right sidebar) are designated as "sponsored" and consist of the 1st-line heading not exceeding 25 characters (which usually contains a Keyword), the 2nd and 3rd lines of text (not exceeding 70 characters) explaining more about the offered service or product: and the 4th line, which discloses the link to the advertiser's website or "landing page" (built into the 1st-line heading). Clicking on the 1st line of the ad enables the Google or Yahoo searcher to go to the advertiser's website to obtain more information about the offered product or service. The same ad, when appearing above the searcher's displayed results, appears as a 3-line quasi-banner type ad, for which positioning and appearance the advertiser pays a per-click premium.

24. Google advertised 5 cents as its minimum per-click price, available to the winners of the continuing Google auction for any given keyword, and a $50 per-click maximum price, and during 2005 started advertising the minimum per-click price to be 1 cent and the maximum as $100.

GOOGLE'S PREDATORY ACTIVITIES - PART I

25. Upon information and belief, Google has a hidden set of rules and software instructions that deny the Plaintiff and other small-business users the ability to find and use any keywords at the stated

minimum price or any price 2. 3. 4 or even 5 times the minimum price. These minimum prices are reserved for Google's favored, high-volume advertisers, such as eBay and the other alleged Co-Conspirators.

26. Plaintiff has tried without success to advertise using various keywords at the minimum price set by Google and at multiples of 2, 3, 4, 5 and up to 100 times the minimum (1-cent or 5-cent) minimum price.

27. It is the click on the advertiser's ad by the Google searcher from and at which Google earns its fee from the advertiser through Pay-Per-Click advertising. The advertiser only pays for the clicks, and not for the many more instances (of ad impressions) in which the Google searcher fails to click on the advertiser's ad. It is this per-click method of pricing (instead of charging by the number of impressions) that enables Google to impose discriminatory pricing on the Plaintiff and other small-business advertisers.

28. Google is requiring Plaintiff and other small-business advertisers to pay as much as 100 times or more per click than the amount per click paid by monopolizing and other large established advertisers who by their established name or trademark are able to get a substantially higher rate of clicks (or "clickthrough rate" or "CTR") for the same number of times their ads are served up to the Google searchers.

29. Google offers no plan by which Plaintiff or other small-business advertiser can rent or use keywords at a fixed price (e.g. for 1.000 impressions), regardless of the type of business or regardless of the results. In other words, Google is requiring each of its advertisers to be as successful as a monopolist, and charging them substantially more (or denying them use of AdWords) if not.

30. Google is extending its market monopoly in this way to every aspect of business in the United States and making existing monopolies larger, turning potential monopolies into monopolies, and preventing small and new businesses from competing.

30A. AdWords has monopoly power for a variety of distinguishing reasons alleged herein, with the result that Yahoo and Microsoft/MSN keyword-targeted Internet advertising are poor, undesirable substitutes for AdWords.

31.. In 2002, Google let AdWords advertisers bid on the price per click they were willing to pay for specific keywords. Later, Google required small-business advertisers to pay more per click than established-business advertisers to be able to place their ads with the selected keywords. Then, in August, 2005, Google created its "Quality" analysis to require Plaintiff and other small businesses to pay often 5, 10, 25 or 100 times more per click than many high-volume advertisers (without any cost justification). Google's incomplete explanation of its Quality requirement is (as of 6/14/06):

> **Quality Score**
>
> This is the basis for measuring the quality of your keyword and determining your minimum bid. Quality Score is determined by your keyword's clickthrough rate (CTR) on Google, relevance of your ad text, historical keyword performance on Google, the quality of your ad's landing page, and other relevancy factors. [https://adwords.google.com/support/bin/answer.py?answer=21388]
>
> [And]
>
> A new addition to the Quality Score
>
> In August, we introduced the Quality Score along with the launch of quality-based minimum bids, letting you know that we evaluate many factors, such as your ad text and clickthrough rate (CTR) to determine the minimum bid for your keyword. Today, we started incorporating a new factor into the Quality Score -- the landing page -- which will look at the content and layout of the pages linked from your ads.
>
> Why are we doing this? Simply stated, we always aim to improve our users' experience so that these users (your potential customers) will continue to trust and value AdWords ads. Have you ever searched on a keyword, found an ad that seemed to be exactly what you wanted, and then clicked on it only to find a site that had little to do with what you were searching for? It's not a great experience.
>
> Incorporating landing page assessment into the Quality Score will help us improve the overall advertising experience for users, advertisers and partners by increasing the quality of the sites we present in our ad results.
>
> Advertisers who are providing robust and relevant content will see little change. However, for those who are providing a less positive user experience, the Quality Score may decrease and in turn increase the minimum bid required for the keyword to run. To help define site quality, we've created a general set of website design tips and guidelines that should help you evaluate and optimize your site.
>
> So, take a look at these guidelines and remember that the more valuable and relevant your site is to your user, the more effective your advertising will be -- and the better your chance of converting a click to a customer.
>
> Posted by Sarah, *Inside AdWords* crew
>
> 12/08/2005 02:41:00 PM -

32. By this 12/08/05 announcement, Google then started to charge Plaintiff and its other small-business advertisers an additional amount per click based on apparent human evaluation of the website "landing page" created by the advertiser and used in the advertiser's AdWords ad, turning Google's pricing scheme into a non-auction pricing bazaar in which there are no standards to be able to determine if any specific advertiser is paying the correct price for the AdWords advertising, and leaving Google free to charge any price it wants according to the pressure that a major advertiser brings to bear upon Google (to suppress competition for desirable keywords); Plaintiff and one millions other small-business advertisers have little sway with Google, which clearly doesn't even want the vast majority of our potential AdWords advertising and has established its predatory pricing scheme to intentionally discourage Plaintiff and other small-business users from using AdWords.

33. Without consulting Plaintiff or other small-business advertisers. Google turns off most of the ads and labels them as "inactive", having the effect of upsetting the advertiser's AdWords marketing program or refuses to allow ads to be placed for a variety of reasons, with the same discouraging effect.

34.. Several days after Google changed to its "Quality" and "Landing Page" method of determining keyword price, an advertising consultant for small-business Google advertisers posted a complaint, saying:

> Google continue to stun me with their lack of forward focus. The new Adwords system where a keyword is 'active' or 'inactive' is yet another money spinner for them that will send customers fleeing elsewhere.
>
> I understand that they want to ensure that adverts are highly relevant when people type search phrases but they have so got it wrong with what they've set up this time.
>
> The campaigns I run for clients are now swamped with inactive keyword phrases and Google are expecting me to raise the cost per click in line with what THEY think is right. * * *
>
> One client has an advert group of only 4 keywords, all of which refer to the company name or the url, and these are highly visible in the advert that appears. And yet, Google have made them inactive, asking for an extra 1p to make them active. Those keyword phrases have no competitors in Adwords and were previously happy at 4p per click, so why the change? The advert text is highly targeted to those keywords and so there is no excuse for them to be made inactive.
>
> Another example is a client who wanted his company site to appear in an advert when someone types his name - this previously worked fine. However, Google now wants 55p per click for the keyword to be made active, presumably because his name isn't mentioned in the advert text. However, if you search on his name in Google, only two sponsored results appear and they're both for Ebay affiliates and are highly non-relevant. **So, EVEN if he was positioned above those, it would have previously have cost 6p per click so why is it that Google now want to charge 55p per click when there is no competition?** [Emphasis supplied.]

When I started using Adwords the system let us get away with keywords that weren't totally linked to advert text and I accepted that if that keyword didn't have a good enough CTR by 1000 impressions, it would be penalised - I had no problem with that. But now, lets see what happens under the new system ... I have a keyword phrase of 'manual handling rules' that would produce advert text of: "Risk Assessment" – "We help you to assess business risks before they become problems" * * *

So, what do Google do? They instantly make it inactive and want me to pay 11p per click to make it active. If you type 'manual handling rules' into Google you'll see that there is very little competition in sponsored search so how can Google justify me having to pay so much per click?

To me, it's really clear what Google are doing - they want to push everyone towards higher click costs and to destroy those who use niche keyword phrases. I used to have clients that got good leads through niche keyword phrases, purely because no-one else optimised for them but now Google are playing God and deciding on what can and can't be displayed and for what cost.

My opinion? Small businesses won't want to play in this Google sandbox anymore and will either go to other pay per click advertisers, or will instead focus on traditional search engine optimisation - neither of which will be good for Googles profits.

The vast majority of businesses in the world are small businesses and with my clients alone I spend thousands a month on their campaign clicks. I am utterly convinced that one year ahead, Google is going to be in a pretty poor state and its market share significantly reduced.

I used to love Google, now they just make me sick. * * *

[Source: http://www.highrankings.com/forum/index.php?showtopic=16253&hl=]

Co-Conspirators

35. Upon information and belief, Google has conspired with the following persons (hereinafter, the "**Co-Conspirators**") in the creation, maintenance, growth and misuse of Google's monopoly in the United States market for keyword-targeted Internet advertising (with Pay-Per-Click pricing), who are receiving the lowest prices per click for the respective keywords being used by them in their AdWords advertising:

A... eBay, Inc., which corporation is a competitor of Google in a variety of markets including various advertising markets; upon information and belief, eBay is a monopolist in the market Internet advertising market defined by eBay's online activities (the heart of which is an auction and payment system for owners of property to offer and sell their property in a single vast, organized market); eBay, upon information and belief, is the primary advertiser of last resort for Google's AdWords advertising system, and the advertiser with the lowest price per click and the only apparent advertiser for many of the estimated tens

of thousands of keywords that Google does not make available to the Plaintiff or other small-business advertisers:

B.. Others, including Schwab & Co., John Hancock Life Insurance Co., Lexus, Honda, Travelocity, Orbitz, Priceline, Expedia, Circuit City, Amazon, PriceGrabber, AOLShopping, Toshiba Direct, BestBuy;

C. Others (to be identified) having a high volume of AdWords advertising who Google allows to advertise at the lowest available PPC rates: and

D.. Others not presently known at this time but will be identified as Co-Conspirators during discovery.

36.. Upon information and belief, starting in 2003 or 2004 and continuing up to the present, Google has initiated communications and negotiations with various major AdWords advertisers, including but not limited to monopolist eBay, to discuss Google's plan to change its AdWords pricing from straight auction to the highest bidder per click to the present structure, as alleged in ¶¶ 12, 13, 13A, 19, 25 and 31-32 above.

37.. The other predatory practices alleged in ¶¶ 25-34 above and 45-70 below also increased the price per click to the Plaintiff and other small business advertisers.

38.. Upon information and belief, Google told the major advertisers (directly or by their reading of Google's new 'Quality" and "Landing Page" requirements) that such increase in price to the Plaintiff and other small business advertisers would drive them from the market and create less competition for the keywords being used by the major advertisers, making their advertising more profitable as a result.

39. Upon information and belief, Google was seeking to increase its sales to the major advertisers through these tactics, and reduce if not eliminate the profitable use of AdWords by the Plaintiff and other small businesses.

40. Upon information and belief, monopolist eBay and other major advertisers agreed to Google's new pricing plan and agreed to hone their own advertising along the lines suggested by Google to obtain a higher clickthrough rate, greater profitability for the major advertiser, and even more use by the major advertisers of Google's AdWords.

Relevant Period

41. The relevant period (the "Relevant Period") for the claims alleged herein is:

A. The 4-year period preceding the filing of this complaint (during June, 2006) as to all claims under the Sherman Act, 15 U.S.C.A. §§ 1, et seq.; the Donnelly Act, § 340 of the New York General Business Law; and the California Cartwright Act, Cal. Bus. & Prof. § 16726, et seq.; and

B. The 3-year period preceding the filing of this complaint as to all claims under §§ 349, 349-c and 350 of the New York General Business Law [CPLR 214(2)].

The Relevant Product and Geographic Markets

42. The **relevant geographic market** is the United States, with a relevant geographic submarket consisting of New York State.

43. **The relevant service market** is "keyword-targeted Internet advertising" in which advertisers pay to have their advertisements displayed (alone or among an ordered group of ads identified as such) near the search results obtained from Internet search engine (such as the search engines of Google and Yahoo) using the keyword(s) selected by the advertiser.

44. The displayed ads, usually containing one or more of the search terms or keyword(s) in the 1st line of the 4-line ad, are hoped to be of interest to the searcher and that the searcher will want to obtain more information by clicking on one or more of the displayed ads.

GOOGLE'S PREDATORY ACTIVITIES - PART II

Google's Price-Per-Click Is Set by the Highest Price a Successful Business Is Willing to Pay for a Click

45. Google charges the advertiser only when a user clicks on the ad, which means that the advertiser does not pay directly for the times that a searcher fails to click on the advertiser's ad.

46. Google, on the other hand, increases the Pay-Per-Click price to advertisers. such as the Plaintiff and other small-business advertisers. by adding to the per-click price demanded by Google for each time a searcher fails to click on the advertiser's ad.

47. The effect is that large, well known companies with strong brands are able to obtain a higher percentage of clicks because of their dominant, often monopolistic. market position. whereas the Plaintiff and other small-business advertisers start off being unable to obtain the same high percentage of clicks. and find that Google then denies them the opportunity to use the keyword in any Google AdWords advertising unless the Plaintiff or the other small-business advertiser agrees to pay 5, 10, 50, or even 100 times or more than the per-click price paid being the well-known. large corporate advertiser for the same keyword.

