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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FLOWBEE INTERNATIONAL, INC.,	*	CIVIL ACTION
AND FLOWBEE HAIRCUTTER LIMITED	*	
PARTNERSHIP,	*	CA-C-09-199
	*	
PLAINTIFFS,	*	
	*	
VS.	*	
	*	CORPUS CHRISTI, TEXAS
GOOGLE, INC.,	*	SEPTEMBER 23, 2009
	*	1:08 P.M.
DEFENDANT.	*	
	*	
* * * * *	*	

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	MR. DAVID TARRANT BRIGHT WATTS, GUERRA & CRAFT, L.L.P. 555 NORTH CARANCAHUA, SUITE 1400 CORPUS CHRISTI, TEXAS 78478
FOR THE DEFENDANT:	MS. MARGARET CARUSO QUINN, EMANUEL, URQUHART, OLIVER & HEDGES, L.L.P. 555 TWIN DOLPHIN DRIVE, SUITE 560 REDWOOD SHORES, CALIFORNIA 94065

(APPEARANCES CONTINUED ON PAGE 2)

COURT RECORDER: MS. VELMA GANO

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1 APPEARANCES: (CONTINUED)

2

FOR THE DEFENDANT:

3

MR. CARL C. BUTZER
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1 (The proceedings began at 1:08 p.m.)

2 (Call to Order of the Court.)

3 THE CLERK: Court calls Civil Action C-09-199,
4 Flowbee International, et al. versus Google, Inc. May I have
5 appearances, please?

6 MR. BRIGHT: Good afternoon, Your Honor. David
7 Bright here on behalf of the Plaintiffs.

8 MS. CARUSO: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MS. CARUSO: Margaret Caruso, from Quinn, Emanuel,
11 Urquhart, Oliver & Hedges, on behalf of Google, Inc., the
12 Defendant.

13 MR. BUTZER: Good afternoon, Your Honor. My name is
14 Carl Butzer. I'm also here representing Google, Inc. And I'm
15 with Jackson Walker.

16 THE COURT: I wanted to call you Mr. Bright. I just
17 couldn't.

18 MR. BRIGHT: That's very kind of you, Your Honor.

19 THE COURT: I did contact your parents, though.

20 So you have a motion to dismiss --

21 MS. CARUSO: Yes, Your Honor.

22 THE COURT: -- right? And I did sign last night
23 sometime your --

24 MS. CARUSO: Thank you very much, Your Honor.

25 THE COURT: -- to appear. And I guess the question

1 is whether this arises out of the contract or just a plain old
2 trademark infringement, if that's what they're going on.

3 MS. CARUSO: I believe -- would you like --

4 THE COURT: Mr. Bright?

5 MR. BRIGHT: Your Honor, our deadline for responding
6 has not expired, and we will be vigorously contesting it. Our
7 position --

8 THE COURT: I know, but I do all pending motions at
9 the initial pretrial conference.

10 MR. BRIGHT: We intend to file a full-blown response.
11 This motion was just filed a week ago. Let me first say, it's
12 going to be our position, and I think it's going to be born out
13 by the facts, that this suit does not arise out of that
14 contract. The contract's not mentioned in the suit. The
15 conduct complained of by Google predates this click-through
16 contract. There may be conflicting terms in various click-
17 through contracts.

18 THE COURT: But you're not relying on the contract
19 for this. You're relying on trademark infringement.

20 MR. BRIGHT: That is absolutely correct, Your Honor.

21 THE COURT: That's what I thought, reading through
22 your petition. So I'm not sure if the forum selection clause
23 in the contract controls. But I'll give you a chance to
24 respond to his response.

25 MS. CARUSO: Okay. Your Honor, I, Google agrees that

1 their complaint is based on trademark infringement. It does
2 not arise out of the contract. However, the forum selection
3 clause is broader than the scope of the contract alone. It
4 goes beyond just the parties' relationship under the contract,
5 if you look at the words, to all claims arising from or
6 relating to the agreement and --

7 THE COURT: Okay. I can -- let me say this.

8 MS. CARUSO: Sure.

9 THE COURT: I can Google my name on Google.

10 MS. CARUSO: Yes.

11 THE COURT: And come up with lots of stuff. And if I
12 found that you were putting my name with someone else, I would
13 have some kind of a cause of action. It might be some kind of
14 slander cause of action. And that forum selection clause would
15 not apply to me, because I didn't have a contract with you.

16 MS. CARUSO: But if --

17 THE COURT: So tell me the difference.

18 MS. CARUSO: The difference is that Flowbee, the
19 Plaintiff, does have a contract with us, an advertising
20 contract. And as one of the terms of that contract, they
21 agreed that any dispute relating to Google's advertising
22 programs would be brought in California, in the courts of Santa
23 Clara County. And there is a case, from the Northern District
24 of Texas --

25 THE COURT: You're going to rely on the law for this?

1 Don't you hate that?

2 MR. BRIGHT: That's terrible.

3 MS. CARUSO: The Northern District of Texas, Your
4 Honor, but there aren't many cases --

5 THE COURT: I know.

6 MS. CARUSO: -- addressing broader claims than, forum
7 selection clauses than just the ones arising from the contract
8 or relating to the contract. But in that case, it did go
9 beyond just the contract. And the Court pointed out that the
10 test of whether or not the action arises from the contract and
11 the contractual relationship or could have been brought outside
12 of the contractual relationship doesn't apply when the terms of
13 the forum selection clause go beyond that relationship. That's
14 one of the terms that Flowbee agreed to in the contract, just
15 like they agreed to other terms, such as that they weren't
16 going to scrape or extract any data from Google's website in
17 connection with what they do.

