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| Page 38   | Page 40  |
| <p>1 WRITTEN DISCOVERY IS CLOSED NOW. WE PROCEEDED<br/>2 BASED ON OUR UNDERSTANDING OF WHAT THIS COMPLAINT<br/>3 SAID.<br/>4 HAD WE KNOWN OTHERWISE, HAD THE ISSUE FOR<br/>5 ADSENSE FOR SEARCH BEEN JOINED EARLIER IN THIS<br/>6 CASE, OUR SUMMARY JUDGMENT WOULD HAVE BEEN ENTIRELY<br/>7 DIFFERENT.<br/>8 WE SPENT 15 PAGES OF OUR SUMMARY JUDGMENT<br/>9 MOTION TALKING ABOUT INFORMATION SEARCH.<br/>10 WE SPENT ONE PAGE TALKING ABOUT<br/>11 DISCLOSURE AND SHARING OF INFORMATION. IT'S ONE<br/>12 PAGE IN OUR BRIEF. WHY? BECAUSE IT WAS A THROW<br/>13 AWAY ISSUE THAT AROSE AFTER THE FACT WHEN THE<br/>14 DEFINITION OF BUSINESS AND INFORMATION SEARCH<br/>15 DIDN'T APPEAR TO BE GOING THE WAY THEY WANTED IT<br/>16 TO.<br/>17 IF ADSENSE FOR SEARCH WERE IN THIS CASE<br/>18 FROM THE START, WE WOULD HAVE HAD A 15-PAGE SUMMARY<br/>19 JUDGMENT MOTION JUST ON THE ISSUE OF DISCLOSURE<br/>20 BECAUSE THAT'S THE ONLY ISSUE THAT IMPACTS ADSENSE<br/>21 FOR SEARCH.<br/>22 THE COURT: WHAT DISCOVERY WOULD YOU HAVE<br/>23 DONE DIFFERENTLY THAN YOU?<br/>24 MR. KRAMER: THERE ARE, THERE ARE A DOZEN<br/>25 OTHER ADVERTISING NETWORKS THAT DIGITAL ENVOY</p> | <p>1 THE COURT: SO.<br/>2 MR. KRAMER: THE OPERATION OF THESE<br/>3 COMPANIES IS IDENTICAL. THEY ARE USING THE<br/>4 TECHNOLOGY IN EXACTLY THE SAME WAY.<br/>5 THE COURT: BUT THE CRITICAL POINT TO THE<br/>6 EXTENT THAT I SEEMED TO CONSIDER IT TO BE AMBIGUOUS<br/>7 IS WHAT THE UNDERSTANDING OF THESE PARTIES IN THIS<br/>8 ROOM WAS WITH RESPECT TO THAT, WHAT ONE PARTY MAY<br/>9 THINK OR THE UNDERSTANDINGS THAT THEY HAVE WITH<br/>10 SOME OTHER, MAYBE IT'S A CUSTOM OR PRACTICE OR SOME<br/>11 OTHER THEORY, BUT IT'S NOT, AND IT'S THE SAME<br/>12 REASON, QUITE FRANKLY, THAT I'M INCLINED TO SAY<br/>13 YOU'RE RIGHT ABOUT NOT GETTING THE QUOVA CONTRACT.<br/>14 EXCUSE ME.<br/>15 MR. KRAMER: LET ME BE VERY CLEAR.<br/>16 DIGITAL ENVOY'S UNDERSTANDING OF THE LANGUAGE THAT<br/>17 IS REMAINING IN THIS CASE, THE NONDISCLOSURE<br/>18 PROVISIONS IN THESE CONTRACTS IS ABSOLUTELY<br/>19 INFORMED, IT'S ABSOLUTELY REVEALED BY THE FACT THAT<br/>20 THEY USE THE SAME PROVISION IN A DOZEN OTHER<br/>21 CONTRACTS WITH A DOZEN OTHER AD NETWORKS FULLY<br/>22 KNOWING AND EXPECTING THAT THEY WILL USE IT TO<br/>23 DISPLAY ADS ON THIRD PARTY SITES AND THEY DON'T<br/>24 THINK THAT'S SHARING THE DATA OR DISCLOSING THE<br/>25 DATA OR ALLOWING SOMEONE TO ACCESS THE DATA. IF</p> |
| Page 39   | Page 41  |
| <p>1 LICENSES UNDER CONTRACTS THAT ARE EXACTLY THE SAME<br/>2 AS OURS, WITH EXACTLY THE SAME NONDISCLOSURE<br/>3 PROVISIONS.<br/>4 GOOGLE OPERATES ITS NETWORK THE SAME WAY<br/>5 EVERY ONE OF THOSE NETWORKS OPERATES.<br/>6 THE COURT: OKAY.<br/>7 MR. KRAMER: AND DIGITAL ENVOY HAS NEVER<br/>8 TOLD ANY OF THOSE COMPANIES THAT THEY'RE IN BREACH.<br/>9 DIGITAL -- THOSE COMPANIES UNDERSTOOD FROM THE GET<br/>10 GO THAT THEY WERE ALLOWED TO USE THIS DATA<br/>11 INTERNALLY.<br/>12 THE COURT: WHAT WOULD YOU HAVE DONE IN<br/>13 DISCOVERY?<br/>14 MR. KRAMER: I WOULD HAVE DEPOSED EVERY<br/>15 SINGLE ONE OF THOSE ADVERTISING NETWORKS AND GOT<br/>16 THEM TO SAY DIGITAL ENVOY KNEW AT THE TIME WE<br/>17 STARTED THAT WE WERE GOING TO USE THIS DATA TO<br/>18 TARGET ADS ON THIRD PARTY WEB SITES AND DIGITAL<br/>19 ENVOY KNEW AND THERE'S NO WAY YOU CAN INTERPRET<br/>20 THIS CONTRACT TO MEAN THAT WE CAN'T USE THIS TO RUN<br/>21 AN AD NETWORK.<br/>22 THE COURT: JUST WHAT I SAID WITH RESPECT<br/>23 TO THE QUOVA CONTRACT, I'M NOT SURE WHY THAT WOULD<br/>24 BE INDICATIVE OF ANYTHING.<br/>25 MR. KRAMER: THE LANGUAGE IS IDENTICAL.</p>              | <p>1 THEY DID, THEY WOULD BE GOING AFTER THESE OTHER<br/>2 COMPANIES FOR BREACH, THAT'S WHY IT'S RELEVANT AND<br/>3 FRANKLY WE JUST DEPOSED ADVERTISING.COM, ONE OF<br/>4 THEIR CUSTOMERS, AND WHO SAID THAT IT'S RIDICULOUS<br/>5 TO READ THE CONTRACT THAT WAY. THEY KNEW FROM THE<br/>6 BEGINNING THAT WE WERE GOING TO USE IT TO RUN AN AD<br/>7 NETWORK. OF COURSE WE ARE OPERATING AN AD NETWORK<br/>8 AND THEY KNEW IT. WE WERE GOING TO USE IT THIS<br/>9 WAY.<br/>10 THEY USED THIS LANGUAGE TO DEFINE THE<br/>11 RELATIONSHIP. SO THEY KNEW FROM THE START THAT'S<br/>12 WHAT WAS GOING TO HAPPEN AND THAT'S WHY THAT<br/>13 DISCOVERY IS RELEVANT AND THERE ARE A DOZEN OF<br/>14 OTHER COMPANIES OUT THERE WE WOULD HAVE GONE TO<br/>15 TALK TO HAD WE KNOW THAT THAT ISSUE WAS FRONT AND<br/>16 CENTER IN THIS CASE.<br/>17 THE COURT: HOLD OFF. ON THE PARAGRAPH<br/>18 40 OF THE FIRST AMENDED COMPLAINT, MR. KRAMER'S<br/>19 POINT THAT THAT IS A LIMITING PARAGRAPH, WHY IS HE<br/>20 WRONG?<br/>21 MR. KRATZ: JUST RESPONDING TO THAT?<br/>22 THE COURT: YES.<br/>23 MR. KRATZ: HE'S WRONG BECAUSE THAT'S NOT<br/>24 WHAT THE COMPLAINT SAYS. THE COMPLAINT DETAILS ALL<br/>25 OF THE THINGS THEY DID AND THEN IT SAYS THAT WE'RE</p>  |

11 (Pages 38 to 41)

U.S. COURT REPORTERS

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1 INCORPORATING EVERYTHING AND WHAT THEY HAVE DONE IS  
 2 A VIOLATION. AND IF THEY WANTED MORE INFORMATION  
 3 ABOUT IT, THEY WOULD HAVE ASKED AND THEY DID.  
 4 THE COURT: WHERE WOULD YOU POINT TO IN  
 5 YOUR COMPLAINT THAT YOU SAY IS A PROVISION THAT  
 6 FAIRLY PUTS AT ISSUE THE ADSENSE PROGRAM, OTHER  
 7 THAN THE ADSENSE PROGRAM, OTHER THAN THE GENERAL  
 8 REFERENCE?  
 9 MR. KRATZ: THAT'S IT. WE SAID WE HAVE  
 10 GOOGLE'S MISUSE AND THE FIRST PARAGRAPH IS RELATED  
 11 TO ADSENSE RESEARCH, WHICH IT DOESN'T SAY THAT,  
 12 JUST IS AND THE SECOND PARAGRAPH IS ADSENSE FOR  
 13 CONTENT.  
 14 THE REASON IT'S BROKEN OUT DIFFERENTLY IS  
 15 BECAUSE THERE'S A LITTLE BIT OF A NUANCE THAT IS  
 16 DIFFERENT ABOUT CONTENT BECAUSE THERE'S ANOTHER  
 17 ARGUMENT TO BE MADE ABOUT ADSENSE FOR CONTENT AND  
 18 HE SAID THAT THE REST OF THE ARGUMENT, THE MAIN  
 19 ARGUMENT IS A THROW AWAY BECAUSE IT'S ALL ABOUT  
 20 INFORMATION SEARCH OR NOT. THE VERY FIRST TIME  
 21 GOOGLE WAS CONTACTED ABOUT IT, THEY WERE TOLD WE  
 22 HAVE A PROBLEM WITH IT BECAUSE IT'S IMPROPER  
 23 SHARING AND DISCLOSURE AND LICENSING AND ALL OF THE  
 24 RESTRICTIVE THINGS. IT'S IN THE COMPLAINT THAT  
 25 THEY CAN'T DO THIS LICENSING AND THE IDEA THAT HE