48. A successful business (sometimes being or becoming a monopoly) is able to obtain a higher percentage of clicks per 1.000 opportunities (i.e., advertising impressions) than a new, unknown business trying to establish itself or a new product or service. Google requires the unknown business to produce as much income for all of the displayed ads (ad impressions) as the successful business pays Google for the clicks its obtains from the 1.000 impressions. This is accomplished by requiring the small business or Plaintiff to pay many times more per click than the per-click price paid by the large. well-known successful advertiser. and makes it unprofitable for the Plaintiff or the other small-business advertisers to use AdWords.

49. The effect is that AdWords has become an advertising boon for the large. successful. monopolizing companies, without having to compete significantly with smaller competitors. The vast majority of smaller competitors is unable to use AdWords economically. because of Google's above-described pricing policy. as well as for other illegal practices of Google. to be described under various subheadings below.

50. This pricing scheme of Google makes it impossible for the Plaintiff and an estimated 1 million other small-business advertisers to use AdWords at all, or profitably. because the cost of the click far exceeds the value of such click to the Plaintiff or other small-business advertiser.

51.. Upon information and belief, one million small business owners find themselves in the same position as the Plaintiff, unable to make profitable use of AdWords because of the various restrictions imposed upon them and the Plaintiff, including a substantial increase in the per-click cost over and above the per-click cost to the large corporate advertisers favored by Google.

52. Google is forcing the Plaintiff and other small-business advertisers to be as profitable as Google's monopolizing and other large corporate customers, or pay an extremely large penalty per click if they want to use this new advertising medium in competition with the major corporations using AdWords.

53. This activity of Google constitutes unlawful. predatory pricing in violation of Sections 1-2 of the Sherman Act, 15 U.S.C.A. §§ 1-2.

Google Refuses to Let Plaintiff and Others Small Businesses Use Keywords Having Little or No Demand by the Large, Monopolizing Advertisers

54. The Plaintiff, through trial and error, found about 25 English words that when used in a Google search had no Google ads appearing.

55. Plaintiff then immediately tried to use those words as keywords for Plaintiff's advertising. but was advised by software response that the words were not available for keyword use.

56. Plaintiff's purpose of finding unwanted words was to be able to avoid having to enter into an auction with anyone for keywords. Plaintiff was willing to use almost any keywords as long as the Plaintiff could obtain their use for the minimum stated Google fee of.5 cents (later 1 cent) per click.

57. Plaintiff found out that Google's stated minimum fee in its auction pricing system does not apply when only one person seeks to use a given keyword. Instead of letting the Plaintiff use the unwanted keyword for 5 cents (or 1 cent) per click, Google stated that the Plaintiff could not use the word at all, and forced the Plaintiff back into an auction with major corporations for the use of keywords of interest to them. with the resulting 5 to 100 times the cost per click that Google forces Plaintiff and other small businesses to pay.

58. This practice of pulling perfectly good English words off of the keywords market to require the Plaintiff and other small businesses to bid for the keywords wanted by the large corporate. high-

volume AdWords advertisers is another predatory practice by Google, and misuse of its monopoly of the market for keyword-targeted Internet advertising.

Google Has Special Deals and Special Pricing with Monopolists and Other Major Advertisers But Does Not Notify Plaintiff or Other Small Businesses About Such Special Deals or Permit the Plaintiff to Participate in Such Deals

59. The Plaintiff noticed that some keywords with no use (beyond 1-2 advertisers) had a surprising presence of one advertiser, eBay, owner of another advertising monopoly. Upon information and belief, this can only be explained by a special deal to make eBay the Google advertiser of last resort (at a bargain price per click, without auction) when Google's discriminatory system (dedicated to chasing away small business advertisers) apparently failed to produce any advertisers (or more than one bona fide advertiser) interested in bidding for the keywords.

60. Google is favoring advertiser eBay by letting eBay have bargain per-click rates, and to do so for keywords where Google has suppressed the competition by not making the keywords available to the Plaintiff or other small-business advertisers.

61. This practice of rigging the auction market (by not letting Plaintiff and other small businesses bid for the relatively unwanted keywords) but giving them to favored advertiser and monopolist eBay for an assumed price per click as low as 1 cent (Google's advertised lowest price per click, or even lower) is another predatory practice by Google, and misuse of its monopoly of the market for keyword-targeted Internet advertising.

Google Prevents Plaintiff and Others from Using Keywords Profitably by Not Allowing Them to Use Lawful Advertising Copy Written by the Plaintiff/Others, and Instead to Use Copy Dictated by Google

62. Google places a series of copy restrictions on advertisers that prevent the Plaintiff and other small-business advertisers from using lawful copy written by them and forces the Plaintiff and others to use the changes required by Google.

63. These copy requirements by Google are destructive of the efforts by the Plaintiff and other small businesses to effectively use AdWords, eliminating much of the work done to create AdWords

campaigns. and slow down the start of the campaigns, and ultimately (when taken together with the other predatory practices by Google) deter the Plaintiff and other small businesses from even thinking about using AdWords. with all of its pricing schemes, prohibitions, putting campaigns on hold, demand for higher prices per click.

64. The effect is to reduce AdWords competition for major advertisers, make their ads more profitable, and jack up the AdWords per-click prices charged to Plaintiff and other small-business advertisers.

Google Stops the AdWords Campaigns of the Plaintiff and Other Small Business and Notifies Them They Have to Pay More to Google to Resume Their Advertising Campaigns

65. Increasingly after adoption of its "Quality" and "Landing Page" programs during 2005-2006. Google has arbitrarily halted the AdWords campaigns of the Plaintiff and other small-business advertisers and demanded a higher price per click to permit the advertising to resume. AdWords never provides any analysis of the competition's per-click price or clickthrough rate in purported justification for Google's actions. enabling the Plaintiff to conclude and allege that part of Google's pricing increases go beyond any stated intention to require Plaintiff and other small business advertisers to pay. in effect. the same price per impression as being paid. in effect, by the higher-volume advertisers.

66.. Under this new pricing structure. Google started to charge the Plaintiff and other small businesses a substantially higher price per click than was being paid by Google's largest customers. such as monopolist eBay. The new price per click to the Plaintiff and other small businesses was raised so that the price for the number of clicks obtained by the Plaintiff or other small business advertisers was equal to the price paid by a major advertiser who for the same keyword obtained, say, 10 times the number of clicks. This raised the per click price to the Plaintiff and other small business advertisers to 1,000% of the existing price per click. without changing the per-click price to Google's major advertisers.

Google Has Decided to Maximize Its Profits by Catering to Large, Successful, Monopolizing Corporations and, through Predatory Pricing Practices, by Discouraging Plaintiff and Other Small Businesses from Using AdWords

67.. Upon information and belief, Google has decided to target, and is targeting, its AdWords services to large, successful and/or monopolizing corporations to maximize Google's revenue and profits; and as a by-product to actively discourage the Plaintiff and other small businesses from using AdWords by a variety of predatory practices, as alleged. This is a major part of Google's scheme to use its monopoly of the keyword-targeted Internet advertising market to participate in the profits of major corporations and monopolies and for Google to help them obtain monopoly or increased monopoly status, and increased profits and monopoly profits.

68.. The willingness by major corporations to stop servicing their smaller business customers (independent wholesales, jobbers and retailers) and charge substantially higher, if not confiscatory prices to their small business customers is not new. The toy and game industry in the 1970's stopped sending salespersons to its smaller retail customers, and instead instructed them to telephone in any orders they wished to place: the tire industry is charging its smaller retailers and wholesalers two or three times as much per tire as they charge to the major retailer competitors with the result that an ever-increasing percentage of tires is being sold by fewer and fewer retailers; the auto-parts manufacturers in the United States are being driven into bankruptcy (37 since January 1, 2004) by giving below-cost pricing to major auto-parts retailers and charging twice as much to the smaller, independent auto-parts wholesalers. There was only one such filing by and auto-parts manufacturer during 2003. [Source: *Business Week*, 10/10/05, p. 40]

69.. When discriminatory pricing is charged by a manufacturer in a competitive industry, the disfavored customer still has choices. But in the instant market, for keyword-targeted Internet advertising there is not much choice. Google has a monopoly, and controls pricing, terms, and whether the Plaintiff and other small businesses are able to make any use of AdWords to compete with AdWords large corporate customers.

70.. The practices of Google as alleged in ¶¶ 12, 13, 13A. 19, 25-34 and 45-70 above are predatory and are in violation of Sections 1-2 of the Sherman Act. 15 U.S.C.A. Sections 1-2.

ADDITIONAL FACTS SUPPORTING ALLEGATION OF GOOGLE'S MONOPOLY

71. In addition to the facts alleged in ¶¶ 23-70 above, the following facts support Plaintiff's allegation of Google's monopoly:

A.. Google has a technical team with its secret know-how that enables Google to increase its market share over the only two present competitors (Yahoo and Microsoft/MSN).

B.. Microsoft/MSN's dedicated effort, huge cash reserves and other resources, up to this moment, have not been able to purchase or develop any team capable of effectively competing with Google's search-engine business and related AdWords keyword-targeted Internet advertising business. Until May 2006. Microsoft/MSN partnered with Yahoo. but in May 2006 MSN began offering its own keyword-targeted Internet advertising.

C.. Yahoo until recently was a licensee of Google's search engine and has now switched to licensing an inferior engine (created years earlier by Inktomi), which means that Yahoo won't be able to compete with Google unless it solves the problem faced by Microsoft (of creating a team able to compete with Google's team).

D.. Google has the fastest search engine of all competing search engines with indexes, algorithms, software and systems to deliver the search results (and accompanying AdWords ads) substantially faster than any other search website can locate and display its search results:

E.. Google has 46.3% of all internet searches conducted at more than 60 search sites [source: http://searchenginewatch.com/reports/article.php/2156451];

F.. Google has the world's largest and most comprehensive collection of information online - 8.1 billion pages, compared to Microsoft's 5.0 billion pages. Yahoo's estimated 4.2 billion pages and Ask Jeeves' or Ask's 2.5 billion pages [Source: http://blog.searchenginewatch.com/blog/041111-084221].

Plaintiff's 6/16/06 Yahoo search for "movie cameras" found 26.200.000 pages, whereas Plaintiff's 6/16/06 Google search using the same phrase found 86,800,000 pages or more than 3 times as many pages:

G.. Overture created the keyword-targeted Internet advertising market but lost its initial domination of the market to Google, because of superiority of Google's databases and software development and other factors:

H.. Google's income is derived mainly from its AdWords business and is more than 71% (2004) and more than 75% (2005) of all income obtained from keyword-targeted Internet advertising of all competitors (based on the figures set forth in the next 2 paragraphs);

I.. Google's revenues from sale of keyword-targeted Internet advertising amounted to $3.189 billion during 2004 and $6.139 billion during 2005 (without adjustment for the small percentage of income derived from Google's CPM (cost per 1.000 impressions) sales of AdSense advertising), in comparison to Yahoo's sale of keyword-targeted Internet advertising amounting to an estimated $1.3 billion during 2004 and an estimated $1.97 billion during 2005. [Estimate assumed 50% of Yahoo's total sales excluding "traffic acquisition cost" or "TAC".]

J. Prior to and during 2004-2005. Microsoft/MSN had no independent revenues from keyword-targeted Internet advertising. so that a substantial part of Microsoft/MSN's revenues are included in Yahoo's revenues.

K.. Google's capitalization during late 2005 was $126.7 billion ($428/share) in comparison to Yahoo's capitalization. of $59.7 billion ($42/share), making Google more than twice as valuable as Yahoo.

L.. Google states in its S-1 Registration Statement filed April 29. 2004 that Google is the largest of the companies in that market; and that the only other company known to Google is Yahoo (with its purchased Overture search business):

M.. The only company publicly stating that it is going to try to challenge Google (and not even mentioning Yahoo) is one of the largest monopolists, Microsoft. showing that there is a need for huge amounts of capital to challenge Google with only 2 challengers for control of Internet.

N.. Google states in its S-1 Registration Statement that it has a variety of intellectual properties upon which its AdWords technology is based, including patents, trademarks, copyrights, know-how, backed by numerous secrecy agreements; this also includes the know-how in finding, indexing and storing web pages and using hundreds of thousands of servers to speed up information processing and distribution by simultaneous use of many interconnected computers for a single search.

O.. Google is using predatory practices (described in ¶¶ 12, 13, 13A, 19, 25-34 and 45-70 above) whereas its strongest competitor, Yahoo, and new competitor, Microsoft/MSN, do not appear to be using such predatory practices;

P.. Yahoo attempted to compete with eBay recently and found that it could not, and gave up its eBay-type Internet activities, suggesting that Yahoo will not be able to continue its competition with Google.

Q.. Google admits that it has not advertised its AdWords service to any significant extent, and was able to build this monopoly by reason of its existing search business;

R.. eBay, a major competitor or potential competitor in other product/service markets, is one of Google's top customers for AdWords advertising services;

S-1.. Google is practicing price discrimination that makes some purchasers (such as the Plaintiff) pay more than other purchasers (large companies) because of the lack of any alternative market; Google is to increase its per-click price for Plaintiff and a million other small-business AdWords customers 2, 10, 25, 50 even 100 times the price per click Google is charging its most-favored customers. But the profitability to an advertiser is in the click, and it is unreasonable and unconscionable to charge small business advertisers 2, 10, 25, 50 or 100 times the price per click when their expectations for profit is substantially less than the profit being obtained by the high-volume advertiser from one click for the same keyword.