18 THE COURT: Okay.

19 MS. CARUSO: So whatever ability they could have had
20 to do that, they gave that up in exchange for advertising on
21 Google's website.

22 THE COURT: Okay. Well, we'll see.

23 MS. CARUSO: Okay.

24 THE COURT: We'll see what I come up with, because I
25 don't know, because I figured that's what they were going to

1 say, is that this had nothing to do with the contract. But now
2 what you're saying is that the relationship is broader than
3 just the contractual relationship.

4 MS. CARUSO: The forum selection clause is broader.

5 THE COURT: The forum selection clause.

6 MS. CARUSO: Yes.

7 THE COURT: Okay.

8 MS. CARUSO: Exactly, Your Honor.

9 THE COURT: Okay.

10 MR. BRIGHT: And we will be filing --

11 THE COURT: I believe it.

12 MR. BRIGHT: -- a lengthy --

13 THE COURT: And I'll wait, excited --

14 MR. BRIGHT: With bated breath.

15 THE COURT: -- to hear from everybody, because it's a
16 great issue. And I don't want y'all to go away, but you know,
17 there you have it.

18 MR. BRIGHT: It's an interesting case.

19 MS. CARUSO: We're happy to come back and talk more
20 about that.

21 THE COURT: So what about the scheduling order? Is
22 that okay?

23 MS. CARUSO: Yes, Your Honor.

24 MR. BRIGHT: It is indeed. We work together
25 famously, Your Honor.

1 THE COURT: Good. Then I'll go ahead and sign the
2 scheduling order, which also adopts your Joint Discovery Case
3 Management Plan.

4 MS. CARUSO: Thank you.

5 THE COURT: And then I'm going to give you a general
6 order that you might want to use, instead of going back and
7 forth. I'm going to give you a mediation order. And you've
8 not been here before, so I'll tell you a little bit. I'm going
9 to enter a general order, too, that tells about my mediation
10 policy and the discovery policy.

11 In the mediation order, you pick your own mediator,
12 you pick your own time for mediation. If it doesn't work out,
13 if you can't agree on a mediator, you can come back to me and
14 I'll appoint one.

15 MS. CARUSO: All right.

16 THE COURT: That's never happened. Y'all know best
17 who can mediate these kind of things, where you want it done,
18 and when you'll be ready for it.

19 Now, I put a date in here for the order for referral
20 to mediation to notify the Court no later than X date. That
21 you can change by agreement. In the general order, you can
22 also change all these dates by agreement, as long as it's not
23 the ones I tell you you can't change, trial, final pretrial
24 conference, dispositive motions deadline, because those, I kind
25 of figure, are mine.

1 Now, the discovery policy is this. It's in the
2 general order, but if you have a discovery problem, you just do
3 a joint call to Ms. Scotch, and she'll have you in to the court
4 within an hour or two, wherever I am, vacations, Timbuktu,
5 literally anywhere.

6 So with that in mind, do you all have any present or
7 anticipated discovery problems?

8 MS. CARUSO: Not at this time, Your Honor.

9 MR. BRIGHT: We haven't propounded any discovery yet,
10 Your Honor. We have a --

11 THE COURT: Do you think I can deny their motion to
12 dismiss just because it would be fun for me to try it?

13 MR. BRIGHT: I think that's a sound basis, and I will
14 find a case that supports that.

15 THE COURT: A sound legal decision?

16 MR. BRIGHT: It is an interesting case, I will say
17 that, Your Honor.

18 THE COURT: All right. Anything else, while you're
19 here?

20 MR. BRIGHT: Your Honor, only if the Court is
21 interested. In anticipation of, having attended some other
22 pretrial conferences --

23 THE COURT: Oh, you have a PowerPoint for me. I'd
24 love to see it.

25 MR. BRIGHT: Only if you're interested in --

1 THE COURT: I'm interested.

2 MR. BRIGHT: Well, then I will --

3 THE COURT: Thank you.

4 MR. BRIGHT: -- show you what this case is about. I
5 anticipated you might ask what this case is about. And with
6 that in mind --

7 THE COURT: Well, I figured out what it was about. I
8 did my own little Google search to see what popped up. I was
9 fascinated about the hair thing. Have you used it?

10 MR. BRIGHT: Obviously not, Your Honor.

11 THE COURT: Okay. Well no, I mean, you look so nice
12 and --

13 MR. BRIGHT: Although, I will say that there is a,
14 among --

15 THE COURT: It's like a science fiction story, isn't
16 it?

17 MR. BRIGHT: It is a little bit.

18 THE COURT: Vacuuming your hair and cutting it?

19 MR. BRIGHT: If I'm not mistaken --

20 THE COURT: Doesn't that take care of everything at
21 the same time?

22 MR. BRIGHT: You know, I don't think I'm talking out
23 of school. Jon Muschenheim used this piece of equipment, with
24 apparent success for years, and might still to this day.

25 THE COURT: No.

1 MR. BRIGHT: I will not lie.

2 THE COURT: You know, that's why we were talking
3 about this years ago. We know this, didn't we? Because we
4 looked, I looked up because Mary Hardin, who's the Court
5 Administrator, she said, "This sounds so familiar." So we
6 looked up to see if we had had another Flowbee case, and no, I
7 think we were talking about Muschenheim. Don't you think,
8 Ms. Gano?

9 COURT RECORDER: I know he's --

10 THE COURT: That's what it was.

11 MR. BRIGHT: U.S. Attorney approved, Your Honor.

12 THE COURT: Okay. So tell me.

13 MR. BRIGHT: Your Honor, I have a notebook. I've
14 given them to opposing counsel. It contains an initial trial
15 brief and also has the slides of this PowerPoint presentation,
16 if I can present that.

