

EXHIBIT 7

6. According to the Declaration that he recently filed in this action, Plaintiff Carl Person ("Person") created an AdWords account with Google in November 2003. According to Google's records, this account was created on November 26, 2003 at 10:53 am PST. To create this account, Person had to electronically accept the Google AdWords Program Standard Terms and Conditions at 10:53 am PST on November 26, 2003, by clicking the acceptance box.

7. A true and correct copy of Google's computer records, demonstrating that Person electronically accepted the AdWords Program Standard Terms and Conditions and created an AdWords account on November 26, 2003, is attached hereto as Exhibit A.

8. A true and correct copy of the Adwords Agreement in effect on November 26, 2003, and to which Person provided his electronic acceptance, is attached hereto as Exhibit B.

9. A true and correct copy of the information from Google's website found at <https://adwords.google.com/support/bin/answer.py?answer=10215&topic=114>, is attached hereto as Exhibit C.

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

Executed on August __, 2006, at Mountain View, California.


8/28/2006
David DiNucci

EXHIBIT A

of 11

Nov 26, 2003 11:02:52 AM

carl@cs.netcom.com
165.247.46.12 - 83939441

1

^ Updates to Customer:
Customer's Account was Activated.

[Show Protocol Buffer Details](#)

Nov 26, 2003 11:02:49 AM

carl@cs.netcom.com
165.247.46.12 - 83939441

^ Updates to Account:
Payment Source Id changed from 0 to 1656381

[Show Protocol Buffer Details](#)

Nov 26, 2003 11:02:49 AM

carl@cs.netcom.com
165.247.46.12 - 83939441

+ Credit Card (Payment Source Id = 1656381) was created.

[Show Protocol Buffer Details](#)

Nov 26, 2003 10:53:48 AM

carl@cs.netcom.com
165.247.46.12 - 83937281

+ Customer was created.
+ Account was created.

[Show Protocol Buffer Details](#)

Nov 26, 2003 10:53:48 AM

carl@cs.netcom.com
165.247.46.12 - 83937181

[Campaign #1\(2596901\)](#)

+ Campaign was created.

[Campaign #1\(2596901\)](#)

+ AdGroup was created.
+ Ad Added

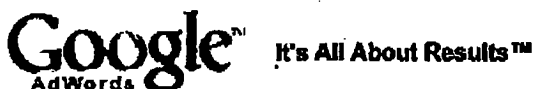
[Speakers Bureau 1st \(11202901\)](#)

[Show Protocol Buffer Details](#)

< First < Prev

Time zone for all dates and times in data tables, reports, and billing (GMT-08:00) Pacific Time. [Learn more.](#)

EXHIBIT B



[Contact Us](#) - [Help](#)

Google AdWords Program Standard Terms and Conditions

Introduction. This Agreement between You and Google Inc. ("Google") consists of these AdWords Standard Terms and Conditions ("Terms and Conditions") and the Google AdWords Program (the "Program") Frequently Asked Questions ("FAQs"). "You" or "Advertiser" means any entity identified in an enrollment form submitted by the same or affiliated persons, and/or any agency acting on its (or their) behalf, which shall also be bound by the terms of this Agreement. If You are an agency, You also represent and warrant that (1) the advertiser on whose behalf You are acting has authorized You to enter into this Agreement and to assume the obligations under this Agreement on such advertiser's behalf and to represent such advertiser within the scope of this Agreement and the Program, and (2) such advertiser agrees to be bound by the terms of this agreement, including but not limited to paying Google for advertisements delivered pursuant to this Agreement. Please read very carefully these Terms and Conditions and the Program FAQs.

- 1. Uses.** You agree that your ads may be placed on (i) any Web site, application or other property owned or operated by Google (a "Google Property") and (ii) any Web site, application or other property owned or operated by a third party (a "Partner") upon which Google places AdWords ads pursuant to a contractual agreement ("Partner Property"), unless You opt out of the applicable syndication program(s) described in the FAQs. Google and/or any Partner may review, reject or remove any ad (including any Target (as defined below)) for any reason. In addition, ads may be modified to comply with policies related to any Google Property or any Partner Property, and (if applicable) where You have authorized Google to optimize campaign performance generally through the use of Google's ad optimization services.
- 2. Partner Properties.** Even if your ad(s) are placed on Partner Property(ies), You agree to direct to Google, and not to any Partner, any communication regarding your ad(s) on any Partner Property. In addition, if You participate in any syndication program(s) by having your ads displayed on Partner Properties, the display of your ads on Partner Property(ies) will provide Partner(s) with access to the content of your ads, including the URL(s), and any contact or other information that can be obtained through such URL(s), as well as data regarding queries or clicks on directory categories.
- 3. AdWords FAQs.** You acknowledge and agree that in order for Google to (among other things) maintain the integrity and dynamic nature of the Program, your participation in the Program is subject to the FAQs, which are incorporated into these Terms and Conditions by reference and may be modified by Google at any time to reflect changes in how Google makes the Program generally commercially available.
- 4. Conversion Tracking.** If as part of the Program you opt to use Google's conversion tracking feature as described in the conversion tracking FAQs, you are solely responsible for following all instructions to activate conversion tracking on your web page. Such activation will result in a visible conversion tracking image (in the form provided by Google), which must be made visible to your customers at all times. In order to ensure user awareness of such conversion tracking image, you agree not to hide, obscure, modify or reduce the image in any way. Failure to comply with the terms of this section may result in Google's inability to provide the conversion tracking feature. You are solely responsible for all use of the conversion tracking feature.
- 5. Targets; Your Web Site(s).** You are solely responsible for knowing the contents of the FAQs. You are solely responsible for all "Targets" (any keyword, negative keyword, category, and other targeting mechanism), and for the content of your ads, including URL links. Google is not responsible for anything related to your Web site(s).
- 6. Prohibited Uses.** Google strictly prohibits using any Google Property, any Partner Property, or any third-party technology: (i) to generate fraudulent impressions of or fraudulent clicks on Advertiser's ad(s) or third-party ad(s), including but not limited to using robots or other automated query tools and/or computer generated search requests, and/or the fraudulent use of other search engine optimization services and/or software; (ii) to advertise substances, services, products or materials that are illegal in any state or country where your ad is displayed; (iii) in any way that violates any policy posted on any Google Property, as revised from time to time; or (iv) to engage in any other illegal or fraudulent business practice under the laws of any state or country where your ad is displayed. You may not include links to any Web site(s) as part of your ad, unless the content found at such site(s) is relevant to your Target(s) and/or ad creative.

You may not run multiple ads linking to the same or similar site on the same search results page. Violation of these policies may result in immediate termination of this Agreement without notice, and may subject you to state and federal penalties and other legal consequences.

7. **Termination; Cancellation.** Unless otherwise agreed to in writing by the parties, You may cancel or delete any ad and/or terminate this Agreement with or without cause at any time by canceling or deleting all ads hereunder via your online account by changing the end dates of such ad(s) to your desired cancellation date or by deleting the ads You no longer wish to run; provided, however, that a cancelled ad may continue to run for up to 48 hours before such cancellation takes effect. Google may at any time terminate the Program, terminate this Agreement, or cancel any ad(s) or your use of any Target. Except as set forth in Section 8 above or unless Google has previously canceled or terminated your use of the Program (in which case subsequent notice by Google shall not be required), Google will notify You via email of any such termination or cancellation, which shall be effective immediately. Upon cancellation of any ad or termination or expiration of this Agreement for any reason, (i) You shall remain liable for any amount due for clicks already delivered and for clicks on any ad(s) through the date such cancellation or termination takes effect, and (ii) Sections 2 and 5 through 15 shall survive expiration or termination.
8. **Confidentiality.** During the term of this Agreement and for a period of two years following the termination or expiration of this Agreement, each party agrees not to disclose Confidential Information of the other party to any third party without prior written consent except as provided herein. "Confidential Information" includes (i) ads (including Targets and URLs), prior to publication, (ii) except as provided in subsection (i) above, any other Program Information or access to technology prior to public disclosure provided by Google to You and identified at the time of disclosure in writing as "Confidential." It does not include information that has become publicly known through no breach by a party, or has been (i) independently developed without access to the other party's Confidential Information; (ii) rightfully received from a third party; or (iii) required to be disclosed by law or by a governmental authority. Nothing in this Agreement shall prohibit or limit either party's use or disclosure of the U.S. Federal Income tax treatment and U.S. Federal Income tax structure of any transaction contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment or tax structure, except where confidentiality is necessary to comply with applicable federal or state securities laws.
9. **No Guarantee.** Google makes no guarantee regarding the levels of Impressions, clicks or conversions for any ad (including any Target) or group of ads or the timing of delivery of any Impressions, clicks or conversions for any ad displayed on any Google Property or any Partner Property. Google may offer the same Target to more than one advertiser. You may not receive any impressions for your ad(s) if for a given Target there are more advertisers or ads than available display positions or if your ads do not meet applicable click-through thresholds.
10. **No Warranty.** GOOGLE MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WITH RESPECT TO ADVERTISING AND OTHER SERVICES, AND EXPRESSLY DISCLAIMS THE WARRANTIES OR CONDITIONS OF NONINFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE.
11. **Limitation of Liability; Force Majeure.** EXCEPT FOR ANY INDEMNIFICATION AND CONFIDENTIALITY OBLIGATIONS HEREUNDER, (i) IN NO EVENT SHALL EITHER PARTY BE LIABLE UNDER THIS AGREEMENT FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND (ii) GOOGLE'S AGGREGATE LIABILITY TO ADVERTISER UNDER THIS AGREEMENT FOR ANY CLAIM IS LIMITED TO THE AMOUNT PAID TO GOOGLE BY ADVERTISER FOR THE AD GIVING RISE TO THE CLAIM. Each party acknowledges that the other party has entered into this Agreement relying on the limitations of liability stated herein and that those limitations are an essential basis of the bargain between the parties. Without limiting the foregoing and except for payment obligations, neither party shall have any liability for any failure or delay resulting from any condition beyond the reasonable control of such party, including but not limited to governmental action or acts of terrorism, earthquake or other acts of God, labor conditions, and power failures.
12. **Payment.** You agree to pay all applicable charges under this Agreement, including any applicable taxes or charges imposed by any government entity, and that Google may change its minimum pricing at any time, as reflected in the FAQs. If You dispute any charge made under the Program, You must notify Google in writing within sixty (60) days of any such charge; failure to so notify Google shall result in the waiver by You of any claim relating to any such disputed charge. Charges shall be calculated solely based on

Invoicing records maintained by Google for purposes of billing. No other measurements or statistics of any kind shall be accepted by Google or have any effect under this Agreement.

13. **Representations and Warranties.** You represent and warrant that (a) all of the information provided by You to Google to enroll in the Program is correct and current; (b) You hold all rights to permit Google and any Partner(s) to use, reproduce, display, transmit and distribute Your ad(s) (including all Targets) and all contents therein ("Use"); and (c) the following items will not violate (or encourage conduct that would violate) any applicable laws, regulations or third party rights in any state or country in which your ad is displayed: any Use by Google or any Partner(s), your Target(s), any Web site(s) linked to from your ad(s), and products or services offered on such Web site(s).
14. **Your Obligation to Indemnify.** You agree to indemnify, defend and hold Google, its agents, affiliates, subsidiaries, directors, officers, employees, and applicable third parties (e.g., all relevant Partner(s), licensors, licensees, consultants and contractors) ("Indemnified Person(s)") harmless from and against any third party claim, liability, loss, and expense (including damage awards, settlement amounts, and reasonable legal fees), brought against any Indemnified Person(s), arising out of your use of the Program, your Web site, and/or your breach of any term of this Agreement. You acknowledge and agree that each Partner, as defined herein, has the right to assert and enforce its rights under this Section directly on its own behalf as a third party beneficiary.
15. **Miscellaneous.** You will be responsible for all reasonable expenses (including attorneys' fees) incurred by Google in collecting unpaid amounts under this Agreement. 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. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and any non-Google purchase order, invoice or other document relating to the subject matter hereof and any additional terms contained therein shall be null and void. Each party hereto is duly authorized to enter into this Agreement and perform its obligations hereunder. Any modifications to this Agreement must be made in a writing approved by the Google Legal Department and executed by both parties. Unless otherwise expressly set forth herein, any notices shall be sent to (a) in the case of Google: c/o Google Inc., Attn: AdWords Program, 2400 Bayshore Parkway, Mountain View, CA 94043, with a copy to the Google Legal Department; and (b) in the case of Advertiser, to the address then on record with Google for your account. Notice shall be given via (x) confirmed facsimile, with a copy sent via first class or air mail; or (y) overnight courier, and such notice shall be deemed given upon receipt. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default. If any provision herein is held unenforceable, then such provision will be modified to reflect the parties' intention, and the remaining provisions of this Agreement will remain in full force and effect. Advertiser may not resell, assign, or transfer any of its rights hereunder. Any such attempt may result in termination of this Agreement, without liability to Google. The relationship(s) between Google and the "Partners" is not one of a legal partnership relationship, but is one of independent contractors. This Agreement shall be construed as if both parties jointly wrote it.

October 23, 2003

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EXHIBIT C



How is the Quality Score calculated?

We want to ensure that your keywords get a fair chance to run and that we do all we can to properly gauge their performance. We use a Quality Score to do this. 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.

Quality Score = keyword's CTR + ad text relevance + historical keyword performance + landing page quality + 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. For content sites, your content bid or cost-per-thousand impressions (CPM), plus the ad's performance history on the site and similar sites, are considered. (For the top positions above Google search results, however, we use your keyword's actual CPC.) 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.

Was this information helpful?

Yes No

You may also be interested in...

[How do I know if my account is running and performing well?](#)

[What are the requirements and guidelines for my AdWords ads?](#)

[How can I improve my campaign performance?](#)

Don't see the answer to your question? Try one of these resources:

[AdWords Discussion Group](#) - Ask questions, share answers, and post your favorite AdWords tips and tricks on Google Groups.

[Learning Center](#) - Build and test your knowledge of AdWords.

[Contact Us](#) - Let one of our AdWords Specialists help.

Search AdWords Help Center

examples: *reporting* or *broad matching*

Look Up Terminology

[Glossary](#)

Learn from other AdWords users

Ask questions, share answers, and post your favorite AdWords tips and tricks on the [AdWords Help Discussion Group](#).

Posts are not moderated by Google

EXHIBIT 8

REDACTED

From: Tina [mailto:tina.p@google.com]
Sent: Wednesday, January 25, 2006 12:11 PM
To: Dan Savage
Subject: Re: [#44767116] deletes

Hi Dan,

Thanks for the email address. I will get started on your Prepay account today. Once it has been set up, I will contact you directly.

Best,

Tina
The Google AdWords Team

Want more info on AdWords? Check out the official AdWords Blog, "Inside AdWords," at <http://adwords.blogspot.com> to get the latest news, information and tips.

Original Message Follows:

From: "Dan Savage" <dsavage@sourcetool.com>
Subject: RE: [#44767116] deletes
Date: Wed, 25 Jan 2006 11:49:17 -0500

dansavage@sourcetool.com

-----Original Message-----

From: Tina [mailto:tina.p@google.com]
Sent: Wednesday, January 25, 2006 11:42 AM
To: Dan Savage
Subject: Re: [#44767116] deletes

Hi Dan,

Thanks for making those changes. We greatly appreciate your efforts in complying with our policies. Please let me know if you have any questions.

Also, do you have another email address I may use to create your new Prepay account?

4/15/2009

Regards,

Tina
The Google AdWords Team

Want more info on AdWords? Check out the official AdWords Blog, "Inside AdWords," at <http://adwords.blogspot.com> to get the latest news, information and tips.

