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7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

12	DIGITAL ENVOY, INC.,)	CASE NO.: C 04 01497 RS
)	
13	Plaintiff/Counterdefendant,)	
)	
14	v.)	GOOGLE INC.'S NOTICE OF
)	MOTION AND MOTION FOR
15)	PARTIAL SUMMARY JUDGMENT
16	GOOGLE INC.,)	REGARDING DIGITAL ENVOY,
)	INC.'S DAMAGES CLAIMS;
17	Defendant/Counterclaimant.)	MEMORANDUM IN SUPPORT
)	THEREOF
)	
18)	Judge: Hon. Richard Seeborg
)	Courtroom: 4, 5 th Floor
19)	Date: September 21, 2005
)	Time: 9:30 a.m.
20)	

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 21, 2005 at 9:30 a.m., defendant/counterclaimant Google Inc. (“Google”) will move this Court pursuant to Fed. R. Civ. P. 56 for partial summary judgment in favor of Google:

(1) that Digital Envoy, Inc.’s (“Digital Envoy”) damages claims are barred and/or circumscribed by the limitation of liability clauses in the license agreement entered into between Google and Digital Envoy on November 30, 2000 and subsequently amended (the “License Agreement”); and

(2) that Digital Envoy cannot establish the requisite causal nexus between Google’s supposed misuse of Digital Envoy’s trade secrets and any loss it suffered or gain that Google supposedly enjoyed and that Digital Envoy therefore is not entitled to any recovery under Cal. Civ. Code § 3426.3(a).

Google’s motion is supported by the following memorandum, the accompanying declarations of David H. Kramer, Mark Rose, Susan Wojcicki, the argument of counsel and any other matters properly before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In November 2000, Google and Digital Envoy entered into a relatively modest contract under which Google received the right to use Digital Envoy’s geolocation data throughout its business in exchange for a few thousand dollars a month. Today, the parties have spent far more litigating over the interpretation of that contract than Google was required to pay in license fees during its four-year term. The reason for this extravagant litigation campaign is simple: Digital Envoy wrongly seeks to parlay its minor contract with Google into an enormous financial windfall.

Based upon a made-for-litigation contract interpretation, Digital Envoy charges that Google violated the parties’ agreement by using Digital Envoy’s data to enhance the

1 geotargeting capabilities in Google’s AdSense advertising program. Citing this alleged
2 violation, Digital Envoy claims entitlement to untold millions of dollars – either as compensation
3 for its imagined loss of business, or to prevent Google’s supposed unjust enrichment. These
4 damages claims, however, suffer from two fatal deficiencies. First, Digital Envoy’s claims are
5 barred or greatly constrained by the two limitation of liability clauses in the parties’ contract.
6 Second, Digital Envoy cannot establish the required causal nexus between Google’s alleged
7 contract violation and the damages Digital Envoy claims.

8 The Court is already familiar with the causation problems that pervade Digital Envoy’s
9 lost profits claim. Asked in interrogatories to provide evidence of the link between Google’s
10 alleged contractual violation and any lost licensing revenue, Digital Envoy came up with
11 nothing. Not surprisingly, the Court recently held that Digital Envoy had failed to offer evidence
12 of the requisite causal connection. Digital Envoy’s inability to supply such evidence is no
13 accident – there is none; its theory is impossibly speculative.

14 The same is true with respect to Digital Envoy’s claim that Google was unjustly enriched
15 by its supposed contractual violation. While Google has undoubtedly profited from its AdSense
16 program, there is no way to attribute any portion of its profits from that program to the use of
17 Digital Envoy’s data. Indeed, Digital Envoy again failed to offer evidence of any such link in
18 response to Google’s interrogatories. Moreover, given the way in which Google used Digital
19 Envoy’s data – solely to prevent ads from being shown – Digital Envoy’s theory makes no sense.
20 Digital Envoy simply cannot demonstrate that any advertisement that Google displayed and
21 earned revenue from was shown or clicked upon because of Digital Envoy’s data. It thus cannot
22 show that “but for” use of the data, Google would have earned lower profits.

23 Digital Envoy’s inability to establish causation dooms its claims for actual damages and
24 unjust enrichment. But no matter what damages claim it puts forth, Digital Envoy cannot
25 overcome two limitation of liability clauses in the parties’ contract. These clauses were included
26 in the agreement to address the circumstances presented here; one party seeking to take
27 advantage of the other through litigation.

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1 The first contractual clause precludes the imposition of any liability against a party
2 except in cases of that party's "willful misconduct." As applied, the provision bars any recovery
3 to Digital Envoy absent a showing that Google *knew* it was engaged in misconduct in its use of
4 Digital Envoy's data. As prior proceedings in this case have shown, Digital Envoy cannot
5 possibly make such a showing. Google's representatives have testified that they always believed
6 the company's use of the data was licensed, and there is no evidence whatsoever to suggest they
7 knew Google was violating the contract, assuming that Google ever was.

8 The second contractual clause limits Google's liability in "any lawsuit or other action"
9 "brought under" the contract to amounts actually paid by Google during the term of the contract.
10 That provision certainly applies to Digital Envoy's claim which is predicated upon Google's
11 supposed breach of the parties' contract, would not exist but for the contract, and stands or falls
12 on the contract's ultimate interpretation. Courts examining similar language in forum selection
13 clauses have routinely held that it covers tort claims that are based upon the contractual
14 relationship. The provision is by no means restricted in application to claims styled as "breach
15 of contract" as Digital Envoy seems to believe. It would have been a simple matter to word such
16 a restrictive clause. Instead, the parties used the expansive phrase "any lawsuit or other action"
17 to reflect their intent that the limitation not be circumvented through the dodge of artful pleading.