17 THE COURT: Thank you. Any objection?

18 MS. CARUSO: Your Honor, we just, you know, saw this
19 five minutes ago, but we're happy to --

20 THE COURT: Well, if you object to it, it's fine. I
21 won't look at it. I'll just look at the presentation.

22 MS. CARUSO: Um --

23 THE COURT: It's going to hurt his feelings, though.

24 MS. CARUSO: The objection is the same either way
25 for --

1 THE COURT: It's going to hurt his feelings terribly.

2 MS. CARUSO: We're fine with you seeing it. We would
3 like to respond, and perhaps at some later opportunity to
4 present our own PowerPoint explaining our side.

5 THE COURT: That would be fine.

6 MR. BRIGHT: I don't think they should be able to
7 respond.

8 THE COURT: No response? Oh, you just missed the
9 response deadline. Okay. This is so much better than
10 sentencing people.

11 MR. BRIGHT: I've got to tell you, Your Honor, it's
12 much better than being sentenced.

13 THE COURT: Uh-huh, uh-huh.

14 MR. BRIGHT: This is fairly brief, Your Honor.
15 Flowbee, as I described, is a vacuum hair cutting system. It
16 is a, as seen in *Wayne's World*, it is a patented hair cutting
17 system. More importantly, perhaps, for purposes of this case,
18 Flowbee, the word "Flowbee" is a coined term. In other words,
19 it means nothing but what you see there.

20 THE COURT: Okay.

21 MR. BRIGHT: It's not a generic term. It doesn't
22 mean --

23 THE COURT: It's a mark.

24 MR. BRIGHT: It's not only a mark, but as opposed to
25 McDonalds, which is also a last name, Flowbee only refers to

1 this thing. It's a made-up word.

2 THE COURT: Okay.

3 MR. BRIGHT: So it's perhaps, you know, like Kleenex,
4 which of course Kleenex has actually sort of become
5 genericized.

6 THE COURT: That's right.

7 MR. BRIGHT: But it is a coined, made-up word.
8 Flowbees have been sold very successfully on infomercials on
9 television and also through the internet. That's a screen shot
10 of Flowbee's internet --

11 THE COURT: Well, do women use them? I mean, how do
12 you do it for long hair?

13 MR. BRIGHT: Yes, absolutely. In fact, Theresa
14 Swerenko is another happy Flowbee -- the former Mrs. --

15 THE COURT: I don't know her.

16 MR. BRIGHT: The former Mrs. Jon Muschenheim, who had
17 very similar hair.

18 THE COURT: Oh. Oh, similar to his, though.

19 MR. BRIGHT: Yes.

20 THE COURT: Yeah. Well no, I meant long hair.

21 MR. BRIGHT: I don't know. I'm sure it's adjustable.

22 THE COURT: It looks kind of dangerous.

23 MR. BRIGHT: Well, you know, Mike Westergren is one
24 of the people who will --

25 THE COURT: Don't tell me he uses it, because I don't

1 believe it.

2 MR. BRIGHT: His hairs are precious to him.

3 THE COURT: I know. And precious few, if I remember.

4 MR. BRIGHT: They're more precious than -- I
5 shouldn't be saying this on the record. A number of our claims
6 pertain to Google's sponsored links. And Your Honor, there's
7 been actually a pretty good track record of litigation
8 regarding this, not only in the Federal District Court in the
9 Northern District of Texas, which is within the Fifth Circuit,
10 of course, but also in the Second Circuit and the Ninth and the
11 Tenth and other places, about the sponsored links.

12 And this is what happens. You get to the Google
13 page, and you Google "Flowbee."

14 THE COURT: Okay.

15 MR. BRIGHT: It's F-L-O-W-B-E-E. It only means that
16 one patented thing that you saw.

17 THE COURT: Okay. So what comes up?

18 MR. BRIGHT: This is what comes up when you Google
19 "Flowbee." You Google that and you get \$40 sale vacuum hair
20 cutter right up at the top. That is --

21 THE COURT: Oh, and that's the top one. And do you
22 pay -- I assume that you kind of pay for how you go in the
23 line?

24 MR. BRIGHT: That is a purchased, sponsored link by
25 Flowbee's competitor, RoboCut. In other words, RoboCut --

1 THE COURT: Okay. So the annoying thing is, is that
2 when you Google "Flowbee," you should get Flowbee first.

3 MR. BRIGHT: You certainly would expect that, because
4 otherwise that's why people use Google, because there's an
5 assumption that the search algorithm is such that the most
6 relevant search result will be first.

7 THE COURT: At the top, yeah.

8 MR. BRIGHT: And there's another aspect of it, and
9 that is that if you Google, for example, "David Bright," I
10 would assume you would get any number of "Davids," any number
11 of things that contain the word "bright," and maybe a whole
12 passel of "David Brights."