Original Message Follows:

From: "Dan Savage" <dsavage@sourcetool.com>
Subject: deletes
Date: Tue, 24 Jan 2006 18:34:26 -0500

I was able to delete all of those.

Dan Savage, CEO

TradeComet.com LLC

Phone: 646-682-7650

Email: <<mailto:dsavage@sourcetool.com>> dsavage@sourcetool.com

4/15/2009

EXHIBIT 9

1 THE COURT: All right.

2 MR. RULE: -- and why the other prongs of Phillips
3 suggest that it ought to be interpreted narrowly, because
4 otherwise, you know, it would seem to be inappropriate and
5 inconsistent with what parties who were dealing with Google
6 have a right to expect when they click on that license.

7 THE COURT: All right. Of course, you know, I'll --
8 I'll let you make that argument. They haven't even made the
9 motion, so, you know, you'll have a full opportunity to make
10 that.

11 You know, I've dealt with these issues before in a
12 variety of different contexts, and if the claim is that the
13 contract says all claims arising out of or relating to -- very
14 broad. If that were an arbitration clause, for example, that's
15 just about as broad as you can get. But I understand your
16 argument. You're telling me there's case law that says that
17 broad language should be construed narrowly, and you may not
18 even have to get there, because you're not sure what you
19 signed. I understand. All right.

20 MR. RULE: And, Your Honor, if I might, just --

21 THE COURT: Yeah.

22 MR. RULE: -- I mean, for example, the language that
23 was in effect on April 19th, 2005 and, we believe, in May 2006
24 when several of these accounts were signed up for, read the
25 agreement -- let me take my glasses off here for a minute --

EXHIBIT 10

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM, LLC,
Plaintiff,

vs. Case No. 09-CV-1400 (SHS)

GOOGLE, INC.,
Defendant.

-----/

CONFIDENTIAL - OUTSIDE COUNSELS' EYES ONLY
VIDEOTAPED DEPOSITION OF HEATHER WILBURN
Palo Alto, California
Monday, April 13, 2009

Reported by:

LORRIE L. MARCHANT, CSR No. 10523, RPR, CRR, CCRR,

CLR

JOB NO. 22284

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April 13, 2009

9:15 a.m.

Deposition of HEATHER WILBURN, held at
the offices of Wilson Sonsini Goodrich &
Rosati, 650 Page Mill Road, Palo Alto,
California, before Lorrie L. Marchant, a
Certified Shorthand Reporter, Registered
Professional Reporter, Certified Realtime
Reporter, California Certified Realtime
Reporter and Certified LiveNote Reporter.

1 H. Wilburn

2 A P P E A R A N C E S:

3 CADWALADER, WICKERSHAM & TAFT, LLP

4 Attorneys for Plaintiff

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6 Washington, DC 20004

7 Phone: (202) 862-2391

8 Fax: (202) 862-2400

9 e-mail: Joseph.bial@cwt.com

10 BY: JOSEPH J. BIAL

11 Attorney at Law

12

13 WILSON SONSINI GOODRICH & ROSATI

14 Attorneys for Defendant

15 1301 Avenue of the Americas, 40th Floor

16 New York, NY 10019-6022

17 Phone: (212) 999-5800

18 Fax: (212) 999-5899

19 e-mail: Jjacobson@wsgr.com

20 BY: JONATHAN M. JACOBSON

21 Attorney at Law

22

23 Also present: Isabelle Young

24 Google Litigation Counsel

25 Matthew Kwan, Videographer

REDACTED

16 Q Have you ever met Dan Savage, the CEO
17 of TradeComet?

18 A No.

19 Q Have you ever had a call with
20 Mr. Savage or any of his colleagues at
21 TradeComet?

22 A No.

23 Q So prior to your declaration, have you
24 ever heard of TradeComet?

25 A No.

1 H. Wilburn

2 Q So this was the first time you've ever
3 heard about TradeComet was in this matter?

4 A M-hm, yes.

REDACTED

REDACTED

14 Q Would it be possible for a Google
15 representative just to create an account if an
16 advertiser gave them an e-mail address and asked
17 the Google representative to create an account
18 for them; would that be possible?

19 A I know we are very careful with -- in
20 terms of how much assistance we provide with
21 advertisers because I know we want to make sure
22 that obviously they're managing their -- their
23 own accounts.

24 I believe for some large advertisers,
25 that could be possible. But, again, there's --

1

H. Wilburn

2

there's still the consent -- the ultimate

3

consent of the advertiser that -- that comes

4

down to it.

5

An AdWords representative would never

6

just create an account arbitrarily, with no

7

direct permissions from -- from the advertisers.

8

Those pieces still need to happen.

REDACTED

REDACTED

Q

25

How would the advertiser agree to

1

H. Wilburn

2

terms and conditions if an account were set up

3

by a Google representative that had asked the

4

customer merely for an e-mail address to set up

5

an account?

6

MR. JACOBSON: Objection.

7

But you can answer.

8

A I haven't had that experience. I

9

don't know how that would happen.

REDACTED

REDACTED

A

23 In cases where terms and conditions
24 are updated, though, you do have to log in
25 individually to each child account.

REDACTED

Page 46

A

16 And then they have the
17 option to accept the terms and conditions and
18 continue advertising with us.

19 Or if, for whatever reason, they don't
20 agree with the new terms and conditions, they
21 don't accept the new terms and conditions, the
22 account will automatically shut off at the end
23 of that window of what they're allowed, then, to
24 accept the new terms and conditions.

25 Q Okay. And pardon me for going further

REDACTED

REDACTED

14 Q And for that account, when you get
15 down to August 29th, 2006, and you have another
16 terms and conditions accepted in the
17 description, that would mean that -- well, what
18 would that mean?

19 You've accepted the terms and
20 conditions back in May. Now it says, down
21 further in the description, that terms and
22 conditions are accepted.

23 MR. JACOBSON: On August 29th.

24 Q On August -- in August -- August --
25 here it says August 29th, 2006.

1 H. Wilburn

2 A My understanding of that would be that
3 the most recent terms and conditions which we
4 presented in the advertiser, in this case, in
5 August 2006, that were accepted on the 29th of
6 August in 2006, would be the most recent terms
7 and conditions that would then dictate the way
8 that the account would be run moving forward.

9 So those would be the terms and
10 conditions to dictate.

REDACTED

REDACTED

10 Q And my question in regards to the
11 timing, how is it possible that an individual
12 could log into eight accounts serially in order
13 to accept the terms and conditions within three
14 seconds?

15 A I wouldn't know. I don't know what
16 this individual did, in particular, when they --
17 accessing their accounts to accept the terms and
18 conditions.

19 Q But if the time stamps are correct
20 here, it must be the case that within three
21 seconds, all accounts had been logged onto and
22 the information had been accessed within that
23 three-second period; is that correct?

24 A This is what it looks like, yes.

REDACTED

REDACTED

Page 74

2 Q I'm sorry. Because the numbers are a
3 little -- let me -- let me just -- we'll call
4 the version that was in effect when he opened
5 the account, let's call those the November 2003
6 terms and conditions.

7 A Okay. Those would have been in effect
8 until April 2005, when the new terms and
9 conditions came into play; right?

10 A Correct.

11 Q And then at that point going forward,
12 it would be the April 2005 terms and conditions
13 would be in effect until the subsequent version
14 became effective; correct?

15 A Correct. Any new terms and conditions
16 presented supersedes any previous terms and
17 conditions agreed to.

18 Q Okay. And so what effect, then, at
19 the end of 2005 would the November 2003 terms
20 and conditions have?

21 A I'm sorry. Can you repeat the
22 question?

23 Q Would the November 2003 terms and
24 conditions still be effective at the end of
25 2005?

1 H. Wilburn

2 A It would be my understanding, based on
3 verbiage in our terms and communications --
4 terms and communications -- terms and
5 conditions, this new version here in April 2005
6 would have superseded any previous terms and
7 conditions that the advertiser had agreed to.

8 Q Okay. And that would be on a
9 going-forward basis?

10 A Correct.

REDACTED

REDACTED

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8 My question is whether Google always
9 implements its venue selection provision of the
10 terms and conditions in any litigation?

11 MR. JACOBSON: Read it back.

12 (Record read.)

13 MR. JACOBSON: Objection.

14 A I don't have personal knowledge of all
15 of the cases that Google pursues, but the terms
16 and conditions are what binds the advertiser in
17 agreement with working with Google.

18 And if the conditions are set forth
19 that any type of litigation has to be brought in
20 a particular venue, that's what the advertiser
21 is agreeing to.

REDACTED

EXHIBIT 11

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



dan@thomasb2b.com (Admin - Legacy) • 549-100-6959 •
Managed by dan@sourcefuel.com (UI)
Customer time zone: Pacific Time
REDACTED

REDACTED

[New Interface \(Beta\)](#) | [New Features](#) | [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 remarketing buffer details](#) [Download as csv](#)

Showing 1 - 1

Date / User / IP - Change ID	Campaign	Ad Group	Description	Legend: = changed; + = added; x = removed
Aug 29, 2006 8:20:08 AM dan@sourcefuel.com REDACTED			Terms end 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



dansavage@gmail.com
 +358-439-1741
 Managed by dan@sourcefoot.com (UI)
 Customer time zone: Pacific Time
 REDACTED

REDACTED

[New Interface \(Beta\)](#) | [New Features](#) | [Help](#)
[Jump to previous customer...](#)

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 [Select custom 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
Aug 28, 2008 9:20:09 AM dan@sourcefoot.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



dan001@tradecomat.com
758-713-4047
Managed by dan@sourcotool.com (UI) - Clickable, Inc. (API)
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
Aug 29, 2008 9:20:11 AM	dan@sourcotool.com			Terms and conditions accepted
	REDACTED			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 E



dan002@tradecomet.com
 • 843-646-8800 •
 Managed by dan@sourcecode.com (UI)
 Customer time zone: Pacific Time
 REDACTED

REDACTED

[New Interface \(Beta\)](#) | [New Feature!](#) | [Help](#) | [Sign out](#)
[Jump to previous customer...](#)

Change History

Show only changes that match the following criteria:

Within date range: - [Select quick date range](#)

Affecting level:

REDACTED

Change type: All Budget

Made by:

[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	<small>⊖ = changed; ⊕ = added; ✖ = removed</small>
Aug 29, 2008 9:20:10 AM dan@sourcecode.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



dan003@tradecomnet.com
- 544-065-9645 -
Managed by dan@sourceool.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	Legend
Aug 28, 2006 9:20:12 AM	dan@sourceool.com				Terms and conditions accepted	⊖ = changed; + = added; × = removed
					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



dan004@tradecomf.com
 • 269-964-0086 •

Managed by dan@sourceatool.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: - [Select bulk date range](#)

Affecting level: Account only

REDACTED

Change type: All Budget

Made by:

[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
Aug 29, 2006 9:20:09 AM dan@sourceatool.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 H



dan005@tradecommet.com
 • 338-794-1045 •
 Managed by dan@sourcecode.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
Aug 29, 2008 9:20:10 AM dan@sourcecode.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 I



dan006@tradecomel.com

• 738-728-0431 •

Managed by dan@sourcefuel.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 ranges](#)

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	Legend: = changed; + = added; x = removed
Aug 29, 2006 9:20:11 AM dan@sourcefuel.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 J



dan007@tradecomf.com -

• 832-287-9582 •

Managed by dan@sourceool.com (U)

Customer time zone: Pacific Time

REDACTED

REDACTED

[New Interface \(Beta\)](#) | [New Features](#) | [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 of 1

Date ▼ / User / IP - Change ID	Campaign	Ad Group	Description	Δ = changed; + = added; x = removed
Aug 29, 2006 9:20:10 AM dan@sourceool.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



dan008@tradecomst.com
 906-559-3884
 Managed by dan@sourceool.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: - [Select output date range](#)

REDACTED

Affecting level:

Change type: All Budget

Made by:

[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
Aug 29, 2006 9:20:11 AM	dan@sourceool.com				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 L



dan030@tradecom.net
521-108-8938

REDACTED

Managed by dan@sourcefuel.com (UI) • ClickTracks Analytics, Inc. (API)
Customer time zone: Eastern Time (PDT +03:00)
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 data 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
Nov 28, 2006 10:45:32 AM dan030@tradecom.net REDACTED			Customer's Account was Activated. REDACTED
Nov 28, 2006 10:45:23 AM dan030@tradecom.net 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@tradecom.net 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@tradecom.net REDACTED			Terms and conditions accepted REDACTED
Nov 28, 2006 10:41:14 AM dan030@tradecom.net REDACTED			Updates to Account: Account created in Moneta with account ID 54727111 Moneta Account (Account Id = 10558615, MonetaServiceType = 7) was updated. Moneta Account Id changed from 0 to 54727111 REDACTED
Nov 28, 2006 10:41:13 AM dan030@tradecom.net REDACTED			Updates to Account: Request created with ID 58917031878167544 to sync account to Moneta. + Moneta Account (Account Id = 10558615, MonetaServiceType = 7) was created. REDACTED
Nov 28, 2006 10:40:39 AM dan030@tradecom.net REDACTED			+ Customer Note (Customer Note Id = 2638836) was created. REDACTED
Nov 28, 2006 10:40:39 AM dan030@tradecom.net 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.

Nov 28, 2006 10:40:36 AM
dan030@tradecomel.com
REDACTED

pending limit to \$10.00
REDACTED

- + Customer was created.
- + Account was created.
- + Google Account dan030@tradecomel.com associated with account
- + Address (Address Id = 19188215) was created.
- + AdWords Account Info (Account Id = 10556616) was created.
- Updates to Customer:
 - Gala Customer Id changed from 0 to 66865411
 - External Customer Id changed from 0 to 6211088939

REDACTED

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

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

EXHIBIT 12

**DECLARATION OF GOOGLE, INC. REPRESENTATIVE
ANNIE HSU**

I, Annie Hsu, hereby declare and state as follows:

1. I am an AdWords Associate for Google, Inc. ("Google"). I have been employed by Google since June 2004. I make this declaration in support of Google's Motion to Dismiss the Amended Complaint in the matter captioned *Lawrence E. Feldman d/b/a Lawrence E. Feldman & Assocs. v. Google, Inc.*, Civil Action No. 06-cv-2540 (E.D. Pa.). I know the facts stated herein of my own personal knowledge, and if called to testify as a witness, I could and would do so competently and under oath.

2. Google's online advertising service that allows advertisers to create text- or image-based ads and to display them online in a targeted manner is called "AdWords." I understand that, in this action, plaintiff Feldman alleges that he was an AdWords advertiser. If so, he was required to enter into an AdWords contract *before* he placed any ads or incurred any charges.

3. When an advertiser wishes to open an AdWords account, he uses Google's on-line sign-up process. (Some very large advertisers do not use this on-line process, and instead interact directly with Google representatives, but those are exceptional cases which are not relevant here.) The on-line sign-up process, which is available through the website <https://adwords.google.com/select/Login>, guides the advertiser through a series of steps, and requires him to provide certain information or responses at each step in order to progress to the next step. In the first series of steps, the advertiser provides information such as the text of the ad he wishes to run, the search keywords that he wishes to target the ad to (terms like "digital camera" or "home mortgage," for example), and so forth. At the conclusion of these steps, the

advertiser may create an AdWords account. The account is inactive, however—and the advertiser *cannot* place any ads or incur any charges—until he performs several additional steps.