18 Given the applicable limitations of liability and the causation problems endemic to
19 Digital Envoy's case, Google requests that the Court grant partial summary judgment to Google
20 barring or substantially circumscribing Digital Envoy's claims for damages.

21 **II. BACKGROUND**

22 The Parties' Agreement

23 Google and Digital Envoy entered into the License Agreement at the heart of this dispute
24 in November 2000. Declaration of David H. Kramer ("Kramer Decl."), Ex. A. Google
25 negotiated for and obtained the right to make unlimited use of the data in Digital Envoy's IP
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1 Address/Physical Location database¹ in Google's business, specifically including Google's
 2 advertising programs. *See* Court's Order, May 20, 2005.² In exchange for these expansive
 3 rights, Google agreed to pay Digital Envoy \$3,000 a month, reflecting the commoditized nature
 4 of the data and the limited relationship of the parties. Kramer Decl., Ex. A.

5 As further evidence that the parties did not intend to share either the risks or rewards of
 6 their relationship, their contract contains a host of limitation of liability clauses dramatically
 7 circumscribing the parties' rights to claim damages from one another:

8 It is mutually acknowledged that data entry, communication and storage are
 9 subject to a possibility of human and machine errors, omissions, delays, and
 10 losses, including inadvertent loss of data or damage to media, which may give rise
 11 to loss or damage. Neither party hereto undertakes any liability to the other for
 12 any such errors, omissions, delays, or losses. EXCEPT AS STATED ABOVE,
 13 LICENSOR MAKES AND LICENSEE RECEIVES NO WARRANTIES,
 14 EXPRESS, IMPLIED, STATUTORY, OR IN ANY OTHER PROVISION OF
 15 THIS AGREEMENT OR ANY OTHER COMMUNICATION, REGARDING
 16 THE PRODUCT, THE DATABASE LIBRARIES AND THE SERVICES, AND
 17 LICENSOR SPECIFICALLY DISCLAIMS ANY WARRANTY OF
 18 MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
 19 NEITHER PARTY UNDERTAKES OR ACCEPTS ANY LIABILITY
 20 WHATSOEVER TO THE OTHER FOR ERRORS, OMISSIONS, DELAYS,
 21 INTERRUPTIONS, OR LOSSES UNLESS CAUSED BY THEIR WILLFUL
 22 MISCONDUCT. EXCEPT FOR INDEMNIFICATION UNDER SECTION 7.5,
 23 IN NO EVENT SHALL EITHER PARTY'S DAMAGES IN ANY LAWSUIT
 24 OR OTHER ACTION BROUGHT UNDER THIS AGREEMENT EXCEED
 25 THE AMOUNTS PAID BY LICENSEE HEREUNDER.

21 _____
 22 ¹ Digital Envoy is one of several companies that generates data that can help users make an
 23 educated guess about the approximate geographic location of a visitor to a website. Specifically,
 24 Digital Envoy's data attempts to match the unique IP addresses assigned to the computers of
 25 individual Internet users to particular countries, regions or metropolitan areas. Declaration of
 26 Mark Rose ("Rose Decl.") at ¶ 2. *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573,
 27 576 (2d Cir. 2000) (describing concept of IP address).

28 ² The License Agreement, which was repeatedly extended and expired in January 2005,
 authorized Google to use Digital Envoy's data in Google's "Business" – broadly defined as "the
 business of producing and maintaining information search technology." Kramer Decl., Ex. A
 (whereas clause defining "Business"). Google was expressly authorized to use the data at any of
 its "offices and data centers" and to "develop indices, services, or applications that are provided
 to third parties." *Id.* at § 3.

1 *Id.* at § 8 (underlining added). This provision was drafted by Digital Envoy, with Google's only
2 relevant contribution consisting of an edit to make reciprocal the last sentence. Kramer Decl.,
3 Ex. B at § 8 (redline of license agreement showing addition of mutuality).

4 Google's Understanding of the Agreement

5 The language of the License Agreement and the parties' negotiations made plain to
6 Google's representatives that Google's right to use Digital Envoy's technology was expansive.
7 Indeed, from the time they negotiated the contract to this day, Google's representatives have
8 always understood that Google had the right to use Digital Envoy's data as Google saw fit,
9 subject only to the limitation that it not distribute or resell the data to third parties.

10 For example, Matthew Cutts, who negotiated the contract with Digital Envoy and then
11 implemented Google's use of Digital Envoy's technology in Google's advertising program,
12 testified under cross-examination:

13 Q. So your understanding is that -- at that point in time, your understanding was that you
14 could use the data in any way you wanted except for giving the complete code to another
third-party?

15 A. I believe that's correct.

16 * * *

17 Q: My question is, that understanding, did you have that understanding consistently
18 from the time of entering into the relationship with Digital Envoy to today, that you had
the ability to use the information for whatever you wanted, except for moving the whole
database to a third-party?

19 A. I believe I did have that understanding.

20 Kramer Decl., Ex. C (Cutts Dep.) at 54:3-7; 64:6-16; *see also* Kramer Decl., Ex. D (Schimmel
21 Dep.) at 103:8-11, 105:18-106:5; Kramer Decl., Ex. E (Rana Dep.) at 8:15-10:16, 20:2-14.