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1 SPENT 15 PAGES ON SEARCH AND 1 PAGE ON THE REST OF  
 2 THE ALLEGATIONS IN THE COMPLAINT RELATING TO 3.1  
 3 AND 7, YOU CAN LOOK AT THEIR BRIEF AND IT'S ABSURD  
 4 THAT HE'S MAKING THIS ARGUMENT NOW. IT'S ABSURD  
 5 THAT HE'S MAKING THIS ARGUMENT WITH RESPECT TO THE  
 6 THIRD PARTIES AND CONTRACTS BEING IDENTICAL WHICH  
 7 THEY'RE NOT.  
 8 THE COURT: OKAY. WE'RE NOW GOING FAR  
 9 AFIELD.  
 10 MR. KRAMER: YOUR HONOR, I'M NOT GOING TO  
 11 JOIN THAT ARGUMENT. I JUST WANT TO POINT YOU TO  
 12 41.  
 13 THE COURT: LET ME STOP YOU ALL NOW FOR A  
 14 MOMENT. EVERYONE STOP.  
 15 YOU CAN GO AHEAD AND SIT DOWN, MR. KRATZ,  
 16 AND WE WILL RESUME.  
 17 MR. KRAMER: PARAGRAPH 41 ALSO MAKES  
 18 SPECIFIC REFERENCE TO GOOGLE MAKES SUBSTANTIAL  
 19 INCOME AND PROFIT FROM THE PLACEMENT OF  
 20 GEOGRAPHICALLY TARGETED NONINFORMATION SEARCH  
 21 RELATED ADVERTISEMENTS. THAT'S IN THE AMENDED  
 22 COMPLAINT 41.  
 23 SO IN 40 IT REFERENCES NONINFORMATION  
 24 SEARCH RELATED ADVERTISEMENTS AND THEN IN 41 WHEN  
 25 THEY TALK ABOUT HOW THEY HAVE BEEN INJURED, GOOGLE

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1 MAKES SUBSTANTIAL MONEY FROM NONINFORMATION SEARCH  
 2 RELATED ADVERTISEMENTS.  
 3 IT'S ABOUT NONINFORMATION SEARCH RELATED  
 4 PROGRAMS, ADSENSE FOR CONTENT. 40 AND 41 BOTH  
 5 LIMIT IT THAT WAY.  
 6 SO THAT'S WHAT WE HAVE BEEN OPERATING  
 7 UNDER. THAT'S WHY WE DON'T THINK ADSENSE FOR  
 8 SEARCH IS IN THE CASE.  
 9 WE HAVE SPECIFICALLY SAID IF YOU WANT TO  
 10 ADD IT TO THIS CASE, WE'LL CONSIDER IT, WE'RE  
 11 WILLING TO DO IT BACK IN JANUARY, BUT SEVEN MONTHS  
 12 LATER OR SIX MONTHS LATER, SIX AND A HALF MONTHS  
 13 LATER, DISCOVERY IS CLOSED. WE'RE GOING TO TRIAL.  
 14 IT SHOULDN'T BE IN THE CASE, AND IF IT IS WE HAVE  
 15 BEEN SUBSTANTIALLY PREJUDICED AS A RESULT. SO  
 16 THAT'S MY TAKE ON ADSENSE SEARCH, YOUR HONOR.  
 17 THE COURT: TO THE EXTENT THAT YOU'RE  
 18 MAKING SOME BURDEN ARGUMENT WITH RESPECT TO ADSENSE  
 19 RESEARCH --  
 20 MR. KRAMER: UH-HUH.  
 21 THE COURT: -- I DIDN'T GET MUCH IN THE  
 22 WAY OF GIVING ME A SENSE OF WHAT IT WOULD MEAN IF I  
 23 SAID THAT THAT IS MATERIAL THAT SHOULD GO OVER.  
 24 MR. KRAMER: YES, YOUR HONOR. BEFORE I  
 25 START TALKING ABOUT THE BURDEN, I DON'T KNOW

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1 EVERYBODY IN THE COURTROOM AND THERE ARE SOME  
 2 RELATIVELY SENSITIVE DATA POINTS THAT GOOGLE WOULD  
 3 LIKE NOT DISCLOSED PUBLICLY.  
 4 THE COURT: ABOUT THE BURDEN?  
 5 MR. KRAMER: ABOUT THE NUMBER OF  
 6 PUBLISHERS AND ADVERTISERS IN ITS VARIOUS PROGRAMS.  
 7 THE COURT: BUT THAT'S NOT WHAT I'M  
 8 ASKING ABOUT. I DON'T NEED TO KNOW THAT FOR THIS  
 9 PURPOSE. WHAT I NEED TO KNOW IS SOME VOLUME  
 10 ASSESSMENT OF MATERIAL. YOU DON'T HAVE TO SAY HOW  
 11 MANY. I WANT TO KNOW IS IT -- DOES IT INVOLVE  
 12 SEARCHING AT NUMEROUS FACILITIES? DOES IT INVOLVE,  
 13 YOU KNOW, THAT KIND OF THING? I DON'T SEE WHY THAT  
 14 IS DISCLOSING ANYTHING OTHER THAN JUST MAGNITUDE.  
 15 MR. KRAMER: WELL, THE MAGNITUDE IS  
 16 DEFINED BY THE NUMBER OF PUBLISHERS AND THAT IS  
 17 ACTUALLY IN THE PAPERS BUT IT'S WITHOUT DISCLOSING.  
 18 THE COURT: NUMBERS DON'T TELL ME MUCH.  
 19 YOU CAN HAVE --  
 20 MR. KRAMER: IT'S NOT 10 CONTRACTS. IT'S  
 21 NOT 100 CONTRACTS. IT'S NOT 1,000 CONTRACTS. IT'S  
 22 NOT 1,000 NEGOTIATIONS. IT'S HUNDREDS OF THOUSANDS  
 23 OF NEGOTIATIONS AND MILLIONS OF WEB SITES. AND  
 24 YOUR HONOR IS RIGHT TO FOCUS ON BURDEN WITH RESPECT  
 25 TO VIRTUALLY ALL OF THIS DISCOVERY BECAUSE IT'S

1 MASSIVELY BURDENSOME AND AS YOU WERE GOING BACK AND  
 2 FORTH WITH MR. KRATZ, I HAD A DEJA VU EXPERIENCE  
 3 BECAUSE WE WERE HERE TALKING ABOUT DISCOVERY  
 4 RELATING TO 22 PUBLISHERS, DISCOVERY RELATING TO  
 5 22, AND THE COURT SAID THAT IS ENORMOUSLY  
 6 BURDENSOME. WHAT ARE YOU TALKING ABOUT? SHOW ME  
 7 THE CAUSAL CONNECTION. SHOW ME WHAT THE DISCOVERY  
 8 IS GOING TO SHOW YOU THAT BEARS ON YOUR CASE AND  
 9 NOW WE'RE TALKING ABOUT HUNDREDS OF THOUSANDS OF  
 10 PUBLISHERS AND MILLIONS OF WEB SITES. THAT IS  
 11 PROBLEMATIC. THAT WOULD TAKE, ACCORDING TO THE  
 12 DECLARATIONS THAT WE SUBMITTED, WHICH ARE  
 13 UNREBUTED, MONTHS.  
 14 THE COURT: AND THIS IS SHIFTING FOCUS A  
 15 BIT BUT WHAT IS THE DEGREE TO WHICH MR. KRATZA IS  
 16 ARGUING THAT DIGITAL ENVOY'S TECHNOLOGY IS USED IN  
 17 EVERYTHING? ADDRESS THAT POINT.  
 18 MR. KRAMER: YOUR HONOR, I FIND MYSELF IN  
 19 THE UNIQUE POSITION OR SELDOM POSITION OF AGREEING  
 20 WITH MR. KRATZA. THE AMENDMENT, THE LIMITATION  
 21 THAT YOUR HONOR IS PROPOSING IS NOT AN ACTUAL  
 22 LIMITATION.  
 23 THE COURT: OKAY.  
 24 MR. KRAMER: THE WAY GOOGLE USES THIS  
 25 TECHNOLOGY IS THAT WHEN A REQUEST COMES FOR AN AD

1 YOU'RE IN A POSITION TO KNOW. YOU LOST A SALE.  
 2 YOU LOST A LICENSEE. WHO, IDENTIFY THAT ONE FOR  
 3 US, OR IDENTIFY THOSE TEN FOR US AND THEN WE HAVE  
 4 SOMETHING TO TALK ABOUT. THAT'S WHAT I SAID THE  
 5 LAST TIME WE WERE HERE TALKING ABOUT THIS ISSUE.  
 6 COME FORWARD WITH SOMETHING TO MAKE ME  
 7 BELIEVE THAT THAT ACTUALLY HAPPENED AND THEN YOU  
 8 HAVE DEMONSTRATED GOOD CAUSE FOR DISCOVERY RELATING  
 9 TO THAT PUBLISHER.  
 10 NOW, THERE'S A REASON WHY THEY HAVEN'T  
 11 COME FORWARD WITH THAT. BECAUSE IT DOESN'T MAKE  
 12 ANY SENSE GIVEN THE WAY THIS BUSINESS WORKS. THE  
 13 PUBLISHERS WHO ARE OPERATING IN GOOGLE'S NETWORK  
 14 DON'T CARE ABOUT GEOTARGETING.  
 15 THE COURT: THAT'S YOUR ASSUMPTION.  
 16 ISN'T YOUR ARGUMENT THAT THOSE PEOPLE WEREN'T OUT  
 17 IN THE MARKETPLACE BECAUSE THEY DIDN'T HAVE TO  
 18 BECAUSE YOU UTILIZING THEIRS TOOK THOSE PLAYERS OUT  
 19 OF THE MARKETPLACE?  
 20 MR. KRAMER: YOUR HONOR, GEOTARGETING  
 21 ISN'T EVEN MENTIONED IN GOOGLE'S MATERIALS FOR  
 22 PUBLISHERS. THEY RENTED THE SPACE ON THEIR SITES.  
 23 WE DO NOT OFFER PUBLISHERS THE ABILITY TO GEOTARGET  
 24 OR OTHERWISE. THEY HAVE NO IDEA WHETHER THE ADS  
 25 THAT THEY'RE GETTING ARE GEOTARGETED OR NOT. THEY