S-2. Online advertising is causing U.S. daily newspapers to lose advertising revenue and threatening traditional U.S. daily newspapers with extinction ["Online Publishing Insider", 6/8/06]; newspapers are attempting to re-create themselves as online newspapers; and in the UK, online advertising

revenues already exceed newspaper advertising revenues [Source: http://news.stepforth.com/2006-news/May31-06.html].

Additional Facts (from New York Times Article of 6/8/06):

T. Building a computing center in The Dallas, Oregon as big as two football fields, with twin cooling plants protruding four stories into the sky which, according to The New York Times, is Google's "weapon in its quest to dominate the next generation of Internet computing"

U. Such new plant "heralds a substantial expansion of a worldwide computing network handling billions of search queries a day and a growing repertory of other Internet services"

V. The new plant " is the backdrop for a multibillion-dollar face-off among Google, Microsoft and Yahoo that will determine dominance in the online world in the years ahead"

W. Microsoft and Yahoo have announced that they are building big data centers upstream in Wenatchee and Quincy, Wash., 130 miles to the north. But it is a race in which they are playing catch-up. Google remains far ahead in the global data-center race, and the scale of its complex here is evidence of its extraordinary ambition

X. Even before the Oregon center comes online .... "Google has constructed the biggest computer in the world, and it's a hidden asset."

Y. Microsoft stunned analysts last quarter when it announced that it would spend an unanticipated $2 billion next year, much of it in an effort to catch up with Google.

Z. Google is known to the world as a search engine, but in many ways it is foremost an effort to build a network of supercomputers, using the latest academic research, that can process more data — faster and cheaper — than its rivals.

AA. "Google wants to raise the barriers to entry by competitors by making the baseline service very expensive,"

BB. In March 2001, when the company was serving about 70 million Web pages daily, it had 8,000 computers.... By 2003 the number had grown to 100,000.

CC. Today ... [t]he best guess is that Google now has more than 450,000 servers spread over at least 25 locations around the world.

DD. Microsoft's Internet computing effort is currently based on 200,000 servers, and the company expects that number to grow to 800,000 by 2011 under its most aggressive forecast, according to a company document.

EE. Yet it is the way in which Google has built its globally distributed network that illustrates the daunting task of its competitors in catching up.

FF. [S]aid Milo Medin, a computer networking expert ... I know of no other carrier or enterprise that distributes applications on top of their computing resource as effectively as Google."

The Need of Independent Candidates and Minority Political Parties to Use AdWords to Compete with the 2 Main Parties and Their Candidates

72.. Starting in December, 2005, the Plaintiff decided to run for statewide office in New York, to seek the elected office of New York Attorney General.

73.. The Plaintiff already had more than two years of working with AdWords, on and off, experiencing various anticompetitive activities imposed by Google on use of AdWords by the Plaintiff and other small-business advertisers.

74.. Independent candidates and minority parties have a difficult time trying to get their message across to voters because the main media (television, newspapers, magazines) do not give much or any publicity to anyone other than the two leading parties and their competing candidacies. The Plaintiff decided that it is necessary to create a new type of medium for independent candidates and minority parties to reach voters and party members if the candidates and parties are to be able to compete and win any elections.

75.. The Plaintiff was familiar with the earlier successes of MoveOn.Org in the raising of campaign funds for a national political candidate, which success preceded the advent of AdWords, and caused the Plaintiff to develop a program to finance an election campaign based on use of AdWords, assuming that a user could select and use Keywords for 5 cents (or 1 cent) a click, as publicized widely by Google in its AdWords website and by tens of thousands of emails, blogs, websites and other communications purporting to explain AdWords and its pricing.

76.. The plan as developed by the Plaintiff required the building of email lists of the "permissive" type, in which the persons on the email list give their written approval to receive emails from the list owner, with the opportunity of each person on the list to easily (through a single click) notify the list owner (i.e., the Plaintiff) that he/she wishes to be taken off of the list.

77.. Person's plan was to use the list to educate the list owners with a continuing series of e-mailings as to problems that could be cured or alleviated if they supported and/or voted for the Plaintiff or the Green Party.

78.. Prevailing thought among the leading authors of election campaign books and articles was that money could be raised from email lists for a cost of about 5% of the money being raised when the list is in existence. The cost to create an email list using traditional (non-Internet) advertising media was too expensive.

79.. Plaintiff's plan using AdWords was to create a list at a cost of 5 cents (or 1 cent) or slightly higher per name, by using the lowest cost words and offering substantial inducements for searchers to click onto Plaintiff's website (costing Plaintiff 1 cent or 5 cents for the click), subscribing to Plaintiff's email list (an "RSS" or "Really Simple Syndication" feature of Internet), and receiving by email a free PDF copy of one or more of Plaintiff's three full-length books.

80.. At this rate, Plaintiff calculated. the Plaintiff could build a list of 1,000,000 persons (with their email addresses and ZIP codes) at a cost of only $10,000 to $50,000, and give Plaintiff the effect of a newspaper or magazine having a similar circulation. The value of the "common stockholders equity" in *The New York Times*, for example, with a comparable circulation, was $1.5 billion on December 25, 2005, according to the newspaper's financial statements. See http://www.nytco.com/pdf-reports/2005-ar10K/selected-financial-data.pdf

81.. A permissive email list of 1,000.000 members could, according to the Plaintiff's plan, finance his election as Attorney General in New York and could be available for various business activities during the same period and after.

82.. Pursuant to his plan, the Plaintiff wrote a series of websites, from January to May, 2006, for the purpose of using AdWords to create a variety of permissive email lists. These websites include: www.americanjobsparty.com (to interest persons in subscribing to follow economic and political issues of interest to them): www.carlperson4NYAG.com (to participate in Plaintiff's campaign for New York Attorney General): and www.lawmall.com/latefees (to provide a service of email notification to subscribers to notify them in advance of dates at which payment must be made on credit cards, leases. mortgages and the like to avoid imposition of late fees; which would enable the Plaintiff to send his various

requests for volunteers, contributions, attendance or other help each time the Plaintiff sent a notice to one of the subscribers).

83.. AdWords, however, never planned to have any keywords available at the low, advertised rate of 1 cent or 5 cents per click, and it became apparent to the Plaintiff that he would be facing costs of 2 to 100 or more times the 1-cent or 5-cent anticipated cost for the planned list development, making the list development impractical.

84.. As a result, Google is preventing independent candidates and minority parties from exercising their right to assemble, vote and speak freely about economic, social and political matters in the United States, through Google's predatory pricing practices with its AdWords monopoly.

85.. When discriminatory pricing is charged by a manufacturer in a competitive industry, the disfavored customer still has choices. But in the instant market, for keyword-targeted Internet advertising there is not much choice. Google has a monopoly, and controls pricing, terms, and whether the Plaintiff and other small businesses are able to make any use of AdWords to compete with AdWords large corporate customers.

SECTION 2 VIOLATIONS BY GOOGLE

Monopolization by Google

86.. By its actions as alleged, Google demonstrates that it has the power to control prices in the relevant geographic markets for keyword-targeted Internet advertising with advertisers such as Plaintiff having to either pay the demanded high price per click often 25 times more than the per-click price paid by major advertisers using the same keywords, or a per-click price often 50 times higher than Google's 1 cent minimum per-click price for keywords that nobody but Plaintiff is seeking to use.

87.. Google created the monopoly with its superior product and business acumen but started to misuse its monopoly through setting up an automated pricing scheme that favored large corporate advertisers (with low per-click prices) and requiring Plaintiff and other small-business advertisers to pay sometimes 50 or 100 times as much per click, a price designed and intended to make it unprofitable for

small advertisers to compete for the use of keywords used by the favored advertisers. and to deny any use at all of keywords not wanted by major advertisers (thereby forcing Plaintiff and other small-business advertisers to stop using AdWords).

88.. The activities of Google adversely effect competition in the market for keyword-targeted Internet advertising (as well as the product and service markets in which any competitors use AdWords) and are lessening competition. tending to monopolize, and injuring consumers and competition in such markets.

89.. Through its activities as alleged, Google is intentionally monopolizing the relevant geographic market for keyword-targeted Internet advertising in violation of Section 2 of the Sherman Act. 15 U.S.C.A. Section 2.

Attempted Monopolization by Google (Alternative Allegation)

90.. Alternatively, by its actions as alleged, Google demonstrates that it has a dangerous probability of achieving monopoly power (to control prices and exclude competition) in the market for keyword-targeted Internet advertising in the United States and in New York State.

91.. The only two challengers to Google's AdWords business are Yahoo and Microsoft/MSN. but neither has a database of search pages, or a number of daily searches. or the dollar amount of advertising revenue or profits to be able to stop Google's growth and ever-increasing power in the relevant market.

92.. Google is engaging in predatory and anticompetitive activities as alleged in ¶¶ 12. 13. 13A. 19. 25-34 and 45-70 above.

93.. The barriers to entry are so high that there appear to be only two actual or potential competitors (Yahoo and Microsoft/MSN), but without any demonstrated ability to put together a team with the know-how to compete effectively against Google. Google's team consists of Google's founders and controlling shareholders of Google, people who cannot be purchased with Microsoft's billions in unused cash reserves. Nobody has the databases to compete with Google and even if they did they may not have the money to purchase and manage 450,000 servers to be able to produce search results in a fraction of a second.

94.. Alternatively, through its activities as alleged, Google is attempting to monopolize the relevant geographic market for keyword-targeted Internet advertising in violation of Section 2 of the Sherman Act, 15 U.S.C.A. Section 2 and during the relevant period actually acquired power over the market.

Conspiracy to Monopolize by Google

95.. Google, in conspiracy with the Co-Conspirators (consisting of various large corporate, high-volume advertisers such as eBay, Schwab) to monopolize the relevant geographic market for keyword-targeted Internet advertising by Google's practices of destroying competition for the keywords being used by the major advertisers and profiting from the higher profitability that these major advertisers can obtain from such non-competitive use of their selected keywords. Google is able to charge higher prices (through its per-click system of pricing) to successful users of Google's keywords, especially when it drives Plaintiff and other small-business purchasers from the market by demanding per-click prices 50 or 100 times as high as those being paid by the high-volume, favored advertisers.

96.. Through its activities as alleged. Google is conspiring with the Co-Conspirators to monopolize the relevant geographic market for keyword-targeted Internet advertising in violation of Section 2 of the Sherman Act, 15 U.S.C.A. Section 2.

PLAINTIFF'S DAMAGES

97.. By reason of Google's activities as alleged, the Plaintiff has suffered the following damages and antitrust injury:

A.. Moneys paid to Google by the Plaintiff as an AdWords advertiser;

B.. Moneys paid by the Plaintiff to develop various websites to be marketed using AdWords;

C.. Value of Plaintiff's non-legal time in developing and marketing his products, services, and websites and loss of the opportunity to spend the time needed to find a market satisfactory to Google

before Google imposes its prohibitive pricing scheme on the Plaintiff and one million other small businesses seeking to develop new products, services and markets;

D.. Amount spent in promoting Plaintiff's candidacy for New York Attorney General;

E.. Loss of income that would have been obtained if Plaintiff won the November, 2006 election for New York Attorney General;

F. Irreparable loss of the opportunity to be elected as New York Attorney General during the November, 2006 elections:

G.. Loss of sales of Plaintiff's 3 books and resulting loss of profits:

H.. Loss of income as attorney from new clients; and

I.. Loss of the value of the permissive email list of 1,000,000 members that could have been built by Plaintiff under his business plan (described in ¶¶ 75-82 above) to use Google keywords not in demand. at a cost of 1 cent to 5 cents per click, but for the illegal activities of Google.

98.. Upon information and belief, the total provable damages suffered by Plaintiff amount to more than $10,000,000. and will be proven with certainty at the time of trial.

PRELIMINARY AND PERMANENT INJUNCTION

99.. The activities of the defendant are continuing and threaten to prevent Plaintiff from being elected as the New York Attorney General during the November 2006 elections.

100.. This year (2006) is a year of political upheaval with a good chance for an independent candidate to get elected in New York as Attorney General, but this opportunity cannot be realized without the use of AdWords at the low rate of 1 cent or 5 cents per click to create a permissive mailing list for Plaintiff to use to obtain volunteers, votes, arrange parties, and obtain and solicit contributions.

101.. If the Plaintiff is not able to enjoin Google from its predatory pricing activities, as alleged. the Plaintiff will suffer irreparable injury by not being able to compete for (or win) the election for New York Attorney General.

102.. Plaintiff is entitled to (i) a preliminary injunction to enjoin Google from its alleged predatory practices during the pendency of this litigation; and (ii) a permanent injunction to enjoin Google from the same predatory practices, as part of the relief in the final judgment in this action. Specifically, without limiting the injunctive relief being sought, Plaintiff seeks an injunction or mandatory injunction

A.. Requiring Google to let Plaintiff and other advertisers pay the lowest available price per click as determined by Google's auction process without any adjustment of the price by Google to reflect "quality", "landing page", clickthrough rate of the advertiser or any other advertisers using the same or similar keyword:

B.. Requiring Google to charge the same price or same position price (either per-click price or price per 1,000 impressions) to all advertisers seeking to use a specific keyword;

C.. Requiring Google to let advertisers use any English words (other than illegal words due to obscenity, copyright, trademark, secrecy or similar laws):

D.. Requiring Google to list in its website all words not available to any AdWords advertiser

E.. Requiring Google to permit all advertisers to use any abbreviations or combination of words in their advertisements allowed by law;

F.. Requiring Google to set up a third-party dispute resolution procedure, at Google's expense, for advertisers to challenge any alleged or actual failure by Google to abide by any of the foregoing injunctive terms:

G.. Requiring Google to comply with the requirements of the Sarbanes-Oxley Act regarding Google's AdWords pricing practices (to determine and report the extent to which Google's income and profits have been, and are being, derived from Google activities in violation of Sections 1-2 of the Sherman Act: and

H. Requiring Google to notify each AdWords advertiser by email in 3 separate mailings, separated by one month each, about this action and the terms of any preliminary injunction or permanent injunction awarded to the Plaintiff.