22 Based on the understanding of its representatives, Google openly used Digital Envoy's
23 data to support its advertising programs for years without any objection whatsoever from Digital
24 Envoy. Kramer Decl., Ex. F (Friedman Dep.) at 213:2-6. Specifically, Google used Digital
25 Envoy's data in its advertising programs – first in AdWords, and later in AdSense.

Google's Advertising Programs

AdWords

The advertising program that Google offers to advertisers is known as AdWords. AdWords permits hundreds of thousands of advertisers to display their messages to Internet users all over the world. If a user "clicks" on a given advertising message, the sponsoring advertiser pays Google for that click. Declaration of Susan Wojcicki ("Wojcicki Decl.") at ¶ 2.

To implement the AdWords program, Google analyzes the content of advertisers' messages and stores them in an indexed database. When called upon to display a message to an end-user, Google searches this database to find what it believes is the most relevant commercial information using a highly complex, weighted algorithm that takes dozens of factors into consideration. Rose Decl. at ¶ 3.

One of the most important factors Google uses to locate advertisements to display to a user is the user's demonstrated interest in a particular subject. Thus, for example, when a visitor queries Google's web index for "basketball," Google will search its inventory for a basketball-related advertisement to match the user's interest. But the user's demonstrated interest is only the first of dozens of factors used in the search process. Others include, for example, the "clickthrough" rate for a particular advertisement, and the amount of money that an advertiser is willing to pay for a user's click.³ Wojcicki Decl. at ¶¶ 3, 4.

In some cases, another factor used in Google's search for a relevant advertisement is the perceived geographic location of the Internet user. Google uses this factor to prevent the display

³ In the Google AdWords program, Google's advertisers inform Google of the "keywords" to which they want display of their advertisements connected (*e.g.*, display only when users search for the term "basketball"). Advertisers also select the maximum amount they are willing to pay Google each time a user "clicks" on their message (*e.g.*, \$.50 per click). Where two advertisers are interested in the same keywords, one advertiser can generally increase its chance of having its message displayed by setting a higher maximum payment per click than another. But because Google is interested in locating advertisements that users find relevant, the advertiser offering the highest maximum cost per click will not necessarily have its message displayed. Users may find another advertiser's message more appealing and thus "click" on that message more often. Google uses the comparative "clickthrough rates" of competing messages as one of the factors in its analysis of which message to display. Wojcicki Decl. at ¶ 4.

1 of advertisements outside the geographic area selected by an advertiser (*e.g.*, where the
2 advertiser asks to display its messages only to users in Nebraska). *Id.* at ¶ 5. And for a time,
3 until shortly after this lawsuit was filed, as one step in estimating a user’s geographic location,
4 Google often used information from Digital Envoy’s IP Address/Location database. Rose Decl.
5 at ¶ 4.

6 To be clear, Google does not actually utilize geotargeting or Digital Envoy’s data to
7 select the particular ads it ultimately displays to end users. Rather, *to the extent Google can*
8 *ascertain a user’s geographic location, it uses that information to exclude advertisements from*
9 *the selection process.* For example, if Google determines that a user searching for “basketball”
10 is in California, Google would drop from its selection process the messages of any advertiser that
11 wanted its ads shown only to those in Nebraska. Google would continue its search for the
12 appropriate advertising messages from the remaining pool of candidate-advertisements using its
13 complex multi-factored algorithm. Rose Decl. at ¶ 6. It would then send the selected
14 advertisements back to the user’s computer. In many, but not all cases, the ads ultimately
15 displayed would be those from the remaining advertiser that offered the highest amount per click
16 for the word “basketball.” Wojcicki Decl. at ¶ 4.

17 AdSense

18 In 2002, Google formally launched its AdSense program. The program allows Google to
19 display advertisements to users visiting the web sites of participating third-party publishers who
20 comprise the Google Network. If a user clicks on a message displayed on a third-party site, the
21 advertiser pays Google, and Google shares a portion of that payment with the third-party
22 publisher. Wojcicki Decl. at ¶ 6.

23 The mechanical process by which Google searches for the advertising messages to
24 display to users visiting third-party sites is identical, in relevant part, to the process used to locate
25 advertising messages to display to users visiting Google’s own site. Indeed, the process of
26 selecting advertising messages is run by the same computers using virtually identical multi-
27 factored and weighted algorithms. Google uses geotargeting and used Digital Envoy’s data in
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1 AdSense just as it used them in AdWords – solely to exclude ads from the selection process and
2 prevent them from being displayed. Rose Decl. at ¶¶ 7-9.

3 **III. ARGUMENT**

4 A party is entitled to summary judgment as a matter of law where the pleadings and
5 evidence show that there is no genuine issue of material fact on the claim in question. Fed. R.
6 Civ. P. 56(c). Where the moving party does not have the burden of proof on a particular issue, it
7 need not introduce evidence to obtain a summary judgment. Rather, it need only show the Court
8 that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v.*
9 *Catrett*, 477 U.S. 317, 323 (1986); *Cline v. Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d
10 1223, 1229 (9th Cir. 2000).⁴

11 **A. Digital Envoy's Damages Claims Are Barred and/or Severely Circumscribed 12 by the Limitation of Liability Clauses in the License Agreement.**

13 The lengthy limitation of liability provision in the License Agreement contains two
14 clauses at issue here. The first clause prevents Digital Envoy from recovering any damages
15 absent a showing of willful misconduct; the second caps any recovery by Digital Envoy under
16 any circumstances at \$308,600, the total amount paid by Google to Digital Envoy under the
17 License Agreement. *See Wojcicki Decl.* at ¶ 5.