4. To activate the account, the advertiser must visit his account page, where he is shown a copy of the AdWords contract. Here is an image depicting what the advertiser sees:

The screenshot shows the Google AdWords account setup interface. At the top left is the Google AdWords logo. On the top right, there are links for 'Help', 'Contact Us', and 'Sign Out', along with the email 'djs@kvn.com' and 'Customer ID: 386-515-5690'. Below this is a navigation bar with 'Campaign Management', 'Reports', 'Analytics', and 'My Account'. Underneath the navigation bar are links for 'Billing Summary', 'Billing Preferences', 'Access', and 'Account Preferences'. The main heading is 'Account Setup', followed by a breadcrumb trail: 'Select location > Choose form of payment > Agree to terms > Provide billing details'. Below this, there is a prompt: 'Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.' A link for 'Terms and Conditions: (Printer-friendly version)' is provided. The main content area is titled 'Google Inc. Advertising Program Terms' and contains two numbered paragraphs. Paragraph 1 discusses 'Policies' and paragraph 2 discusses 'The Program'. At the bottom of the terms section, there is a radio button labeled 'Yes, I agree to the above terms and conditions.' Below the terms section are two buttons: 'Back' and 'Continue'.

Google AdWords

djs@kvn.com | Help | Contact Us | Sign Out
Customer ID: 386-515-5690

Campaign Management | Reports | Analytics | My Account

Billing Summary | Billing Preferences | Access | Account Preferences

Account Setup

Select location > Choose form of payment > Agree to terms > Provide billing details

Carefully read the following terms and conditions.
If you agree with these terms, indicate your assent below.

[Terms and Conditions: \(Printer-friendly version\)](#)

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

Yes, I agree to the above terms and conditions.

[Back](#) [Continue](#)

It is important to note that, on the actual account page, there is a scroll bar on the right side of the window depicted above that allows the advertiser to scroll through and read the entire contract,

including the forum-selection clause that is at issue in Google's Motion to Dismiss. The scroll bar does not appear in the image above.

5. Google ensures that the AdWords contract is short and easy to read. The contract that plaintiff Feldman alleges he agreed to is just seven paragraphs long, plus a short pre-amble. See Complaint dated June 1, 2006, Ex. A. It is printed and displayed entirely in twelve-point type. The advertiser can quickly and easily scroll through the entire document in the window depicted above. Alternatively, as shown in the figure above, Google gives the advertiser the option to display a "Printer-friendly version" of the contract—one that fills the full screen, with all the other material on the page removed—which he can review on the screen, or, if he prefers, print so that he can review the document in paper form.

6. After Google presents the contract to the advertiser as shown in the figure above, the advertiser *must* click "Yes, I agree to the above terms and conditions" to progress to the next step. If the advertiser does not click "Yes, I agree to the above terms and conditions," pressing the "Continue" button will merely return him to the same page, with the "Yes, I agree to the above terms and conditions" button highlighted. Unless he agrees to the AdWords contract, the advertiser can never activate his account, which means that he can never place any ads or incur any charges.

7. I understand that plaintiff Feldman alleges he agreed to the AdWords contract in or around January 2003. Based on my work as an AdWords associate, I am familiar with how AdWords accounts were activated at that time, and the procedures described above were in place then. In short, if plaintiff Feldman ever advertised through the AdWords program, Google presented him with the AdWords contract, and he clicked the button to indicate that he agreed to the contract, *before* he placed any ads or incurred any charges.

I declare under penalty of perjury under the laws of the State of California and the Commonwealth of Pennsylvania that the foregoing is true and correct. Executed on this 16th day of November, 2006, at Santa Clara County, California.



ANNE HSU

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ABBREVIATIONS

- “Pl. Mem.” refers to 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).
- “Wilburn Dec.” refers to the Declaration of Heather Wilburn, dated March 30, 2009.
- “Howley Dec.” refers to the Declaration of Daniel Howley, dated April 15, 2009.
- “Walsh Dec.” refers to the Declaration of Sara Ciarelli Walsh, dated April 22, 2009.

Google Inc. ("Google") respectfully submits this reply memorandum in support of its motion to dismiss the Complaint ("Cplt.") filed by TradeComet.com LLC ("TradeComet").

PRELIMINARY STATEMENT

If there were evidence that TradeComet did not assent to the current AdWords terms and conditions, dated August 2006, TradeComet would certainly have relied on it here. But TradeComet has submitted no such testimony and does not deny that it, in fact, assented. Nor does it submit any evidence that the terms were rejected or not received. Walsh Dec. Ex. A, at 6. The only conclusion that can be drawn is that TradeComet's assent was given, and freely so.

TradeComet was founded by Dan Savage, a Harvard Business School graduate. Cplt. ¶¶ 37-38. Mr. Savage has been using Google's AdWords program for his businesses since January 2002. *Id.* ¶ 38. TradeComet claims to have created at least 14 AdWords accounts for its Sourcetool.com site, generating many millions of dollars of revenue. *Id.* ¶ 48; Walsh Dec. Ex. A, at 5. Now, apparently unhappy with the traffic and revenue Sourcetool.com is receiving, TradeComet seeks to evade the forum selection clause to which it repeatedly assented – a clause to which users such as TradeComet must agree in order to use, or continue to use, the AdWords program. Walsh Dec. Ex. B, at 13:5-11, 34:18-35:6; Howley Dec. Ex. 7, ¶ 5, Ex. 12 ¶¶ 2-6. TradeComet further argues that it would be "unconscionable" to require TradeComet to "trek to Santa Clara County," Pl. Mem. at 19, even though TradeComet has traveled to Santa Clara County to meet with Google in the past, and has volunteered to be a class representative in litigation against Google previously filed in Santa Clara County. Walsh Dec. Ex. C, ¶¶ 8, 9. TradeComet's arguments contravene long-standing federal policy upholding forum clauses. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972) (forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown . . . to be unreasonable under the circumstances"). TradeComet's arguments should be rejected.

ARGUMENT

I. THIS FORUM IS IMPROPER UNDER BOTH THE CURRENT AND PRIOR TERMS AND CONDITIONS

TradeComet's main argument is that the August 2006 terms and conditions do not apply, and that, instead, the prior terms (dated April 2005 and May 2006) govern. Under these earlier versions, the forum selection clause states that "the agreement must be . . . adjudicated in Santa Clara County, California." Howley Dec., Exs. 2, 3. Plaintiff's attempt to evade the August 2006 version is unavailing for the reasons explained below. Regardless of the version that governs, however, this case can be pursued only in Santa Clara County.

The injuries alleged by TradeComet result from alleged increases in minimum bid requirements for AdWords for SourceTool.com, based on Google's Landing Page Quality adjustments. According to TradeComet, these adjustments made it more difficult for it to attract Google searchers to SourceTool.com. This, in turn, is alleged to have weakened SourceTool's ability to compete, in violation of Section 2 of the Sherman Act. Cplt. ¶¶ 33, 43-49, 94-97, 104-14. *But see Pacific Bell Tel. Co. v. LinkLine Commc'ns*, 129 S. Ct. 1109, 1118 (2009) (holding that price increases by monopolist, even if they impair plaintiff's ability to compete effectively, cannot support a claim for relief under Sherman Act § 2).¹ It is beyond dispute that any adjustments to SourceTool's Landing Page Quality and any resulting increases in minimum bid requirements would all have occurred within the context of the contractual AdWords relationship between Google and TradeComet, and would have affected TradeComet only to the extent it sought to purchase advertising through that contractual relationship. Likewise, TradeComet's Section 1 allegations concerning the "relaxation of the Landing Page Quality methodology for

¹ Google limits its memorandum to issues concerning venue. Google disputes TradeComet's merits allegations, including those as to alleged market definition, monopoly power, exclusionary conduct, and effect on competition.

certain ‘search partners,’” Cplt. ¶ 101, are meaningless unless viewed in reference to the parties’ actions under the AdWords agreements and the context in which Landing Page Quality adjustments allegedly occurred. *See, e.g., id.* ¶¶ 100-02, 117-19. The other conduct alleged by TradeComet – Google’s acquisitions, “exclusive arrangements,” and expansion of its search functions, *id.* ¶¶ 68, 86-89 – is not alleged to be an independent source of injury to TradeComet. These allegations are advanced, instead, to support the (false and unsustainable) allegation that “there [is] no realistic alternative” (*id.* ¶ 48) to AdWords.

TradeComet’s allegations require an “adjudication” of the AdWords agreement, as it is the “source of the right, duty and injury” forming the basis of the case. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 392 (2d Cir. 2007); Cplt. ¶¶ 8, 9, 43-53, 78, 91-103; Walsh Dec. Ex. B, at 34:14-35:6, Howley Dec. Ex. 12 ¶¶ 2-6. Claims such as TradeComet’s, where the source of the alleged injury is conduct undertaken by Google pursuant to the AdWords agreement, require “adjudication” of the agreement to determine the rights and obligations of the parties and, thus, whether any kind of claim exists. Otherwise, the “adjudicated in” venue clause has no meaning. Under either the current or prior versions of the AdWords terms, therefore, the correct forum is in Santa Clara County. *Feldman v. Google Inc.*, 513 F. Supp. 2d 229, 246-47 (E.D. Pa. 2007) (transferring “click-fraud” action to Santa Clara County under “adjudicated in” language); *Person v. Google Inc.*, 456 F. Supp. 2d 488, 493 (S.D.N.Y. 2006) (treating old and new Google forum selection clause language identically).²

² No case that Plaintiff cites suggests otherwise. *B&H Mfg. Co. v. Bright*, 2002 WL 31820963, at *13 (Cal Ct. App. 2002) supports Google’s position because it enforced a forum clause in a deed of incorporation where the action involved the misappropriation of property because “each of the[] claims, and the relief [sought], relate . . . to rights and duties enumerated in the deed.” In *Bancomer S.A. v. Sup. Ct.*, 44 Cal. App. 4th 1450, 1463 (Cal. Ct. App. 1996), and *Coalition for ICAAN Transparency Inc. v. VeriSign, Inc.*, 452 F. Supp. 2d 924 (N.D. Cal. 2006), the respective courts declined to enforce a forum agreement against or on behalf of an entity that was not a party to the agreement; the cases are thus distinguishable. In *General Envtl. Sci. Corp. v. Horsfall*, 25 F.3d 1048,

II. THE CURRENT AGREEMENT IS THE OPERATIVE AGREEMENT

Despite evidence that TradeComet assented to the current terms several times, Wilburn Dec. Exs. B-L; Walsh Dec. Exs. D-F, TradeComet urges the Court to wipe the current terms from existence.³ TradeComet argues that (a) the language in the current version stating that it supersedes prior versions has no effect, Pl. Mem. 11-14; (b) that the current version was not “reasonably communicated” to TradeComet, *id.* 15-17; and (c) that Google should be estopped from enforcing the current version because of Plaintiff’s (blatantly false) allegation of “selective enforcement” of the venue clause. *Id.* at 1-2, 10, 20. These arguments are unavailing.

A. The Current Version Supersedes the Prior Versions. The current AdWords terms and conditions govern this action. Walsh Dec. Ex. B at 76:12-21. Contrary to Plaintiff’s assertion that the agreement contains a boilerplate merger or integration clause that fails to eliminate prior terms expressly, the current agreement specifically says that it “*supersedes and replaces any other agreements, terms and conditions applicable to the subject matter hereof.*” Wilburn Dec. Ex. A (emphasis added). On their face, the current terms replace any prior terms. *See Health-Chem Corp. v. Baker*, 915 F.2d 805, 811 (2d Cir. 1990) (“When the parties to a contract enter into a new agreement that expressly supersedes the previous agreement, the previous agreement

1994 WL 228256 at *8 (6th Cir. 1994) (table case), *Light v. Taylor*, 2007 WL 274798, at *6 (S.D.N.Y. 2007), *Imation Corp. v. Quantum Corp.*, 2002 WL 385550, at *4 (D. Minn. 2002), and *E&J Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148, 1162 (E.D. Cal. 2005), unlike here, many of the alleged injuries stemmed from conduct that would have injured the plaintiffs whether or not a contractual relationship existed between the parties. *Williams v. Deutsche Bank Secs.*, 2005 WL 1414435, at *3 (S.D.N.Y. 2005), is cited for its interpretation of a choice of law provision and is therefore not on point.

³ Plaintiff’s attempts to discredit Ms. Wilburn’s testimony should be cast aside. Pl. Mem. 16. Whether or not she heard of TradeComet before submitting her declaration has no bearing on her ability to interpret and testify truthfully about the contents of Google’s records.

is extinguished”); *City of Los Angeles v. Gurdane*, 59 F.2d 161, 163 (9th Cir. 1932) (stating that “superseded” means “obliterated” in interpreting California’s constitution).⁴

TradeComet asks the Court to hold that the prior versions still govern because the prior versions were in effect when it opened its first accounts and when some of the alleged conduct complained of occurred. It asserts that the current version does not state expressly that it applies retroactively, and argues that the slight differences between the specific language in the forum selection clauses in the current and prior versions prohibit the current version from superseding the prior versions. Pl. Mem. 8, 11-13.⁵ These arguments are misguided.

First, both the current and prior versions of the terms specifically allow Google to modify the terms themselves or the AdWords program. See Wilburn Dec. Ex. A, ¶ 2; Howley Ex. 2, ¶ 2; Ex. 3, ¶ 2. This case was filed while the current version was in effect; thus, based on the plain language of the terms and conditions, the current version governs. *MySpace, Inc. v. Globe.com*, 2007 WL 1686966, at *10; *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 399-400 (S.D.N.Y. 2003). This case is therefore inapposite to *Allez Med. Applications, Inc. v. Allez Spine, LLC*, 2007 WL 927905, *7 (Cal. Ct. App. 2007) (unreported)⁶ (declining to apply arbitration provision retroactively where it had not been ratified until after the complaint was filed) (cited at Pl. Mem 13). Second, the Complaint itself alleges “ongoing exclusionary

⁴ *Amtower v. Photon Dynamics, Inc.* 158 Cal. App. 4th 1582, 1609 (Cal. Ct. App. 2008) is of no import here. The court held there that a merger clause does not meld two separate agreements with separate parties; it does not say that terms that “supersede” and “replace” others should not be given full effect.

⁵ Inexplicably, TradeComet maintains that the earlier versions apply to accounts created well after August 2006. Not only must the current terms apply to those accounts, Howley Dec. Ex. 12, ¶¶ 2-6, the current terms’ language renders them applicable to accounts created prior to their implementation. See *MySpace, Inc. v. Globe.com*, 2007 WL 1686966, at *10 (C.D. Cal. 2007) (modified terms that permitted modification applied to accounts created before terms were modified).

⁶ Plaintiff repeatedly relies on unpublished California state cases, which are not considered good law. California Rules of Court 8.1115. By distinguishing them here, Google does not rely on them as precedential, and does not concede their applicability.

conduct” and seeks injunctive relief, e.g., Cplt. ¶¶ 50-53, 108, 114, 120, 121(e), belying any suggestion that the alleged unlawful conduct is cabined to some earlier time frame. Finally, TradeComet’s assertion that the current version should not supersede the prior versions because it “eliminate[s] prior rights,” is simply wrong. Pl. Mem. 13. Like the current version, the prior versions located venue in Santa Clara County. *Security Watch Inc. v. Sentinal Sys.*, 176 F.3d 369 (6th Cir. 1999) and *Choice Sec. Sys. v. AT&T.*, 141 F.3d 1149 (1st Cir. 1998) (table), (Pl. Mem. 12-13), are therefore inapplicable, as both involved a series of one-year agreements where the current agreements contained arbitration clauses but the former agreements did not, and claims that were denied arbitration were cabined to the time frame covered by the earlier agreements.⁷ Moreover, as explained above, the prior versions require Plaintiff to bring suit in Santa Clara County in any event.