13 When you Google "Flowbee," no part of "\$40 sale
14 vacuum hair cutter" sounds like "Flowbee." If you got a water
15 park or something, you know, maybe. But you know, it's
16 Google's position that since this is a, what's called a
17 sponsored link, that, you know, that's clearly an
18 advertisement. I don't think that "sponsored link" -- I mean,
19 sponsored by whom? It's certainly our position that that is --

20 THE COURT: Okay.

21 MR. BRIGHT: -- if not absolutely misleading --

22 THE COURT: This is good.

23 MR. BRIGHT: -- certainly has the capacity to
24 mislead. If you -- this is Google Images. And what do you
25 get? You get the competitor, right up at the top. This is if

1 you Google "Flowbee" on Google Maps, there's their competitor
2 at the top. If you Google, Google News, you're going to get
3 their competitor there. And again --

4 THE COURT: Have you seen their contract, the
5 competitor's contract?

6 MR. BRIGHT: No, I have not, Your Honor.

7 THE COURT: You're entitled to that under Rule 26.

8 MR. BRIGHT: I believe so, Your Honor.

9 THE COURT: So --

10 MR. BRIGHT: And --

11 THE COURT: That's it.

12 MR. BRIGHT: Thank you, Your Honor.

13 THE COURT: That's what I'm telling you. That should
14 be part of the Rule 26 disclosures from the Defendant.

15 MR. BRIGHT: Google product search, Google "Flowbee,"
16 and again you're Googling a coined term, here's Google Groups,
17 it's up at the top --

18 THE COURT: Does Yahoo -- did I read that Yahoo now
19 uses Google to Google, I mean, to search words, phrases and
20 things?

21 MR. BRIGHT: I don't know the answer to that
22 question.

23 THE COURT: So Google was going to buy Yahoo. Right?
24 And Yahoo said no. And then they said, "Oh, forget about it.
25 We'll just use Google to, in our search." Is that --

1 MS. CARUSO: I'm not sure about that, Your Honor.

2 THE COURT: Okay. Maybe I just made that up.

3 MS. CARUSO: I think perhaps Microsoft has an
4 arrangement with Yahoo concerning their search systems. But I
5 don't believe that Google does in that fashion.

6 THE COURT: I thought -- okay. You would know. I
7 just wondered if it was some kind of a contract between all
8 these things that changed things around.

9 MR. BRIGHT: Actually, this has been going on since,
10 if I'm not mistaken, 1994 maybe is when Google started selling
11 trademark terms as trigger search words. If I'm not mistaken,
12 I have it in my notes, but they sell various words to trigger,
13 you know, search results --

14 THE COURT: Well, they must have sold "Flowbee" to
15 that competitor.

16 MR. BRIGHT: Unquestionably.

17 THE COURT: One would assume. But I'm going to hear
18 something different, I imagine.

19 MR. BRIGHT: I don't know that they're, I don't
20 believe that they are disputing that Google sold --

21 THE COURT: Flowbee.

22 MR. BRIGHT: -- the use of the word "Flowbee" to
23 Flowbee's competitor. I think they're --

24 THE COURT: This is just a sad situation when you
25 can't trust Google.

1 MR. BRIGHT: If you Google "Flowbee.com," that's what
2 this is, Flowbee.com --

3 THE COURT: Huh-uh.

4 MR. BRIGHT: -- you get 40 -- I'm not saying if you
5 put it up in the URL. I'm saying if you Google
6 "Flowbee.com" --

7 THE COURT: I got it.

8 MR. BRIGHT: -- you get the competitor at the top.
9 If you Google something close to Flowbee, which is like leave
10 the W out --

11 THE COURT: Uh-huh.

12 MR. BRIGHT: -- there's their competitor. If you
13 Google "F-L-O-W-B-E," leave an E out and misspell it, you get
14 their competitor.

15 THE COURT: Okay. I got it.

16 MR. BRIGHT: How about, quote --

17 THE COURT: Move on.

18 MR. BRIGHT: "Flowbee haircut system."

19 THE COURT: Okay.

20 MR. BRIGHT: Clearly you're going to get the
21 Flowbee -- no, you're going to get competitor, competitor,
22 competitor.

23 THE COURT: Okay.

24 MR. BRIGHT: In terms of whether it's confusing, I
25 don't -- I don't know why a person wouldn't assume that that

1 \$45 sale vacuum hair cutter was Flowbee.

2 THE COURT: Was Flowbee. Yeah, I would.

3 MR. BRIGHT: What does Google say? Google --

4 THE COURT: But I'm not good at this either.

5 MR. BRIGHT: On Google's AdWords learning center,
6 where they sell these search terms to people --

7 THE COURT: Okay. I just think she ought to just
8 turn her pockets out and be done with it.

9 MR. BRIGHT: Well, I don't want her money, Your
10 Honor, just her client's.

11 THE COURT: Okay.

12 MR. BRIGHT: But one of the things Google says to
13 people that do business with them, they say who, you know, for
14 example --

15 THE COURT: Okay.

16 MR. BRIGHT: -- RoboCut. Let's say the competitor,
17 who availed themselves of this AdWords program, once you
18 activate your account, RoboCut, your ads will be eligible to
19 appear. That is, the AdWords system will constantly seek out
20 search queries related to the key words you've selected. In
21 this case, they've selected trademark term "Flowbee." Then
22 display your ads to highly targeted audiences. In short, you
23 would be advertising directly to an audience already looking
24 for you. In other words, this is Google's --

25 THE COURT: Got it. Is that in your contract?

1 MR. BRIGHT: No. This is actually on the Google
2 learning center page --

3 THE COURT: Okay.

4 MR. BRIGHT: -- for the AdWords. If you're
5 interested in buying AdWords through Google, such as Flowbee,
6 they're saying in short, RoboCut, you're advertising directly
7 to an audience already looking for Google, I mean for --

8 THE COURT: Flowbee.

9 MR. BRIGHT: -- Flowbee. Pardon me.

10 THE COURT: Got it.

11 MR. BRIGHT: In contrast, if you go to the Google
12 page, you Google the word "Google," you see no such sponsored
13 links on there. You don't see anything for bing.com or
14 Yahoo --

15 THE COURT: Yahoo.

16 MR. BRIGHT: -- or Dogpile.

17 THE COURT: Well, that's because they hadn't paid
18 them. Yahoo hasn't paid them.

19 MR. BRIGHT: If they would allow them to do that in
20 the first place.

21 There's also the Google AdSense program, which allows
22 people with websites to display targeted Google ads on their
23 own websites. Now, with respect to this, we talked about the
24 F-L-O-W-B-E.com, where you had the competitor show up. In
25 addition, you're directed to a website that is F-L-O-W-B-E.com.