18 The parties' License Agreement is integrated and, according to Digital Envoy,
19 unambiguous. Kramer Decl., Ex. A at § 13 (integration clause); Kramer Decl., Ex. G
20 (interrogatory responses) at Nos. 5, 6 (Digital Envoy admitting contract is unambiguous). The
21 interpretation of the limitation of liability clauses is therefore a question of law for the Court. *In*
22 *re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002); *Lundin/Weber Co. LLC v. Brea Oil Co.*, 117 Cal.
23 App. 4th 427, 433 (2004) (contract interpretation is essentially judicial function); Cal. Civ. Proc.

24
25 ⁴ Even if summary judgment or summary adjudication of an entire claim is not warranted,
26 Federal Rule of Civil Procedure 56(d) allows a court to grant partial summary judgment, thereby
27 reducing the number of facts at issue in a case. Fed. R. Civ. P. 56(d); *State Farm Fire and Cas.*
28 *Co. v. Geary*, 699 F. Supp. 756, 759 (N.D. Cal. 1987). If for any reason the Court believes that
summary judgment is unavailable, Google respectfully requests that the Court grant it partial
summary judgment with respect to the specific issues raised herein.

1 Code § 1856. Because the meaning of these clauses is clear, the Court should enforce them as
2 written, barring and/or appropriately limiting Digital Envoy's claims for damages.

3 **1. Digital Envoy Is Precluded from Recovering Damages in This Case**
4 **Because It Cannot Show Willful Misconduct by Google**

5 Google and Digital Envoy agreed that neither party would be liable to the other except in
6 cases of "willful misconduct." *See* Kramer Decl., Ex. A at § 8 ("Neither party undertakes or
7 accepts any liability whatsoever to the other for errors, omissions, delays, interruptions, or losses
8 unless caused by their willful misconduct."). The phrase "willful misconduct" is described as
9 being much more than mere negligence or even gross negligence, and as involving conduct of a
10 quasi-criminal nature. *See Woodson v. Everson*, 61 Cal. App. 2d 204, 208 (1943) (finding that
11 defendant was liable for negligence but not for willful misconduct). While gross negligence
12 constitutes merely such a lack of care as to indicate a passive and indifferent attitude toward
13 results, willful misconduct involves a positive intent actually to harm another or to do an act with
14 a positive, active, and absolute disregard of its consequences. *Id.* at 209. Further, willful
15 misconduct involves deliberate conduct in doing acts, with "knowledge or appreciation of the
16 fact" that harm is likely to result. *Id.* at 208 (emphasis added). Thus, to constitute willful
17 misconduct there must be "actual knowledge, or that which in the law is deemed to be the
18 equivalent of actual knowledge" of the probability of injury to another. *Id.* at 209.

19 To demonstrate willful misconduct, it is plainly not enough for a plaintiff to show that a
20 defendant intended to act in a manner that is later shown to have been wrongful. *See Gillespie v.*
21 *Rawlings*, 49 Cal. 2d 359, 367 (1957). The plaintiff must show that the defendant acted with
22 either knowledge that serious injury would result, or a wanton and reckless disregard of the
23 possible results. *Id.* (finding that defendant was not liable for willful misconduct because
24 defendant was neither aware of nor reckless with respect to probable injury).

25 Accordingly, to recover damages at all in this case, Digital Envoy must show that in
26 utilizing Digital Envoy's Database Libraries, Google *knew* that it was breaching the License
27 Agreement and *intended* to breach its terms to the detriment of Digital Envoy. Digital Envoy
28

1 cannot possibly make such a showing. There simply is no evidence that Google knew or
 2 believed that it was engaging in improper sharing or disclosure of Digital Envoy's data or
 3 violating the parties' contract. There is no evidence suggesting that Google did not honestly
 4 believe that it was authorized to use the data as it did.⁵ In fact, all of the evidence is to the
 5 contrary, as each of Google's representatives testified that he believed the contract authorized
 6 Google's use of the data in AdSense. Accordingly, by the plain terms of the License Agreement,
 7 Digital Envoy is not entitled to recover damages from Google.

8 **2. To the Extent Digital Envoy Is Permitted Any Recovery, It Is Limited**
 9 **to Amounts Paid by Google to Digital Envoy Under the License**
 10 **Agreement.**

11 From the start, this has been a contract case masquerading as a claim for trade secret
 12 misappropriation. Digital Envoy would have no trade secret claim against Google but for the
 13 parties' License Agreement, and its claim stands or falls based upon the contract's ultimate
 14 interpretation. Accordingly, the claim falls squarely within the second limitation of liability
 15 clause of the contract capping Digital Envoy's recovery in "any lawsuit or other claim brought
 16 under th[e] Agreement" to the amount paid by Google during the contract term. Kramer Decl.,
 17 Ex. A at § 8.