To find that the current version does not supersede the prior versions would render the “supersedes and replaces” language meaningless and contravene basic principles of contract interpretation. *See Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985); *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith*, 68 Cal. App. 4th 445, 473 (Cal. Ct. App. 1999). Therefore, the current version is the operative agreement in this case.

B. The agreement was reasonably communicated. TradeComet’s assertion that the current agreement was not reasonably communicated strains credulity. TradeComet claims to have at least 14 AdWords accounts. Walsh Dec. Ex. A, at 5.⁸ Each account’s interface contains

⁷ The remaining cases cited by TradeComet are equally inapplicable. In *Bancomer*, 44 Cal. App. 4th at 1458-62, the party seeking to enforce the forum selection clause was not a party to the agreement. In *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 283-84 (2d Cir. 2005), the court held that a merger clause did not serve to extinguish prior agreements that were unrelated to the subject matter of the agreement at issue.

⁸ As stated in its opening memorandum, Google reserves its right to challenge the relevance of any of the accounts identified by Plaintiff as relevant to this litigation.

a link to the current terms and conditions so that they can be reviewed at any time. Wilburn Dec. ¶ 3. As described in Google's opening memorandum, the forum selection clause is stated in clear language within a nine paragraph contract. Assent to the current version was unquestionably given by the e-mail address associated with the 14 accounts – dan@sourcetool.com, dan031@tradecomet.com, or adwords101@tradecomet.com – on August 29, 2006, November 28, 2006, and May 20, 2007. Wilburn Dec. ¶¶ 6-7, Exs. B-L; Walsh Dec. Exs. D-F. TradeComet submits no evidence that anyone at TradeComet denies such assent or complains that the terms were not reasonably communicated.⁹ Moreover, it is uncontested that TradeComet could not have continued advertising through AdWords without such assent, Walsh Dec. Ex. B, at 13:5-11, 34:14-35:6; yet it continued to advertise on AdWords well after August of 2006.¹⁰ Walsh Dec. Exs. E, F; Wilburn Ex. L. In fact, well after August 2006, Plaintiff specifically assented to the current AdWords terms on three *additional* occasions – twice on November 28, 2006, and then again on May 20, 2007. *Id.* In light of this evidence, the argument that Google did not reasonably communicate the current version is simply baseless. *See Person*, 456 F. Supp. 2d at 496-97 (sufficient notice of Google's terms where plaintiff could review terms by clicking on link and had to assent to terms in order to use AdWords); *Feldman*, 513 F. Supp. 2d at 233-36 (same).

⁹ While TradeComet introduces no evidence that it rejected the current version, it attempts to cast doubt on its acceptance by pointing out that the terms were accepted for ten accounts in the span of three seconds. This can be explained by the fact that TradeComet has a "My Client Center" (MCC) account, which acts as an umbrella over individual AdWords accounts. Walsh Dec. Ex. G. As explained by a Google publication in 2006, accepting the current version in one AdWords account managed through an MCC account allowed the user instantaneously to accept the current version for all other accounts under that MCC. *Id.* Ex. H. TradeComet's argument thus does not call into question whether TradeComet assented to the current version. It confirms it.

¹⁰ That a Google representative may have assisted TradeComet with opening an AdWords prepay account, Pl. Mem. 16; Howley Dec. Ex. 8, has no bearing on whether TradeComet assented to the current version. If TradeComet did not assent, it would have presented evidence to that effect.

C. *Google does not enforce its forum selection clause selectively.* TradeComet repeatedly accuses Google of selecting which agreement ought to apply in an outcome-driven manner based on the facts of each case, pointing to *Person*. The accusation is utterly false. Google moved to dismiss in *Person* based on the “adjudicated in” language in the then-current prior versions (as evidenced by Plaintiff’s own exhibit). *See* Howley Dec. Ex. 5, pp. 4-5. Only when Mr. Person denied signing that agreement did Google additionally submit the agreement that Mr. Person signed in 2003 when he created his AdWords account. *See Person*, 456 F. Supp. 2d at 493. In any event, the court in *Person* interpreted the forum selection clause in both versions conterminously. *Id.*¹¹

Moreover, Google consistently enforces its forum selection clause. *See, e.g., id.; Feldman*, 513 F. Supp. 2d 229; *In re LimitNone, LLC*, 551 F.3d 572 (7th Cir. 2008); *Digital Envoy v. Google Inc.*, 319 F. Supp. 2d 1377 (N.D. Ga. 2004).¹² Even if Google did not enforce its forum clause consistently, Plaintiff cites no case that says that selective enforcement of a venue clause nullifies the enforceability of the clause. TradeComet’s mudslinging is as irrelevant as it is false.

¹¹ “Initially, Defendant produced a copy of the current agreement. (See Decl. of Sar[a] Ciarelli Ex. A, July 27, 2006.) Plaintiff, however, objected that the 2006 agreement is not the same as the one he signed when he became an AdWords customer in 2003. (Pl. Opp’n.Mem.4.) In response, Defendant produced a copy of the contract users were asked to sign in 2003. Both contracts contain a forum selection clause stating that disputes or claims arising out of the contract are to be adjudicated in Santa Clara County, California.” *Person*, 456 F. Supp. 2d at 493.

¹² The cases TradeComet cites where Google did not enforce its forum selection clause are instances where it would have been inappropriate to do so. *Langdon v. Google Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007), involved multiple defendants other than Google who were obviously not parties to the forum selection clause. In *Rescuecom v. Google Inc.*, ___ F.3d ___, 2009 WL 875447 (2d Cir. 2009), plaintiff did not sue as an AdWords advertiser, and the alleged wrongful conduct had nothing to do with Google’s duties to plaintiff under any contract.

III. GOOGLE'S FORUM SELECTION CLAUSE IS NOT UNCONSCIONABLE

TradeComet asserts that the forum selection clause in the current version should not be enforced because it is "unconscionable" to require Plaintiff to "trek to Santa Clara County." Pl. Mem. 18-19. This position contravenes Supreme Court authority. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991) (holding an adhesion contract requiring plaintiffs from Washington to litigate in Florida reasonable and enforceable). Furthermore, Plaintiff fails to meet its "heavy burden" of showing that litigating 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. v. Man B&W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

TradeComet has garnered millions of dollars in revenue from using AdWords and other Google programs, and proclaims Sourcedtool.com to have been the second-fastest growing website in the world. Cplt. ¶ 44, 48; Walsh Dec. Ex. C, ¶ 6 (AdWords usage of \$400,000 per month). TradeComet had no difficulty traveling to Google's headquarters in Santa Clara County to meet with Google representatives, and even volunteered to be a lead plaintiff in a class action against Google in Santa Clara County. *Id.* ¶ 8, 9. Plaintiff, therefore, falls far short of its heavy burden of showing that litigating in Santa Clara County will effectively deprive it of its day in court. *New Moon Shipping Co.*, 121 F.3d at 32; *see also Person*, 456 F. Supp. at 495-97 (enforcing forum selection clause, even as a contract of adhesion); *Feldman*, 513 F. Supp. 2d at 239-43 (holding forum selection clause not unconscionable).

IV. DISMISSAL IS PROCEDURALLY PROPER

TradeComet argues that dismissal under 28 U.S.C. § 1406, Fed. R. Civ. P. 12(b)(1), or Fed. R. Civ. P. 12(b)(3), is procedurally improper, and that Google's only remedy is to seek

transfer under Section 1404(a). Pl. Mem. 20-23. Cases in this Circuit indicate otherwise. *See, e.g., Asoma Corp. v. SK Shipping Co.*, 467 F. 3d 817, 822 (2d Cir. 2006); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 434-35 (S.D.N.Y. 2007) (rejecting argument that defendants should have sought enforcement of forum clause by transfer under 28 U.S.C. § 1404(a) instead of dismissal under 28 U.S.C. § 1406(a) and 12(b)(3), as the Second Circuit has “repeatedly enforced forum selection clauses through motions to dismiss for improper venue”); *Person*, 456 F. Supp. 2d at 492-93, 497-98 (granting dismissal and transferring under § 1406(a)); *Technology Express, Inc. v. FTF Bus. Sys. Corp.*, 99-CV-11692 (LAK), 2000 WL 222628, at *2-3 (S.D.N.Y. 2000) (dismissing complaint under § 1406). *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988), on which TradeComet relies, is in no way contrary; there, Section 1406 had been found inapplicable by the district court, and the issue was not even before the Court. *Id.* at 29 n.8. Moreover, even if TradeComet were correct in asserting that 28 U.S.C. § 1404(a) controls, transfer would plainly be warranted. *See, e.g., Feldman*, 513 F. Supp. 2d at 244-49 (transferring action under 28 U.S.C. § 1404(a) based on Google’s forum selection clause); *Digital Envoy*, 319 F. Supp. 2d at 1377 (same); *Licensed Practical Nurses, Technicians & Health Care Workers v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 409 (S.D.N.Y. 2000) (similar).¹³

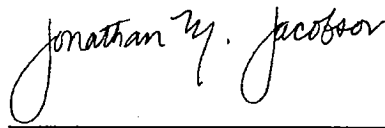
CONCLUSION

For the reasons stated above and in Google’s opening memorandum of law, the Complaint should be dismissed.

¹³ Out of an abundance of caution, Google requests that, if the Court does not dismiss the Complaint under Section 1406, it transfer the case to the San Jose Division of the Northern District of California under 28 U.S.C. § 1404(a) or § 1406(a). Google is headquartered in Santa Clara County and the witnesses, documents, and operative facts concerning Google’s strategic decisions and implementation of the Landing Page Quality assessment will be found there. In light of the Court’s broad discretion to consider notions of fairness and convenience, and Plaintiff’s prior willingness to litigate against Google in Santa Clara County, Walsh Ex. C, ¶ 9, transfer is warranted under § 1404(a). *Indian Harbor Ins. Co. v. Factory Mut. Ins. Co.*, 419 F. Supp. 2d 395 (S.D.N.Y. 2005) (transferring case after weighing factors including convenience of witnesses and locus of facts).

Dated: April 22, 2009

Respectfully submitted,



Jonathan M. Jacobson
Susan A. Creighton
Chul Pak
Sara Ciarelli Walsh

WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION

1301 Avenue of the Americas
40th Floor
New York, New York 10019
(212) 497-7700 (Telephone)
(212) 999-5899 (Telecopier)

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 SARA CIARELLI
WALSH IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS

I, Sara Ciarelli Walsh, declare as follows:

1. I am an associate at the law firm Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel for Google Inc. ("Google") in this matter, and am admitted to practice before the Court.

2. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's Response to Defendant's First Request for Production of Documents.

3. Attached hereto as Exhibit B is a true and correct copy of excerpted pages of the transcript of the Deposition of Heather Wilburn, which took place on April 13, 2009.

4. Attached hereto as Exhibit C is a true and correct copy of the Declaration of Daniel D. Savage In Support of Plaintiffs' Opposition to Google's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) filed in *Kinderstart.com LLC v. Google, Inc.*, 5:06-02057 (JF) (N.D. Cal.).

5. Attached as Exhibit D is a true and correct copy of a printout provided to me by Google, based on an account number identified in Plaintiff's Response to Defendant's First Request for Production of Documents.

6. Attached hereto as Exhibit E is a true and correct copy of a printout provided to me by Google, based on an account number identified in Plaintiff's Response to Defendant's First Request for Production of Documents.

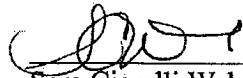
7. Attached hereto as Exhibit F is a true and correct copy of a printout provided to me by Google, based on an account number identified in Plaintiff's Response to Defendant's First Request for Production of Documents.

8. Attached hereto as Exhibit G is a true and correct copy of a printout provided to me by Google that shows details of a "My Client Center" account.

9. Attached hereto as Exhibit H is a true and correct copy of a printout of a webpage published by Google, available at <http://adwordsapi.blogspot.com/2006/09/new-google-advertising-program-terms.html>.

I declare that the foregoing is true and correct to the best of my knowledge.

Dated: April 22, 2009
New York, New York



Sara Ciarelli Walsh

EXHIBIT A

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

TRADECOMET.COM LLC,

Plaintiff

v.

GOOGLE INC.,

Defendant

CIVIL ACTION NO. 09-1400 (SHS)

**PLAINTIFF'S RESPONSES TO DEFENDANT'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

In accordance with Federal Rules of Civil Procedure 26 and 34, Plaintiff TradeComet.com LLC ("TradeComet") responds to Defendant's First Request for Production of Documents ("Defendant's Request") as follows:

GENERAL RESPONSES AND OBJECTIONS

TradeComet asserts these General Responses and Objections to Defendant's Request. These General Responses and Objections, unless otherwise stated, are incorporated by reference in the specific responses set forth below and are neither waived nor limited by the specific responses.

1. TradeComet objects to Defendant's Request in that there is currently no order from the Court permitting such a discovery request and Google has previously stated it did not require such discovery. Furthermore, in light of the fact that Google has already filed its brief seeking to dismiss this action, Google has no demonstrable need for such discovery.

2. TradeComet objects to all instructions, definitions, and document requests to the extent they purport to impose obligations beyond those required by the Federal Rules of Civil

Procedure, the Local Rules for the United States District Court for the Southern District of New York (the "Local Rules") and/or any other applicable rule or court order.

3. TradeComet objects to each document request to the extent that it seeks documents not relevant to the claims or defenses of any party and is not reasonably calculated to lead to the discovery of admissible evidence.

4. TradeComet objects to each document request to the extent that it is unreasonably cumulative or duplicative.

5. TradeComet objects to each document request to the extent that it seeks information protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, exemption, or immunity. TradeComet also objects to Defendant's Request and its definitions and/or instructions insofar as they seek the production or disclosure of privileged documents or information from TradeComet's counsel working on this litigation, on the grounds that such requests are unreasonable, unduly burdensome, and beyond the scope of the Federal Rules of Civil Procedure.

6. Inadvertent disclosure of any material subject to any claim of privilege, work-product protection, or any other exemption, privilege, or immunity shall not constitute a waiver of any privilege or of any other ground for objecting to discovery of such materials, its subject matter or information contained therein, or of TradeComet's right to object to the use of the material during any later proceeding or otherwise seek return of the material.

7. TradeComet's objections and responses are based on information presently known to TradeComet. TradeComet's investigation and review are continuing. TradeComet reserves the right to assert additional objections and to supplement, modify, or amend these objections and responses.

8. The failure of TradeComet to make a specific objection to a particular, individual request is not, and shall not be construed as, an admission that responsive information exists. Likewise, any statement herein that TradeComet will produce any documents in response to an individual request does not mean that TradeComet in fact has any such documents, that any such documents exist, or that TradeComet will search all files maintained by any person, but instead reflects the intention of TradeComet, subject to its objections, to conduct a reasonable search for responsive documents.

9. TradeComet objects to each document request to the extent that it is overbroad, vexatious, or harassing, or would impose oppression, undue burden, or expense.

10. TradeComet objects to each document request to the extent that it seeks documents that: (a) are already in Defendant's possession, custody or control; (b) are in the possession, custody or control of third parties; (c) are as accessible to Defendant as the documents are to TradeComet; or (d) can reasonably be obtained more conveniently from a source other than TradeComet. TradeComet will produce documents only to the extent that such information or materials are in the possession, custody, or control of TradeComet.

11. TradeComet objects to each document request to the extent that it seeks information of a confidential or proprietary nature.