OTHER RELIEF SOUGHT

103.. The Plaintiff is entitled to an award of treble damages.

104.. The Plaintiff is entitled to an award of attorneys' fees.

105. Plaintiff is entitled to a judgment as to liability against Google for violation of § 2 of the Sherman Act by reason of the facts alleged in ¶¶ 1 through 104 above.

Continuing Violation of the Sarbanes-Oxley Act

106. Upon information and belief, more than 50% of Google's income and profits is attributable to its violation of Section 2 of the Sherman Act, as alleged, and Google's failure to report this fact in its S-1 Registration Statement is a continuing violation of the Sarbanes-Oxley Act and a major reason for Google's ability to continue violating the statute without any enforcement activities by government or by class action lawsuits for recovery of treble damages on behalf of each of the injured small businesses.

107. Plaintiff is injured by Google's continuing violation of the Sarbanes-Oxley Act, requiring the Plaintiff to spend time and money to obtain judicial relief as to Google's predatory pricing, which activities would have been unnecessary if Google had reported in its SEC filings that more than 50% of Google's income results from its violation of Section 2 of the Sherman Act.

108. Plaintiff is entitled to a permanent injunction requiring Google to make the disclosures required by the Sarbanes-Oxley Act, as alleged above.

Possible Class Action Allegations by Amendment

109.. The Plaintiff hereby provides notice that he or appropriate counsel may amend this pleading to convert this action into a class action to establish Google's liability to a defined class of small-business AdWords advertisers under Sections 1-2 of the Sherman Act.

COUNT II

[Violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1 – Conspiracy to Fix Prices and Unreasonably Restrain Trade]

110.. Plaintiff alleges and realleges each of the allegations set forth in ¶¶ 1-109 above, and further allege that the activities of Google and the Co-Conspirators, as alleged in ¶¶ 35-40 above, amount to a violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1 as an illegal price-fixing conspiracy and an unreasonable restraint in trade.

111. The pricing and other practices of Google as alleged in ¶¶ 12, 13, 13A, 19, 25-34 and 45-70 above are the published and unpublished Google rules under which more than an estimated one million keyword-targeted Internet advertisers, including each of the Co-Conspirators, place many millions of targeted ads each day with Google.

112. The structured market is pursuant to an agreement, combination and conspiracy in which competitors purchase their keyword-targeted Internet advertising from Google, knowing that the less successful advertisers (i.e., the advertisers with a lower percentage of clickthroughs and website landing pages or products and services that are less successful) wind up paying many more times per click than the most successful advertisers, including all of the Co-Conspirators.

113. Plaintiff is a competitor with law firms and law-related organizations bidding for use of the keyword (or term) "commercial litigator" (including Mitchell Law Offices, FindLaw.com, Legal Match.com, Small Business Law Firms.com - a national directory of lawyers , and Bosco Law Office) where the per click price is getting near Google's stated maximum of $50 or $100 per click, upon information and belief, a price that can be afforded by the type of client or customer normally obtained by such advertisers, but wholly non-affordable for the Plaintiff with his individual practice representing small businesses. Plaintiff is also a competitor of major publishers in the advertising of books using AdWords; and a competitor of various better-financed Attorney General candidates using AdWords (i.e., Richard Brodsky-

Democrat: Denise O'Donnell-Democratic: Jeanine Pirro-Republican) using AdWords to promote their respective candidacies for New York Attorney General.

114. Also, Google is a competitor of eBay, one of Google's largest and most favored AdWords advertiser.

115. The purpose of the agreement, combination and conspiracy is (i) to provide low per-click prices to the high-volume users of AdWords. (ii) discourage lower-volume users from bidding for use of the keywords being used by the high-volume users by increasing the per-click price to unprofitably high levels for such low-volume advertisers such as the Plaintiff; removing keywords not wanted by high-volume advertisers to prevent low-volume advertisers such as Plaintiff from having a low-cost alternative: and ultimately allowing Google to participate in the monopolistic profits of the monopolizing users of AdWords and helping their monopolies grow, while trying to put low-volume users out of business or require them to pay unprofitably high per-click rates until they are driven out of business by the excessive charges for AdWords advertising.

116. High-volume advertisers are able to figure this out for themselves, but as beneficiaries of Google's pricing scheme they have no incentive to remove themselves from the agreement, combination and conspiracy.

117. The AdWords advertising placed by any advertiser goes to each state of the United States, unless the advertiser opts to have the advertising placed with searchers whose email addresses appear to be from specific geographic areas of the country. The Plaintiff has not made use of this feature. and upon information and belief less than 10% of Google's advertisers make use of such feature (mostly local businesses not trying for website sales and state or local candidates).

118. The agreement, combination and conspiracy is for the unlawful purpose and objective of providing low per-click prices to the high-volume users, and eliminating competition for their keywords from low-volume advertisers such as Plaintiff by setting up a series of unworkable rules resulting in inordinately high per-click prices to discourage Plaintiff and other low-volume users from competing (and thereby bidding up the prices) for the keywords being used by the high-volume advertisers.

119. Also, in return for providing the preceding benefit to the high-volume advertisers. Google is able to participate in their profitable use of the protected keywords immediately and. as to the future. by helping the high-volume advertisers become monopolists in their respective markets, if they are not monopolists already.

120. The arrangement with Google makes it impossible for any of the high-volume advertisers to be acting independently. Google's software ties everyone in by the Google-written software instructions that result in very low per-click prices for the high-volume users and per-click prices perhaps 50 times or more as high (but averaging perhaps 10 to 25 times as high) for low-volume advertisers such as the Plaintiff.

121. The per-click prices for the Plaintiff resulting from Google's auctions in November 2003 through mid-summer 2004 were substantially lower than the per-click prices needed to be incurred after Google changed its pricing scheme to adjust for "Quality" and "Landing Page".

122. Plaintiff has been injured by the activities of Google by being required to pay excessive per-click prices that are unprofitable for the Plaintiff to incur if the Plaintiff is to be able to use Google's AdWords monopoly. or not use the monopoly advertising service at all. In either case Plaintiff has been sustaining losses, both as to excessively high per-click advertising costs or the sunk costs of trying to prepare websites. products and services for marketing through AdWords. when AdWords cannot be used profitably by Plaintiff or most other small businesses.

123. Each of the Co-Conspirators joined the agreement, combination and conspiracy with the intent and purpose of unreasonably restraining trade. knowing that it would be obtaining unlawfully low per-click prices at the expense of low-volume users such as the Plaintiff.

124.. These activities by Google in concert with monopolist eBay and the other Co-Conspirators alleged in ¶¶ 35-40 above amount to a per se conspiracy to fix prices and a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. 15 U.S.C.A. Section 1.

Plaintiff's Damages

125.. By reason of Google's activities as alleged, the Plaintiff has suffered the damages described in ¶¶ 97-99 above.

Preliminary and Permanent Injunction

126.. The activities of the defendant are continuing and threaten to prevent Plaintiff from being elected as the New York Attorney General during the November 2006 elections.

127.. Plaintiff realleges the allegations set forth in ¶¶ 99-101 and subparagraphs A through H of ¶ 102.

Other Relief Sought

128.. The Plaintiff is entitled to an award of treble damages.

129.. The Plaintiff is entitled to an award of attorneys' fees.

COUNT III

[Violation of § 340 of the New York General Business Law, Known as the Donnelly Act - Monopolizing, Attempting to Monopolize, and Combining or Conspiring to Monopolize the Keyword-Targeted Internet Advertising Market in New York; Price-Fixing and Unreasonable Restraint of Trade]

130. Plaintiff alleges and realleges each of the allegations set forth in ¶¶ 1-129 above, and further alleges that the activities of Google and the Co-Conspirators amount to a violation of § 340 of the New York General Business Law (also known as the New York Donnelly Act).

131. The Plaintiff has suffered damages as alleged in ¶¶ 97-99 above.

132. The Plaintiff is entitled to an award of treble damages under the Donnelly Act. [Cox v. Microsoft. 1st AD, 2002]

133. The Plaintiff is entitled to an award of attorneys' fees.

134. The Plaintiff is threatened with irreparable damages to his candidacy for New York Attorney General. as alleged in ¶¶ 72-84 and 99-102 above.

135. The Plaintiff is entitled to a preliminary injunction and permanent injunction as alleged in ¶¶ 99-102 above.

COUNT IV

[Violation of §§ 349 and 349-c of the New York General Business Law – Deceptive Acts and Practices in Conduct of Google's Business in New York; Additional Penalty for Elderly-Person Fraud]

136. Plaintiff alleges and realleges each of the allegations set forth in ¶¶ 1-135 above, including ¶¶ 13 and 13A. and further alleges that the activities of Google amount to a violation of §§ 349 and 349-c of the New York General Business Law, as a series of deceptive acts and practices directed against consumers. including consumers such as Plaintiff over the age of 65.

137. The Plaintiff accepted Google's offered price of 1 cent or 5 cents per click and proceeded to build various AdWords campaigns based on such advertised minimum auction prices. By reason of Google's advertised auction system and advertised minimum price, the Plaintiff was entitled to pay the minimum price for keywords selected by the Plaintiff that were not being sought at the same time by any other bidder (other than eBay. as apparent purchaser of a substantial number of keywords having little or no demand).

138. Within days after starting to advertise at 5 cents or 1 cent per click with keywords selected by the Plaintiff. Google terminated the Plaintiff's advertising for most selected keywords and informed the Plaintiff that he would have to pay substantially more per click than the 5 cents or 1 cent agreed to.

139. Plaintiff in some instances agreed to increase the price per click from 5 cents or 1 cent to 50 cents or more, and proceeded with some of the originally selected keywords.

140. Then, Google advised the Plaintiff through automated messages that the Plaintiff's advertising was stopped by Google, and that the Plaintiff had to figure out some way to make his advertising

more appealing to Google searchers so that Plaintiff would obtain a higher percentage of clickthroughs as to the number of searches receiving the Plaintiff's ads.

141. Google was demanding something that the Plaintiff could not reasonably create or obtain and Plaintiff was forced to terminate his advertising and lose the value of his investment of money and time in the AdWords advertising projects. This occurred about 5-6 times during the relevant period (during the period from November, 2003 to the present).

142. The Plaintiff has suffered damages as alleged in ¶¶ 97-99 above.

143. The Plaintiff is entitled to an award of treble damages under Section 349(h) (up to $1.000).

144. The Plaintiff is entitled to an injunction under New York General Business Law § 349(h) prohibiting Google from engaging in the conduct described in ¶ 144 above.

145. The Plaintiff is entitled to an award of attorneys' fees under Section 349(h).

146. Google acted willfully, and maliciously, with near criminal indifference to its civil obligations. for the purpose of injuring the Plaintiff and an estimated one million other small businesses that spent time and effort to use AdWords, only to be rejected by Google through substantially higher prices than originally promised, or by complete rejection of the advertisers' advertising.

147. Google's activities in increasing the offered price to its more than 1.000.000 advertisers through an automated system not enabling customers to obtain an explanation from a human being before Google applied its predatory practices. involved a high degree of moral turpitude and demonstrated such wanton dishonesty as to strongly imply a criminal indifference by Google to its civil obligations to the Plaintiff and one million other small-business advertisers, including advertisers over 65 years of age.

148. The Plaintiff is entitled to punitive damages against Google in an amount to be determined by the trier of fact. [*Latiuk v. Faber*. 4th Dept. 2000]

149. From its marketing studies. Google was fully aware that its activities adversely affected an estimated 50.000 consumers over the age of 65. including the Plaintiff; Google's database includes the

age of the Plaintiff as well as the age of the other AdWords advertisers over the age of 65, and that Google's conduct was in willful disregard of the rights of the Plaintiff and the other advertisers over the age of 65.

150. Google's conduct deprived such persons over the age of 65 of the money they intended to use to sustain themselves during the remainder of their lifetime and for most of whom work was not available or possible to replace the money taken unlawfully by Google.

151. The Plaintiff is entitled to an additional civil penalty of $10,000, under subsection 2 (entitled "Supplemental civil penalty") of § 349-c of the New York General Business Law.

COUNT V

[Violation of §§ 350 and 350-e of the New York General Business Law – False Advertising; Bait and Switch Advertising]

152. Plaintiff alleges and realleges each of the allegations set forth in ¶¶ 1-151 above, and further alleges that the activities of Google and the Co-Conspirators amount to a violation of §§ 350 and 350-e of the New York General Business Law, as false advertising, including bait and switch advertising, victimizing an individual consumer.

153. The Plaintiff has suffered damages as alleged in ¶¶ 97-99 above.

154. The Plaintiff is entitled to an award of treble damages under § 350-e of the New York General Business Law (up to $1,000).

155. The Plaintiff is entitled, under Section 350-e of the New York General Business Law, to an injunction prohibiting Google from engaging in the conduct described in ¶¶ 12, 13-13A, 19, 25-34, 45-70 and 152 above.

156. The Plaintiff is entitled to an award of reasonable attorneys' fees (under Section 350-e).

157. Google acted willfully, and maliciously, with near criminal indifference to its civil obligations, for the purpose of injuring the Plaintiff and one million other small businesses that spent time and effort to use AdWords, only to be rejected by Google through substantially higher prices than originally promised, or by complete rejection of the advertisers' advertising.