18 Digital Envoy's trade secret claim depends entirely upon its License Agreement with
 19 Google. Its sole theory of misappropriation is that Google misused its trade secrets while *under*
 20 *a duty to limit their use*. See Cal. Civ. Code § 3426.1(b)(2)(B)(ii); Amended Complaint, ¶¶ 27-
 21 28, 40, 46. That claim simply would not exist absent the License Agreement, as the License
 22 Agreement is the sole basis for the use-limitation duty upon which Digital Envoy's claim rests.⁶

23 ⁵ In a prior Order, the Court indicated that a jury could find that Google's use of Digital
 24 Envoy's data in AdSense was a violation of the License Agreement. See Court Order, May 20,
 25 2005, at 10:11-14. It further indicated that a jury could find that Google's interpretation of the
 26 License Agreement was unreasonable. *Id.* at 10:20-23. But the Court did not find that Google
 acted in willful violation of the contract. Nowhere did the Court suggest that Google did not
 actually hold an interpretation of the License Agreement allowing it to use the data as it did.
 Digital Envoy has not offered and cannot offer evidence upon which such a finding could be
 based.

27 ⁶ As the Court has seen first hand, Digital Envoy's claim turns entirely upon the
 28 interpretation of the License Agreement – either Google was entitled to use the data as it did, or
 (continued...)

1 Digital Envoy thus seeks to enforce rights that owe their existence to the parties' contract.⁷
 2 Accordingly, its action is one brought under the agreement and it is subject to the limitation of
 3 liability clause in that contract.

4 An analysis of the language of the clause confirms this interpretation. The term "action"
 5 is commonly understood to mean "a proceeding in a court of justice by which one demands or
 6 enforces one's right." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 54 (1988). "Brought,"
 7 as the past tense of bring, means "to institute." *Id.* at 182, 180. "Under" is commonly
 8 understood to mean "subject to the authority, control, guidance, or instruction of." *Id.* at 1285.
 9 Thus, an action "brought under the agreement" is a court proceeding instituted subject to the
 10 authority, control, guidance or instruction of the parties' agreement. It is difficult to see how
 11 Digital Envoy's claim is not one instituted subject to the control, guidance or instruction of the
 12 License Agreement, since the rights at issue arise from the contract and the entire case turns
 13 upon the ultimate interpretation of the contract.

14 There is virtually no case authority interpreting the precise language at issue. *But see*
 15 *Hoopai v. Civil Serv. Comm'n*, 106 Hawaii 205, 222 (2004) (contract clause covering
 16 "complaints with respect to ... matters under the collective bargaining agreements" as covering
 17 "complaints *related to* matters covered under collective bargaining agreements") (emphasis
 18 added). The Ninth Circuit has passed upon similar language in an arbitration clause in a contract
 19 which was applicable to claims "arising hereunder." *Mediterranean Enters., Inc. v. Ssangyong*
 20 *Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). Noting that the clause was not as broad as one
 21 covering claims "arising out of or relating to" the contract, the court nevertheless held the

22 _____
 (...continued from previous page)

23 it violated some use prohibition in the License Agreement and thus might have committed
 24 misappropriation (assuming it acted with the requisite intent). Indeed, as if to highlight the
 essential nature of the contract to its case, Digital Envoy recently filed a motion for summary
 judgment the outcome of which turns entirely upon interpretation of language in the contract.

25 ⁷ Digital Envoy's claim that its data actually is a trade secret is also entirely dependent
 26 upon the License Agreement, as Digital Envoy must invoke the confidentiality provisions of the
 License Agreement to establish the supposed confidentiality of the data in the first instance. *See*
 27 Cal. Civ. Code § 3426.1(d) (requiring that "trade secrets" be subject to reasonable efforts to
 maintain their secrecy).

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1 language was broad enough to cover all “disputes and controversies relating to the interpretation
2 of the contract and matters of performance.” *Id.*, citing *In re Kinoshita & Co.*, 287 F.2d 951, 953
3 (2d Cir. 1961) (when clause “refers to disputes or controversies ‘under’ or ‘arising out of’ the
4 contract,” arbitration governs “disputes and controversies relating to the interpretation of the
5 contract and matters of performance...”). Notably, the *Ssangyong* court held that the clause
6 covered the plaintiff’s claim for breach of fiduciary duty because the duty itself was created by
7 the parties’ contract. *Id.*

8 Other courts have likewise interpreted such language to include all claims dependent
9 upon an agreement, including tort claims that rest upon the parties’ contractual relationship. *See*
10 *Terra Int’l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 692 (8th Cir. 1997) (while forum
11 selection covering “disputes arising between the parties hereunder” was limited to disputes
12 “arising under the license agreement,” it covered plaintiff’s negligence and strict liability claims
13 because such claims would not have existed but for the agreement); *National Micrographics*
14 *Sys., Inc. v. Canon U.S.A., Inc.*, 825 F. Supp. 671, 677-78 (D.N.J. 1993) (forum selection clause
15 in contract applying to “any and all causes of action *hereunder* by and between the parties
16 hereto” covered tort claims).

17 Digital Envoy seems to believe the clause in question applies only to claims styled as
18 “breach of contract” claims. But if the parties had intended for the clause to be so restricted, they
19 could easily have crafted one which applied only to “claims for breach of contract.” They did
20 not. Instead they used broader language covering “any lawsuit or other action brought under
21 th[e] agreement.” In so doing, the parties made clear that if their contract was at the heart of a
22 dispute, their agreed upon limitation of liability would operate regardless of one party’s creative
23 efforts to plead around their agreement. As Digital Envoy’s home district has explained:

24 Reading the word “hereunder” to apply only to a pure breach of contract claim
25 between the parties would be unduly crabbed and narrow. “Hereunder” refers to
26 the relations that have arisen as a result of th[e] contract. To read otherwise
27 would mean that the mere recitation of a form of action would dictate the
28 enforceability of a forum selection clause. Such a restrictive reading would
frustrate commercial reliance on such clauses which are encouraged.