12. TradeComet objects to Definition 3 of "document" to the extent that it purports to impose obligations beyond those permitted by the Federal Rules of Civil Procedure, the Local Rules, and/or any other applicable rule or court order. TradeComet further objects on the grounds that it is vague, overbroad, and unduly burdensome.

13. TradeComet objects to Definition 6 as vague and overbroad.

14. TradeComet objects to Definition 9 as vague and overbroad.

15. TradeComet objects to each Instruction to the extent it purports to impose obligations beyond those permitted by the Federal Rules of Civil Procedure, the Local Rules, and/or any other applicable rule or court order.

16. TradeComet objects to Instruction No. 4 to the extent that it seeks documents from entities other than TradeComet or outside the control of TradeComet. TradeComet will not produce any documents in the possession, custody or control of any third party.

17. TradeComet objects to Instruction No. 9 on the grounds that it is overbroad, oppressive, and unduly burdensome.

18. TradeComet's decision to produce documents in response to Defendant's Request notwithstanding the objectionable nature of any of the definitions or instructions, or the document requests themselves, should not be construed as: (a) an admission that the information or documents requested are relevant; (b) a waiver of the General Objections or the objections asserted in response to specific document requests; or (c) an agreement that requests for similar information or documents will be treated in a similar manner. TradeComet reserves all objections that may be available to it at any hearing or trial or on any motion to the use or admissibility of any material produced.

SPECIFIC RESPONSES TO DOCUMENT REQUESTS

Request for Production No. 1.

Documents sufficient to show all of Plaintiff's AdWords Accounts with Google concerning (i) SourceTool.com or (ii) the placement of AdWords advertisements which, once clicked upon, would direct the user to the home page or another page of the Sourcedtool.com domain.

Response to Request for Production No. 1.

TradeComet incorporates by reference its general objections stated above. TradeComet objects on the ground that the request is vague, ambiguous, and overbroad. TradeComet objects on the ground that it is unduly burdensome for Defendant to request information that is equally and more accessible to Defendant than it is to TradeComet.

Subject to the foregoing, after a reasonable search, TradeComet has identified the following AdWords Accounts:

460-292-5045
203-332-8137
931-356-5131
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
521-108-8939

Request for Production No. 2

All Terms and Conditions Plaintiff contends govern the AdWords Accounts responsive to Request No. 1 on which Plaintiff intends to rely in opposing Google's motion to dismiss based on venue, and all prior or subsequent version of the Terms and Conditions, including but not limited to documents with the following titles: "Google AdWords Program Standard terms and Conditions," "Google Inc. AdWords Program Terms," and "Google Inc. Advertising Terms."

Response to Request for Production No. 2

TradeComet incorporates by reference its general objections stated above. TradeComet objects on the ground that the request is vague, ambiguous, and overbroad. TradeComet objects

on the ground that it is unduly burdensome for Defendant to request information that is more accessible to Defendant than it is to TradeComet.

Subject to the foregoing, the documents requested are in Google's control and would have been responsive to TradeComet's document request to Google. Google has either produced such documents pursuant to Plaintiff's First Request for Production of Documents or failed to produce such documents because they do not exist.

Request for Production No. 3

Documents sufficient to show Plaintiff's acceptance or rejection of the AdWords Terms and Conditions responsive to Request No. 2.

Response to Request for Production No. 3


TradeComet incorporates by reference its general objections stated above. TradeComet objects on the ground that the request is vague, ambiguous, and overbroad. TradeComet objects on the ground that it is unduly burdensome for Defendant to request information that is more accessible to Defendant than it is to TradeComet.

Subject to the foregoing, the documents requested are in Google's control and would have been responsive to TradeComet's document request to Google. Google has either produced such documents pursuant to Plaintiff's First Request for Production of Documents or failed to produce such documents because they do not exist.

TradeComet reserves the right to supplement the responses herein and to take additional discovery, including depositions of persons submitting affidavits, declarations or other documents to the Court or in response to arguments that Defendant makes in its briefing.

Dated: April 16, 2009

CADWALADER, WICKERSHAM & TAFT LLP



Charles F. Rule
Jonathan Kanter
Joseph J. Bial
Daniel J. Howley
1201 F St. NW
Washington, DC 2004
Tel: (202) 862-2200
Fax: (202) 862-2400

Attorneys for Plaintiff, TradeComet.com LLC

EXHIBIT B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRADECOMET.COM, LLC,
Plaintiff,

vs. Case No. 09-CV-1400 (SHS)

GOOGLE, INC.,
Defendant.

-----/

CONFIDENTIAL - OUTSIDE COUNSELS' EYES ONLY
VIDEOTAPED DEPOSITION OF HEATHER WILBURN
Palo Alto, California
Monday, April 13, 2009

Reported by:
LORRIE L. MARCHANT, CSR No. 10523, RPR, CRR, CCRR,
CLR
JOB NO. 22284

1

H. Wilburn

REDACTED

5

Q Do you know whether all advertisers
6 have to sign up for AdWords through the online
7 process that you described in your declaration?

8

A Yes. It is an online advertising
9 product. The only way that you can activate
10 your AdWords account is to accept our terms and
11 conditions.

REDACTED

25

1

H. Wilburn

REDACTED

14 Q Now, if you were not using a client
15 center account to manage your ten accounts, how
16 would you accept the terms and conditions under
17 those -- under those circumstances?

18 A You would log into your AdWords
19 account; you would see a notification alert at
20 the top of the page, when you first logged in,
21 that informed you, this is what's going on. You
22 have this much time to accept the new terms and
23 conditions. You can either accept now or we can
24 remind you later.

25 But there is a finite amount of time

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H. Wilburn

in which they have to -- to accept the new terms
and conditions; otherwise, their account will
stop running. Because an advertiser has to have
accepted the most recent terms and conditions in
order to advertise with us.

REDACTED

REDACTED

1 H. Wilburn

2 Q Do you know whether Google always --
3 pardon me.

4 Do you know whether Google always
5 enforces its terms and conditions in every
6 litigation? Strike that. That's not my
7 question.

8 My question is whether Google always
9 implements its venue selection provision of the
10 terms and conditions in any litigation?

11 MR. JACOBSON: Read it back.

12 (Record read.)

13 MR. JACOBSON: Objection.

14 A I don't have personal knowledge of all
15 of the cases that Google pursues, but the terms
16 and conditions are what binds the advertiser in
17 agreement with working with Google.

18 And if the conditions are set forth
19 that any type of litigation has to be brought in
20 a particular venue, that's what the advertiser
21 is agreeing to.

REDACTED

EXHIBIT C

Case C 06-02057 JF

**DECLARATION OF DANIEL D. SAVAGE IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER
FED.R.CIV.P. 12(b)(6)**

Filed October 26, 2006

Declaration of Daniel D. Savage
Exhibit 1

1 Gregory J. Yu (State Bar No. 133955)
2 GLOBAL LAW GROUP
3 2015 Pioneer Court, Suite P-1
4 San Mateo, CA 94403
5 Telephone: (650) 570-4140
6 Facsimile: (650) 570-4142
7 E-mail: glgroup [at] inreach [dot] com

8 Attorney for Plaintiffs and Proposed Class and Subclasses

9
10
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

<p>15 KINDERSTART.COM LLC, a California 16 limited liability company, on behalf of itself and 17 all others similarly situated, 18 Plaintiffs, 19 v. 20 GOOGLE, INC., a Delaware corporation, 21 Defendant.</p>	<p>22 Case No. C 06-2057 JF 23 DECLARATION OF DANIEL D. 24 SAVAGE IN SUPPORT OF 25 PLAINTIFFS' OPPOSITION TO 26 GOOGLE'S MOTION TO DISMISS 27 UNDER FED.R.CIV.P. 12(B)(6)</p>
---	---

28 I, DANIEL D. SAVAGE, HEREBY DECLARE AS FOLLOWS:

1. My name is Daniel D. Savage, and I am a resident of the City of New York, NY.
I submit this Declaration in support of Plaintiffs' opposition to Google, Inc.'s motion to dismiss.

2. I have worked over 20 years in the publishing business. I am a graduate of
Harvard College and obtained an MBA from Harvard Business School.

3. I am a member and a manager of TradeComet.com LLC, a Delaware limited
liability company ("TradeComet"), which is headquartered in New York, NY. We launched a
website known as www.sourcetool.com ("sourcetool.com") in November 2005. As an online
information tool and advertiser, TradeComet competes against Google.

4. Our site, sourcetool.com, joined Google's AdWords and AdSense programs in
November 2005. By March 2006, sourcetool.com was receiving over 600,000 daily visits.

1 5. To reach online audiences on the Internet, TradeComet has had no viable options
2 besides search-led advertising where ads are matched to search results. TradeComet advertises
3 this way using both Google (through AdWords) and MSN. Search-led advertising is crucial
4 because search users see our ads at the very instant they are ready to view key information and
5 make dynamic commercial decisions over the Web. TradeComet would not have launched
6 sourcetool.com or succeeded as a B2B online business without using paid search advertising.

7 6. During the first quarter of 2006, TradeComet spent over \$400,000 each month on
8 AdWords for our site. During this same period, our revenues reached over \$600,000 per month
9 through AdSense from Google.

10 7. On or about July 13, 2006, sourcetool.com's minimum bids for key words under
11 AdWords set by Google rose without warning by 10-fold. With such a massive price increase,
12 TradeComet was not able to secure the funds or raise financing to meet these newly created
13 minimum bids. As a result, from that date to present, sourcetool.com was forced to surrender at
14 least 80% of our original monthly traffic and over \$500,000 in monthly revenues per month.

15 8. On or about August 3, 2006, three executives of TradeComet, including myself,
16 met with certain employees of Google in Mountain View, California. During the meeting, one
17 Google employee stated that Google was hesitant to link to sites that also carried online paid
18 advertising links as Google does.

19 9. The very first time I learned of this lawsuit and began considering to join
20 Plaintiffs as a potential class member and representative was October 23, 2006. It is
21 TradeComet's intention to join this class action as a co-representative plaintiff on behalf of the
22 classes.

23 I DECLARE UNDER PENALTY OF PERJURY, that the above is based on my personal
24 knowledge.

25 Executed on this 26th day of October, 2006, in New York, New York.

26
27
28

By: s/s Daniel D. Savage
DANIEL D. SAVAGE

EXHIBIT D

REDACTED

REDACTED | REDACTED | REDACTED | Help | Sign out

Jump to previous customer...

REDACTED

dansavage@sourcetool.com • REDACTED

REDACTED 460-292-5046 REDACTED

Credited by Box Traders, Com, Inc

Customer time zone: Pacific Time

REDACTED

Change History

Show only changes that match the following criteria:

Within date range: Aug 29, 2006 - Aug 29, 2006 Selected: quick data range

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

Date / User / IP - Change ID	Campaign	Ad Group	Description
Aug 29, 2006 9:20:09 AM dans@sourcetool.com REDACTED			Terms and conditions accepted REDACTED

Showing 1 - 1

⚙ = changed; + = added; X = removed

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REDACTED

REDACTED

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

REDACTED

EXHIBIT E

Google AdWords
 dan031@tradedcomet.com • REDACTED
 REDACTED, 203-332-8137 • REDACTED
 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](#)

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](#)

REDACTED

Showing 1 - 9

Date / User / IP - Change ID	Ad Group	Description
Nov 28, 2006 8:46:37 PM dan031@tradedcomet.com REDACTED		Customer's Account was Activated. REDACTED
Nov 28, 2006 8:46:30 PM dan031@tradedcomet.com REDACTED		+ Address (Address Id = 21024398) was created. + Payment Source (Payment Source Id = 7955198) was created. + Timezone Update enabled + Updates to Customer. Address Id changed from 21023498 to 21024398
Nov 28, 2006 8:46:29 PM dan031@tradedcomet.com REDACTED		Updates to Account: Billing Address Id changed from 21023498 to 21024398 Payment Source Id changed from 0 to 7955198
Nov 28, 2006 8:41:53 PM dan031@tradedcomet.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 8:46:29 PM EST
Nov 28, 2006 8:41:32 PM dan031@tradedcomet.com REDACTED		Terms and conditions accepted REDACTED
Nov 28, 2006 8:41:31 PM dan031@tradedcomet.com REDACTED		Updates to Account: Account created in Moneta with account ID 54963213 MonetaAccount (AccountId = 11347418, MonetaServiceType = 7) was updated. MonetaAccount Id changed from 0 to 54963213 REDACTED
Nov 28, 2006 8:41:31 PM dan031@tradedcomet.com REDACTED		Updates to Account: Request created with ID 58921797348754368 to sync account to Moneta.

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

REDACTED

+ MonetiaAccount (Accountid = 11347418, MonetiaServiceType = 7) was created.

REDACTED

+ Customer Note (Customer Note Id = 3098978) was created.

REDACTED

Updates to Account:
Daily Spending Limit changed from no account-level daily spending limit to \$10.00

REDACTED

+ Customer was created.
+ Account was created.
+ Google Account dan031@tradecornel.com associated with account
+ Address (Address Id = 21023498) was created.
+ AdWords Account Info (Account Id = 11347418) was created.
Updates to Customer:
Gala Customer Id changed from 0 to 57112813
External Customer Id changed from 0 to 2033328137

REDACTED

Nov 28, 2006 8:38:10 PM
dan031@tradecornel.com

REDACTED

Nov 28, 2006 8:38:10 PM
dan031@tradecornel.com

REDACTED

Nov 28, 2006 8:38:06 PM
dan031@tradecornel.com

REDACTED

Time zone for all statistics in this account (GMT-05:00) Eastern Time, USA (New York)

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REDACTED

REDACTED

REDACTED

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

REDACTED

EXHIBIT F

REDACTED

REDACTED | Help | Sign out

REDACTED | REDACTED | Help | Sign out

Jump to previous customer...

Google
AdWords

adwords010@tradecomat.com • REDACTED
REDACTED 931-356-6131 • REDACTED
Managed by dan@sourcebot.com (U)
Customer time zone: Pacific Time
REDACTED

Change History

Show only changes that match the following criteria:

Within date range: May 20, 2007 - May 20, 2007 [Select quick date range](#)

Affecting level: Account only

Change type: All Budget

Made by: All external users

[Filter change history](#)

[Chart view](#)

[Show all details](#) [Show all historical buffer details](#) [Download as CSV](#)

Date / User / IP - Change ID	Ad Group	Description
May 20, 2007 11:15:28 AM adwords010@tradecomat.com REDACTED		+ Customer Note (Customer Note Id = 4133154) was created. REDACTED
May 20, 2007 11:15:28 AM adwords010@tradecomat.com REDACTED		Updates to Account: Daily Spending Limit changed from no account-level daily spending limit to \$50.00 REDACTED
May 20, 2007 11:14:50 AM adwords010@tradecomat.com REDACTED		Updates to AdWords Account Info: Ad Words edition changed from Ad Words Starter Edition to Ad Words Standard Edition Date of graduation from Starter Edition is May 20, 2007 11:14:50 AM PDT REDACTED
May 20, 2007 10:41:05 AM adwords010@tradecomat.com REDACTED		Updates to Account: Client Services Rep. Id changed from 0 to 5775840 REDACTED
May 20, 2007 10:41:05 AM adwords010@tradecomat.com REDACTED		Managed Account was updated. Status changed from Pending to Active Manager Access Level is 'User Interface and API' Manager is 'dan@sourcebot.com' REDACTED
May 20, 2007 10:41:05 AM adwords010@tradecomat.com REDACTED		Managed Account was created. Status is Active Manager Access Level is 'User Interface and API' Manager is 'dan@sourcebot.com' REDACTED

Showing 1 - 15

Legend: = changed, + = added, X = removed

+ Managed Account was created.
 + Status is Pending
 + Manager Access Level is 'User Interface and API'
 + Manager is 'den@sourceol.com'
 REDACTED

^ Customer's Account was Activated.
 REDACTED

+ Address (Address Id = 29729154) was created.
 + Payment Source (Payment Source Id = 10302114) was created.
 ^ Updates to AdWords Account Info:
 Where this user advertises most often changed from Old user without this data to Online - via the Internet
 Where this user sells his/her products/services most often changed from Old user without this data to Online -- on a website

^ Updates to Customer:
 Address Id changed from 29728854 to 29729154

^ Updates to Account:
 Billing Address Id changed from 29728854 to 29729154
 Payment Source Id changed from 0 to 10302114
 REDACTED

^ Updates to Account:
 Timezone Effective Date is May 20, 2007 10:35:41 AM PDT
 REDACTED

^ Timezone Update enabled
 REDACTED

^ Terms and conditions accepted
 REDACTED

^ Updates to Account:
 Account created in Moneta with account ID 90783019

^ MonetaAccount (Accountid = 15568674, MonetaServiceType = 7) was updated.
 ^ Moneta Account Id changed from 0 to 90783019
 REDACTED

^ Updates to Account:
 Request created with ID 1721530286508738 to sync account to Moneta.
 + MonetaAccount (Accountid = 15568674, MonetaServiceType = 7) was created.
 REDACTED

^ Updates to Account:
 Daily Spending Limit changed from no account-level daily spending limit to \$200.00
 REDACTED

+ Customer was created.
 + Account was created.
 + Google Account adwords010@tradecomet.com associated with account
 ^ Notification Preference Changes for adwords010@tradecomet.com:
 Do not receive any Google market research email messages.
 Do not receive any newsletter email messages.
 Do not receive any performance suggestion email messages.
 + Address (Address Id = 29728854) was created.