1 And on information and belief, we think these are, this is a
2 website which has availed itself of the AdSense, you know,
3 Google's AdSense campaign. You see Flowbee on there that is
4 correctly spelled.

5 THE COURT: Who did that website? Do you know the --

6 MR. BRIGHT: We don't know. I mean, we have a -- I
7 think that's something we're going to have to be assessing out
8 in discovery.

9 THE COURT: Okay.

10 MR. BRIGHT: But, I mean, we can find out who did the
11 website and we know the name of some company, but we don't
12 know --

13 THE COURT: What's the name of the company?

14 MR. BRIGHT: Oh, I have it in my notes, Your Honor,
15 and I'm not sure. I mean, it's a very generic sounding name,
16 you know.

17 THE COURT: That did the website?

18 MR. BRIGHT: Yes, that did this F-L-O-W-B-E website.
19 But on it --

20 THE COURT: Could you look it up and find out?

21 MR. BRIGHT: I don't know that I have that -- I know
22 that we did look it up, and I know that we did come up with
23 that information.

24 (PAUSE.)

25 THE COURT: Go ahead. I'm watching.

1 MR. BRIGHT: Oh, pardon me. The interesting thing is
2 here we see Flowbee correctly spelled, F-L-O-W-B-E-E. You
3 click on that, and you get to this page that has the Flowbee
4 search request, and it is chock full of competitors.

5 THE COURT: That's the same as the one without the E.

6 MR. BRIGHT: Right. But when you, if you go to
7 this --

8 THE COURT: That thing at the top left?

9 MR. BRIGHT: If you go to this F-L-O-W-B-E.com, in
10 other words, the misspelled --

11 THE COURT: Yeah.

12 MR. BRIGHT: -- Flowbee, you get to this website that
13 is F-L-O-W-B-E.com, which doesn't mean anything. Flowbe, it's
14 not even a coined term or anything else. It's a misspelling of
15 Flowbee. And it is our belief that the owner of this website
16 has availed itself of the AdSense campaign that Google has
17 which allows these links that you can buy from Google. And if
18 you click on that Flowbee link there that is correctly
19 spelled --

20 THE COURT: Okay.

21 MR. BRIGHT: -- you end up with competitors. And
22 this again is something we're going to have to do some serious
23 discovery on, but that's something that's of great concern.

24 And I have a discussion of the applicable state and
25 federal law, if the Court is interested in it. It's also

1 included in our brief and in our petition, if you're interested
2 in the various causes of action.

3 THE COURT: I read all of it, I promise.

4 MR. BRIGHT: Well, in that case, I won't belabor
5 that, Your Honor. So there you have it.

6 THE COURT: Now, don't you think she can respond now?

7 MR. BRIGHT: Certainly.

8 THE COURT: Are you done?

9 MR. BRIGHT: I am, Your Honor.

10 THE COURT: Okay. Thank you, Mr. Bright.

11 MS. CARUSO: Thank you, Your Honor. I didn't come
12 prepared with slides, but I would like to address a few of the
13 points, just so you can understand --

14 THE COURT: I saw you were making notes to tell me.
15 Yes, please.

16 MS. CARUSO: -- the context here.

17 First of all, as noted, I think it would be an
18 interesting case to see through, and perhaps someone else who
19 doesn't have a contract with Google will sue us here, and we
20 can be back.

21 THE COURT: Very diplomatic. Thank you.

22 MS. CARUSO: You know, one thing that, when you were
23 talking earlier about Kleenex, I think it provides a useful
24 analogy for what we're talking about here, and to understand
25 how it is that sponsored links work for the searcher.

1 THE COURT: Because I imagine if I put in Kleenex, I
2 would get not just Kleenex, but Scott Tissues and all the
3 other --

4 MS. CARUSO: Probably so, much like if you went to
5 Wal-Mart or --

6 THE COURT: But I don't know if they still have a
7 mark, if Kleenex still has a mark.

8 MS. CARUSO: I believe that they do. At least they
9 present it that way.

10 THE COURT: Okay.

11 MS. CARUSO: If you were to go into a drug store and
12 say, "Where do you keep the Kleenex," it's not necessarily that
13 you want to purchase Kleenex brand tissue.

14 THE COURT: Uh-huh.

15 MS. CARUSO: It's that you want to know where that
16 type of product is kept. Or maybe you have it in your head
17 that you do want Kleenex, but when you go to that section that
18 has the tissue, you decide, you know, this one has lotion in
19 it. Maybe I want that one instead. It has some features I
20 hadn't thought about. Or this one has a better price, and
21 that's my primary driving point.

22 So it's useful to have all of those relevant things
23 in one place, because not everyone who types in, "I'm looking
24 for Kleenex," is looking just to buy Kleenex. They might be
25 doing some competitive shopping as well.

1 They also might be looking for, you know, a lot of
2 the examples here were of competitors. But those aren't, of
3 course, the only types of sponsored links there are. There
4 could be people who have news stories about that product,
5 customer reviews of that product. So there's a lot of
6 information, relevant information to a trademark product that
7 can be gotten from this search term. And that's what Google is
8 interested in providing.

9 And in terms of the sponsored links, Mr. Bright
10 referred continuously to Google selling words. And Google
11 recognizes that it doesn't have, it doesn't own those
12 trademarks. It does not sell those trademarks.