158. The Plaintiff is entitled to punitive damages against Google in an amount to be determined by the trier of fact.

COUNT VI

[Violation of § 16720 of the California Cartwright Act - Monopolizing, Conspiracy to Fix Prices, and Discriminatory Pricing in Google's Keyword-Targeted Internet Advertising]

159. Plaintiff alleges and realleges each of the allegations set forth in ¶¶ 1-158 above, and further alleges that the activities of Google and the Co-Conspirators amount to a violation of various subparagraphs of § 16720 of the California Business & Professions Code (part of the Cartwright Act).

160. The Plaintiff has suffered damages as alleged in ¶¶ 97-99 above, and is authorized to sue under § 16750 of the California Cartwright Act.

161. The activities of Google are prohibited restrictions in trade or commerce (subparagraph a of § 16720): limit or reduce the productions, or increase the price of merchandise or of any commodity (subparagraph b): prevent competition in the sale or purchase of merchandise, produce or any commodity (subparagraph c); price fixing (subparagraph d): are contracts. obligations or agreements not to sell below a standard figure (subparagraph e-1); and to keep the price fixed or higher (subparagraph e-2); setting prices to preclude free and unrestricted competition in articles or commodities (subparagraph4-3): and pooling interests to affect price (subparagraph e-4).

162. Plaintiff's AdWords advertising was distributed by Google to searchers in California and Google was required to obey California law as to such advertising. but failed to do so, causing injury to the Plaintiff.

163. The Plaintiff is entitled to an award of treble damages under § 16750.

164. The Plaintiff is entitled to an award of attorneys' fees under § 16750.

165. The Plaintiff is entitled to a preliminary and permanent injunction under § 16750.

PRAYER

WHEREFORE, the Plaintiff demands judgment against Google, as follows:

1. As to Count I, that it be adjudged and decreed that the activities of Google constitute a violation of § 2 of the Sherman Act:

2. As to Count II, that it be adjudged and decreed that the activities of Google constitute a violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1 (as an illegal *per se* conspiracy to fix prices and a conspiracy in unreasonable restraint of trade):

3. As to Count III, that it be adjudged and decreed that the activities of Google constitute a violation of § 340 of the New York General Business Law (also known as the New York Donnelly Act):

4. As to Count IV, that it be adjudged and decreed that the activities of Google constitute a violation of Sections 349 and 349-c of the New York General Business Law (deceptive acts and practices directed against New York consumers; with an additional penalty for defrauding elderly persons):

5. As to Count V, that it be adjudged and decreed that the activities of Google constitute a violation of Section 350 of the New York General Business Law (false advertising, including bait and switch advertising, victimizing an individual consumer):

6. As to Count VI, that it be adjudged and decreed that the activities of Google constitute a violation of subparagraphs "a" through "e" and "e-1" through "e-4" of § 16720 the California Cartwright Act:

7. Awarding damages in favor of the Plaintiff, in an amount of $10,000,000 or more, which will be proved with certainty at the time of trial:

8. Awarding trebled damages to the Plaintiff as to each of Counts I through VI (with limitations as to Counts IV and V).

9. Awarding attorneys' fees to the Plaintiff as to each of Counts I through VI;

10. Enjoining Google and its Co-Conspirators, preliminarily and permanently, as to each of the predatory practices described in ¶¶ 12, 13, 13A, 19, 25-34 and 45-70 above and requiring Google to notify each AdWords advertiser by email in 3 separate mailings, separated by one month each, about this action and the terms of any preliminary injunction or permanent injunction awarded to the Plaintiff;

11. Assessing interest against Google (as to Counts IV and V), costs and disbursements; and

12. Granting the Plaintiff such other and further relief as this Court may deem just and proper.

Jury Demand

Plaintiff hereby demands a trial by jury of all issues properly triable to a jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: **New York, New York**
June 19, 2006

Carl E. Person (CP 7637)
Plaintiff, *Pro Se*
325 W. 45th Street - Suite 201
New York, New York 10036-3803
(212) 307-4444

EXHIBIT 5

United States District Court
Southern District of New York

CARL E. PERSON,	:	
Plaintiff,	:	
v.	:	Civ. Action No. 06-CV-4683 (RPP) (AJP)
GOOGLE INC.,	:	
Defendant.	:	

DEFENDANT GOOGLE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Google Inc. ("Google") respectfully submits this memorandum of law in support of its motion to dismiss the complaint filed by plaintiff Carl E. Person ("Person"), pursuant to Rules 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure, for improper venue and failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

The Complaint in this case is brought in the wrong forum and asserts causes of action that state no claim under governing law.

1. The Complaint's allegations all arise out of Person's efforts to place advertising through Google's "AdWords" program. The AdWords Agreement, however, provides that claims concerning it must be adjudicated in Santa Clara County, California. Because he filed this case instead in the Southern District of New York, Person's Complaint should be dismissed for lack of venue.

2. On the merits, Person's antitrust claims (asserted under the Sherman Act and its New York and California counterparts) are entirely without merit. Person's claim, in essence, is that Google charges him more than it charges large corporate advertisers. Controlling Supreme Court and Second Circuit precedent, however, make clear that the Sherman Act recognizes no such claim. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. 398, 407 (2004); *Official Airline Guides v. FTC,* 630 F.2d 920 (2d Cir. 1980).

3. Person's remaining claims under the Sarbanes-Oxley Act and New York's General Business Law are equally meritless. There is no private right of action for the violations of Sarbanes-Oxley he alleges, and nothing in the General Business Law makes it unlawful for a company to revise its pricing structure as the need may arise.

Person's Complaint should therefore be dismissed in its entirety under FED. R. CIV. P. 12(b)(3) and (b)(6).

BACKGROUND

A. The Parties

Person is an attorney and business person – and frequent and experienced litigant – residing in New York, New York. Compl. ¶ 4. He seeks to be elected Attorney General of New York State during the upcoming elections in November 2006. *Id.* ¶ 7.

Google is a "global technology leader focused on improving the ways people connect with information." *Id.* ¶ 11. According to Person, Google operates the fastest Internet search engine in the world, handles 46.3% of Internet searches, and has the largest and most comprehensive collection of information online. *Id.* ¶ 71.

B. Google's AdWords Program

Google generates revenue through its advertising programs. *Id.* ¶ 11. The advertising program at issue in this case is called AdWords. AdWords allows an advertiser to bid for the right to have its advertisement shown when a user searches for a particular term or "keyword." *Id.* ¶ 31. When a Google user types in a search term that contains the keyword, short advertisements from advertisers that have placed winning bids for that keyword appear on the right margin of the webpage listing the user's search results. *Id.* ¶¶ 20, 23. If and when a user "clicks" on the advertisement, the user is taken to the webpage promoted by the advertiser. *Id.* As relevant to this lawsuit, AdWords advertisers are charged for each click that an AdWords advertisement attracts. *Id.* Prior to 2005, the minimum per-click price was 5 cents per-click with a maximum of $50 per-click. *Id.* ¶ 24. In 2005, Google changed its pricing to set a 1 cent per-click minimum and a $100 per-click maximum. *Id.*

Google aims to provide its users with the highest quality and most relevant advertisements. *Id.* ¶ 31. To determine the offered price for an advertiser's use of a keyword, Google employs a complex formula that considers a keyword's click-through rate, the relevance

of an ad, and the quality of the "landing page" linked to the ad. *Id.* This is referred to as an advertiser's Quality Score. *Id.* The Quality Score is then factored into a formula based on other advertisers' bids for the use of the keyword, and how prominent a space in the margin the advertiser would prefer for the advertisement to appear. *Id.* ¶¶ 13, 13A (citing https://adwords.google.com/select/afc/pricing.html). If the content of an ad and its landing page are relatively less robust and relevant, an advertiser's Quality Score decreases and the minimum bid required for the keyword increases. *Id.* ¶ 31. The ad with the least prominent placement will always pay 1 cent per-click no matter what was bid. *Id.*

Not every word is a keyword available for use. *Id.* ¶ 33. Certain keywords are inactive, and demand a higher bid than the minimum 1 cent per-click to "active[ate.]" *Id.* ¶¶ 32-34.

C. Person's Participation in AdWords

Person has used AdWords to advertise and market several books, his legal practice, and his candidacy for elective office. *Id.* ¶¶ 6, 8. Every participant in AdWords is required to enter into an agreement with Google setting forth the terms and conditions of participation (the "AdWords Agreement" or "Agreement"). *See* Agreement at 1 ("These Terms govern Google's advertising program(s) . . . and, as applicable, Customer's participation in any such Program(s)") (annexed as Exhibit A to the Declaration of Sara Ciarelli, executed July 27, 2006 ("Ciarelli Declaration")).[1] The AdWords Agreement provides Google with absolute discretion to reject any or all ads of an advertiser, including Person, "for any or no reason." Agreement ¶ 2.

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[1] The AdWords Agreement can be found at Google's website, www.AdWords.google.com (specifically, www.AdWords.google.com/select/TCUSbilling0406.html). Person cites this website in his complaint. *See* Compl. ¶ 8. As such, the Court can consider the AdWords Agreement in adjudicating this motion under FED. R. CIV. P. 12(b)(6). *See Yung v. Lee*, 432 F.3d 142, 146 (2d Cir. 2005) (on motion to dismiss, court can consider any document incorporated in complaint by reference and "any document not incorporated [in the complaint] but that is, nevertheless, 'integral' to the complaint because the complaint 'relies heavily upon its terms and effect'") (citations omitted); *Subaru Distributors Corp. v. Subaru of America, Inc.*, 425 F.3d 119, 122 (2d Cir. 2005) (same). In addition, on a motion pursuant to FED. R. CIV. P. 12(b)(3), the Court may consider materials outside of the pleadings. *Caremark Therapeutic Services v. Leavitt*, 405 F. Supp. 2d 454, 457 (S.D.N.Y. 2005).

The AdWords Agreement also contains a forum selection clause. Pursuant to its terms, Person agreed to adjudicate any disputes arising under the Agreement in Santa Clara County, California, where Google is headquartered. Agreement ¶ 9.

D. Proceedings to Date

Person's Complaint was filed June 19, 2006. He later filed a motion for a preliminary injunction. On June 29, 2006, this Court ordered, consistent with the agreement of the parties, that Google's time to respond to the Complaint be extended until July 27, 2006, and that consideration of the motion for preliminary injunction be deferred until consideration of Google's motion to dismiss.

ARGUMENT

I. THE ACTION SHOULD BE DISMISSED FOR IMPROPER VENUE

As a threshold matter, Person's action should be dismissed because he filed it in the wrong court. Based on the express terms of the AdWords Agreement into which Person entered, Person is required to litigate any disputes stemming from use of the AdWords program in Santa Clara County, California.

A complaint may be dismissed pursuant to Rule 12(b)(3) if venue is improper. *See* FED. R. CIV. P. 12(b)(3). A plaintiff bears the burden of demonstrating that venue is proper. *Caremark Therapeutic Servs.*, 405 F. Supp. 2d 454, 457 (S.D.N.Y. 2005).

It is well settled that contractual forum selection clauses are valid and should be enforced unless a plaintiff shows that enforcement would be "unreasonable" under the circumstances. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding validity of forum selection clauses in form contract); *Bear, Stearns & Co. v. Bennett*, 938 F.2d 31, 31 (2d Cir. 1991). A plaintiff must make a "strong showing" to overcome the presumption of enforceability that attaches to forum selection clauses. *M\S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

The AdWords Agreement into which Person entered with Google expressly mandates that venue for disputes concerning the Agreement must lie in Santa Clara County, California:

> The 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.*

Agreement ¶ 9 (emphasis added). Person thus agreed to exclusive venue in Santa Clara County. *See John Boutari & Sons, Wines & Spirits, S.A. v. Attiki Importers & Distributors., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994) (where forum selection clause employs "mandatory venue language . . . the clause will be enforced").

The gravamen of Person's Complaint is that Google's pricing under the Agreement is monopolistic and constitutes a deceptive trade practice. *See* Compl. ¶¶ 12-14. The relationship between the parties is governed by the AdWords Agreement, and Person's claims call for interpretation and application of the Agreement. In particular, Person complains about policies and procedures under the Adwords program, *see, e.g., id.* ¶¶ 13, 13A, which are incorporated into the Adwords Agreement, *see* Agreement at 1 & ¶ 1. In addition, the Adwords Agreement and the policies that are part of it afford certain defenses to Google. *See, e.g., infra* at 19. Person's claims are therefore subject to the mandatory forum selection provision. *See also Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361 (2d Cir. 1993) (scope of forum selection clause "is not restricted to pure breaches of the contracts containing the clauses," but may cover related claims including violation of antitrust laws); *Lurie v. Norwegian Cruise Lines, Ltd.*, 305 F. Supp. 2d 352, 363 (S.D.N.Y. 2004) ("it is well settled that forum selection clauses may encompass claims beyond breach of the contract containing the clause, including tort claims"); *American Mktg. Enters., Inc. v. Sun Apparel, Inc.*, 1997 WL 47813, at *3 (S.D.N.Y. Feb. 6, 1997) (forum selection clause covered claims regarding underlying validity of contract containing clause, including "fraud in the inducement" claims); *Bison Pulp & Paper Ltd. v. M/V Pergamos*, 1995

WL 880775, at **15-17 (S.D.N.Y. 1995) (forum selection clause covered not only breach of contract claim but also related tort claims).