1 IN MOST CASES THERE WILL BE SOME CONSULTATION OF  
 2 THE DATA TO DECIDE WHAT AD. IF IT'S ONE OF MANY  
 3 VARIABLES, 20 TO 25 DIFFERENT VARIABLES THAT GOOGLE  
 4 USES IN ORDER TO DETERMINE WHAT AD TO SELECT BUT  
 5 IMPOSING A LIMITATION BY SAYING WHAT, WHAT ADS USE  
 6 THEIR IP AND WHICH DO NOT IS NOT EFFECTIVE.  
 7 THE COURT: ALL RIGHT.  
 8 MR. KRAMER: IT'S EFFECTIVE WITH  
 9 ADVERTISERS BUT NOT WITH RESPECT TO PUBLISHERS.  
 10 THE COURT: ALL RIGHT.  
 11 MR. KRAMER: I DON'T KNOW IF YOU WANT ME  
 12 TO TALK ABOUT THE ISSUE MORE GENERALLY ABOUT THEIR  
 13 DAMAGES THEORY, YOUR HONOR, BECAUSE I THINK THAT'S  
 14 WHERE THE RUBBER MEETS THE ROAD IN THIS CASE AND ON  
 15 THESE MOTIONS AND I'M HAPPY TO DO IT.  
 16 THE COURT: ALL RIGHT.  
 17 MR. KRAMER: THEY HAVE TWO. THEY HAVE AN  
 18 ACTUAL DAMAGES THEORY AND AN UNJUST ENRICHMENT  
 19 THEORY. THE ACTUAL DAMAGES THEORY IS THAT SOME OF  
 20 THE HUNDREDS OF THOUSANDS OR ONE OF THE THOUSANDS  
 21 OF PUBLISHERS IN GOOGLE'S NETWORK WOULD HAVE TAKEN  
 22 A LICENSE FROM DIGITAL ENVOY BUT FOR GOOGLE'S USE  
 23 OF THE DATA IN ITS ADVERTISING PROGRAMS.  
 24 THE COURT: RIGHT.  
 25 MR. KRAMER: WE SAID TO THEM, TELL US HOW

1 HAVE NO CONTROL OVER THE ADS THAT ARE RECEIVED.  
 2 ALL THEY CARE ABOUT IS THAT THEY GET ADS, USERS  
 3 CLICK ON THEM AND THERE'S A REVENUE SHARE. THAT'S  
 4 WHAT DRIVES THE DECISION. THERE'S BEEN NO SHOWING  
 5 AT ALL THAT A PUBLISHER THAT PARTICIPATES IN  
 6 GOOGLE'S NETWORK CARES ABOUT GEOTARGETING AT ALL  
 7 AND GOOGLE DOESN'T THINK THEY DO BECAUSE THEY DON'T  
 8 MARKET. PUBLISHERS DON'T FIND OUT.  
 9 THE COURT: SO IN YOUR THEORY WHAT IS IT  
 10 THAT THEY NEED TO SHOW? THEY NEED TO SHOW SOME  
 11 POTENTIAL CUSTOMER COMING TO THEM AND SAYING WE'RE  
 12 CONSIDERING WHETHER OR NOT TO LICENSE DIRECTLY WITH  
 13 YOU AND THEN THOSE PEOPLE GO OFF AND THEY BECOME,  
 14 THEY BECOME GOOGLE CUSTOMERS AND YOU NEVER SEE THEM  
 15 AGAIN.  
 16 MR. KRAMER: THAT CERTAINLY WOULD BE GOOD  
 17 CAUSE FOR THAT PUBLISHER BUT WE'RE NOT EVEN THERE.  
 18 AND I HAVE TO TELL YOU NOT ONLY HAVE THEY NOT  
 19 DEMONSTRATED THAT ANY OF THE PUBLISHERS IN GOOGLE'S  
 20 CARE ABOUT IT BUT THERE'S A REASON WHY THEY  
 21 PARTICIPATE IN A ADVERTISING NETWORK.  
 22 MY SON'S WEB SITE HAS ADS FROM GOOGLE ON  
 23 IT. I'M NOT GOING TO GO GET A LICENSE FROM DIGITAL  
 24 ENVOY SO I CAN HAVE GEOTARGETED ADS ON MY SON'S  
 25 SITE. THEY DON'T HAVE INVENTORY OF ADVERTISEMENTS.

1 THEY DON'T HAVE HARDWARE AND TARGETING PROCESSES.  
 2 THEY DON'T HAVE SOFTWARE. THEY DON'T HAVE A  
 3 LICENSE FROM DIGITAL ENVOY AND THEY DON'T NEED ONE.  
 4 THAT'S WHAT WE'RE TALKING ABOUT.  
 5 THE COURT: NOW, BRING THIS BACK IN,  
 6 HAVING LET YOU OPEN THE DOOR TO HAVING DISCUSSED  
 7 THIS GENERALLY BRING IT BACK TO THE DISCOVERY  
 8 MOTIONS.  
 9 MR. KRAMER: SO THEY ASKED US TO IDENTIFY  
 10 PUBLISHERS IN THE NETWORK, HUNDREDS OF THOUSANDS,  
 11 THEN THEY ASKED FOR EVERY CONTRACT OF EVERY  
 12 PUBLISHER, HUNDREDS OF THOUSANDS. THEN THEY ASKED  
 13 FOR ALL NEGOTIATIONS OR NEGOTIATOR, HUNDREDS OF  
 14 THOUSANDS. THEN THEY SAID FOR EVERY PUBLISHER THAT  
 15 PARTICIPATES IN YOUR NETWORK, HERE'S AN EIGHT  
 16 FACTORED MULTI CALCULATED MATHEMATICAL PROCESS I  
 17 WANT YOU TO ENGAGE IN DRAWING INFORMATION FROM  
 18 SERVERS ALL OVER THE PLACE TO FIGURE OUT FOR EVERY  
 19 ONE OF THOSE PUBLISHERS HOW MUCH MONEY YOU GOT, HOW  
 20 MUCH WAS DERIVED THAT WERE GEOTARGETED WHETHER THEY  
 21 CARED OR NOT, AND HOW MUCH WAS DERIVED FROM. I  
 22 MEAN, IT'S MIND BOGGLING IN TERMS OF WHAT THE  
 23 REQUESTS ACTUALLY ASK FOR WITH RESPECT TO  
 24 PUBLISHERS.  
 25 IT'S LAID OUT IN OUR PAPERS AND I

1 PROBABLY LAID IT OUT IN THE PAPERS BETTER THAN I  
 2 COULD. THERE'S ONE INTERROGATORY THAT IS EIGHT  
 3 PARTS, WHICH IN AND OF ITSELF IS OBJECTIONABLE BUT  
 4 IT'S PARTICULARLY OBJECTIONABLE WHEN YOU APPLY THAT  
 5 EIGHT PART INTERROGATORY TO A WORLD IN WHICH THESE  
 6 PUBLISHERS DON'T CARE, THESE PUBLISHERS, YES,  
 7 THEY'RE POTENTIAL CUSTOMERS OF DIGITAL ENVOY BUT  
 8 IT'S NOT ENOUGH TO SAY THAT. EVERYBODY IS A  
 9 POTENTIAL CUSTOMER OF ENVOY. WHAT THEY NEED TO  
 10 SHOW IS SOME CAUSAL CONNECTION BETWEEN LOST  
 11 BUSINESS AND GOOGLE'S OPERATION.  
 12 AND ONE LAST CAUSAL LINK THAT IS MISSING  
 13 HERE IS LET'S ASSUME THERE'S A PUBLISHER WHO  
 14 ACTUALLY CARES ABOUT GEOTARGETING. LET'S ASSUME  
 15 THAT THAT PUBLISHER WAS ACTUALLY WILLING TO CREATE  
 16 AN INFRASTRUCTURE TO SERVE GEOTARGETED ADS AS  
 17 OPPOSED TO GOING TO SOME DIFFERENT NETWORK THAT  
 18 WOULD GIVE THEM THE ADS IF THEY CARED ABOUT  
 19 GEOTARGETING, THEN THERE'S A QUESTION THAT THERE  
 20 ARE STILL PEOPLE OUT IN THE WORLD THAT APPLY  
 21 GEOTARGETING AND HOW WOULD WE KNOW THEY WOULD HAVE  
 22 GONE TO DIGITAL ENVOY?  
 23 THE COURT: BUT, AGAIN, I'M NOT GOING TO  
 24 SUGGEST THAT THE ANSWER TO A DISCOVERY MOTION  
 25 REQUEST IS ALWAYS, WELL, IT'S JUST DISCOVERY SO,

1 YOU KNOW, YOU KNOW, CALM DOWN ON THE MERITS AND  
 2 LET'S GO ON WITH DISCOVERY.  
 3 MR. KRAMER: UH-HUH. BUT ONE THING THAT  
 4 IS NOT IN DISPUTE, AS I UNDERSTAND IT, IS THAT  
 5 DIGITAL, OR THAT GOOGLE, RIGHTLY OR WRONGLY, IS AT  
 6 A CERTAIN POINT IN TIME OUT TELEVISIONING DIGITAL  
 7 ENVOY'S INTELLECTUAL PROPERTY FOR PURPOSES OF DOING  
 8 SOME GEOTARGETING. THEY'RE LICENSED TO OR NOT AND  
 9 THAT'S THE DISPUTE THAT WE'RE LITIGATING.  
 10 MR. KRAMER: UH-HUH.  
 11 THE COURT: BUT THAT HAS HAPPENED?  
 12 MR. KRAMER: YES, YOUR HONOR.  
 13 THE COURT: ALL RIGHT. NOW, FOR  
 14 DISCOVERY PURPOSES, THEY ARE SAYING THAT, THAT THEY  
 15 WANT TO GET INFORMATION THAT IN A GROSS SENSE GIVES  
 16 THEM SOME BASIC FACTS ABOUT WHO THESE PEOPLE ARE  
 17 THAT ARE USING, MAYBE THEY DON'T CARE ABOUT USING  
 18 IT, BUT NONETHELESS THEY ARE USING THEIR  
 19 INTELLECTUAL PROPERTY, AND THEN THEY ARE MOUNTING  
 20 THE ARGUMENT THAT THOSE CUSTOMERS ARE NOT CUSTOMERS  
 21 AVAILABLE TO THEM.  
 22 AND I HEAR WHAT YOU SAY WHICH IS, WELL,  
 23 IN ORDER TO GET I GUESS TO JUSTIFY THAT, THAT  
 24 REQUEST FROM IN YOUR MIND THEY NEED TO SAY SHOW  
 25 SOME INSTANCES IN WHICH THOSE PEOPLE WERE SHOPPING