13 THE COURT: Well, what do you do? I thought it was
14 just a search engine.

15 MS. CARUSO: It is a search engine. So what we do in
16 the AdWords program, Google offers the --

17 THE COURT: Don't you buy, I mean, I've heard this, I
18 didn't know it was true, but I've heard that you, you're able
19 to buy kind of a slot in the deal. When you look up Kleenex,
20 you can buy your position.

21 MS. CARUSO: It's a little bit, not exactly that.

22 THE COURT: Can you -- no?

23 MS. CARUSO: I'll talk a little bit about it.

24 THE COURT: Okay.

25 MS. CARUSO: So what happens if you decide to become

1 an AdWords advertiser? You get various information from Google
2 about how your account is going to work. Mr. Bright had one of
3 those terms up here --

4 THE COURT: Okay.

5 MS. CARUSO: -- that applies to all AdWords
6 advertisers, Flowbee included. And you identify key words. So
7 the whole point of AdWords is to provide relevant advertising
8 to the consumers --

9 THE COURT: So you would put vacuum, hair cutter,
10 Flowbee, because that's the biggest, like the Kleenex, of the
11 vacuum hair cutter industry.

12 MS. CARUSO: Right. You might choose to enter those
13 as the key words.

14 THE COURT: And say, "I want to come up under these
15 searches."

16 MS. CARUSO: And then you have the opportunity to
17 bid, to tell Google, "I'm willing to pay X amount of money for
18 every click that someone makes when my ad is displayed, in
19 connection with that key word."

20 THE COURT: So if that competitor that he kept
21 showing that comes up first paid more money than Flowbee --

22 MS. CARUSO: It may or may not be the case, because
23 it's not driven solely by price. There is an algorithm that
24 Google uses, and it's a combination of relevance and price.
25 And that algorithm is much more complicated than I could

1 explain to you.

2 THE COURT: Is that a trade secret?

3 MS. CARUSO: I believe it is, Your Honor. It's --
4 and it's what enables Google to display that information.
5 Because from Google's perspective, it's in everyone's interest
6 to have the most relevant information be displayed.

7 So if you wanted to bid on the Flowbee mark, but
8 you're selling your services as a mediator, for example, you
9 could, you know, bid "I'll pay \$20 a click for people who are
10 looking for Flowbee. There's a high correlation of Flowbee
11 users and people who need mediators."

12 THE COURT: And mediators or whatever, okay.

13 MS. CARUSO: But Google's, that's probably not going
14 to be highly rated, even if you're by and away the higher
15 bidder, because Google's going to look at the relevance of
16 that, their algorithm will look at the relevance of that site
17 and kind of the clicks --

18 THE COURT: Well, do you tell your, do you tell
19 people when they enter into a contract with you that they're
20 going to be subject to these algorithms, and they may not be
21 the first person, even if that's their trademark name, they may
22 not be the first entity that comes up when their actual name is
23 Googled?

24 MS. CARUSO: Yes. Google has --

25 THE COURT: You tell them all that?

1 MS. CARUSO: If you sign up for an AdWords account,
2 you get numerous correspondence from Google explaining kind of
3 here's how AdWords works. And then there's a lot of questions
4 and answers. "My ad isn't showing up as high as I want it to
5 be. Why is that?" And Google will give explanations.

6 THE COURT: Did you get an explanation, Mr. Bright,
7 for your company, Flowbee?

8 MR. BRIGHT: I'm sorry, Your Honor?

9 THE COURT: Did Flowbee say, "Why is this happening?"

10 MR. BRIGHT: No. I think --

11 THE COURT: They never contacted Google and said,
12 "Why is this happening?"

13 MR. BRIGHT: I don't know that they did. I don't
14 think it's that easy to get a response to -- I'm not sure if
15 you can get Mr. Google on the phone, but I think he --

16 THE COURT: I've talked to him many times.

17 MR. BRIGHT: I think he --

18 THE COURT: And it's Ms. Google.

19 MR. BRIGHT: My bad, Your Honor. I think it's pretty
20 clear why this happens. There's two different things we're
21 talking about. One is if you're a lawyer who handles cases
22 involving foreclosures, you might want to bump yourself up on
23 the search, this generic search for foreclosure lawyers, or
24 foreclosure, or lawyers. It's another thing when you're paying
25 money, as a competitor --

1 THE COURT: Okay.

2 MR. BRIGHT: -- paying money to pop up there.

3 THE COURT: I just, I didn't mean to interrupt her
4 presentation, except for that one issue. And I'll give you
5 another chance to speak, if you would like.

6 MR. BRIGHT: Sure.

7 THE COURT: But I just wanted to know if you had
8 complained to Google that this is happening, fix it. Other
9 than the suit.

10 MR. BRIGHT: Well --

11 THE COURT: So do you have any correspondence from
12 them, from Flowbee?

13 MS. CARUSO: Not that we're aware, Your Honor.

14 THE COURT: Okay. You've talked to all the Googles?

15 MS. CARUSO: Not every one of them, but we looked for
16 that.

17 So basically, that's how AdWords works. And we,
18 Google's position, again, one of the things Mr. Bright said
19 when he had the screen shot up and pointed to, he circled in
20 red the sponsored link language.

21 THE COURT: Right.

22 MS. CARUSO: That's something that, you know, as he
23 said, it's clearly sponsors, clearly paid-for advertising. So,
24 and there's the shading beneath that as well. You would think
25 that calls out to customers this is not the natural search

1 result. This is giving you something that's sponsored. Just
2 like you know that when you have a football game that's
3 sponsored by something, or a game show, they say, "Please
4 support our sponsors," we know that sponsors mean paid for.