1 *Picken v. Minuteman Press Int'l, Inc.*, 854 F. Supp. 909, 911-12 (N.D. Ga. 1993) (contract clause
2 applicable to claims “hereunder” not limited to claims styled as breach of contract and covers
3 claims for fraud and deceit); *Warnaco Inc. v. VF Corp.*, 844 F. Supp. 940, 947-49 (S.D.N.Y.
4 1994) (finding tort claims covered by forum selection clause reading, “[a]ny dispute or issue
5 arising hereunder...”). Moreover, it simply makes no sense that the parties would have agreed
6 upon limits for breach of contract claims but not for tort claims dependent on that contract when
7 it is the tort claims that present a far greater risk of unexpected liability.

8 According to the Eighth Circuit, a court should not permit a party to use “[s]trategic or
9 artfully drawn pleadings . . . to circumvent an otherwise applicable” contractual provision. *See*
10 *Terra Int'l, Inc.*, 119 F.3d at 695 (refusing to elevate pleading form over substance of parties’
11 forum selection clause applicable to disputes arising under the contract); *see also Manetti-*
12 *Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (interpretation of clause
13 depends not on a party’s artful pleading but on whether “resolution of the claims relates to
14 interpretation of the contract”; forum selection clause applying to claims regarding
15 “interpretation” or “fulfillment” of contract applies to plaintiff’s tort claims); *Picken*, 854 F.
16 Supp. at 911-12 (mere recitation of a form of action should not dictate the enforceability of
17 contractual clause). That is precisely what Digital Envoy hopes to do here. Its efforts should be
18 rejected.

19 The limitation of liability provision caps Digital Envoy’s potential recovery in this case at
20 the amount Google paid to Digital Envoy under the contract. It is undisputed that Google paid
21 Digital Envoy \$308,600 under the contract. Wojcicki Decl. at ¶ 5. Accordingly, Google is
22 entitled to a partial summary judgment order barring Digital Envoy from recovering more than
23 \$308,600 in this action.

24 **B. Digital Envoy Cannot Establish the Requisite Causal Nexus Between**
25 **Google’s Supposed Misuse of Digital Envoy’s Trade Secrets and Any Loss It**
26 **Suffered or Gain that Google Supposedly Enjoyed.**

27 Limitations of liability aside, discovery has made clear that Digital Envoy cannot
28 establish claims for damages based upon either its own alleged losses, or Google’s supposed

1 unjust enrichment. In both cases, Digital Envoy’s claims are entirely speculative, and it cannot
2 prove any causal connection between Google’s supposed misappropriation and its damages.
3 Google is thus entitled to partial summary judgment barring Digital Envoy from seeking a
4 recovery under Section 3426.3(a) of California Civil Code.

5 Civil Code Section 3426.3(a) – part of California’s enactment of the Uniform Trade
6 Secrets Act (“USTA”) – provides:

7 A complainant may recover damages for the actual loss *caused by*
8 misappropriation. A complainant also may recover for the unjust enrichment
9 *caused by* misappropriation that is not taken into account in computing damages
10 for actual loss.

11 Cal. Civ. Code § 3426.3(a) (emphasis added). Thus, as part of its prima facie case, a party
12 claiming actual damages must show that its supposed damages were caused by the defendant’s
13 alleged trade secret misappropriation. Likewise, a party seeking to recover for a defendant’s
14 alleged unjust enrichment may only recover for enrichment caused by the alleged
15 misappropriation. *Id.*; see also *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658,
16 1666 (2003) (listing elements of UTSA claim, including damages, and noting that plaintiff bears
17 burden on each element of claim).

18 Courts that have had occasion to consider the UTSA’s causation requirement in the
19 summary judgment context have strictly enforced it. See, e.g., *Murphy Elecs., Inc. v. K.R.*
20 *Anderson Co.*, 102 Wash. App. 1029, No. 45172-3-I, 2000 WL 1279302 (Wash. App. Sept. 11,
21 2000) (granting summary judgment to trade secret defendant on damages where plaintiff failed
22 to show its lost sales were caused by defendant’s alleged misuse of customer list; plaintiff failed
23 to offer evidence from customers indicating they would have remained plaintiff’s customers but
24 for alleged misappropriation); *Computer Sciences Corp. v. Computer Assocs. Int’l, Inc.*, Nos. CV
25 98-1374 WMB SHX, CV 98-1440-WMB SHX, 1999 WL 675446 (C.D. Cal. Aug. 12, 1999)
26 (granting summary judgment to trade secret defendant on damages highlighting requirement that
27 a defendant’s wrongful acts be a “but for” cause of plaintiff’s damage and noting plaintiff failed
28 to show that defendant would not have undertaken a tender offer against which plaintiff had to

1 defend absent alleged misuse of supposed secrets); *Fedders Corp. v. Haier Am. Trading, LLC*,
2 No. 00 Civ. 5583(JSM), 2002 WL 519733 (S.D.N.Y. Apr. 14, 2002) (granting summary
3 judgment to trade secret defendant on damages where plaintiff failed to show that defendant's
4 alleged misuse of competitive bid information caused injury to plaintiff in process; plaintiff
5 offered only speculation as to what would have happened in the competitive process absent
6 supposed misappropriation).