May 20, 2007 10:40:05 AM
 den@sourceol.com
 REDACTED

May 20, 2007 10:35:48 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:35:41 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:35:41 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:31:51 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:31:26 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:31:26 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:28:22 AM
 adwords010@tradecomet.com
 REDACTED

May 20, 2007 10:28:19 AM
 adwords010@tradecomet.com
 REDACTED

REDACTED

- + AdWords Account Info (Account id = 15568674) was created.
- ⊗ Budget Optimizer feature enabled
- ⊗ Policy-checks in self-service UI enabled
- ⊗ Updates to Customer:
 Cella Customer Id changed from 0 to 94346019
 External Customer Id changed from 0 to 8313565131

REDACTED

Time zone for all statistics in this account: (GMT-08:00) Pacific Time, US/CA/MTWKS

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REDACTED

REDACTED

REDACTED

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

REDACTED

REDACTED

REDACTED



dan@sourcetool.com
REDACTED 916-112-2038 • REDACTED
My Client Center • Jump to client
Customer time zone: Pacific Time
REDACTED

REDACTED

REDACTED | REDACTED | REDACTED | Help | Sign out
Jump to previous customer...

My Client Center

Alerts in Your Accounts
You have 2 alerts.

REDACTED

Download as .csv

Performance Budget

All time Change range

REDACTED

All time

Jan 1, 2001 - Apr 20, 2009 Go

1 - 16 of 16 clients.

Client Accounts	Customer ID	Clicks	Imp.	Search CTR	Content CTR	Conversions	Conv. Rate	Amount Spent
Total - all 16 clients								
REDACTED	REDACTED							
dan001@tradecomel.com	758-713-4047				REDACTED			
dan002@tradecomel.com	943-546-8800							
dan003@tradecomel.com	544-065-9646							
dan004@tradecomel.com	259-964-0096							
dan005@tradecomel.com	338-794-1045							
dan006@tradecomel.com	736-728-0431							
dan007@tradecomel.com	832-287-9582							
dan008@tradecomel.com	906-559-3884							
dan009@tradecomel.com	521-108-8939							
dan@thomasb2b.com	549-100-6859				REDACTED			
diansavage@gmail.com	356-439-1741							
REDACTED	REDACTED							
REDACTED	REDACTED							
Tradecomel adwords010@tradecomel.com	931-356-5131							
REDACTED	REDACTED							

Show 20 rows per page

Reporting is not real-time. Performance statistics are no more than 3 hours old.
‡ All statistics shown are compiled for each client's time zone. Some dates may be one day off due to time zone differences. Learn more

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REDACTED

Information about accounts not identified by Plaintiff as relevant to this litigation and details pertaining to Plaintiff's accounts that may be confidential have been redacted

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

REDACTED

REDACTED

REDACTED

REDACTED



dan@sourcetool.com
REDACTED 916-112-2038 • REDACTED
My Client Center • Jump to client
Customer time zone: Pacific Time
REDACTED

REDACTED

REDACTED | REDACTED | REDACTED | Help | Sign out
Jump to previous customer...

My Client Center

REDACTED

Alerts in Your Accounts
You have 2 alerts.

Download as .csv

Performance Budget

All time Change range

REDACTED

All time
Jan 1, 2001 - Apr 20, 2009 Go

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Client Accounts	Customer ID	Clicks	Impr.	Search CTR	Content CTR	Conversions	Conv. Rate	Amount Spent
Total - all 16 clients								
REDACTED	REDACTED							
dan001@tradecomel.com	758-713-4047				REDACTED			
dan002@tradecomel.com	943-546-8800							
dan003@tradecomel.com	544-085-9845							
dan004@tradecomel.com	259-964-0098							
dan005@tradecomel.com	338-794-1045							
dan006@tradecomel.com	736-728-0431							
dan007@tradecomel.com	832-287-9582							
dan008@tradecomel.com	906-559-3984							
dan030@tradecomel.com	521-108-8939				REDACTED			
dan@thomasb2b.com	549-100-6859							
diansavage@gmail.com	356-439-1741							
REDACTED	REDACTED							
REDACTED	REDACTED							
Tradecomel adwords010@tradecomel.com	931-356-5131							
REDACTED	REDACTED							

Show 30 rows per page

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† All statistics shown are compiled for each client's time zone. Some dates may be one day off due to time zone differences. Learn more.

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REDACTED

Information about accounts not identified by Plaintiff as relevant to this litigation and details pertaining to Plaintiff's accounts that may be confidential have been redacted

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

REDACTED

REDACTED



Create Blog | Sign In



AdWords API Blog
The official source of information about the AdWords API.

Search

New Google Advertising Program Terms & Conditions

Tuesday, 10 September 2008

On August 29th we issued a revision of the Google Advertising Program Terms and Conditions that will affect many AdWords accounts within the United States. Since many of you manage US-based accounts via the API, we wanted to call attention to this event as it requires account holders or their managers to physically "click to accept" the new Google Advertising Program Terms and Conditions.

To be clear... these Terms and Conditions apply to AdWords users (regardless of whether or not they use the API), and are separate and distinct from the changes that we announced to the AdWords API beta Terms and Conditions.

Affected AdWords account holders will have until November 27, 2006 to log in to their accounts and either accept or reject the new Google Advertising Program Terms & Conditions. If an account has not accepted these new Google Advertising Program Terms and Conditions by this deadline, API access will be blocked until the user accepts.

We recommend that you speak with your advertisers/clients in order to determine who should review and accept/decline these terms.

Account managers (MCC users) can automatically accept these new Google Advertising Program Terms and Conditions for all affected accounts under their My Client Center by logging into the MCC, navigating to an affected child account, and accepting the Google Advertising Program Terms & Conditions. This action will then instantaneously accept the new Google Advertising Program Terms and Conditions for all other accounts under that MCC. If you maintain a nested/hierarchical MCC structure, please be sure that you login to your top-most MCC when you accept the changes. This will ensure that all of your sub-accounts will automatically accept the Google Advertising Program Terms and Conditions.

Unfortunately, we're unable to interpret the meaning of changes in our legal documents for you. If you have questions or you need legal advice on interpreting the terms, we encourage you to consult counsel to help you understand how these changes may affect you.

Again, please note that in order to ensure uninterrupted access to your accounts, the new Google Advertising Program Terms and Conditions must be accepted before November 27, 2006.

— Jon Dlorio, Sr. Product Marketing Manager

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AdWords Downtime: April 18, 10am-2pm PDT

La búsqueda se hace un hueco en la conferencia para desarrolladores Google I/O

UI framework changes in Android 1.6

Writing Talking Applications for Android

A Beginner's Guide to Google Summer of Code™

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- Gears For Safari
- Gears 0.4 is here!

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- Local news in more places
- New insights for your Search

Google Maps API Blog

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- App Engine, Local Search, & Maps: Making Static Maps... Interactive?
- geo search 2.0. Data In, Data Out

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- It's time to sign up for Google I/O
- SMore enterprise developer tools, App Engine and Secure Data Connector

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- And the Super Bowl Ad Blitz Winners Are...
- Be the Valentine's Day Wingman

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- An ARIA for Google Moderator
- What it ions?

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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

I. Background

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

A. The Advertising Relationship between TradeComet and Google

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

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

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

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

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

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

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

B. The Relevant Forum Selection Clauses

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

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

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

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

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

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

II. Standard of Review

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

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

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

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

III. Analysis

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

A. Which Forum Selection Clause Applies

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

Under California state law, the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting. Cal. Civ. Code § 1636; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 474 (Cal. Ct. App. 1998). When a contract is reduced to writing, this intent “is to be ascertained

from the writing alone, if possible.” Cal. Civ. Code § 1639; *see also Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 559 (Cal. Ct. App. 1999).

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

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

B. Dismissal Based on a Forum Selection Clause

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

To obtain dismissal based on a forum selection clause, the party seeking enforcement of the clause must demonstrate that: (1) the clause was reasonably communicated to the party resisting enforcement, (2) the clause was mandatory and not merely permissive, and (3) the

claims and parties involved in the suit are subject to the forum selection clause. *Id.* at 383-84. After the party seeking enforcement has established these three conditions, the burden shifts to the party resisting enforcement to rebut the presumption of enforceability by “making a sufficiently strong showing that ‘enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.’” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

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

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

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

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

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

⁴ A “clickwrap” license is one that

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

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

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

2. *The forum selection clause is mandatory.*

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

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

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

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

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

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

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

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

Id.

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

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

email on the Match website are subject to a forum selection clause governing “any dispute arising out of the Website and/or the Service”).

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

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

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

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

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

Furthermore, in considering whether a plaintiff’s claims are subject to a choice of law provision, the California Supreme Court has determined that a clause that “provides that a specified body of law ‘governs’ the ‘agreement’ between the parties, encompasses all causes of action arising from or related to that agreement.” *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 470 (1992). In reaching this conclusion, the court was skeptical that “any rational businessperson . . . would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.” *Id.* at 469. It wrote that if such a result were desired, the parties should “negotiate and obtain the assent of their fellow

parties to explicit contract language specifying what jurisdiction's law applies to what issues.” *Id.* at 470. This logic parallels that of the Second Circuit in *Phillips* and applies here, as the parties agreed to litigate all claims relating to their agreement or to Google's advertising program in Santa Clara County. On its face, such an encompassing forum selection clause demonstrates the parties' objective intent to litigate claims such as those brought by TradeComet in California, rather than in New York.

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

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

As an initial matter, TradeComet bears the burden of showing that the forum selection clause is unreasonable or unjust. *See Phillips*, 494 F.3d at 383-84. However, TradeComet offers neither evidence to support its allegation of selective prosecution⁵ nor legal authority indicating that such behavior—if true—would make a forum selection clause unconscionable and thus unenforceable. Additionally, the fact that the August 2006 Agreement may or may not be a contract of adhesion does not invalidate its forum selection provision. *See Brodsky*, 2009 WL 3490277, at *7-8 (“[A] forum selection clause is not unenforceable even if it appears in a contract of adhesion, including so-called ‘click wrap’ contracts” (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991))).

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

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

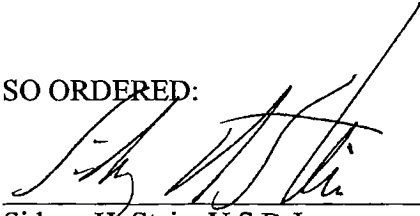
litigate its claims. See *M/S Bremen*, 407 U.S. at 18 (“[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”); see also *Novak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

IV. Conclusion

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

Dated: New York, New York
March 5, 2010

SO ORDERED:



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

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
TRADECOMET.COM LLC,

Plaintiff,

-against-

GOOGLE, INC.,

Defendant.
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #
DATE FILED <u>3/12/10</u>

09 CIVIL 1400 (SHS)

JUDGMENT

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

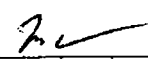
ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 5, 2010, Google's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(3) is granted, and TradeComet's motion to strike Exhibits D through H of the Walsh Declaration is denied.

Dated: New York, New York
March 12, 2010

J. MICHAEL McMAHON

Clerk of Court

BY:



Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

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

Date:

In Re:

-v-

Case #: ()

Dear Litigant,

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

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

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

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

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

J. Michael McMahon, Clerk of Court

by: _____

, Deputy Clerk

APPEAL FORMS

U.S.D.C. S.D.N.Y. Docket Support Unit

1

Revised: May 18, 2007

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

-----X
-V-
-----X

NOTICE OF APPEAL

civ. ()

Notice is hereby given that _____
(party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

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

(Signature)

(Address)

(City, State and Zip Code)

Date: _____

() _____
(Telephone Number)

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

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

-----X
-V-
-----X

MOTION FOR EXTENSION OF TIME
TO FILE A NOTICE OF APPEAL

civ. ()

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

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

(Signature)

(Address)

(City, State and Zip Code)

Date: _____

() _____ - _____
(Telephone Number)

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

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

-----X
-V-
-----X

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ()

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

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

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

(Signature)

(Address)

(City, State and Zip Code)

Date: _____ () _____ - _____
(Telephone Number)

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

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

-----X
-V-
-----X

AFFIRMATION OF SERVICE

civ. ()

I, _____, declare under penalty of perjury that I have
served a copy of the attached _____

upon _____

whose address is: _____

Date: _____
New York, New York

(Signature)

(Address)

(City, State and Zip Code)

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

TRADECOMET.COM LLC,

Plaintiff

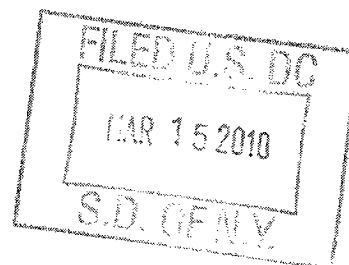
v.

GOOGLE INC.,

Defendant

CIVIL ACTION NO. 09-cv-1400(SHS)

Notice of Appeal



Notice is hereby given that Tradecomet.com LLC, Plaintiff, in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the Court's Opinion and Order entered in this action on the 5th day of March 2010 (Dkt No. 38), and the Clerk's Final Judgment entered in this action on the 12th day of March (Dkt No. 39), granting Defendant's Motion to Dismiss based on lack of subject matter jurisdiction and improper venue.