Meanwhile, Person makes no allegation – nor could he – that enforcement of the Agreement's venue provision would be unreasonable or unjust. To the contrary, the provision appropriately locates venue where one of the two contracting parties is located: Google's headquarters are in Santa Clara County. *See Carnival Cruise Lines*, 499 U.S. at 595 (finding forum selection clause fair where, *inter alia*, venue was chosen where one contracting party was located); *accord Ainsley Skin Care of New York, Inc. v. Elizabeth Grady Face First, Inc.*, 1997 WL 742526, at *4 (S.D.N.Y. Dec. 2, 1997). There is no allegation that the forum selection clause was the product of fraud or overreaching. Similarly, Person cannot genuinely claim that litigation in the agreed-upon forum of Santa Clara County – while perhaps less convenient than New York – would effectively deprive him of his day in court. *See M/S Bremen*, 407 U.S. at 17-18 ("Whatever 'inconvenience' [plaintiff] would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it 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."); *accord Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563, 566 (S.D.N.Y. 1987) ("Of course, it is far more convenient for plaintiffs to sue in New York than in Greece. However, this circumstance is not sufficient to justify allowing plaintiffs to avoid the effect of the contract they entered into freely, providing for suit in the country where their cruise took place.").

Because Person filed this action in the wrong forum, this Court should dismiss his claims. *See Leonard v. Garantia Banking Ltd.*, 1999 WL 944802, at **7-9 (S.D.N.Y. Oct. 19, 1999) (dismissing claims for improper venue under Rule 12(b)(3), in light of forum selection clause),

aff'd mem., 213 F.3d 626 (2d Cir. 2000); *Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A.*, 493 F. Supp. 626, 631 (S.D.N.Y. 1980) (same).

II. PERSON STATES NO MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

Person charges Google with violating Section 2 of the Sherman Act by charging high and discriminatory prices for keyword-targeted Internet advertising. These claims should be dismissed for the basic reason that it is not unlawful for an alleged monopolist to charge high or discriminatory prices. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. 398, 407 (2004); *Official Airline Guides v. FTC,* 630 F.2d 920 (2d Cir. 1980) ("*OAG*").

Person's claim. The core of Person's Complaint is that Google charges high and/or discriminatory prices to Person and other "small-business advertisers," and low and/or discriminatory prices to "major corporate advertisers" (such as eBay). Specifically, Person alleges that Google requires plaintiff and other "small business advertisers" to pay "sometimes 50 or 100 times as much per click" than large corporate advertisers with low per-click prices. Compl. ¶ 87. He asserts that these aspects of Google's pricing somehow allow Google to maintain its alleged monopoly power, and also constitute an attempt to monopolize, conspiracy to fix prices, and/or a conspiracy to monopolize an alleged market for "key word-targeted Internet advertising." *Id.* ¶¶ 12, 13.[2]

All of plaintiff's injuries from the claimed antitrust violations are based on this alleged discriminatory pricing or alleged high pricing of the keywords that Person seeks to use. There

[2] Although Person assails Google's pricing as "discriminatory," his allegations acknowledge that the pricing is the product of a real-time, automatic auction process. His complaint is only that larger companies gain more favorable pricing because their advertising is more appealing to consumers, not because the terms that Google offers are different (or "discriminatory") in fact. *See* Compl. ¶ 48 ("A successful business . . . is able to obtain a higher percentage of clicks per 1,000 opportunities (i.e., advertising impressions) [and, thus, lower per-click prices] than a new, unknown business"). For purposes of this motion to dismiss, however, it can be assumed that the pricing is somehow "discriminatory."

are no allegations that even suggest that Google is squeezing out competing keyword-targeted advertising platforms such as Yahoo! or Microsoft/MSN, or otherwise expanding its alleged market by means other than its superior product offering. Similarly, there are no allegations that Google's purported discriminatory pricing impairs the ability of Google's competitors to compete, thereby protecting or expanding Google's market power. To the contrary, the Complaint suggests the opposite: that price increases will discourage a selection of advertisers and cause Google to lose market share to its rivals. *Id.* ¶¶ 32, 34, 50.

Person has not alleged exclusionary conduct. To state a claim for monopolization, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). As the Supreme Court recently explained in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, to satisfy these elements, the plaintiff must be able to show anticompetitive conduct, not merely the ability to charge monopoly prices:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the inventive to innovate, the possession of monopoly power will not be found unlawful unless it accompanied by an element of anticompetitive *conduct.*

540 U.S. at 407. Similarly, to state a claim for attempted monopolization, a plaintiff must plead "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993) (citing 3 P. AREEDA & D. TURNER, ANTITRUST

LAW ¶ 820, p. 312 (1978)). Accordingly, proof of anticompetitive or exclusionary conduct is an essential element of any claim for monopolization or attempted monopolization.

Conduct is not anticompetitive for purposes of Section 2 unless it expands (or threatens to expand) the defendant's market power by impairing the competitiveness of rivals. *OAG*, 630 F.2d 920. In *OAG*, petitioner, a monopolist publisher of airline schedules, declined to list the schedules for connecting flights of commuter airlines in the manner that it listed the connecting flights of certificated airlines, severely handicapping the commuter airlines' ability to compete. *Id.* at 921-922. The FTC ordered petitioner to list connecting flight listings for commuter airlines in the same way that it published connecting flight listings for certificated airlines. *Id.* at 921. The Second Circuit reversed the FTC's order, finding that "[petitioner], though possibly a monopolist in the airline schedule publishing industry "was engaged in a different line of commerce from that of the air carriers," where the alleged competitive injury took place. *Id.* at 926. Accordingly, the court relied on the "long recognized right of the trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 927 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980)). Under *OAG*, a plaintiff's allegations of exclusionary conduct necessarily fail unless he can allege that he is a *competitor* of Google in the relevant market. Here, Person does not – and clearly cannot – advance any such allegation.

The decision in *Soap Opera Now, Inc. v. Network Publishing Corp.*, 737 F. Supp. 1338 (S.D.N.Y. 1990), is to the same effect. Plaintiff, a publisher of a six-page weekly newsletter about soap operas called Soap Opera Now ("SONOW"), alleged a violation of Section 2 of the Sherman Act based on much larger Soap Opera Digest's cancellation of SONOW's advertisements. Plaintiff argued that because of Soap Opera Digest's dominant position in the alleged relevant market, it had a duty to publish SONOW's advertisements, and its refusal to do

so constituted anticompetitive or exclusionary conduct. *Id.* at 1342. After determining that Plaintiff failed to create an issue of fact as to whether SONOW and Soap Opera Digest were competitors in the same relevant market, the court granted summary judgment to defendant, stating "[e]ven assuming that defendant is a monopolist in its product market, unless plaintiff and defendant are in competition with one another, defendant has no duty to deal with plaintiff." *Id.* at 1349 (citing *OAG*, 630 F.2d at 925-28).

This basic proposition – that the alleged misconduct must impair the competitiveness of rivals – is uniformly supported by case law. Thus, for example, the court in *Ficker v. Chesapeake & Potomac Telephone Co.*, 596 F. Supp. 900 (D. Md. 1984), dismissed monopolization claims of an attorney who alleged that a monopolist publisher of a telephone directory refused to print the fees he charged when it ran his advertisements. The court explained that "the plaintiff in the instant case does not allege, nor can he allege, that the defendants' conduct restrained trade in *their own* market for *their own* benefit. Absent this anticompetitive animus, plaintiff's claims must fail." *Id.* at 903; *cf. CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (holding that broadcasters are not required to accept paid editorial advertisements); *see also* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 774d (2d ed. 2002) (explaining that non-competitors lack standing to sue in this context); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) ("the presence of a competitive relationship is fundamental to invoking the Sherman Act to force access to the property of another"); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988) ("[defendant] has not refused to deal with anyone ... [plaintiffs] simply failed to outbid *their* competitors"); *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987) ("it is difficult to see how denying a facility to one who ... is not an actual or potential competitor could enhance or reinforce the monopolist's market power").

By allegedly charging discriminatory prices, Google is in no way "expand[ing its] monopoly." *OAG*, 630 F.2d at 927-28. Person asserts no allegations that Google is excluding its competitors. Instead, his only allegations are that the purportedly high and discriminatory prices that Google charges are inhibiting competition – not with Google, but among Google's customers. Absent an allegation that Person is a competitor of Google's – an allegation that he has not made and cannot make – it is beyond question that accusations of high or discriminatory pricing to a customer fail to state a claim under Section 2 of the Sherman Act.

III. PERSON STATES NO CLAIM FOR CONSPIRACY TO RESTRAIN TRADE OR TO MONOPOLIZE UNDER THE SHERMAN ACT

Person also asserts claims for conspiracy to restrain trade and conspiracy to monopolize. Both claims are based the same allegations: purported agreements between Google and its larger customers, such as alleged co-conspirator eBay, to charge prices that Person assails as discriminatory. *See* Compl. ¶¶ 35-40.

Conspiracy under Sherman 1. It is not "price fixing" or otherwise unlawful for a company to agree with a customer on the price the company will charge and the customer will pay, no matter how discriminatory. "An agreement between a buyer and a seller regarding the price for the transaction between them is not illegal because the agreement deals with the sale price, not the resale price." ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, at 130 n.738 (5th ed. 2002) ("ALD"); *see also 49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986) (granting summary judgment on price-fixing claim where there was "no agreement among competitors to set prices"); *Brillhart v. Mutual Medical Ins.*, 768 F.2d 196, 199 (7th Cir. 1985) ("[t]he plaintiff cannot make out a cause of action for horizontal price-fixing since the alleged agreement ... does not run between competitors").

The only federal statute condemning certain types of price discrimination is the Robinson-Patman Act, 15 U.S.C. § 13. But that Act applies only to physical goods, not services such as Internet advertising, *see* ALD at 469 & n.95 – a point plaintiff implicitly concedes, Compl. ¶ 43 (referring to "keyword-targeted Internet advertising" as "[t]he relevant service market"). Person's efforts to dress up a Robinson-Patman claim in the garb of a Sherman Act claim necessarily fail because the statutes have entirely different (and sometimes conflicting) requirements. In particular, as discussed above, a seller's discriminatory pricing among its customers – the equivalent of a "secondary line" price discrimination case under Robinson-Patman – is simply not a recognized claim under the Sherman Act. *See OAG*, 630 F.2d at 925-28; *Soap Opera,* 737 F. Supp. at 1349; *Ficker*, 596 F. Supp. at 903-04.

Conspiracy under Sherman 2. Because Person fails to state a claim for conspiracy to restrain trade under Section 1 of the Sherman Act, his claims for conspiracy to monopolize under Section 2 necessarily fail as well. 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 809 (2d ed. 2002) ("[a]ny arrangement that could be considered a 'conspiracy' to monopolize must necessarily also be an unreasonable 'contract,' 'combination,' or 'conspiracy' in restraint of trade offending § 1").

Furthermore, Person's claims for conspiracy to monopolize fail for the same reason that his other monopolization claims fail: Where an alleged conspiracy, "if successful, would not amount to illegal monopolization, there may be no liability for conspiracy to monopolize." ALD at 312 & n.467; *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1175 (E.D. Va. 1995) ("because the gist of monopolization is the power to exclude competition, a conspiracy to monopolize must be one that is *somehow* rationally directed to the exclusion of competitors"). Google is aware of no cases holding that an agreement or conspiracy between an alleged

monopolist and its customers as to the prices that a defendant will charge such customers can ever rise to the level of "conspiracy to monopolize" under Section 2 of the Sherman Act.

IV. PERSON STATES NO CLAIM UNDER THE DONNELLY ACT OR THE CALIFORNIA CARTWRIGHT ACT

In addition to alleging violations of the Sherman Act, Person alleges that Google violated New York's antitrust statute entitled the Donnelly Act, N.Y. GEN. BUS. LAW §§ 340-47, and California's Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700-70. Neither statute has a counterpart to Section 2 of the Sherman Act applicable to unilateral conduct. ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES, at 6-1 and 35-1 (3d ed. 2004). While both statutes prohibit agreements in restraint of trade akin to those prohibited by Section 1 of the Sherman Act, the courts of both respective states are guided by federal law. *Id.* at 6-6 n.56, 35-2 n.16; *see also, e.g., Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 183 n.9 (1999); *People v. Rattenni*, 81 N.Y.2d 166 (1993). Therefore, for the same reasons that Person's antitrust claims fail under federal law, they fail under New York's Donnelly Act and California's Cartwright Act.

V. PERSON STATES NO SARBANES-OXLEY CLAIM

Although difficult to discern, Person appears to seek relief under the Sarbanes-Oxley Act. Compl. ¶¶ 102G, 106-08. Person alleges that Google was required to disclose its alleged violation of Section 2 of the Sherman Act in its Registration Statement. *Id.* ¶ 106. This claim fails for several reasons.

As an initial matter, as described above, Person fails to allege any violation of the Sherman Act. There can be no duty to report a non-existent violation.