5 THE COURT: But if you Google "Flowbee" --

6 MS. CARUSO: Uh-huh.

7 THE COURT: -- does that not come up as sponsored
8 link first?

9 MS. CARUSO: It depends, Your Honor, actually on --
10 there are -- because of the way the algorithm works, it's not
11 always going to show up the same way every day.

12 THE COURT: It will be different every day?

13 MS. CARUSO: But so some days --

14 THE COURT: If I Google it right now, I've got on
15 Google --

16 MS. CARUSO: Okay.

17 THE COURT: -- and I put in "Flowbee," and we'll see
18 what comes up.

19 MS. CARUSO: All right.

20 THE COURT: Flowbee haircut system, first thing.
21 Uh-oh. Are you the \$45 RoboCut?

22 MR. BRIGHT: That's our competitor, Your Honor.

23 THE COURT: Flowbee -- no, it says "Flowbee" with a
24 trademark.

25 MS. CARUSO: Your Honor, I believe --

1 THE COURT: Is that your competitor? Come look at
2 this. You all come look at this and see what this is. I don't
3 see how that could be your competitor.

4 MR. BRIGHT: That is our competitor. It says,
5 "Flowbee, \$45 RoboCut," and that is not us, Your Honor.

6 MS. CARUSO: So, Your Honor, I think that this site,
7 haircut compare, if you click on it, I think it compares
8 Flowbee to RoboCut.

9 THE COURT: Okay.

10 MS. CARUSO: So it --

11 MR. BRIGHT: That is RoboCut's website.

12 MS. CARUSO: So it's using --

13 THE COURT: Oh, so that's RoboCut's website?

14 MR. BRIGHT: RoboCut has that website.

15 THE COURT: Oh. So if I -- I'm just Googling
16 "Flowbee." And what comes up is the sponsored link --

17 MR. BRIGHT: That is correct.

18 THE COURT: -- with the competitor's website.

19 MS. CARUSO: Right. And this use, you know,
20 comparing Flowbee to RoboCut on the website, we submit, Your
21 Honor, is clearly fair use. It's comparative advertising,
22 there are FTC guidelines --

23 THE COURT: I've got it. But it may be a little
24 unfair if I were Flowbee. I'm just saying. And I may not have
25 this case, you know, permanently, but --

1 MS. CARUSO: Right.

2 THE COURT: -- I would be annoyed.

3 MS. CARUSO: Well, Your Honor, the law is more
4 specific -- I know you didn't (inaudible) talked about earlier,
5 but annoyance isn't the test really. It's whether or not
6 there's a likelihood of confusion that arises from this. And,
7 you know, here you've got the Flowbee name and the RoboCut
8 name, and Haircut Compare is your URL there. So this is a
9 comparison website.

10 THE COURT: Except it's RoboCut's website.

11 MS. CARUSO: It is, and they're free to compare the
12 two products, just like --

13 THE COURT: I understand.

14 MS. CARUSO: -- Coke is free to compare itself to
15 Pepsi, and Pepsi does a Pepsi challenge.

16 THE COURT: I would feel somewhat confused if I were
17 looking up Flowbee and got that for number one. That's all I'm
18 saying. And that is one of the legal issues --

19 MS. CARUSO: Yes, Your Honor, it certainly is.

20 THE COURT: -- is the possibility of confusion, or
21 the likelihood of confusion.

22 MR. BRIGHT: Correct.

23 MS. CARUSO: That's right, Your Honor. That's the
24 key legal issue, and one that certainly will be addressed by --

25 THE COURT: In California, you think.

1 MS. CARUSO: Yes.

2 THE COURT: And it may be. You may be right about
3 it.

4 MS. CARUSO: -- by consumer studies and experts.
5 So because, you know, as consumers people bring
6 different ideas and perceptions into things.

7 THE COURT: What are the damages? You have to
8 disclose how many hits were made on that RoboCut versus
9 Flowbee?

10 MS. CARUSO: Well --

11 THE COURT: Is that it? What are the damages?

12 MR. BRIGHT: Well, it's the money that they have been
13 paid, it is the money that we have lost, and it is potentially
14 attorney's fees and exemplary damages, depending on --

15 THE COURT: So you're going to have to look at
16 RoboCut. Are you going to have to add them in and see how much
17 they've made off this?

18 MR. BRIGHT: We don't anticipate doing that, Your
19 Honor.

20 THE COURT: How else could you find out what you
21 lost, except for what they got?

22 MR. BRIGHT: I suspect it will be the subject of
23 forensic accounting that can show when this practice started
24 and --

25 THE COURT: I see.

1 MR. BRIGHT: -- how it affected our profits.

2 THE COURT: Okay.

3 MS. CARUSO: You know, it's a very interesting
4 question, Your Honor.

5 THE COURT: It is, isn't it?

6 MS. CARUSO: Because, of course, the Plaintiff is
7 very free to sue the competitor for -- they're the ones who
8 chose to frame the ad the way that they did.

9 THE COURT: Except for you put it -- it was the
10 placement, is what he's saying, is that --

11 MS. CARUSO: It was placed --

12 THE COURT: Location, location, location.

13 MS. CARUSO: It was placed pursuant to our algorithm,
14 that's correct. They chose the words and they chose that
15 connection. Flowbee has sued this competitor before, in
16 California.

17 THE COURT: Really?

18 MS. CARUSO: Yes. So as you can see, though, I guess
19 maybe perhaps Google is perceived as having a bigger --

20 THE COURT: A hand in it?

21 MS. CARUSO: -- bank book.

22 THE COURT: Okay.

23 MS. CARUSO: So I'm happy to address anything else
24 Your Honor has questions on.

25 THE COURT: No, I think you've done a wonderful job.

1 I appreciate it.

2 MS. CARUSO: Thank you.

3 THE COURT: And it's interesting. You know, I wish
4 I -- I hope I get to keep the case, but I may not. So anything
5 else?