1 AROUND FOR GEOTARGETING AND UNTIL THEY DO THAT,  
 2 THIS IS TOO FAR AFIELD.  
 3 MR. KRAMER: IT'S MORE THAN THAT, THAT  
 4 IT'S NOT JUST TOO FAR AFIELD, IT'S A MIND BOGGLING  
 5 AND BURDENSOME AS REQUESTED. THE REASON FOR SAYING  
 6 THEY NEED TO COME FORWARD WITH SOMETHING FIRST IS  
 7 BECAUSE THAT'S HOW YOU LIMIT THE BURDEN. THAT'S  
 8 HOW YOU SAY, OKAY, HERE'S SOMEBODY, HERE ARE FIVE  
 9 COMPANIES THAT WE THINK WE WOULD HAVE LICENSED OUR  
 10 DATA TO, BUT FOR GOOGLE'S SUPPOSED MISUSE OF THE  
 11 DATA ON THE PUBLISHER SIDE. WE HAVEN'T TALKED  
 12 ABOUT THE ADVERTISER'S SIDE YET.  
 13 AND I HAVE A SEVENTH CIRCUIT CASE BY  
 14 JUDGE POSNER WHICH TALKS ABOUT DAMAGES IN A TRADE  
 15 SECRET CONTEXT AND HE SAID, "FOR YEARS WE  
 16 HAVE BEEN SAYING WITHOUT MUCH VISIBLE EFFECT THAT  
 17 PEOPLE WHO WANT DAMAGES HAVE TO PROVE THEM USING  
 18 METHODOLOGIES THAT NEED NOT BE INTELLECTUALLY  
 19 SOPHISTICATED BUT MUST NOT INSULT THE INTELLIGENCE.  
 20 POST HOC ERGO PROPTER HOC WILL NOT DO; NOR THE  
 21 ENDUING OF SIMPLISTIC EXTRAPOLATION AND CHILDISH  
 22 ARITHMETIC WITH THE APPEARANCE OF AUTHORITY BY  
 23 HIRING A PROFESSOR TO MOUTH DAMAGES THEORIES THAT  
 24 MAKE A JOKE OF THE CONCEPT OF EXPERT KNOWLEDGE."  
 25 THE COURT: OF COURSE, JUDGE POSNER IS

1 NOT OPINING ON A DISCOVERY MOTION ONE ASSUMES?  
 2 MR. KRAMER: THAT'S RIGHT, HE IS NOT  
 3 OPINING. THE CASE IS SCHILLER & SCHMIDT, INC., V.  
 4 NORDISCO CORP., 969 F.2D AT 416, SEVENTH CIRCUIT,  
 5 1992.  
 6 WHAT HE'S SAYING IS THAT THIS THEORY  
 7 THEY'RE ADVANCING HERE YOU CAN LOOK AT IT NOW AND  
 8 DECIDE THIS DOESN'T MAKE A LOT OF SENSE AND IT  
 9 DOESN'T MAKE ANY SENSE AS FAR AS GOOGLE IS  
 10 CONCERNED.  
 11 THE COURT: IT DOESN'T MAKE ANY SENSE IF  
 12 YOU ACCEPT THE ASSUMPTION BEHIND THE ARGUMENT WHICH  
 13 IS NONE OF THESE PEOPLE, NONE OF THESE PUBLISHERS  
 14 IS GOING TO CARE ABOUT THE GEOTARGETING ASPECT OF  
 15 IT. IT COMES ALONG WITH THE PACKAGE. THEY REALLY  
 16 DON'T CARE.  
 17 MR. KRAMER: THEY DON'T KNOW.  
 18 THE COURT: EITHER THEY DON'T KNOW OR  
 19 CARE BUT THE BOTTOM LINE IS THAT IT'S A GIVEN THAT  
 20 THEY WILL NOT BE IN THE MARKETPLACE FOR  
 21 GEOTARGETING. THEY WON'T BE OUT THERE ACQUIRING  
 22 THAT SERVICE.  
 23 MR. KRAMER: IF THAT'S WHAT THEY CONTEND,  
 24 LET THEM COME FORWARD AND SAY, HERE'S PROOF. WE  
 25 HAVE PROOF. WE OFFERED EVIDENCE THAT THEY DON'T

1 UNIMAGINABLE BURDEN ON GOOGLE WITH RESPECT TO THIS  
 2 DISCOVERY, LITERALLY, UNDISPUTED, MONTHS, TO GATHER  
 3 THIS INFORMATION AND DO THE CALCULATIONS, THEY SEEM  
 4 TO THINK WE CAN DO IT AT THE TOUCH OF A BUTTON.  
 5 THAT'S NOT SO AND THE EVIDENCE IS TO THE CONTRARY  
 6 AND IT'S UNDISPUTED. THEY WANT THIS MASSIVE BURDEN  
 7 TO BE TAKEN BY MY CLIENT AND HUNDREDS OF MILLIONS  
 8 OF DOLLARS FOR A PIPE DREAM. AND UNTIL THEY COME  
 9 FORWARD WITH SOMETHING THAT SHOWS THAT PIPE DREAM  
 10 HAS SOME BASIS IN REALITY, SOME GOOD CAUSE, THERE'S  
 11 NO BASIS FOR GRANTING THE DISCOVERY CONCERNING THE  
 12 PUBLISHERS.  
 13 THE COURT: LAST COMMENT AND THEN WE'LL  
 14 BRING IT TO A CLOSE.  
 15 MR. KRAMER: YOUR HONOR, I DID NOT  
 16 DISCUSS THE ISSUE OF ADVERTISEMENTS, WHICH IS  
 17 EQUALLY BURDENSOME AND EQUALLY PROBLEMATIC. THAT'S  
 18 THEIR UNJUST ENRICHMENT THEORY. AND I DON'T WANT  
 19 TO SUGGEST. IT'S CRITICAL THAT WE TALK ABOUT BOTH  
 20 OF THESE SO THE COURT UNDERSTANDS EXACTLY WHAT  
 21 BURDEN IS BEING ORDERED IN THE EVENT THAT ANY  
 22 DISCOVERY ON ANY OF THIS PROCEEDS.  
 23 THE COURT: YOU'VE GOT BY THE TIME IT'S  
 24 20 OF YOU'RE SITTING DOWN. OKAY. GO AHEAD.  
 25 MR. KRAMER: WITH RESPECT TO THE

1 CARE. WE OFFERED THE TESTIMONY OF MR. SIMMELL WHO  
 2 EXPLAINED THAT PUBLISHERS DON'T CARE AND WOULDN'T  
 3 DO WHAT THEY'RE SUGGESTING HERE. I HAVE AS A  
 4 RESULT OF DEPOSITIONS THAT WERE TAKEN AFTER THE  
 5 PAPERS WERE SUBMITTED ON THIS MOTION, THE TESTIMONY  
 6 OF DOUBLE CLICK AND ADVERTISING.COM, TWO OTHER  
 7 ADVERTISING NETWORKS WHO SAID THAT THEY DON'T CARE.  
 8 THEY WOULDN'T DO WHAT DIGITAL ENVOY IS SUGGESTING.  
 9 I'M HAPPY TO SHOW IT.  
 10 THE COURT: BUT IF ANECDOTAL MATERIAL  
 11 THAT SHOWS VARIOUS PUBLISHERS DON'T CARE, WHY IS  
 12 THIS?  
 13 MR. KRAMER: THESE AREN'T PUBLISHERS,  
 14 THEY OPERATE NETWORKS. THEY'RE IN THE SAME EXACT  
 15 POSITION AS GOOGLE. THEY SAY NO ONE WOULD LEAVE  
 16 FROM THEIR NETWORK. ACTUALLY DOUBLE CLICK SAYS ONE  
 17 A YEAR MIGHT, MIGHT, MIGHT, MIGHT LEAVE FROM BEING  
 18 A PUBLISHER TO TAKING A LICENSE DIRECTLY, ONE A  
 19 YEAR, AND ADVERTISING.COM SAYS, NO, THAT DOESN'T  
 20 MAKE ANY SENSE AND THEY'RE IN THE EXACT SAME THROWS  
 21 AS GOOGLE. THEY WERE AT THE DEPOSITION AND I'M  
 22 HAPPY TO SHARE THE TESTIMONY WITH THE COURT. THE  
 23 POINT IS RULE 26 SAYS FOR GOOD CAUSE SHOWN.  
 24 THE COURT: RIGHT.  
 25 MR. KRAMER: THEY'RE LOOKING TO IMPOSE AN

1 ADVERTISERS, THE DISCOVERY IS IF ANYTHING EVEN MORE  
 2 BURDENSOME. THERE'S A REQUEST THAT SAYS THAT GIVE  
 3 ME ALL COMMUNICATIONS ABOUT ANYTHING EVER WITH ANY  
 4 OF THE HUNDREDS OF THOUSANDS OF ADVERTISERS IN YOUR  
 5 NETWORK. THAT'S A REQUEST THAT THEY SERVED AND  
 6 IT'S HARD TO TELL WHETHER THEY'RE SERIOUS ABOUT  
 7 THAT BECAUSE THE BURDEN WOULD BE UNIMAGINABLE.  
 8 THE COURT: WELL, ARE THERE ANY LIMITS  
 9 THAT YOU CAN SUGGEST TO IT? I KNOW YOUR POSITION  
 10 IS THAT YOU DON'T WANT ANY DISCOVERY BUT --  
 11 MR. KRAMER: NOT AT ALL. IF THEY CAME  
 12 FORWARD AND SAID HERE'S A PUBLISHER THAT WE WOULD  
 13 HAVE LICENSED TO BASED ON SOME EVIDENCE, WE WOULD  
 14 GIVE THEM DOCUMENTS. IN FACT, I REPRESENTED AT THE  
 15 LAST HEARING, WE WOULD GIVE THEM DOCUMENTS  
 16 REFLECTING THE COMMUNICATIONS BACK AND FORTH WITH  
 17 THE PUBLISHER. THERE AREN'T GOING TO BE ANY THAT  
 18 MENTION GEOTARGETING OR DIGITAL ENVOY BUT THAT'S A  
 19 FACT AND WE'LL LET AND GET THEM THAT WITH THE SAME  
 20 PUBLISHER.  
 21 THE COURT: WHY ISN'T THERE A POSSIBILITY  
 22 OF DOING IT ON A SAMPLING BASIS? I MEAN, THE  
 23 NOTION THAT THEY HAVE TO COME FORWARD AND GIVE YOU  
 24 NAMES AND THEN THEY'LL GIVE YOU DISCOVERY, I THINK  
 25 THAT'S SHIFTING THE BURDEN SOMEWHAT.