Secondly, Person fails to specify which section of the Sarbanes-Oxley Act purportedly gives rise to a duty of disclosure here, or to identify any section of the Sarbanes-Oxley Act that creates a private right of action and thus provides Person with standing to pursue a claim for

relief. The Sarbanes-Oxley Act created only two private rights of action: section 306, permitting recoupment of profit realized through insider trading during blackout periods; and section 806, providing whistleblower protection to employees of companies. 15 U.S.C. § 7244(a); 18 U.S.C. § 1514A(b)(1)(B). Courts have refused to imply private rights of action for other Sarbanes-Oxley Act provisions. *See In re BISYS Group Inc. Derivative Action*, 396 F. Supp. 2d 463, 464 (S.D.N.Y. 2005) (refusing to imply private right of action for section 304 of the Act); *accord In re Whitehall Jewellers, Inc. Shareholder Derivative Litig.*, 2006 WL 468012, at *7 (N.D. Ill. Feb. 27, 2006); *Neer v. Pelino*, 389 F. Supp. 2d 648, 652-57 (E.D. Pa. 2005); *see generally Cort v. Ash*, 422 U.S. 66, 80 (1975) (refusing to infer private cause of action under criminal statute).

Person's claims seeking disclosure of a (non-existent) Sherman Act violation plainly do not fit within the express causes of action created by sections 306 or 806. Having failed to identify a section of the Sarbanes-Oxley Act giving rise to a private right of action, Person lacks standing to seek relief under that statute.

VI. PERSON STATES NO CLAIM UNDER THE NEW YORK GENERAL BUSINESS LAW

Person also fails to state a claim under New York General Business Law §§ 349 (Deceptive Acts and Practices Unlawful) and 350 (False Advertising Unlawful) for deceptive trade practices or false advertising. Although again difficult to discern, Person's claims appear to be based on the assertion that he was entitled to pay a certain minimum per-click price, without any change over time. *See* Compl. ¶¶ 136-58.

Specifically, Person alleges that he accepted Google's "offered" bidding price of 1 cent or 5 cents per-click and that he was "entitled" to pay this minimum price on a going-forward basis. *Id.* ¶ 137. Several days later, according to Person, Google terminated his advertising and advised that he would have to bid more per click for continued ads. *Id.* ¶ 138. Person further alleges

that after he increased his price per click bid, Google terminated his advertising and advised that he had to make his advertising more appealing to searchers. *Id.* ¶ 140. (As explained elsewhere in the Complaint, Person's Quality Score must have decreased because he was not providing relevant content or landing pages for searchers – and thus his required minimum bid price increased. *See id.* ¶ 31). According to Person, he and "other small businesses" were injured because they "spent time and effort to use AdWords, only to be rejected by Google through substantially higher prices than originally promised, or by complete rejection of the advertisers' advertising." *Id.* ¶ 146. Person further alleges that this conduct by Google also constitutes "false advertising, including bait and switch advertising." *Id.* ¶ 152.

To maintain a claim under General Business Law § 349 for deceptive acts or practices, a plaintiff must allege (1) a consumer oriented act or practice, (2) that is misleading in a material respect, and (3) injury resulting from such act or practice. *Exxonmobil Inter-America, Inc. v. Advanced Information Engineering Services, Inc.*, 328 F. Supp. 2d 443, 447 (S.D.N.Y. 2004). To maintain a claim under General Business Law § 350 for false advertising, a plaintiff must allege the same elements, although with specific reference to a defendant's advertising. *See Maurizio v. Goldsmith*, 230 F.3d 518, 522 (2d Cir. 2000); *accord Goshen v. Mutual Life Insurance Co. of New York*, 98 N.Y.2d 314, 324 n.1 (2002). While Person also references General Business Law §§ 349-c and 350-e, those provisions do not create separate liability. Rather, they address specific remedies for violations of §§ 349 and 350.

Person fails to allege the first two elements for a claim under either §§ 349 or 350.

A. PERSON FAILS TO ALLEGE CONSUMER ORIENTED CONDUCT

First, Pearson fails to allege any consumer-oriented conduct. The New York Court of Appeals has made clear that §§ 349 and 350 have a "public focus" and are directed at "wrongs

against the consuming public": A plaintiff must "charge conduct of the defendant that is consumer-oriented" and "demonstrate that the acts or practices have a broader impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24-25 (1995); *see also Exxonmobil Inter-America, Inc.*, 328 F. Supp. 2d at 448 ("New York courts have generally found that business-to-business transactions do not give rise to § 349 claims."); *Genesco Entertainment v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984) ("The typical violation contemplated by [§ 349] involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising."); *Canario v. Gunn*, 751 N.Y.S.2d 310, 311 (App. Div. 2d Dep't 2002) ("Private transactions without ramifications for the public at large are not the proper subject of a claim under General Business Law § 350"). In contrast, Person's own allegations indicate that Google's challenged conduct is directed at businesses (such as his own) – and not at the consuming public at large. *See* Compl. ¶¶ 146, 147, 157 (alleging injury to plaintiff and other small businesses).

Cruz v. NYNEX Info. Resources, 703 N.Y.S.2d 103 (App. Div. 1st Dep't 2000), is instructive here. In *Cruz*, the Appellate Division addressed the question of whether small businesses constitute "consumers" protected by §§ 349 and 350. *Id.* at 104. Analogous to the facts here, the plaintiffs in *Cruz* were small businesses that had purchased advertisements in the defendants' "Yellow Pages." *Id.* Reversing the trial court, the Appellate Division concluded that allegations based on business advertising transactions did not fall within the statutory ambit. *Id.* at 107.

The *Cruz* court began by noting that the term "consumer" under New York law is "consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes'." *Id.* at 106. The court also

observed that the statutes' primary concern was with consumers, and that the statutes' application to disputes between businesses was "severely limit[ed]." *Id.* at 107. Noting that advertisement space in the Yellow Pages is a commodity available to businesses only, the court reasoned that the advertising transactions at issue fell outside the scope of the consumer protection statutes. *Id.*

Similarly, the advertising purchased by Person on AdWords does not constitute a "consumer" *purchase* for "personal, family, or household purposes." Rather, Person used AdWords to market his publications, legal business, and candidacy for elective office. Compl. ¶ 6. As such, Person fails to identify any consumer-oriented conduct by Google.

B. PERSON FAILS TO ALLEGE A MISLEADING ACT OR PRACTICE BY GOOGLE

Second, Person fails to allege any misleading act or practice by Google. Person points to two portions of Google's AdWords website, which describe the "[b]idding" and "[c]alculating [p]rice" processes for the auction process through which advertisers bid their desired price and obtain a price for advertising on AdWords. Compl. ¶¶ 13, 13A.[3]

Person first complains that Google "offered" him a minimum price of 1 cent and 5 cent per-click for advertising, although he fails to provide specifics as to how those prices were "offered" to him or when. *See* Compl. ¶ 137; *see also Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 526 (S.D.N.Y. 2003) (dismissing claims under §§ 349 and 350 for lack of specificity; "A plaintiff must plead with specificity the allegedly deceptive acts or practices that form the basis of a claim under the Consumer Protection Act."). Person then claims that Google wrongly required a higher price per-click several days later. Compl. ¶ 138.

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[3] Specifically, Person points to the document found at https://adwords.google.com/select/afc/ pricing.html. Compl. ¶¶ 13, 13A. As noted above (p. 3, n.1), this Court can consider such document on a motion to dismiss. The document is annexed as Exhibit B to the Ciarelli Declaration.

The AdWords website, however, nowhere states that a price obtained through the bidding process remains constant over time. To the contrary, the website document referenced by Person specifically states that "Ad space is not reserved in advance. Ads compete on a real-time basis and are served immediately." The website document also describes that "[a]dvertisers set the highest amount they would like to spend per day for each campaign." The website document thus indicates that the auction process is ongoing, and that pricing changes over time based on competing bids and an advertiser's Quality Score. As such, while Person charges that he was later required to bid higher prices than he was "originally promised" through an auction process, Compl. ¶¶ 146, 157, his own allegations, the Google website he references, and the very nature of a competitive bidding process all demonstrate that no promise of static pricing was ever made.

Person also complains that Google advised him that he had to make his advertising more appealing to searchers and obtain a higher percentage of click-throughs. Compl. ¶ 140. Again, Person's own allegations demonstrate that there was nothing misleading here. To the contrary, Person himself references Google's description of the Quality Score system, which affects an advertiser's required minimum bid price. *Id.* ¶ 31. Google specifically advised advertisers that it was seeking to improve the overall experience for Google searchers, by "increasing the quality of the sites we present in our ad results." *Id.* Google explained to advertisers that it wanted to ensure that their ad text and landing pages were relevant and meaningful for Google searchers:

> [W]e always aim to improve our users' experience so that these users (your potential customers) will continue to trust and value AdWords ads. Have you ever searched on a keyword, found an ad that seemed to be exactly what you wanted, and then clicked on it only to find a site that had little to do with what you were searching for? It's not a great experience. . . .
>
> Advertisers who are providing robust and relevant content will see little change. However, for those who are providing a less positive user experience, the Quality Score may decrease and in turn increase the minimum bid required for the keyword to run.

Id. To aid advertisers improve their Quality Score, Google also provided website design tips and guidelines "that should help you evaluate and optimize your site." *Id.* Thus, advertisers like Person are fully apprised of the need to make their ads appealing to Google searchers, and advertisers like Person are given tips to help them achieve this goal.

Person further complains that his advertising through AdWords was at times rejected or stopped. *See id.* ¶ 146. Again, there is nothing misleading here. To the contrary, the AdWords Agreement expressly instructs advertisers that ads may be removed: "Google or Partners may reject or remove any ad or Target for any or no reason." Agreement ¶ 2. Given the express descriptions and instructions provided to advertisers through the AdWords Agreement and Google website – referenced by Person's own Complaint – Person fails to identify any Google act or practice that was misleading in any material respect.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed.

Dated: July 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member in good standing of this Court, hereby certifies that on July 27, 2006, she did personally cause to be served a copy of the foregoing Memorandum Of Law on the following by hand delivery:

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EXHIBIT 6

United States District Court
Southern District of New York

CARL E. PERSON,	:	
Plaintiff,	:	
v.	:	Civ. Action No. 06-CV-4683 (RPP) (AJP)
GOOGLE INC.,	:	
Defendant.	:	

DEFENDANT GOOGLE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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August 31, 2006

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I. THE ACTION SHOULD BE DISMISSED FOR IMPROPER VENUE

In its moving papers, Google demonstrated that this action should be dismissed for improper venue in light of the forum selection clause in the AdWords Agreement. Br. at 4-7. Person's primary response is that Google has not provided evidence of the AdWords Agreement and venue clause to which he agreed. Opp. at 3, 4; Declaration of Carl Person, executed Aug. 2, 2006 ("Person Decl.") ¶¶ 7, 9. Person's Complaint, however, failed to provide the month and year in which he started using AdWords. Accordingly, Google provided the most recent version of the AdWords Agreement and invoked its forum selection clause. Person now attests that he entered into an AdWords Agreement in November 2003. Opp. at 3, 4; Person Decl. ¶ 8; *see also* Declaration of David DiNucci, executed Aug. 30, 2006 ("DiNucci Decl.") ¶¶ 6-8 & Ex. A.

The AdWords Agreement in effect in November 2003 contained a similar forum selection clause. DiNucci Decl. ¶ 8 & Ex. B. Indeed, if anything, the venue clause in this earlier AdWords Agreement is even broader:

> This Agreement shall be governed by the laws of California, except for its conflicts of laws principles. *Any dispute or claim arising out of or in connection with this Agreement shall be adjudicated in Santa Clara County, California.*

DiNucci Decl. Ex. B Section 15 (emphasis added). Person concedes that he "gave [his] assent electronically" to this Agreement in November 2003. Person Decl. ¶ 8; *see also* Opp. at 3, 4. And Google's records confirm that he accepted this AdWords Agreement and venue clause. DiNucci Decl. ¶¶ 6-8 & Exs. A, B. Person thus agreed that any claim arising out of or in connection with the Adwords Agreement must be adjudicated in California. All of Person's claims plainly arise out of or in connection with the AdWords Agreement (and the AdWords Program governed by that Agreement). Indeed, the entire focus of his complaint is on Google's pricing practices under the Agreement, and his supposed harm from them. *See, e.g.*, Compl. ¶¶ 12-14, 30A.

Person next argues that enforcement of the venue clause would be unfair because it would "cancel the benefits of the liberal venue provisions given to antitrust plaintiffs." Person Decl. ¶ 10; *see also* Opp. at 4. The Second Circuit, however, has made clear that a contractual venue clause should be enforced regardless of broad statutory venue provisions – including in the antitrust context. *See Bense v. Interstate Battery Sys. of America, Inc.*, 683 F.2d 718, 720-21 (2d Cir. 1982) (rejecting argument that Congressional purpose underlying broad antitrust venue provision would be undermined by enforcement of contractual forum selection clause); *Strategic Mktg. & Communications, Inc. v. Kmart Corp.*, 41 F. Supp. 2d 268, 271-72 (S.D.N.Y. 1998) (enforcing forum selection clause in antitrust case); *see generally Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (forum selection clause applied to securities claims, despite broader venue statute).

Person further argues that he needs "speedy resolution" of this action. Person Decl. ¶ 10. He provides no evidence or argument, however, to demonstrate that litigation in the agreed-upon venue of California would be any less speedy than here.

Finally, Person argues that Google may, at some unstated time, move its AdWords headquarters to Michigan and its corporate headquarters to Oregon. Person Decl. ¶¶ 11-12. Neither potential future relocation – which, if actually completed, would likely take several years – affects the current lawsuit, particularly in light of the contractual venue clause into which Person knowingly entered. In addition, neither potential future relocation makes the improper venue of New York any more justifiable.