6 MR. BRIGHT: Only if you want us to start Round 2,
7 Your Honor.

8 THE COURT: Do you want another round?

9 MR. BRIGHT: If you like. We operate at the pleasure
10 of the Court.

11 THE COURT: It's up to you. My time is your time.

12 MR. BRIGHT: Well, I guess I would say this. I don't
13 think the sponsored link is clear. Google did a customer
14 survey to find out whether they ought to call this a sponsored
15 link or an advertisement, which is what it is, and they chose
16 sponsored links, because more people clicked on a thing that
17 said sponsored link than clicked on an advertisement. You know
18 why? Because I don't know what sponsored link means. It means
19 sponsored by whom? I mean, you --

20 THE COURT: Sponsored by Google? Sponsored by --

21 MR. BRIGHT: Apparently sponsored by Google and paid
22 for by a competitor, competitors' paid advertisements with --

23 THE COURT: I wouldn't know what it meant. I
24 wouldn't have an opinion.

25 MR. BRIGHT: And I think that's misleading. I think

1 it's -- I think it has more value to the competitor. RoboCut
2 gets more value out of that when it has "sponsored link"
3 than --

4 THE COURT: I guess I was, I didn't know -- I figured
5 if I put in a "Flowbee," that I would get not a sponsored link
6 first, but I would get something else, like a natural word
7 search. You know what I'm -- like you used to do in Westlaw.

8 MR. BRIGHT: Which is why you use Google. If you
9 thought that every time you did a search on Google you were
10 just going to come up with a mass of advertisements, nobody
11 would use it. It's -- the stock and trade of Google is not
12 where they make all their money. They make their money doing
13 this stuff. But the stock and trade of Google is people
14 clicking on there, because they think that they're going to get
15 the most relevant, in descending order of relevance, with
16 respect to their search.

17 THE COURT: Well, I think that's interesting.

18 MR. BRIGHT: And if you're searching a generic term
19 like "vacuum hair system," or if you're looking in the Yellow
20 Pages, or if you're walking down an aisle in the store that
21 says "pain relievers," I understand you're going to be
22 bombarded with products. But when you pick up a box of
23 Advil --

24 THE COURT: But even those products pay for their
25 placement in the stores.

1 MR. BRIGHT: They do indeed. You walk down the aisle
2 in the store, assuming that you're going to get a number of
3 brands of toothpaste, or, to use this example, a number of
4 brands of pain reliever.

5 THE COURT: Except for Crest toothpaste and all those
6 tooth -- they pay for their placement in the stores also.

7 MR. BRIGHT: Unquestionably. Now, if --

8 THE COURT: So placement, so location is important,
9 no matter what.

10 MR. BRIGHT: I think that's correct. And if you
11 reach for a box of Crest toothpaste, and what is inside that
12 Crest toothpaste is Ultra Bright, that is rather confusing.
13 And what people are doing is they are Googling "Flowbee," a
14 coined term that refers to one and only one thing in the whole
15 universe.

16 THE COURT: Okay.

17 MR. BRIGHT: It's not a generic search.

18 THE COURT: Thank you.

19 MR. BRIGHT: And I think that's one of the things
20 that's --

21 THE COURT: I understand.

22 MR. BRIGHT: -- rather confusing.

23 THE COURT: You may both be right. Who knows?

24 MS. CARUSO: I'd like to make just a few points --

25 THE COURT: You may.

1 MS. CARUSO: -- in response, Your Honor. Thank you.
2 One is that, you know, Flowbee vacuum hair cutting system, this
3 is one of the things that Mr. Bright just said could be typed
4 in, if someone has only bid on vacuum hair cutting system, and
5 not Flowbee, the fact that vacuum hair cutting system is typed
6 in is going to be part of what drives their ad to show up in
7 response as well.

8 THE COURT: I can imagine that.

9 MS. CARUSO: So just, I bring that to your attention
10 because it's not as if, you know, Flowbee can decide, we're
11 going to carve out this realm of words and no one else can be
12 associated with them at all.

13 A couple of other things. You know, Westlaw you
14 mentioned, and of course, Westlaw charges you for the use of
15 the system. Google doesn't charge you for the use of the
16 system. It's paid for by advertising. So that's --

17 THE COURT: You all paid for my Westlaw. Thank you
18 very much.

19 MS. CARUSO: Yes, Your Honor. Westlaw charges
20 people. They don't give it out for free.

21 And just one final thing I'd like to raise, since
22 we're citing evidence that's not before the Court, is that the
23 FTC has issued a letter specifically approving of the use of
24 the term --

25 THE COURT: This type of use?

1 MS. CARUSO: -- "sponsored link," as a way to call
2 out to consumers that this is not natural results.

3 THE COURT: Okay.

4 MS. CARUSO: That it's something else. Thank you.

5 THE COURT: I think I can see why Google hired you.
6 Thank you. That's it?

7 MR. BRIGHT: I believe so, Your Honor.

8 THE COURT: All right. Thank you all very much.

9 MS. CARUSO: Thank you.

10 MR. BRIGHT: Thank you, Your Honor.

11 THE COURT: You're excused.

12 MR. BRIGHT: Thank you.

13 (Proceedings concluded at 1:44 p.m.)

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18 I, court approved transcriber, certify that the foregoing is a
19 correct transcript from the official electronic sound recording
of the proceedings in the above-entitled matter.

20

21

22

23 /s/ Molly Carter
Molly Carter

September 25, 2009
Date

24

25