1 I MEAN, IF YOUR ARGUMENT IS THAT YOU'RE  
2 NEVER GOING TO FIND ANYTHING IN HERE THAT IS GOING  
3 TO DEMONSTRATE THAT THESE ARE POTENTIAL CUSTOMERS  
4 THAT WERE NOT AVAILABLE FOR YOUR CONDUCT, YOU'RE  
5 JUST NOT GOING TO DO IT, WELL, MAYBE ONE  
6 ALTERNATIVE TO CONSIDER IS WHETHER OR NOT THERE IS  
7 SOME KIND OF INITIAL DISCLOSURE ON SOME SORT OF  
8 SAMPLING BASIS SO THEY CAN LOOK AT IT. I MEAN, MY  
9 CONCERN ABOUT ALL OF THE WAY YOU'RE APPROACHING  
10 THIS, MR. KRAMER, IS THAT YOU HAVE A VERY DEFINITE  
11 VIEW OF THIS CASE, GREAT, YOU MAY WIN WHEN YOU  
12 LITIGATE IT ALL OUT, BUT YOU'RE APPLYING YOUR VIEW  
13 OF THE WORLD TO THEIR DISCOVERY REQUESTS.

14 MR. KRAMER: UH-HUH.

15 THE COURT: NOW, ON THE BURDEN ISSUE YOU  
16 HAVE TO HAVE SOMETHING TO SAY AND I UNDERSTAND THAT  
17 BUT IT IS NOT THE USUAL PRACTICE, AND YOU DID NOT  
18 GET SUMMARY JUDGMENT ON EVERYTHING. YOU GOT IT ON  
19 SOME THINGS. YOU CAN'T SAY MY VIEW OF THE WORLD IS  
20 X AND THAT'S HOW MY DISCOVERY IS GOING TO PROCEED,  
21 CONSISTENT WITH MY VIEW OF THE WORLD.

22 MR. KRAMER: I UNDERSTAND, YOUR HONOR.  
23 THE IDEA IN APPROACHING THIS, I MEAN, I WISH WE  
24 WEREN'T HERE IN THE CONTEXT OF A MOTION TO COMPEL  
25 AND WE INSTEAD WERE ADDRESSING ISSUES INVOLVING

1 REGARD IS THAT THEY CONCEDE AND HAVE CONCEDED ALL  
2 ALONG IS THAT AD WORDS IS LICENSED. ADVERTISING  
3 COME TO GOOGLE FOR AD WORDS. MR. DENUCCI'S  
4 DECLARATION SAYS THAT. THAT'S THE PROGRAM THEY ALL  
5 PARTICIPATE IN. SOME PARTICIPATE IN ADSENSE FOR  
6 CONTENT. SO IF DIGITAL ENVOY WANTS TO SHOW THAT  
7 THERE'S AN ADVERTISER OUT THERE THAT WOULD NOT HAVE  
8 PARTICIPATED IN THE ADSENSE FOR CONTENT PROGRAM  
9 ONLY, IF DIGITAL ENVOY'S DATA WASN'T AVAILABLE FOR  
10 THEM THROUGH GOOGLE, HAVE AT IT. IT'S IMPOSSIBLY  
11 SPECULATIVE. IT'S IMPOSSIBLY SPECULATIVE AND IT'S  
12 EVEN MORE COMPLICATED THAN THAT BECAUSE AT THE END  
13 OF THE DAY THE ADVERTISERS IF THEY THINK THAT THEIR  
14 ADS ARE GOING TO BE SLIGHTLY LESS TARGETS BECAUSE  
15 DIGITAL ENVOY'S DATA ISN'T THERE, THEY'RE STILL  
16 GOING TO PARTICIPATE IN THE PROGRAM. THEY'RE STILL  
17 GOING TO PARTICIPATE BECAUSE ALL THEY CARE ABOUT IS  
18 GETTING USERS TO THEIR SITE. THEY CARE ABOUT  
19 CHECKS.

20 SO IF GOOGLE'S IS SLIGHTLY LESS TARGETED  
21 THEY MIGHT GET FEWER AND MIGHT HAVE PAID SLIGHTLY  
22 LESS MONEY FOR THEM HYPOTHETICALLY BUT HOW YOU CAN  
23 POSSIBLY GET THERE BY SAYING GIVE ME EVERY DOCUMENT  
24 YOU EVER EXCHANGED WITH EVERY ONE OF YOUR HUNDREDS  
25 OF THOUSANDS OF ADVERTISERS, IT JUST, THERE'S NO

1 LIMITATION OF LIABILITY CAUSES IN THE CONTRACT AND  
2 THE INABILITY TO DEMONSTRATE CAUSATION AS A MATTER  
3 OF LAW, BUT THAT'S NOT WHY WE'RE HERE.

4 THE COURT: I --

5 MR. KRAMER: WE'RE HERE TO TALK ABOUT  
6 DISCOVERY AND SINCE THIS IS THE VEHICLE, THE ONLY  
7 VEHICLE WHICH I HAVE TO RAISE THE ARGUMENTS  
8 INVOLVING THE PIE IN SKY NATURE OF THEIR DAMAGES  
9 THEORY I HAVE TO RAISE IT HERE. I WISH I COULD  
10 BRING IT IN A DIFFERENT CONTEXT, BUT THE COURT IS  
11 ENTITLED TO RECOGNIZE JUST AS TENUOUS A THEORY THIS  
12 IS IF IT HAS ANY BASIS IN REALITY AT ALL. AND WITH  
13 RESPECT TO THE ADVERTISERS, LET ME BRING IT BACK TO  
14 THEY WANT TO SHOW THAT AN ADVERTISER WOULDNT HAVE  
15 ADVERTISED WITH GOOGLE BUT FOR THE AVAILABILITY OF  
16 GEOTARGETING. THAT'S THEIR UNJUST ENRICHMENT  
17 THEORY.

18 THE COURT: OKAY.

19 MR. KRAMER: GOOGLE MAKES ITS MONEY FROM  
20 ADVERTISERS. PUBLISHERS DON'T PAY GOOGLE. THE  
21 OTHER WAY AROUND.

22 THE COURT: THEY'RE JOINT VENTURERS.

23 MR. KRAMER: IN EFFECT. WE, WE RENT OUT  
24 THE SPACE THAT THE PUBLISHERS OFFER.

25 THE PROBLEM FOR DIGITAL ENVOY IN THIS

1 EFFORT AT ALL AS YOUR HONOR SAID AT THE START.

2 THE COURT: THE SECOND PART, THE LAST  
3 THING YOU JUST SAID IS THE ONE THAT HAS SOME, SOME  
4 RESONANCE WITH ME WHICH IS THE BURDEN ISSUE, BUT  
5 THE MERITS DISCUSSION, THE ARGUMENT THAT, THAT YOU  
6 THINK YOU'RE GOING TO BE ABLE TO EVISCERATE THEIR  
7 DAMAGES THEORY AND THE LIKE IS NOT A DISCOVERY  
8 ARGUMENT TO ME.

9 WHAT I WANTED TO FOCUS ON IS IF YOU SAY  
10 IT'S GROSSLY OVER, GROSSLY BURDENSOME AND  
11 OVERBROAD, THEN WHAT ARE THE LIMITS ON IT THAT MAKE  
12 SENSE, NOT THE, YOU KNOW, THEY'RE NOT GETTING  
13 ANYTHING BECAUSE THEY'RE CIRCLING AROUND AND  
14 THERE'S NO WAY THEY'RE GOING TO MAKE THIS DAMAGE  
15 CLAIM AND THIS, THAT, AND THE OTHER THING. YOU MAY  
16 BE RIGHT, MR. KRAMER, I DON'T KNOW, WE HAVEN'T  
17 REACHED THAT POINT IN THE CASE BUT I HAVE REAL  
18 TROUBLE WITH THE NOTION THAT IN A DISCOVERY CONTEXT  
19 I OUGHT TO BE MAKING THE CALLS ON WHETHER OR NOT  
20 THEY HAVE GOT A DAMAGE THEORY OR NOT AND, AND  
21 THAT'S -- AND YOU ARE NOT GIVING ME A LOT OF HELP  
22 ON. OKAY. GRANTED WE DON'T THINK MUCH OF THEIR  
23 DAMAGE THEORY BUT AT THE VERY LEAST, BECAUSE OF THE  
24 BURDEN ISSUE, WE SHOULD LIMIT, WE SHOULD PUT THESE  
25 CONSTRAINTS ON THEIR REQUEST, AND RESERVING THEIR

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1 RIGHT TO SAY THEY SHOULDN'T EACH GET A PIECE OF  
 2 PAPER, I UNDERSTAND THAT, BUT I'VE GOT THE CHOICE  
 3 NOW BETWEEN WHAT YOU'RE TELLING ME IS THE BEGINNING  
 4 OF THE APOCOLAS AND THEY'RE SAYING THEY DON'T GET A  
 5 PIECE OF PAPER.  
 6 MR. KRAMER: YOUR HONOR, I DON'T MEAN TO  
 7 GIVE YOU THAT EITHER OR CHOICE, BUT I THINK THE  
 8 LAST TIME WE WERE HERE YOUR HONOR SAID THAT'S NOT  
 9 YOUR JOB TO REWRITE THEIR REQUESTS.  
 10 THE COURT: THAT'S TRUE.  
 11 MR. KRAMER: THESE ARE THEIR REQUESTS.  
 12 THE COURT: YES.  
 13 MR. KRAMER: WE TOLD THEM WHAT OUR  
 14 POSITION WAS IN THE MEET AND CONFER NINE MONTHS  
 15 AGO. THEY'RE NOT SAYING I WANT THE SUBSET.  
 16 THEY'RE SAYING I WANT YOU TO DO THIS. I WANT YOU  
 17 TO ORDER THIS, YOUR HONOR. AND IF THEY HAVE  
 18 SOMETHING ELSE THAT THEY WANT US TO PRODUCE THAT'S  
 19 LESS BURDENSOME THAT WE COULD MANAGE WITHOUT  
 20 MILLIONS OF DOLLARS IN EXPENSE, WELL, THEN WE  
 21 SHOULD BE TALKING ABOUT THAT BUT IT'S NOT FOR US TO  
 22 INTRODUCE THAT INTO THE CONVERSATION. THESE ARE  
 23 THEIR REQUESTS AND THEIR MOTION.  
 24 LAST POINT.  
 25 THE COURT: YES.