In sum, Person has failed to make the strong showing necessary to overcome the presumption of enforceability of the parties' agreed-upon venue selection clause. This case should be dismissed

for improper venue.[1]

II. PERSON FAILS TO STATE A CLAIM UNDER THE SHERMAN ACT

A. PERSON STATES NO MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

In his opposition brief, Person does little more than restate his monopolization and attempted monopolization claims: Google, he asserts, forces Person and "other small advertisers to increase [their] bid something like 10 to 100 times or be excluded from the bidding process (in essence, another way of refusing to deal with small advertisers)." Opp. at 14. As explained in Google's opening brief, however, Person's actual and attempted monopolization claims necessarily fail because neither claim is supported by sufficient allegations of exclusionary conduct. Br. at 7-11. The conduct Person complains of — the charging of allegedly high and discriminatory prices — is not exclusionary as a matter of law. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

Had Google chosen not to deal with Person at all, it would have been well within its rights to do so. "[A]s a general matter, the Sherman Act does not restrict 'the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.* at 408 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *Official Airline Guides v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (same); *Soap Opera Now, Inc. v. Network Publ'g Corp.*, 737 F. Supp. 1338, 1349

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[1] In a single sentence at the end of his brief, and without any formal motion papers, Person seeks a transfer to the Northern District of California. Br. at 25. Person provides neither evidence nor argument in support of his "cross-motion." Assuming that Person's claims are not dismissed with prejudice on the merits, the venue clause would permit him to institute a new proceeding in California.

(S.D.N.Y. 1990) ("unless plaintiff and defendant are in competition with one another, defendant has no duty to deal with plaintiff"). In this case, Google has not refused to deal with Person. According to Person, Google is merely charging him prices for advertising that, while lower than the prices charged by Yahoo! and MSN, are higher than what Person would prefer. That is no basis for an antitrust claim.

Conceding that his Complaint, as drafted, lacked the essential allegation of exclusionary conduct, Person now proposes to add a new paragraph to the Complaint (¶ 95A). This new paragraph advances an argument that Google's pricing should be deemed exclusionary because, Person says, it stands to increase Google's market share "at the expense of Yahoo and MSN." Opp. 15; *see id.* at 5. Ignoring, for the moment, the fact that Person's proposed amendment is entirely conclusory, lacking in any underlying factual support, and wholly inconsistent with the rest of his allegations, *see* Compl. ¶¶ 32, 34, 50, the proposed addition fails to cure the Complaint's deficiency because the conduct that Person attacks still would not be exclusionary as a matter of law.

All competition is designed to increase the competing firm's market share. That fact, however, does not make it *exclusionary*. *See, e.g., Spectrum Sports, Inc. v. McQuillan,*, 506 U.S. 447, 458 (1993) ("The law directs itself not against conduct that is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."). There must, instead, be evidence that the conduct is designed to "exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). In this case, there is no allegation of any tying arrangement, exclusive dealing arrangement, or other conduct of the sort that carries with it the prospect of depriving Google's rivals of access to customers or supplies. Instead, the sole allegation that Person proposes to add is that Google's *pricing* practices are designed to allow it to increase its market share at the expense of Yahoo! and MSN.

Charging low and/or discriminatory prices to customers is not exclusionary, as a matter of law, absent evidence that the prices are "predatory," that is, below an appropriate measure of cost. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993); *Northeastern Telephone v. AT&T*, 651 F.2d 76, 88-89 (2d Cir. 1981). Person advances no such allegations here; nor can he. His concern is not that Google's prices are below cost — since they are not — but that the "lower" prices he alleges are available to larger advertisers are not available to him. Complaint ¶¶ 12, 13B, 35, 37, 47, 71(S-1), 86-89. That is not predatory pricing.

Person acknowledges that the "higher" prices Google charges even small advertisers, such as himself, are still a far more favorable bargain than the even higher prices offered by Yahoo! and MSN. *See* Declaration of Carl Person in Support of Motion for Preliminary Injunction, executed June 26, 2006, ¶¶ 29-35. This charging of low, but non-predatory, prices is the essence of competition. As the Supreme Court has stated, "[l]ow prices benefit consumers regardless of how those prices are set, and as long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Absent allegations of below-cost predatory pricing, therefore, Person's allegations necessarily fail. *See Trinko*, 540 U.S. at 407-08; *Official Airline Guides*, 630 F.2d at 927-28; *Soap Opera Now, Inc.*, 737 F. Supp. at 1349.

The decision in *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989) (Breyer, J.), is on point. In *Monahan's*, the plaintiff alleged that defendant Boston Whaler, Inc. sold boats to plaintiff's competitors at prices lower than, and terms better than, it offered to plaintiff. *Id.* at 526. The court held that "Whaler's actions (which we shall call 'price discrimination') are not, on balance, anticompetitive for Sherman Act purposes." *Id.* at 527. In doing so, the court stated, *inter alia*, that "the Sherman Act does not normally forbid a seller from charging a low, nonpredatory

price, even though that price may make it harder for a competitor to enter, or to remain in, the market." *Id.* at 528. It also noted that there is "nothing anticompetitive in the simple fact that a seller selectively cuts prices, or offers other favorable terms, to some of its dealers even though such discrimination harms the non-favored dealers." *Id.* at 529; *accord, e.g., AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982) ("We do not think section one of the Sherman Act requires the manufacturer to offer the same price to all its customers"); *Zoslaw v. MCA Distributing Corp.* 693 F.2d 870, 887 (9th Cir. 1982) ("the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act"); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors*, 637 F.2d 1376, 1387 (9th Cir. 1981) ("courts are reluctant to interfere with a company's business decision to distribute products in a particular fashion."). Because Person fails to allege any conduct but "price discrimination" of the kind that courts have held lawful, and even desirable, under the Sherman Act, and because Person's proposed amendment would not salvage the claim, the Section 2 claim should be dismissed with prejudice.

B. PERSON STATES NO CLAIM FOR CONSPIRACY TO RESTRAIN TRADE UNDER SECTION 1 OF THE SHERMAN ACT

Evidently recognizing the invalidity of the theory of Section 1 violation advanced in his Complaint — namely, that an agreement between Google and a major advertiser regarding the rates the advertiser will pay is somehow "price fixing" — Person's opposition brief recasts the allegations as "includ[ing] a horizontal agreement among competitors [i.e., the advertisers] to be bound by the terms of the auction." Opp. 17. The effort fails.

A valid claim of horizontal conspiracy among competitors requires proof of some exchange of commitment *among* the competitors. Person does not allege such an agreement; nor could he. Person merely alleges a series of agreements between Google and its various customers — agreements that are necessarily vertical. Compl. ¶¶ 35-40. This is insufficient to state a claim under

Section 1 of the Sherman Act. *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (a claim of horizontal conspiracy requires "an agreement between or among direct competitors"). As the Fifth Circuit explained in *Spectators' Communications Network, Inc. v. Colonial Country Club*, 231 F.3d 1005, 1014 (5th Cir. 2000), there must be "evidence of the competitors agreeing among themselves. This hub and spoke sort of proof [of agreements between advertisers at golf tournaments and a golf tournament sponsor] does not establish a horizontal combination." Because the Complaint alleges nothing more than individual agreements between Google and each of its corporate advertisers, and no agreement among the advertisers themselves, it fails to state a claim for antitrust conspiracy under Section 1 of the Sherman Act and should be dismissed with prejudice.

III. PERSON STATES NO CLAIM UNDER THE DONNELLY ACT OR CARTWRIGHT ACT

Person concedes that his Donnelly Act and Cartwright Act claims rise or fall with his Sherman Act claims. Opp. at 18. Since his Sherman Act claims fails, his state law antitrust claims necessarily fail as well.

IV. PERSON STATES NO SARBANES-OXLEY CLAIM

Person's single-sentence opposition regarding his Sarbanes-Oxley allegations does little to save them. Opp. at 18. Person wholly fails to identify which sections of the Sarbanes-Oxley Act were allegedly violated. In addition, Person fails to demonstrate that he has standing to seek relief under unidentified provisions of the Act.

V. PERSON STATES NO CLAIM UNDER NEW YORK GENERAL BUSINESS LAW §§ 349 AND 350

A. PERSON FAILS TO ALLEGE CONSUMER ORIENTED CONDUCT

Person's initial response regarding his failure to allege consumer oriented conduct is that the statutes do not expressly require it. Yet cases interpreting the statutes — including the two cited by Person — uniformly require *consumer* oriented conduct. *See* Moving Br. at 15-16. Indeed, the statutes are part of Article 22-A, entitled "Consumer Protection from Deceptive Acts and Practices."

Person also contends that the AdWords advertising system affects consumers at large because advertisers market products to consumers through the system. Opp. at 20-21. Person's asserted connection to consumer oriented conduct is too attenuated. Indeed, the same was true in *Cruz v. NYNEX Info. Resources*, 703 N.Y.S.2d 103 (App. Div. 1st Dep't 2000), which addressed small business advertising in the Yellow Pages. Although consumers purchase services or products through the Yellow Pages, the *Cruz* court concluded that small business advertisers simply do not qualify as "consumers" protected by §§ 349 and 350. Person does not address *Cruz* at all. Nor do the two cases on which Person relies, *see* Opp. at 20-21, address even remotely similar conduct. In fact, both found consumer oriented conduct *absent* and dismissed the claims.

B. PERSON FAILS TO ALLEGE A MISLEADING ACT OR PRACTICE BY GOOGLE

While Person is correct that the heightened pleading requirements of FED. R. CIV. P. 9(b) do not apply to his §§ 349 and 350 causes of action (and Google made no such assertion in its moving papers), to state a claim Person must still "plead with specificity the allegedly deceptive acts or practices that form the basis" of his claim. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 526 (S.D.N.Y. 2003). This Person fails to do.

Person's opposition concedes that he is not entitled to have any minimum bid price locked in, contradicting the allegations in his Complaint. Opp. at 19; *compare* Compl. ¶¶ 137-41. Now, Person claims that Google's website falsely describes its auction and pricing processes. Opp. at 22 (allegedly false statements are noted in paragraphs 13 and 13A of Complaint). Specifically, Person appears to argue that Google "secretly" bases its pricing on the rate of clickthroughs achieved by an ad, which he claims results in larger advertisers being able to secure lower prices because such larger advertisers are more profitable to Google. Opp. at 19, 22-23. Of course, this theory is nowhere alleged in his General Business Law counts. *See* Compl. ¶¶ 136-58. It is axiomatic that a litigant cannot amend his pleadings through a memorandum of law. *See Jacobson v. Peat, Marwick,*

Mitchell & Co., 445 F. Supp. 518, 526 (S.D.N.Y. 1977).

In any event, Person points to nothing that is "secret" or even misrepresented about Google's auction and pricing processes. Google's website — cited in Person's own complaint — expressly states that an advertiser's bid price depends on its Quality Score. Compl. ¶ 31 ("Quality Score" is "the basis for measuring the quality of your keyword and determining your minimum bid"). Google's website also expressly describes that an advertiser's Quality Score depends on a keyword's clickthrough rate; the higher the rate, the lower the required bid price:

> How is the Quality Score calculated?
>
> . . . Each keyword is given a Quality Score based on data specific to your keyword performance on Google, including your keyword's clickthrough rate (CTR), relevance of ad text, historical keyword performance, the quality of your ad's landing page, and other relevancy factors.
>
> . . . Your keyword's Quality Score and maximum CPC (at the keyword or Ad Group level as seen on Google) determine your ad's rank on Google and the search network. . . . Remember that improving the relevance of your ad text and keywords will increase your keyword's Quality Score and reduce the price you pay when someone clicks on your ad.

DiNucci Decl. Ex. C (attaching document found at https://adwords.google.com/support/bin/answer.py?answer=10215&topic=114);[2] *see also* Compl. ¶ 31 ("Quality Score is determined by your keyword's clickthrough rate . . . . [T]he Quality Score may decrease and in turn increase the minimum bid required for the keyword to run."). Thus, Google makes it perfectly clear that bid price depends on an advertiser's clickthrough rate. While it may be that larger advertisers typically enjoy higher clickthrough rates with users, the salient point is that the pricing process is accurately described in Google's website: An advertiser's required bid price depends on its clickthrough rate;

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[2] As explained in Google's moving brief, the Court can consider this document on a motion to dismiss. *See* Br. at 3 n.1. Person cites this same website and document in his Complaint. *See* Compl. ¶ 31 (citing https://adwords.google.com/support/bin).

the higher the clickthrough rate, the lower the required bid price.

Person also appears to complain that Google misrepresents that pricing is conducted through an "auction" process, when the process includes Google's evaluation of each participant. Opp. at 20. Again, there is nothing misleading here. Google expressly advises how its pricing process works, including Google's use of a Quality Score to set minimum bids. *See* Compl. ¶ 31.

Finally, Person appears to complain that Google is providing "cost-per-click" advertising that is really "cost-per-impression" pricing. Opp. at 23-24. Again, not so. As Person acknowledges, Google expressly defines "cost-per-impression" pricing as charging the advertiser "for each time your ad is displayed." Opp. at 23 (quoting Google Learning Center). Person does not, and cannot, allege that the AdWords cost-per-click program is priced in this fashion. Rather, the program charges "only when users click on your ad." *Id.* Of course, an advertiser's bid price for submitting an ad depends on its Quality Score and anticipated clickthrough rate. But that is entirely different than charging an advertiser each time that its ad is displayed. AdWords' cost-per-click program does no such thing.

CONCLUSION

For the reasons above and in Google's moving brief, the Complaint should be dismissed.

Dated: August 31, 2006

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned, a member in good standing of this Court, hereby certifies that on August 31, 2006, she did personally cause to be served a copy of the foregoing Reply Memorandum Of Law on the following by hand delivery:

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Dated: August 31, 2006

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