Respectfully Submitted,

Charles F. Rule
Jonathan Kanter
Joseph J. Bial
Daniel J. Howley
CADWALADER, WICKERSHAM & TAFT LLP
700 Sixth Street, NW
Washington, DC 20001
Tel: (202) 862-2200
Fax: (202) 862-2400

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 TRADECOMET.COM LLC,

5 Plaintiff

6 -vs-

DOCKET NO.: CV-09-1400 (SHS)
New York, New York
March 17, 2009

8
9 GOOGLE INC,

10 Defendant

11 -----x
12 TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE

13 BEFORE THE HONORABLE SIDNEY H. STEIN
14 UNITED STATES DISTRICT JUDGE

15 A P P E A R A N C E S:

16 For the Plaintiff:

CHARLES F. RULE, ESQ.
JOSEPH J. BIAL, ESQ.
JONATHAN KANTER, ESQ.
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Washington, D.C. 20004

22 For the Defendant:

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SARA C. WALSH, ESQ.
CHUL PAK, ESQ.
Wilson Sonsini Goodrich
& Rosati P.C.
1301 Avenue of the Americas
New York, NY 10019

29 Audio Operator:

No Audio Operator

30 Proceedings Recorded by Electronic Sound Recording
31 Transcript Produced by Transcription Service

32 -----x
33 KRISTIN M. RUSIN
34 217 Pine Meadows Circle
35 Hickory NC 28601
36 kmrusin@earthlink.net

1 THE CLERK: TradeComet.com versus Google, zero nine
2 civil fourteen hundred.

3 Counsel, please state your names for the Court.

4 MR. RULE: Charles F. Rule, Cadwalader, on behalf of
5 TradeComet.com LLC, Your Honor. And with me are Joe Bial and
6 Jonathan Kanter.

7 THE COURT: Hi. Good afternoon to all three of you.

8 MR. RULE: Good afternoon to you, Your Honor.

9 MR. JACOBSON: And from Wilson Sonsini, Jon Jacobson,
10 representing Google. And I'm joined by Sarah Walsh and Chul
11 Pak.

12 THE COURT: All right. Good afternoon to all of you.
13 Please be seated. This is being recorded.

14 Mr. Rule, your name is very familiar. Did you --
15 were you formerly at Fried Frank in Washington?

16 MR. RULE: Yes, Your Honor, I was.

17 THE COURT: I believe you worked with my daughter,
18 who is Elizabeth Stein.

19 MR. RULE: I believe that's correct, Your Honor.

20 THE COURT: All right. So there's a disclosure. I
21 didn't -- I didn't realize that until I saw your name.

22 MR. RULE: And just for the record, Your Honor, Mr.
23 Kanter did as well.

24 THE COURT: All right. She's -- and for disclosure
25 purposes, she's no longer at Fried Frank.

1 MR. RULE: Correct, Your Honor.

2 THE COURT: I have the letters in front of me, and
3 the defendant wants to move on 12(b)(3) grounds. There's
4 always some back and forth in the Second Circuit as to where
5 improper venue really is, whether it's under 12(b)(3) or
6 12(b)(6), and I've written on that as well. But for analysis
7 purposes, let's assume what the -- what the request is is
8 simply to move to dismiss for improper venue.

9 And the defendant points to Person v. Google, which
10 I've read, transferring the case -- that case to California on
11 the basis of a -- what was construed as a mandatory forum
12 selection clause. The plaintiff, I think, is saying let's get
13 -- if there's going to be a motion to dismiss, let's have it
14 all briefed, not only 12(b)(3) but also failure to state a
15 claim, if that's what defendant is saying.

16 Mr. Rule, do I have the back and forth pretty much
17 correct?

18 MR. RULE: That's correct, Your Honor.

19 THE COURT: All right.

20 And for Google Inc, is that -- do I -- from your
21 standpoint, do I have it pretty much correct?

22 MR. JACOBSON: Yes, Your Honor.

23 THE COURT: All right.

24 So, Mr. Rule, the question then is in light of Person
25 v. Google, it looks like you've got a high hurdle to clear, or

1 mountain to scale, or whatever the image should be. Is the
2 clause different? I think in one of your letters you say it
3 is, but without any support for that.

4 MR. RULE: Your Honor, if I might just give you a
5 little background, and then --

6 THE COURT: Sure.

7 MR. RULE: -- try to answer your question, I think it
8 was February 27th we had a discussion with Google's counsel
9 where Google indicated that they wanted an extension, which we
10 agreed to, of twenty-eight days.

11 THE COURT: No, I saw that, and you --

12 MR. RULE: Right.

13 THE COURT: -- felt somewhat abused by the fact that
14 --

15 MR. RULE: Right.

16 THE COURT: -- after they asked for the extension,
17 only now do they come and say let's get this -- what they
18 characterize as a -- as a winning argument out of the way so
19 that we don't have to do all that work, and you come back and
20 say well, hey, guys, why did you do that to me, if you knew
21 this, you should have done it earlier. And you're probably
22 right, but we are where we are.

23 MR. RULE: Okay. And I should also point out, in the
24 Person case, there was a similar argument, and they filed both
25 their 12(b)(6) and what they're calling a 12(b)(3) motion at

1 the same time, and, interestingly, led at that point in that
2 case with their 12(b)(6) motion.

3 We believe that this is a very different case. The
4 most glaring difference is that TradeComet is a competitor of
5 Google's, competitor that's been put out of business. Person
6 involved an individual who was trying to run for the attorney
7 general, I believe, of the state of New York and really was
8 suing as a -- as a customer.

9 But with respect to the specific question of what
10 agreement was in effect, we believe that's not at all clear.
11 It's also true that Person was decided before the Phillips
12 case. And we assume that the defendant is going to argue based
13 on Phillips that venue should be transferred under that
14 standard. And at least the third prong of the Phillips
15 standard suggests that the language of the venue clause is
16 important.

17 Google has cited in its letter to Your Honor a venue
18 clause that, frankly, we're not sure whether it applies to us.
19 We frankly don't think it does. We have seen various
20 agreements, and basically what happens is if you are a -- want
21 to use their Adwords, you go to Adwords. You have to, in order
22 to sign up, click through the license. You click it through.
23 You don't actually get, necessarily, the text of that
24 agreement. And then you get to the --

25 THE COURT: No, but you see it. You see it there.

1 MR. RULE: You do -- you do see it, but --

2 THE COURT: And then you click --

3 MR. RULE: -- there are --

4 THE COURT: It's kind of like shrink wrap. Is that
5 the idea?

6 MR. RULE: Yes, Your Honor.

7 THE COURT: As soon as you open it, you've -- you're
8 bound.

9 MR. RULE: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. RULE: If you click through. Now, we -- I think
12 as we get into this, we have, from our position, some arguments
13 about what -- and the significance of the contract, but suffice
14 it for this moment to say that it's our understanding -- but
15 frankly, this is something -- we would like to get some
16 discovery, because the agreements are in the possession of
17 Google, not in the possession of our client.

18 But from what we can tell, based on the accounts that
19 were set up by TradeComet, there was a provision -- a venue
20 provision different from the one that Mr. Jacobson quoted in
21 his letter. If you look at Person, the court in that case
22 really did not spend any time trying to parse through the
23 language of the venue clause to decide whether or not those
24 particular claims came within that venue clause.

25 But we think that the -- that the venue clause that

1 | at least applied to some of the agreements at the time said
2 | that this agreement shall be adjudicated in Santa Clara County,
3 | I think it is, California. This is not a contract claim, Your
4 | Honor. This is -- and this is not a case where we have
5 | artfully pled around a contract claim. It's just not about a
6 | contract.

7 | It's a Section 2 claim. The allegations are that
8 | Google violated Section 2 unilaterally, and we don't believe
9 | that, frankly, under either provision, but certainly under that
10 | agreement, shall be -- this agreement shall be adjudicated in
11 | Santa Clara County -- requires that venue be shifted,
12 | particularly in light of the fact that -- you know, I mean, the
13 | venue -- clearly, in the absence of a provision, venue would
14 | lie in this court.

15 | Frankly, all the witnesses are here, all the factors
16 | of convenience that you would normally think are relevant here.
17 | So you know -- but again, we would like to get some -- a little
18 | bit of discovery on that question, and we don't believe that
19 | the provision that has been cited is the one that's relevant.
20 | And beyond that, in Person, the court didn't actually address
21 | the question of interpreting the contract.

22 | THE COURT: All right. But help me -- help me a
23 | little. I understand your argument is -- it seems to me the
24 | initial part of your argument is we're not sure what we agreed
25 | to, so we need some discovery to see whether we clicked what it

1 was that we were agreeing to. Is that correct?

2 MR. RULE: Well, there were four -- I think there
3 were something over ten -- I think it may have been fourteen
4 different accounts that were set up. And each time you set up
5 an account, you would click through on this license. Now, once
6 you've done that, and once you've signed up, you don't click
7 through again. The agreement says that that agreement survives
8 even a termination.

9 So there are fourteen different sign-ups, if you
10 will, Your Honor, that are at issue.

11 THE COURT: All right. And if life is -- if life is
12 simple, which it never is, those fourteen different clicks will
13 all click on one forum selection clause. But we'll see. Or
14 that -- you're asking -- you're saying we don't know, so you
15 want to find out.

16 MR. RULE: We don't know, but based --

17 THE COURT: Okay.

18 MR. RULE: -- on when Google has litigated this issue
19 previously, and they routinely litigate this issue, the
20 agreements that they've produced indicate a variety of
21 different formulations of their forum clause.

22 THE COURT: All right. These companies -- all
23 companies are always sort of tinkering with their language to
24 get closer to what they want to do.

25 So agree with me for these purposes that your first

1 aim is to find out what it is you've agreed to. Okay.

2 MR. RULE: Correct.

3 THE COURT: Is part of your argument that our claims
4 -- although we don't know what we agreed to, we believe some of
5 our claims, or maybe all of our claims, aren't governed by that
6 forum selection clause?

7 MR. RULE: I think I would put it, Your Honor, none
8 of our claims are governed by that forum --

9 THE COURT: None of them.

10 MR. RULE: None of them.

11 THE COURT: Okay.

12 MR. RULE: Because we are not suing under the
13 contract. What we are claiming is that Google has essentially
14 used its market power, which it obtained unlawfully, to exclude
15 us as a competitor from the marketplace. Part of that has been
16 through --

17 THE COURT: But the vehicle of the exclusion is this
18 Adwords contract.

19 MR. RULE: Not exactly, Your Honor, and just -- I
20 mean, I'd like to see Mr. Jacobson's arguments to respond to
21 them, but I will say that I think their position is a little
22 bit like you go to their site, you click on the -- on the
23 license, which you have to get to before you can actually, in
24 effect, communication with the machine that is Google, and once
25 you've clicked it though and you've signed the venue or forum

1 selection clause, apparently you still have to sue them in
2 California even if at that point they refuse to deal with you
3 at all, because you clicked it, and, after all, it arises
4 through that agreement, because part of what we are arguing
5 here is it amounts to a refusal to deal of a sort in the sort
6 of Aspen Skiing sort.

7 But there are other elements of our claim, including
8 an agreement that we allege is anti-competitive that they had
9 with a competitor -- a direct competitor of ours, Business.com.
10 All of those things -- so in effect, this is a situation where
11 in order to even talk to them, you have to sign this license.
12 And they can refuse to deal with you, and apparently, I think,
13 their argument would be if you -- if we refuse to deal with
14 you, because you clicked that license you've got to sue in
15 Santa Clara County.

16 Or they're saying --

17 THE COURT: Wait, say that -- say that last part
18 again.

19 MR. RULE: If you go to their website and click in
20 order to be told that they're going to refuse to deal with you,
21 because you have clicked the license -- that your only resource
22 is to sue them in Santa Clara County, California.

23 THE COURT: Okay, but that's not you, right?

24 MR. RULE: Your Honor, --

25 THE COURT: That's not you.

1 MR. RULE: -- they -- what our allegations are -- are
2 that we have not been dealt with, that we -- there was a
3 relationship. The relationship, in effect, after they came to
4 -- we had meetings in New York, and they found out what our
5 business plans were. Their approach to TradeComet changed
6 because they saw and understood the competitive threat
7 presented by vertical search engines.

8 And at that point, they engaged in various conduct,
9 including refusing to send traffic to us -- I understand that
10 they will likely claim that that's because of landing quality
11 page or something, but the fact is that whereas before the --
12 our client was able to obtain words, afterwards they weren't.

13 And -- and it -- and it -- I think there are also --
14 the fact that you have an agreement that is a click-through
15 agreement by what we argue is a monopolist cannot be allowed to
16 put everybody, no matter how small, no matter how much they're
17 put out of business, to travel to the forum for Google's
18 convenience based on any claim you bring against Google.

19 And it's very hard these days not to deal with
20 Google. It's very hard to imagine any claim against Google
21 where there isn't some place in the record an agreement. But I
22 think, Your Honor, you know, if -- if we're allowed to brief
23 this issue, we can point out to you why, under Phillips, the
24 language of the agreement, even the one quoted, doesn't extend
25 to these claims --

1 THE COURT: All right.

2 MR. RULE: -- and why the other prongs of Phillips
3 suggest that it ought to be interpreted narrowly, because
4 otherwise, you know, it would seem to be inappropriate and
5 inconsistent with what parties who were dealing with Google
6 have a right to expect when they click on that license.

7 THE COURT: All right. Of course, you know, I'll --
8 I'll let you make that argument. They haven't even made the
9 motion, so, you know, you'll have a full opportunity to make
10 that.

11 You know, I've dealt with these issues before in a
12 variety of different contexts, and if the claim is that the
13 contract says all claims arising out of or relating to -- very
14 broad. If that were an arbitration clause, for example, that's
15 just about as broad as you can get. But I understand your
16 argument. You're telling me there's case law that says that
17 broad language should be construed narrowly, and you may not
18 even have to get there, because you're not sure what you
19 signed. I understand. All right.

20 MR. RULE: And, Your Honor, if I might, just --

21 THE COURT: Yeah.

22 MR. RULE: -- I mean, for example, the language that
23 was in effect on April 19th, 2005 and, we believe, in May 2006
24 when several of these accounts were signed up for, read the
25 agreement -- let me take my glasses off here for a minute --

1 must be construed as if both parties jointly wrote it, governed
2 by California law, except for its conflicts of law, principles,
3 and adjudicated in Santa Clara County, California. So
4 basically, the sentence reads the agreement must be adjudicated
5 in Santa Clara, California.

6 That is much different language from -- related to
7 the language that is quoted in Mr. Jacobson's letter, and we
8 believe is clearly applicable to a number, if not all, of the
9 contracts or the accounts that TradeComet basically signed up
10 for here.

11 THE COURT: Okay. I think I have your argument.
12 Thank you.

13 Mr. Jacobson, it seems to me they're entitled to know
14 what they clicked on. I would think that -- you'd have a great
15 interest in showing them what they clicked on.

16 MR. JACOBSON: Your Honor, I absolutely consent to --
17 to that point. There's -- there's no -- there's no issue with
18 it. I do want to point out, because I think -- you know, we
19 will -- we would be back here again on this, but the law is
20 fairly clear that breach of a forum selection clause is a
21 breach of contract. It gives rise to damages, and the damages
22 are the costs incurred in invoking that clause to effect the
23 dismissal or transfer.

24 So you know, we will go through this discovery as Mr.
25 Rule requests, and we will reasonably respond to it. But I do

1 | want everyone to be on notice to recognize that that's our
2 | position and that this is not, you know, a completely free ride
3 | on Google's expense.

4 | THE COURT: All right. Mr. --

5 | MR. JACOBSON: I would like -- if I could just -- you
6 | indulge --

7 | THE COURT: You've thrown -- you've put --

8 | MR. JACOBSON: -- me for a second.

9 | THE COURT: -- that shot across his bow, or over his
10 | shoulder, based on where you sit, and he understands that
11 | you're going to be moving for attorney's fees, is what it
12 | sounds like, --

13 | MR. JACOBSON: Yes.

14 | THE COURT: -- if you prevail. Go ahead.