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1 MR. KRAMER: LAST POINT AND THIS WILL BE  
 2 THE LAST ONE. I DISAGREE WITH YOUR HONOR WITH  
 3 RESPECT TO WHETHER OR NOT YOU CAN LOOK AT THEIR  
 4 DAMAGES CLAIM IN CONNECTION WITH THE DISCOVERY  
 5 MOTION. THE STANDARD IS, AS YOUR HONOR ARTICULATED  
 6 IT HAS TO BE RELEVANT. IF THIS DAMAGE CLAIM ISN'T  
 7 GOING ANYWHERE.  
 8 THE COURT: OR TO GOOD CAUSE AND LIKELY  
 9 LEAD TO THE DISCOVERY.  
 10 MR. KRAMER: IF THIS DAMAGE CLAIM ISN'T  
 11 GOING ANYWHERE, YOU CAN DECIDE THAT AND SAY  
 12 DISCOVERY ISN'T RELEVANT BECAUSE THIS DAMAGE CLAIM  
 13 ISN'T GOING ANYWHERE. IF YOU HAVE A DIFFERENT  
 14 THEORY THAT IT IS RELEVANT, LET ME HEAR IT BUT THIS  
 15 CLAIM ISN'T GOING ANYWHERE.  
 16 AND LASTLY, IF YOUR HONOR IS GOING TO  
 17 ORDER THIS KIND OF BURDENSOME DISCOVERY WE TALKED  
 18 ABOUT THE MOTION TO BIFURCATE. THERE'S NO REASON  
 19 THAT WE COULDN'T NOW BIFURCATE LIABILITY AND  
 20 DAMAGES. IT'S AN ISSUE OF INTERPRETATION AND  
 21 INTENT. AND WE CAN TRY THOSE ISSUES AND TALK ABOUT  
 22 WHAT DISCOVERY, IF ANY, THEY ARE ENTITLED TO BUT  
 23 BEFORE YOU IMPOSE MILLIONS OF DOLLARS OF BURDEN ON  
 24 GOOGLE I THINK WE OUGHT TO CONSIDER THE ISSUE OF  
 25 BIFURCATION.

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1 THE MOTION WE MADE PREVIOUSLY WAS NOT  
 2 LIABILITY AND DAMAGES, IT WAS CONTRACT  
 3 INTERPRETATION AND EVERYTHING ELSE AND THAT WAS MY  
 4 MISTAKE. IT SHOULD HAVE BEEN LIABILITY AND DAMAGES  
 5 AND IF THE COURT IS CONSIDERING ALLOWING THIS KIND  
 6 OF SWEEPING DISCOVERY BIFURCATION IS APPROPRIATE.  
 7 THE COURT: ALL RIGHT. THE FINAL WORD,  
 8 MR. KRATZ.  
 9 MR. KRATZ: YOUR HONOR, I KNOW YOU WANT  
 10 TO MOVE THIS ALONG.  
 11 THE COURT: PROFOUNDLY.  
 12 MR. KRATZ: AND THE PROBLEM IS I'M  
 13 STRUGGLING WITH THAT BECAUSE WE HAVE GOT A  
 14 SITUATION WHERE WE'RE HAVING OUR CLAIMS DEFINED FOR  
 15 US, WE'RE HAVING OUR DAMAGES THEORIES DEFINED FOR  
 16 US INCORRECTLY. IT'S NOT THAT HE GETS TO SPEND ALL  
 17 OF THIS TIME CHARACTERIZING.  
 18 THE COURT: AND I'M NOT GOING TO BE  
 19 MAKING -- THIS IS NOT THE HEARING, I KEEP  
 20 REITERATING, WHERE I AM GOING TO BE MAKING CALLS ON  
 21 THE MERITS OF THE CASE.  
 22 BUT THE PROBLEM THAT I HAD, AND THIS GOES  
 23 BACK TO MY COMMENT BEFORE, AS I READ YOUR DISCOVERY  
 24 REQUESTS, AND AS MR. KRAMER CORRECTLY POINTS OUT,  
 25 THEY ARE EXPANSIVE. YOU'RE NOT HELPING AND IT'S

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1 YOUR ROLE AT THIS JUNCTURE, FRANKLY, TO PUT SOME  
 2 PARAMETERS ON IT BECAUSE YOU FORCE THE ISSUE IN  
 3 SOME WAYS BY HAVING -- I'M WILLING TO EXCEPT, BY  
 4 THE WAY FOR PURPOSES OF DISCUSSION, THAT TO ORDER  
 5 SIMPLY LET'S SAY I GRANT DIGITAL ENJOY'S MOTION  
 6 WITH RESPECT TO DISCOVERY, I DON'T THINK THERE'S  
 7 ANY DOUBT THAT IT WOULD BE BURDENSOME. I MEAN, I  
 8 THINK IT IS EXTENSIVE AND YOU'RE NOT EVEN SAYING IT  
 9 ISN'T.  
 10 AND THE RESULT OF THAT IS THAT I EXPECT  
 11 SOME, SOME EFFORT TO SAY, ALL RIGHT, THAT WHAT WE  
 12 WOULD BE ASKING FOR WOULD BE VERY, VERY, VERY  
 13 EXTENSIVE. AND WE'RE TRYING TO DO THIS IN A  
 14 FASHION WHERE PERHAPS WE DON'T NEED EVERY PIECE OF  
 15 PAPER AND WE'LL LIVE WITH THIS BATCH AND COME BACK.  
 16 THERE'S ABSOLUTELY NO EFFORT BETWEEN THE PARTIES TO  
 17 TRY TO FIND SOME MIDDLE GROUND IN TERMS OF  
 18 MATERIALS THAT YOU GET RESERVING THE RIGHT TO ASK  
 19 FOR ME AND NOW DISCOVERY IS CLOSED SO THAT'S A  
 20 WHOLE DIFFERENT ISSUE, BUT I DON'T GET THE SENSE  
 21 THAT THE MEETING AND CONFERRING, TO PUT IT MILDLY,  
 22 IS NOT A MODEL OF HOW THIS SHOULD BE DONE BECAUSE  
 23 IT SOUNDS LIKE THERE'S EVEN SOME QUESTION ABOUT,  
 24 ABOUT BASED ON MR. KRAMER'S COMMENTS, HE THINKS HE  
 25 LIMITED THE CASE IN SOME FASHION AND YOU DON'T

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1 THINK HE DID AND ALL OF THIS OTHER STUFF BUT THESE  
 2 REQUESTS, THE REASON THAT HE IS ARGUING THAT THESE  
 3 MERIT ISSUES IS BECAUSE THESE REQUESTS ARE SO  
 4 EXTENSIVE.  
 5 MR. KRATZ: MAY I ADDRESS THAT?  
 6 THE COURT: YES.  
 7 MR. KRATZ: OF COURSE BEFORE I DO IF  
 8 WE'RE TALKING ABOUT BURDEN ONLY I'M FINE WITH THAT  
 9 FOR PURPOSES OF THIS DISCUSSION BUT MR. KRAMER MADE  
 10 SEVERAL COMMENTS THAT ARE FACTUALLY INACCURATE THAT  
 11 ARE BOTH WITH RESPECT TO OUR CLAIM AND PLUS WITH  
 12 RESPECT TO THE FACTS IN THIS CASE.  
 13 NOW, I WANT AN OPPORTUNITY, AT SOME  
 14 POINT, TO ADDRESS THAT CONDUCT BECAUSE IT'S  
 15 HAPPENED AGAIN AND AGAIN AND IT'S IMPORTANT BECAUSE  
 16 IT'S LEFT WITH THIS FRAMEWORK THAT WE'RE THIS  
 17 LITTLE PIECE THAT'S OUT THERE TRYING TO GET A BIG,  
 18 A BIG CLAIM AGAINST IT AND THAT IMPRESSION HAS BEEN  
 19 REPEATED AGAIN AND AGAIN AND AGAIN AND IT'S WRONG.  
 20 IT'S FALSE. AND THEY'RE FALSE BASED ON FALSE  
 21 STATEMENTS.  
 22 WHAT I'D LIKE TO DO IS TO HAVE AN  
 23 OPPORTUNITY TO RESUBMIT BASED ON A TRANSCRIPT OF  
 24 THIS HEARING BECAUSE IT'S THERE AND IT'S A BIG  
 25 PROBLEM.

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1 THE COURT: WHAT IS IT THAT YOU'RE  
 2 ASKING? I MEAN, I SELDOM HAVE A DISCOVERY MOTION  
 3 THAT IS NOW, IT'S IN THE CONTEXT OF THE DISCOVERY  
 4 MOTION WE APPEAR TO BE HAVING THE TRIAL OF THE  
 5 CASE.  
 6 MR. KRATZ: I UNDERSTAND THAT. AND IF  
 7 ALL WE'RE TALKING ABOUT IS BURDEN, I WANT TO TALK  
 8 ABOUT THAT BUT THE PROBLEM IS --  
 9 THE COURT: THAT'S WHAT MY FOCUS IS  
 10 BECAUSE I AGREE WITH YOU THAT THIS IS A DISCOVERY  
 11 MOTION AND SO TO THE EXTENT THAT -- BUT MR. KRAMER  
 12 IS CORRECT THAT I HAVE TO APPLY THE STANDARD AND  
 13 THE STANDARD IS IF HE WAS RIGHT, AND IF HE IS RIGHT  
 14 AND GO BACK AND LOOK AT IT, THAT SOME OF WHAT  
 15 YOU'RE ASKING FOR DOESN'T RISE TO THE LEVEL OF  
 16 LIKELY TO LEAD TO THE DISCOVERY OF ADMISSIBLE  
 17 EVIDENCE.  
 18 OBVIOUSLY I HAVE TO LOOK AT THE SUBSTANCE  
 19 OF THE CASE.  
 20 MR. KRATZ: THEN THAT'S THE PROBLEM.  
 21 THE COURT: BUT I NEED TO LOOK AT IT  
 22 THROUGH THE LENS OF NOT DECIDING THE ISSUES BUT  
 23 DETERMINING WHETHER OR NOT SOMETHING IS ARGUABLY IN  
 24 THE CASE OR NOT IN THE CASE.  
 25 MR. KRATZ: AND THAT'S THE PROBLEM, AND I

