

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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CASE TITLE TradeComet.com, LLC, Plaintiff/Appellant v. Google, Inc., Defendant/Appellee	DISTRICT S.D.N.Y. JUDGE Sidney H. Stein COURT REPORTER	DOCKET NUMBER 09-cv-1400 APPELLANT TradeComet.com, LLC COUNSEL FOR APPELLANT Cadwalader, Wickersham & Taft LLP

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COUNSEL'S SIGNATURE /s/ Charles F. Rule	DATE March 29, 2010
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DATE ORDER RECEIVED	ESTIMATED COMPLETION DATE	ESTIMATED NUMBER OF PAGES
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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

5 Plaintiff

7 -vs-

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

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 :

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29 Audio Operator:

No Audio Operator

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

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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 