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January 19, 2011

BY CM/ECF

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals
For the Second Circuit
500 Pearl Street
New York, New York 10007

**Re: TradeComet.com LLC v. Google Inc.,
No.: 10-911 – Letter under FRAP 28(j)**

Dear Ms. Wolfe:

Defendant-Appellee Google Inc. submits this letter under FED. R. APP. P. 28(j) to advise the Court of two circuit court opinions issued following submission of Google's brief on August 18, 2010.

- *Rafael Rodriguez Barril, Inc. v. Conbraco Indus.*, 619 F.3d 90 (1st Cir. 2010). In this case, the First Circuit affirmed a Rule 12(b)(6) dismissal based on a forum selection clause specifying venue "in the state and federal courts sitting in Mecklenburg County, North Carolina." *Id.* at 92.
- *Hillis v. Heineman*, 626 F.3d 1014 (9th Cir. 2010), *aff'g* 2009 WL 2222709 (D. Ariz. 2009). The Ninth Circuit affirmed a Rule 12(b)(3) dismissal for improper venue based on a forum clause requiring venue in the "State or Federal Courts serving the State of Ohio." *Id.* at 1016.

Although neither decision addresses specifically the argument advanced in TradeComet's briefs that transfer under 28 U.S.C. § 1404(a) is the only means of enforcing a forum selection clause when transfer to a domestic federal forum is possible, both cases affirm dismissals under Rule 12(b).

The decision in *Hillis* means that, in addition to the First, Third, Fourth, Sixth, Seventh, and Eighth Circuits, *see* Google Br. 23-26, the Ninth Circuit also allows enforcement through Rule



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12(b). As Google's brief points out, Google is aware of no court of appeals that adheres to TradeComet's argument that forum clauses are enforceable only under § 1404(a) when transfer to a domestic federal forum is possible.

Respectfully yours,

A handwritten signature in cursive script that reads "Jonathan M. Jacobson".

Jonathan M. Jacobson

cc: All Counsel (by CM/ECF)