15 | MR. JACOBSON: Your Honor, just -- just briefly, in
16 | the initial call we had, we had not at that point -- first of
17 | all, we didn't know that the case was going to be before Your
18 | Honor. We did know that it was no longer before -- who was the
19 | prior judge? -- before Judge Buchwald. We didn't know who it
20 | was going to be before.

21 | THE COURT: Oh, did she -- it was assigned to her,
22 | and then transferred for some reason to me?

23 | MR. JACOBSON: She recused.

24 | THE COURT: All right.

25 | MR. JACOBSON: So -- and during that conversation, I

1 did indicate to Mr. Rule that there was an issue with venue,
2 and we had not tied it down at that point. And --

3 THE COURT: You had not --

4 MR. JACOBSON: We had not tied it down at that point.

5 THE COURT: All right.

6 MR. JACOBSON: Since then, and -- and before I wrote
7 my letter, we did confirm that -- that Mr. Savage, through his
8 e-mail address dan@sourcetool.com, clicked on what is now the
9 current terms and conditions for Adwords. He clicked on it on
10 August 29th, 2006, and we will provide this information to the
11 plaintiff, and those are the terms quoted in my letter, and I
12 gave Your Honor and counsel for TradeComet the URL.

13 And that -- that agreement provides very clearly that
14 all claims arising out of or relating to the -- the language
15 that you read -- this agreement or the Google programs shall be
16 litigated exclusively in Santa Clara County. The agreement
17 also provides that it supersedes and replaces all prior
18 agreements.

19 So we believe at the end of the day that there's not
20 going to be any issue that this is the governing agreement for
21 -- for all of the accounts in -- in question.

22 Having -- having said that, the -- the question today
23 is, you know, should we brief venue only first, or should we
24 brief everything. And let me just tell you the practical
25 reasons that led us to send you the letter that we did, which

1 is we did go through this with Mr. Person -- Mr. Person -- who,
2 contrary to what Mr. Rule told you, did allege that he was a
3 competitor of Google. The case was ultimately identical to
4 this one. They will disagree with that. We will argue that
5 that's the case. And -- and you will -- you will look at that
6 at an appropriate time.

7 But we went through this. We briefed the merits.
8 Judge Paterson looked only at the venue at the end of the day.
9 We went out to California. We briefed the merits again. The
10 complaint was dismissed without prejudice. We wound up
11 briefing the merits a third time after the complaint had been
12 amended.

13 So the only purpose for this is to reduce the amount
14 of briefing of the merits from --

15 THE COURT: Well, you -- you don't have --

16 MR. JACOBSON: -- from three to two.

17 THE COURT: -- to convince me that what -- your
18 motion should be only based on the venue clause, and you should
19 do it under 12(b)(3), it seems to me.

20 MR. JACOBSON: Or 12(b)(1), I think you said, --

21 THE COURT: Oh, I'm --

22 MR. JACOBSON: -- in C.F. First Class [phonetic].

23 THE COURT: -- sorry, have -- I've been saying three,
24 but it's really --

25 MR. JACOBSON: Yeah.

1 THE COURT: -- one, is that it? Okay.

2 MR. JACOBSON: It -- it's actually either -- either
3 one. Your opinion in C. First Class [phonetic] says 12(b)(1).
4 The Second Circuit's opinion affirms dismissal under 12(b)(3).

5 THE COURT: That's --

6 MR. JACOBSON: I believe --

7 THE COURT: -- in that same -- in C. First Class
8 [phonetic]? That was the airline case, I think. Is that --

9 MR. JACOBSON: That was -- that was your case from
10 last year.

11 THE COURT: And they affirmed it? They affirmed my
12 decision? You citing another section, or --

13 MR. JACOBSON: I have not tracked the subsequent
14 history of your case, but the case that Mr. Rule was citing to
15 you from the Second Circuit 2007 was a 12(b)(3) case.

16 THE COURT: And I used 12(b)(1)?

17 MR. JACOBSON: You used 12(b)(1) --

18 THE COURT: Okay.

19 MR. JACOBSON: -- in C. First Class [phonetic].

20 THE COURT: Well, they are the Second Circuit. I am
21 a district court. So go with them.

22 You don't have to convince me of that, but Mr. Rule
23 now should try to convince me otherwise.

24 It seems to me that the way we should go is you
25 should get your discovery, limited to what's your agreement

1 | with them, so let him know, if you can, what days you clicked,
2 | and he'll tell you what his website said on those days at those
3 | times. It seems to me that -- that's what you want, correct?

4 | MR. RULE: Your Honor, yes, and again, I just -- you
5 | know, we would like the opportunity to -- to indicate that
6 | something seems amiss when, you know, Google can essentially
7 | threaten people with fees, as Mr. Jacobson did to my associate
8 | --

9 | THE COURT: Threaten with what? He just threatened
10 | you now --

11 | MR. RULE: Right.

12 | THE COURT: I wouldn't use that word, but he put you
13 | on notice that he believes they have a right to attorney's fees
14 | for these --

15 | MR. RULE: Right.

16 | THE COURT: -- unwarranted and untoward actions. I
17 | heard that.

18 | MR. RULE: But -- but --

19 | THE COURT: But what -- what are you saying?

20 | MR. RULE: Well, my concern is, Your Honor -- you
21 | know, Google's a very large company, very well endowed.
22 | Frankly, we don't want a situation where at every turn, every
23 | place they can, they try to drag this case out. We believe
24 | that we are right on the venue question.

25 | THE COURT: I understand. We also believe that we

1 are right on the 12(b)(6) question. We think --

2 THE COURT: I understand that, but --

3 MR. RULE: -- that we have stated -- we have stated a
4 claim. And frankly, we -- if he bifurcates it this way,
5 they've just dragged this out further.

6 THE COURT: No. I certainly understand your point,
7 and I certainly understand how you're a bit suspect given the
8 request early on, and you're thinking as well if they knew they
9 were going to do this, why in the world would they have used --
10 sought the -- sought the adjournment. I understand that.

11 But it is certainly easier from a management
12 standpoint for me to look at the venue issue first, especially
13 in light of Person v. Google, so -- and I understand your point
14 is that it's a different case, but it tells me that I -- I have
15 the ability here, and it's logical, to kind of cauterize that
16 issue from the rest and for me to look at that issue alone. Go
17 ahead.

18 MR. RULE: And, Your Honor, I don't disagree that you
19 may want to look at it. My only concern is that if you look at
20 it and you agree with us, the problem that will be facing us is
21 we then will have -- he'll have another bite at the apple. And
22 throughout --

23 THE COURT: If you're right, he will have another
24 bite at the apple, but I'm telling you that I'm sensitive to
25 your concern, and this briefing schedule will be pretty much

1 | what you want, within reason. In other words, I'm not going to
2 | have a six-week briefing schedule on either a 12(b)(1) or a
3 | 12(b)(3) motion.

4 | MR. RULE: Well, I certainly hope it's not going to
5 | be any longer than he already has, which is April 7th. But I
6 | would certainly also hope that if we're right that we are going
7 | to get discovery. I mean, the other problem we have is that
8 | even with respect to the discovery on the issues that we've
9 | talked about on venue, we've tried to be reasonable with
10 | Google, and the response we got was I can't give you anything
11 | because my client will fire me if I give you any discovery.

12 | And the problem -- we don't want to run into a
13 | situation where this is just dragged out forever. I do
14 | understand why Google doesn't want anyone to see their
15 | documents. And I understand that they're going to fight as
16 | long as they can for that.

17 | And all we're asking Your Honor to do is to help us
18 | out, recognizing who we're going against, and not -- not
19 | helping them at every turn block the ability of a plaintiff
20 | like this to get to court and have its day in court.

21 | THE COURT: Okay. I can give you -- I can't adopt
22 | the characterizations you've just made, but I can assure you
23 | that the case will be adjudicated efficiently and promptly.

24 | MR. RULE: That's all I can ask, Your Honor, at the
25 | end of the day.

1 THE COURT: Now -- but let's -- I want to avoid
2 discovery issues here on the -- on the venue point. So put
3 your request in writing as soon as you can --

4 MR. RULE: Okay.

5 THE COURT: -- to Mr. Jacobson. If you feel you're
6 better protected by doing it as a formal document demand, do
7 it. I'll let it be returnable on -- well, it depends upon --
8 if it's as narrow as I think it should be, it can be returnable
9 -- Mr. Jacobson, ten days? Can you do that?

10 MR. JACOBSON: Your Honor, we had talked about an
11 April 7th date for the motion. Because it's just going to be
12 limited to venue, what I would propose is to advance that a
13 week to March 31. The problem, candidly, is that next week all
14 of the antitrust lawyers are at the ABA convention, and I'm
15 speaking. I believe Mr. Rule is speaking as well at that.

16 So if we could have -- again, I'll advance it a week
17 till March 31, and get the motion on file. Then once they have
18 the motion, then they can formulate the discovery, and we'll
19 respond to their request within three business days.

20 THE COURT: Sounds all right to me, although I
21 thought you wanted to get your request out now. If you want to
22 wait till his motion, Mr. Jacobson is saying they'll respond in
23 three business days. That's pretty good.

24 And we're talking -- now we're talking -- this is St.
25 Patrick's Day, so you're talking about two weeks to make your

1 motion, and then a document demand returnable on three days'
2 notice.

3 Mr. Rule?

4 MR. RULE: Well, Your Honor, I -- I guess, since I
5 believe the request that we are going to make is pretty narrow,
6 and we discussed really most of the issues here, it strikes me
7 that it's better for us to get that request out now.

8 THE COURT: All right. Get it out.

9 MR. RULE: Right. So we will -- we will do that. I
10 don't think we'll wait for his motion.

11 THE COURT: I don't mind.

12 MR. JACOBSON: Your Honor, it doesn't make any sense,
13 because we haven't decided who the declarant is going to be on
14 the declaration to support when Mr. Savage clicked on the -- on
15 the website, so how --

16 THE COURT: No, but he has --

17 MR. JACOBSON: -- are they going to --

18 THE COURT: -- own view -- he has his own view as to
19 when his people clicked on the website, I take it.

20 Is that correct?

21 MR. RULE: That's absolutely correct, Your Honor.

22 MR. JACOBSON: But that's not discovery from us.
23 That's our discovery if we elected to take it from him. So I'm
24 -- let me -- let me be clear.

25 THE COURT: Well -- go ahead.

1 MR. JACOBSON: We want to respond to his venue-based
2 discovery as promptly as possible. When I say that I'll get
3 back to him in three days, I don't mean that I'll produce
4 everything in three days. I will --

5 THE COURT: Oh.

6 MR. JACOBSON: -- I will produce everything as
7 absolutely as quickly as I can. But I will get back to him on
8 what's possible, what's not possible, and what -- if it is --
9 is over broad, and what I think is appropriate, and --

10 THE COURT: Okay. But why -- I understand that, and
11 that's fine. I misinterpreted your offer. But what's wrong
12 with his right now telling you what he wants?

13 MR. JACOBSON: If he -- if he wants to do that,
14 that's fine. I suspect he'll want to do it again when he sees
15 our venue motion, but if he wants to let us know what he wants
16 in the way of discovery relating to the venue issue now, I can
17 forward it to the client and, as I said, I will get back to him
18 as quickly as we can.

19 THE COURT: All right. Let's -- Mr. Rule, you can
20 make a document demand returnable on ten day's notice whenever
21 you wish.

22 MR. RULE: Okay, Your Honor, and obviously, if Google
23 submits a declaration as opposed to the actual agreements, we
24 would want to reserve the right -- we may want to depose the
25 declarant, depending on what they, in fact, file at the time of

1 the motion, but --

2 MR. JACOBSON: If he wants the agreement, it's right
3 here. It's right on the website that I cited in the letter.
4 It's --

5 THE COURT: Well, but he's -- what he's saying is
6 there are clicks at different times, and there may be different
7 wording. He wants to see how that developed.

8 MR. JACOBSON: And that's absolutely true, and -- but
9 not relevant for the reasons that I indicated earlier.

10 THE COURT: No, I think your reasons are your website
11 says the last one clicked on is the operative one.

12 MR. JACOBSON: Correct.

13 THE COURT: That -- we're talking about discovery.
14 We're talking about relevant -- things that are relevant to the
15 lawsuit. He has the ability to track each one. He doesn't
16 have to rely on your statement that because it says it, it's
17 true.

18 MR. JACOBSON: I couldn't agree with that more.

19 THE COURT: All right. [Pause] All right.

20 Ms. Blakely, the pretrial conference having been held
21 today, it's hereby ordered that plaintiff may send a document
22 demand to defendant returnable on ten days' notice. Defendant
23 may move to dismiss the complaint for improper venue or lack of
24 jurisdiction based on improper venue.

25 Mr. Jacobson, is that the way to phrase it in light

1 of 12(b)(1) and 12(b)(3)?

2 MR. JACOBSON: Yes. One would be jurisdictional, and
3 three would be venue.

4 THE COURT: All right. By March 31 -- is that what
5 you were saying?

6 MR. JACOBSON: Yes, Your Honor.

7 THE COURT: Mr. Rule, when do you want to respond?
8 Again, you're interested in moving this, so it's whenever you
9 want.

10 MR. RULE: We can respond in two weeks.

11 THE COURT: All right.

12 MR. RULE: About April 15th, just to pick a date.

13 THE COURT: That makes it April -- April 15th is two
14 weeks and one day. That's all right.

15 Mr. Jacobson, a week to reply?

16 MR. JACOBSON: That's fine, Your Honor.

17 THE COURT: April 22 to reply.

18 If there are any discovery disputes, which there
19 should not be on this narrow issue, write me a letter, and the
20 other side should respond within a few days, and I'll handle
21 it. But I -- it seems to me there shouldn't be any dispute.

22 You can be relatively targeted in your document
23 request here, Mr. Rule.

24 MR. RULE: Yes, Your Honor.

25 THE COURT: All right. This case does not have the

1 vibrations that I want in a litigation. There seem to be some
2 posturing. But let's -- let's move it forward. Let's test it
3 on the venue.

4 Anything else I can do for the parties?
5 Plaintiff?

6 MR. RULE: Not today, Your Honor.

7 THE COURT: All right.

8 Defendant?

9 MR. JACOBSON: No, Your Honor. And I will assure
10 you that Mr. Rule and I will cooperate to the maximum extent
11 possible within the bounds of representing our clients, and --

12 THE COURT: Right, as long as he knows you're going
13 to seek attorney's fees if you win. I understand.

14 (Laughter)

15 THE COURT: Gentlemen, I understand completely I was
16 a lawyer a lot more than -- longer than I was a judge. I
17 understand.

18 MR. JACOBSON: And if I don't put that on the record,
19 it's not -- it's not -- it's a reality that if I don't put it
20 on the record now, we're going to be told, you know, why didn't
21 you tell me that later. And there's -- there's a lot more
22 behind this case than -- than is before Your Honor today, and
23 hopefully you will never have to be beset with it.

24 But there -- there's a lot going on here, and
25 hopefully it will be the province of a co-jurist in San Jose,

1 California to confront those issues.

2 THE COURT: I have an antitrust lawsuit here. I have
3 a nascent motion to dismiss on the grounds that the dispute is
4 governed by a mandatory forum selection clause. I think I can
5 handle that.

6 Thank you all.

7 MR. JACOBSON: Thank you, Your Honor.

8 MR. RULE: Thank you, Your Honor.

9

10 I, KRISTIN M. RUSIN, court approved transcriptionist, certify that the
11 foregoing is a correct transcript from the official electronic sound recording of the proceedings
12 in the above-entitled matter.

13 Transcript is certified original only if signed in green ink.

14

3/24/09 