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1 WANT TO TALK ABOUT BURDEN BUT THE PROBLEM IS THAT  
 2 HE'S MAKING ARGUMENTS WHETHER THIS IS DISCOVERABLE  
 3 OR NOT BASED ON FALSEHOODS WITH RESPECT TO WHAT OUR  
 4 CLAIM IS BUT ALSO WITH RESPECT TO WHETHER THERE IS  
 5 EVIDENCE IN THERE AND I'VE GOT A BIG PROBLEM WITH  
 6 THAT. I'M READY TO TALK ABOUT BURDEN BUT NOW HERE  
 7 AGAIN, YOU KNOW, IF THE RULING IS THAT IT'S  
 8 DISCOVERABLE THEN, THEN ALL RIGHT, HE DID IT AND  
 9 THAT'S FINE, LET'S TALK ABOUT BURDEN. OKAY. BUT  
 10 THAT'S NOT WHAT I'M HEARING.  
 11 THE PROBLEM IS WE STILL NEED TO LOOK AT  
 12 THE OVERALL FRAMEWORK AND I HAVE A LOT TO SAY ABOUT  
 13 THAT BECAUSE THE ONLY PERSON THAT HAS BEEN ABLE TO  
 14 GIVE OUR DAMAGE THEORY IS MR. KRAMER. HE'S GOT IT  
 15 WRONG BASED ON THE FACTUAL UNDERPINNING EVIDENCE,  
 16 HE HAS IT WRONG WITH RESPECT TO WHAT ARGUMENTS  
 17 WE'RE GOING TO MAKE AND SO THAT'S THE PROBLEM I'VE  
 18 GOT. AND I KNOW YOU WANT TO GET DONE, AND I KNOW  
 19 YOU WANT TO TALK ABOUT BURDEN AND I'M GOING TO DO  
 20 THAT RIGHT NOW BUT THEN WHAT ARE WE LEFT WITH?  
 21 THE COURT: WHAT WE'RE LEFT WITH IS AN  
 22 OUT OF HAND DISCOVERY HEARING. I MEAN, IT IS OUT  
 23 OF HAND. THE PARTIES ARE NOT ASSISTING THE COURT  
 24 IN TRYING TO FOCUS ON WHAT DISCOVERY IS REASONABLE  
 25 AND WHAT DISCOVERY ISN'T. ALL I'M HEARING,

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1 FRANKLY, FROM BOTH SIDES IS THEY'RE EAGER  
 2 LITIGATORS WHO WANT TO ARGUE THE MERITS OF THE  
 3 CASE, BUT, REALLY, YOU KNOW, THIS IS NOT, THIS IS  
 4 NOT THE HEARING ON THE SUBSTANCE OF THIS CASE AND  
 5 NEITHER SIDE IS, I MEAN, I'M ALMOST INCLINED TO  
 6 FORCE YOU TO GO AND SIT AND DO SOME MORE MEETING  
 7 AND CONFERRING BECAUSE IT'S NOW THE TWO, YOU KNOW,  
 8 I, I --  
 9 MR. KRATZ: MAY I ADDRESS SOME OF THIS?  
 10 THE COURT: SOME OF IT BUT I'M LOSING  
 11 GROUND. THIS IS ONE OF THE FEW HEARINGS WHERE I  
 12 KNOW LESS AFTER THE HEARING THAN I DID BEFORE.  
 13 MR. KRATZ: AND I SUBMIT THE PROBLEM IS  
 14 THE MISCONCEPTION OF WHAT OUR CASE IS.  
 15 THE COURT: THAT'S NOT THE ENTIRE  
 16 PROBLEM.  
 17 MR. KRATZ: IT IS.  
 18 THE COURT: THE PROBLEM IS, I'LL TELL YOU  
 19 WHAT THE PROBLEM IS, IS THAT THE LAWYERS HAVE NOT  
 20 FOCUSED THE QUESTION. INSTEAD THEY HAVE USED THIS  
 21 OPPORTUNITY AS A SPRING BOARD TO ARGUE EVERY  
 22 CONCEIVABLE ISSUE IN THE CASE AND THE FOCUS OUGHT  
 23 TO BE ON THE MAGNITUDE OF THE DISCOVERY THAT IS  
 24 BEING REQUESTED AND WHETHER OR NOT UNDER THAT BROAD  
 25 RUBRIC OF DISCOVERABILITY IF IT FALLS OUTSIDE OR

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1 NOT.  
 2 MR. KRATZ: OKAY.  
 3 THE COURT: AND I AM HEARING -- BUT GO  
 4 AHEAD. I'LL GIVE YOU FIVE MORE MINUTES AND IF  
 5 THERE'S SOME REQUEST THAT YOU WANT TO GIVE ME SOME  
 6 WRITTEN SUBMISSION, I'LL CONSIDER DOING THAT BUT I  
 7 COULD BE HERE FOR DAYS THE WAY THIS IS GOING AND I  
 8 HAVE OTHER THINGS TO DO.  
 9 MR. KRATZ: AND, YOUR HONOR, THEIR  
 10 SPECIFIC REQUEST THAT DIRECTLY ADDRESSES ADSENSE  
 11 AND NOT ANY WHETHER IT BE GOOGLE'S OR NOT.  
 12 INTERROGATORIES 5, 6, 10, AND 11 DIRECT TO ADSENSE  
 13 WHICH IS THE ENTIRETY OF OUR CLAIM. REQUEST FOR  
 14 PRODUCTION 3.  
 15 THE COURT: WELL, YES. BUT THEIR  
 16 ARGUMENT IS THAT ADSENSE IS NOT IN THE CASE.  
 17 THERE'S NO DISPUTE THAT'S WHAT YOU'RE ASKING FOR, I  
 18 AGREE WITH YOU. YOU'RE ASKING FOR MATERIAL  
 19 PERTAINING TO ADSENSE FOR SEARCH, RIGHT, IN  
 20 ADDITION TO ADSENSE FOR CONTENT.  
 21 MR. KRATZ: YEAH.  
 22 THE COURT: WHY IS -- WELL, I DON'T WANT  
 23 TO GO THERE. THIS WILL GO ON FOREVER.  
 24 MR. KRATZ: I KNOW BUT THE DAMAGE THEORY  
 25 IS NOT WHAT HE SAYS. THE DAMAGE THEORY IS WE HAVE

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1 A MULTITUDE OF FORCED PLACED LICENSES THAT THEY  
 2 HAVE OUT THERE. THEY HAVE FORCED ALL OF THESE  
 3 PEOPLE TO DO GEOTARGETING AND THEY WANT TO DO  
 4 GEOTARGETING DESPITE MR. KRAMER TO THE CONTRARY,  
 5 THERE'S PUBLIC STATEMENTS BY PUBLISHERS, BY GOOGLE  
 6 THAT SAYS, THAT SAYS THAT THIS IS A GREAT OFFERING,  
 7 THIS IS SOMETHING THEY WANT. THIS ADVERTISING.COM  
 8 DEPOSITION THAT HE'S TALKING ABOUT, THERE'S  
 9 DOCUMENTS IN THERE THAT SAYS THAT BEFORE THEY SIGN  
 10 UP WITH US, THEY WERE TRYING TO DO GEOTARGETING ON  
 11 THEIR OWN. THEY WERE BAD AT IT AND THEY SAID  
 12 THEY'RE LOSING CUSTOMERS AS A RESULT OF THAT.  
 13 OKAY. SO THIS NOTION -- BUT OUR DAMAGE THEORY IS  
 14 MORE THAN JUST, YOU KNOW, WE LOST A CUSTOMER HERE  
 15 OR THERE. WE WANT TO DO A MARKET SHARE ANALYSIS.  
 16 THEY INVADDED A TREMENDOUS AMOUNT OF SPACE AND GIVEN  
 17 LICENSES TO USE OUR TECHNOLOGY.  
 18 THE COURT: BUT IN ORDER TO DO THAT, BUT  
 19 THIS IS DANGEROUS FOR ME TO VENTURE INTO THIS, BUT  
 20 IN ORDER TO DO THAT AREN'T YOU GOING TO HAVE TO  
 21 SHOW THAT THERE WAS SOME MARKET FOR YOUR SERVICES  
 22 INDEPENDENT AND BY WAY OF DOING THAT AREN'T YOU  
 23 GOING TO HAVE TO MAKE SOME PRESENTATION THAT THERE  
 24 ARE PLAYERS IN THE MARKET THAT ARE SEEKING TO HAVE  
 25 YOUR SERVICES AND THAT YOU HAVE, AND BUT FOR GOOGLE

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1 COMING INTO THIS AREA AND PROVIDING IT AS PART OF  
 2 THEIR SERVICE THAT THEY WOULD HAVE LICENSED WITH  
 3 YOU? DON'T YOU HAVE TO HAVE SOME PEOPLE THAT YOU  
 4 COULD IDENTIFY?  
 5 MR. KRATZ: WE HAVE SOME PEOPLE BUT  
 6 THAT'S NOT OUR DAMAGE CLAIM WITH RESPECT TO JUST  
 7 THOSE PEOPLE BECAUSE THEY WENT AND TOOK IT ALL.  
 8 THE COURT: THE PLAINTIFFS WERE HOPEFULLY  
 9 SPECULATIVE.  
 10 MR. KRATZ: ABSOLUTELY NOT. THEY  
 11 LICENSED IT TO THEM AND WE SHOULD GET THE REVENUE  
 12 FOR THOSE LICENSES.  
 13 THE COURT: BUT THAT'S LIKE SAYING IF  
 14 THERE'S AN ASPECT TO THE LICENSE THAT THEY THROW  
 15 IN, BUT THERE'S NO MARKET FOR AN INDEPENDENT OF  
 16 THAT, AREN'T YOU GOING TO HAVE TO SHOW THERE IS A  
 17 MARKET?  
 18 MR. KRATZ: WELL, THERE IS, WE ARE IN  
 19 BUSINESS. THAT'S WHAT WE DO.  
 20 THE COURT: OKAY.  
 21 MR. KRATZ: AND IT'S NOT JUST -- MR.  
 22 KRAMER SAYS IT'S INCONCEIVABLE THAT THESE CONTENT  
 23 SITES WANT TO LICENSE.  
 24 THE COURT: OKAY. THIS IS WHAT I'M GOING  
 25 TO DO. I'M GOING TO BRING THIS TO A CONCLUSION AND