7 These trade secret decisions are in accord with California law which precludes any
8 recovery of damages where a plaintiff fails to offer concrete, admissible evidence that a
9 defendant's alleged misconduct caused its injury. *See, e.g., Saelzler v. Advanced Group 400*, 25
10 Cal. 4th 763, 767, 775-76 (2001) (granting summary judgment to defendant where plaintiff failed
11 to present evidence that breach of duty of care caused plaintiff's harm). As the California
12 Supreme Court has made clear, summary judgment on a claim for damages is warranted where
13 the plaintiff's evidence is little more than guesswork "in the realm of mere speculation and
14 conjecture." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 490 (2001) (citation omitted); *see also Wiz*
15 *Tech., Inc. v. Coopers & Lybrand LLP*, 106 Cal. App. 4th 1, 4 (2003) (granting summary
16 judgment on damages claims where plaintiff failed to offer admissible evidence of causal
17 connection between defendant's allegedly improper resignation as plaintiff's accountants and a
18 host of claimed injuries).

19 Here, even assuming that Google was not licensed to use Digital Envoy's data in
20 connection with its AdSense program, and even assuming such use constitutes trade secret
21 misappropriation, Digital Envoy cannot show that such use caused it any actual loss or that
22 Google was unjustly enriched because of such use.

23 **1. Digital Envoy Cannot Establish Any Actual Loss Caused by Google's**
24 **Supposed Misappropriation**

25 In its initial disclosures, Digital Envoy claimed: "Google's wrongful actions have caused
26 Digital Envoy to suffer actual damages, including lost income, licensing and business
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1 opportunities.”⁸ Kramer Decl., Ex. H (Digital Envoy, Inc.’s Rule 26(a)(1) Disclosures) at 7.
2 Tellingly, Digital Envoy acknowledged the speculative nature of its claim even then. *Id.* (“To
3 the extent sufficient specificity of this category of damages cannot be achieved, Digital Envoy
4 will claim recovery [through disgorgement].”) Digital Envoy has since had ample opportunity to
5 provide evidence in support of its actual damages theory. But as the Court has already
6 recognized, Digital Envoy has offered nothing to suggest that its theory is anything other than
7 speculation:

8 Digital has failed to establish any link between its claims that Google exceeded
9 the scope of its License and discovery regarding Google’s agreements, revenue,
10 negotiations, and communications with Google Network members. Rather,
11 Digital must establish a causal relationship between such members and itself, such
12 as an allegation that a Google Network member told Digital that, but for Google’s
13 inclusion of geo-targeting technology in its package, that member would have
14 licensed the technology from Digital

15 Court Order, July 15, 2005, at 6.

16 Not only did Digital Envoy fail to establish the requisite causal nexus in prior
17 proceedings, it refused to do so in response to Google’s discovery requests. Specifically, Google
18 asked Digital Envoy to identify any publisher that it believed would have licensed Digital
19 Envoy’s data but for Google’s supposed misuse of the data. Kramer Decl., Ex. I (Response to
20 Interrogatory No. 17).⁹ While Digital Envoy is surely in the best position to know of any lost
21 business, Digital Envoy did not identify a single publisher in response to the interrogatory.
22 Having refused to supply the information as requested in discovery, Digital Envoy may not now

23 ⁸ According to Digital Envoy, “potential customers of Digital Envoy ... instead entered into
24 a sharing relationship with Google.” *See* Digital Envoy’s Motion to Compel, April 29, 2005, at
25 11. It claims that Google “[ate] Digital Envoy’s market....” *Id.* at 9. As Google has previously
26 noted, Digital Envoy’s actual damages claim is highly suspect from the start. Even before it
27 licensed Google, Digital Envoy licensed the then-leading Internet advertising network in the
28 country, Advertising.com, to use its data to run advertisements across a network of publisher
sites - - precisely the use it complains about in this case - - for a flat fee of a few thousand dollars
a month. Advertising.com and a host of other Digital Envoy licensees have been and remain free
to use Digital Envoy’s data to display advertisements on publishers’ websites and thereby “eat”
the supposed market in which Digital Envoy claims to have suffered loss.

⁹ Having failed to identify any such publisher in response to Google’s first interrogatory,
Digital Envoy then elected not to answer Google’s next interrogatory asking it to explain the
basis for any contention that a publisher would have licensed its data. Kramer Decl., Ex. I
(Response to Interrogatory No. 18).

1 come forward with the evidence in the hopes of forestalling summary judgment. Fed. R. Civ. P.
2 37(c)(1) (“[a] party that without substantial justification fails to disclose information required by
3 Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is
4 not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a
5 motion any witness or information not so disclosed.”); *see also Cambridge Elecs. Corp. v. MGA*
6 *Elecs., Inc.*, 227 F.R.D. 313, 323-34 (C.D. Cal. 2004) (plaintiff that failed to supply information
7 in responses may not rely on undisclosed information to raise a triable issue of fact in opposition
8 to summary judgment); *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100, 1118 (C.D. Cal. 2002)
9 (same).

10 It is not enough for Digital Envoy to assert incessantly that publishers participating in
11 Google’s AdSense program (*i.e.* Google’s network) are Digital Envoy’s “potential customers.”
12 Rather, to establish the causation required to recover for its supposed actual loss, Digital Envoy
13 must show that but for Google’s alleged misappropriation these “potential customers” would
14 have become actual customers for Digital Envoy. Given that Digital Envoy has not shown (and
15 indeed, now cannot show) that a single publisher would have become a Digital Envoy licensee
16 but for Google’s alleged misappropriation, Digital Envoy’s causation theory fails as a matter of
17 law.¹⁰ Accordingly, Google is entitled to partial summary judgment with respect to Digital
18 Envoy’s claim for actual damages.