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1 I'M GOING TO DO TWO THINGS: ONE IS WITH THE  
 2 UNDERSTANDING THAT YOU NOW HAVE THAT I DON'T VIEW A  
 3 LOT OF THE ARGUMENT AS HAVING SHED A LOT OF LIGHT  
 4 ON MY DISCOVERY REQUEST, YOU'RE GOING TO BE AT THE  
 5 MERCY OF WHAT I ORDER WITH RESPECT TO I'LL GO BACK  
 6 AND I'LL READ ALL OF THIS AND I'LL GIVE IT  
 7 CONSIDERABLE THOUGHT, AND I WILL MAKE AN ORDER.  
 8 IN THE MEANTIME, I REALLY DO THINK THAT  
 9 IT IS APPROPRIATE THAT FOR THE PARTIES THAT KNOW  
 10 THIS CASE AS WELL AS THEY KNOW IT TO TRY TO GET  
 11 TOGETHER AND SEE IF THEY CAN TRY AND MEET ON THESE  
 12 DISCOVERY REQUESTS.  
 13 ON THE GOOGLE MOTION I AM PREPARED TO  
 14 RULE ON THE GOOGLE MOTION, AS I INDICATED, BUT ON  
 15 YOUR MOTION, I THINK IT IMPLICATES SOME ISSUES THAT  
 16 MAY BE THE PARTIES TOGETHER COULD TRY TO WORK  
 17 THROUGH IT, AND THEY COULD PUT SOME, SOME  
 18 PARAMETERS ON THIS DISCOVERY THAT WOULD BE WORKABLE  
 19 FOR BOTH.  
 20 IF YOU DON'T DO THAT, I'LL GIVE YOU AN  
 21 ORDER.  
 22 AND IF YOU'RE ALL SO, YOU KNOW, YOU THINK  
 23 THAT THERE'S MORE THAT I NEED TO KNOW BESIDES THE  
 24 PAD OF PAPERS THAT I HAVE ALREADY SEEN, ARE YOU  
 25 REQUESTING AN OPPORTUNITY TO SUBMIT SOMETHING? IS

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1 THIS WHAT YOU WANT TO DO TO QUOTE-UNQUOTE CORRECT  
 2 THE RECORD FROM WHAT MR. KRAMER HAS ARGUED?  
 3 MR. KRATZ: THE PROBLEM IS I HAVE NOT  
 4 BEEN GIVEN AN OPPORTUNITY TO MAKE A COMPLETE  
 5 RECORD.  
 6 THE COURT: I'M OFFERING YOU THAT  
 7 OPPORTUNITY.  
 8 MR. KRATZ: I HAVE GIVEN ONE DAMAGE  
 9 THEORY AND WE HAVE THREE.  
 10 THE COURT: MR. KRATZ, I'M TELLING YOU  
 11 YOU COULD DO THAT, YOU CAN DO IT ORALLY OR IN  
 12 WRITING.  
 13 MR. KRATZ: OKAY. THAT'S FINE, THAT'S  
 14 WHAT I WOULD LIKE TO DO.  
 15 THE COURT: OKAY. OKAY. SO WHEN WOULD  
 16 YOU BE PREPARED TO GIVE ME THIS SUBMISSION?  
 17 MR. KRATZ: I WOULD LIKE TO HAVE THE  
 18 TRANSCRIPT.  
 19 THE COURT: OKAY. WELL.  
 20 MR. KRATZ: WE'RE TALKING ABOUT -- WE'RE  
 21 DERAILED ANYWAY.  
 22 THE COURT: YOU'RE NOT DERAILED. YOU'RE  
 23 ASSUMING I'M GOING TO CHANGE ALL SORTS OF DATES AND  
 24 I MAY NOT SO DON'T ASSUME THAT. BUT I'M NOT GOING  
 25 TO FURTHER THE DERAILEMENT BY A PROLONGED SUBMISSION

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1 PERIOD ON A DISCOVERY MOTION.  
 2 SO IF YOU WANT TO SUBMIT SOMETHING  
 3 FURTHER TO ME, NO, WE'RE NOT GOING TO AWAIT THE  
 4 TRANSCRIPT. YOU KNOW WHATEVER IT IS YOU WANT TO  
 5 TELL ME, GOD KNOWS YOU'RE PREPARED TO TELL ME RIGHT  
 6 NOW, SO SUBMIT IN WRITING ANYTHING FURTHER THAT YOU  
 7 THINK I SHOULD CONSIDER IN CONJUNCTION WITH THIS  
 8 DISCOVERY MOTION AND I WANT IT SUBMITTED BY NEXT  
 9 FRIDAY, A WEEK FROM FRIDAY, AND IT'S GOING TO BE  
 10 LIMITED TO, I'M GOING TO LIMIT IT TO TEN PAGES BUT  
 11 I WOULD BE DELIGHTED IF PEOPLE USE LESS THAN TEN  
 12 PAGES.  
 13 CAN YOU TELL ME WHATEVER YOU THINK I NEED  
 14 TO KNOW WITH RESPECT TO THIS DISCOVERY MOTION, AND  
 15 I AM NOT GOING TO HAVE REPLY BRIEFS AND SURREPLY  
 16 BRIEFS AND EACH SIDE IS GOING TO I'M SURE SAY THE  
 17 OTHER SIDE HE'S MISCHARACTERIZED THIS, THAT, AND  
 18 THE OTHER. I'M BRINGING IT TO A CLOSE. SO A WEEK  
 19 FROM FRIDAY, GIVE ME WHATEVER YOUR SUBMISSION IS  
 20 AND THEN YOU'LL GET AN ORDER FROM ME BECAUSE YOU  
 21 HAVE TO MOVE THIS CASE ALONG.  
 22 MR. KRATZ: I WOULD LIKE NOTHING BETTER,  
 23 YOUR HONOR.  
 24 MR. KRAMER: YOUR HONOR, COULD I PROPOSE  
 25 A STATUS CONFERENCE OR A CMC WITHIN THE NEXT SAY

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1 THREE OR FOUR WEEKS SO WE CAN TALK ABOUT THE ISSUES  
 2 THAT MAY FLOW OUT OF THIS?  
 3 THE COURT: THAT'S FINE. IT WOULD HAVE  
 4 TO BE TOWARDS THE END OF JULY BECAUSE BETWEEN THE  
 5 NINTH CIRCUIT CONFERENCE AND OTHER THINGS THERE'S  
 6 NO WAY YOU CAN GET ON THE SCHEDULE BEFORE THEN.  
 7 MR. KRATZ: I AGREE WITH THAT. I THINK  
 8 WE NEED TO DO THAT. WE HAVE A DEADLINE COMING UP  
 9 OF EXPERT DISCLOSURES.  
 10 THE COURT: RIGHT. WELL, I WAS UNDER THE  
 11 IMPRESSION I WAS GOING TO GET A STIPULATION FROM  
 12 YOU PEOPLE TO MOVE SOME DATES.  
 13 MR. KRATZ: PRESUMING THAT'S NOT A  
 14 PROBLEM BECAUSE THAT'S GOING TO COME AND GO BEFORE  
 15 THE CASE MANAGEMENT. AGAIN WE NEGOTIATED -- LET'S  
 16 TRY TO DO THIS BY STIPULATION AND ENDED UP SAYING  
 17 NOW LET'S JUST WAIT. SO, YOU KNOW, HERE AGAIN  
 18 WE'RE LEFT WITH THIS NO IDEA WHAT GOOGLE'S ULTIMATE  
 19 POSITION IS GOING TO BE ON THIS. HE SAYS IT'S ALL  
 20 OVER AND THE PROBLEM IS WE CANT GIVE AN EXPERT  
 21 DISCLOSURE, WE DONT HAVE ANY DATA, YOU KNOW, I  
 22 MEAN, WE JUST DONT.  
 23 THE COURT: WELL, WHAT I WILL DO IS I  
 24 WILL SET A CMC DATE. IN THE INTERIM, IF YOU ARE  
 25 CONCERNED THERE'S A DATE, EXPERT DISCLOSURES DATES

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1 ARE GOING TO COME AND GO, AND YOU WANT TO AGREE TO  
 2 GIVE ME A STIPULATION TO EXTEND IT, I DONT HAVE A  
 3 PROBLEM WITH THAT.  
 4 THE THING I DO HAVE A PROBLEM WITH IS  
 5 THIS NOTION THAT SEEMS TO BE FLOATING AROUND THE  
 6 COMMENT THAT IT'S A DERAILED CASE, THAT THAT MEANS  
 7 THAT EVERYTHING IS JUST GOING TO GO OFF INTO LIMBO  
 8 AND THAT DATES ARE NATURALLY GOING TO EVAPORATE.  
 9 ALL I'M GOING TO DO IS WHATEVER DATE IS COMING UP  
 10 PRIOR TO THE CMC THAT I'M ABOUT TO SET AT THE END  
 11 OF JULY, I WILL. IF YOU WANT TO EXTEND THAT OUT BY  
 12 STIPULATION, I DONT HAVE A PROBLEM WITH THAT.  
 13 MR. KRATZ: DO YOU HAVE A PROBLEM WITH  
 14 THAT?  
 15 MR. KRAMER: I WOULD LIKE TO GET A  
 16 SPECIFIC PROPOSAL.  
 17 THE COURT: YOU'RE NOT GOING TO DO IT  
 18 WITH ME SITTING HERE BUT DO IT WHILE YOU'RE  
 19 TOGETHER.  
 20 MR. KRAMER: NO, NO, CERTAINLY NOT.  
 21 MR. KRATZ: WELL, AS LONG AS --  
 22 THE COURT: OKAY. I'M GOING TO SET A  
 23 CASE MANAGEMENT CONFERENCE, A FURTHER CASE  
 24 MANAGEMENT CONFERENCE FOR JULY 28TH, A THURSDAY, AT  
 25 2:00 O'CLOCK.

1 MR. KRAMER: THANK YOU, YOUR HONOR.  
2 THE COURT: OKAY. AND JUST TO REVIEW THE  
3 BIDDING AGAIN, IT'S GOING TO BE WHATEVER FURTHER  
4 SUBMISSION ANYBODY WANTS TO SEE LIMITED TO TEN  
5 PAGES OR LESS WITH RESPECT TO THE PENDING DISCOVERY  
6 MOTIONS BY A WEEK FROM FRIDAY AND THEN THE MATTER  
7 WILL BE TAKEN UNDER SUBMISSION AND I WILL BE  
8 RECEIVING A STIPULATION AS I UNDERSTAND IT FROM YOU  
9 REGARDING THE IMPENDING EXPERT DISCLOSURE DATES;  
10 RIGHT?

11 MR. KRAMER: YES, YOUR HONOR.

12 MR. KRATZ: NO, YOUR HONOR.

13 THE COURT: THANK YOU.

14 (WHEREUPON, THE PROCEEDINGS IN THIS  
15 MATTER WERE CONCLUDED.)

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