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22 ¹⁰ In order to establish a causal connection that would be anything other than speculation,
23 Digital Envoy would have to show that a website publisher cared enough about receiving geo-
24 targeting ads to have acted differently if Google had been unable to supply them. Digital Envoy
25 has made no such showing. Accordingly, there is no reason to believe that publishers would
26 have sought out an alternative means of geo-targeting advertisements that appeared on their sites.
27 Further, Digital Envoy has failed to show that any publisher that believed geo-targeting of
28 advertisements on its site was important would have sought geo-targeting capability from Digital
Envoy directly instead of using a host of other options, most notably alternative advertising
networks who offer geo-targeting. Given the presence of other advertising networks offering
geo-targeting, there is simply no way Digital Envoy could show that a website publisher would
have itself become a Digital Envoy licensee if it were unable to obtain geo-targeted
advertisements from Google in the AdSense programs.

1 **2. Digital Envoy Cannot Establish Any Unjust Enrichment Caused by**
2 **Google’s Supposed Misappropriation**

3 Digital Envoy’s unjust enrichment theory fares no better. According to Digital Envoy,
4 Google unjustly earned profits by making unlicensed use of Digital Envoy’s data to enhance the
5 geotargeting capabilities offered to advertisers in Google’s AdSense program. Again, Digital
6 Envoy must offer evidence demonstrating causation – that but for Google’s allegedly unlicensed
7 use of the data, Google would not have earned the profits it did from its AdSense program. Cal.
8 Civ. Code § 3426.3(a); *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612 (1992). Again,
9 Digital Envoy cannot possibly make that showing.

10 **a. Google Did Not Earn Any Direct Revenue from Digital**
11 **Envoy’s Data.**

12 Google does not and has never charged advertisers for the ability to target their messages
13 to a particular geographic location. Wojcicki Decl. at ¶ 5. Likewise it has never charged
14 advertisers for (or allowed advertisers to have) use of or access to Digital Envoy’s data. *Id.*;
15 Rose Decl. at ¶¶ 8-9. Accordingly, Google has not earned any revenue that can be directly
16 attributed to the use of Digital Envoy’s data in its AdSense program.

17 **b. Digital Envoy Cannot Trace Any of Google’s AdSense Revenue**
18 **to Google’s Use of Digital Envoy’s Data.**

19 Because it cannot establish any direct connection to any portion of Google’s AdSense
20 profits, Digital Envoy claims that Google would have earned less from AdSense advertisers if
21 Google had not enhanced its geo-targeting capabilities using Digital Envoy’s data. But this
22 theory, like the others, is nothing but pure speculation. Digital Envoy has not made and cannot
23 make a showing that Google would have earned less money but for the use of Digital Envoy’s
24 data as part of the geo-targeting process in AdSense.

25 In discovery, Google specifically asked Digital Envoy to identify any advertiser that
26 would not have advertised with Google or would have paid Google less but for Google’s use of
27 the data in its AdSense program. Digital Envoy could not identify a single entity and has offered
28

1 no evidence that an advertiser would have acted differently. Kramer Decl., Ex. I (Response to
2 Interrogatory Nos. 11-14).¹¹

3 As noted, Google earns revenue from its AdSense program when its ads are displayed on
4 third party sites and then clicked on by end users. Thus, to show some connection between use
5 of its data and revenues earned by Google, Digital Envoy would have to show, at the very least,
6 that its data was used to select the particular ads that Google displayed to end users. But **Google**
7 **never used its own geo-targeting capabilities or Digital Envoy's data to select the ads it**
8 **displayed. Instead, it used geo-targeting and Digital Envoy's data solely to exclude**
9 **advertisements from the selection process.** Rose Decl. at ¶ 9. The distinction is critical. It
10 means that Digital Envoy could never show that Google's use of the data caused the display of
11 an advertisement upon which a user clicked to generate revenue for Google. The best that
12 Digital Envoy could ever hope to show is that but for the use of Digital Envoy's data to exclude
13 ads from possible selection, Google would, as a theoretical matter, have had a larger group of ads
14 to select from and thus **might** have displayed a different advertisement. *Id.* There is simply no
15 way, however, for Digital Envoy to show that there would have been any difference in the ads
16 that Google actually selected to display (much less the extent of any difference) had Google not
17 used Digital Envoy's data. *Id.* For all anyone knows, Google's use of the data had no impact at
18 all on the selection process - - the ads selected for display, the clicks on those ads, and the
19 revenues generated from them could have been the same without use of Digital Envoy's data.

20
21 ¹¹ Further, Digital Envoy has repeatedly conceded that Google was licensed to use Digital
22 Envoy's data in the process of selecting advertising messages in its AdWords program (for
23 display on Google's own web sites). During the relevant time period, the AdWords program was
24 significantly larger than AdSense as every advertiser necessarily participated in it (in contrast to
25 their selective participation in AdSense). Declaration of David DiNucci in Support of Google's
26 Motion for Summary Judgment (filed 6/1/2005) at ¶ 2. Under the circumstances, it would do
27 Digital Envoy no good to show that an advertiser was attracted to Google because of its
28 geotargeting capabilities. To the extent an advertiser even cared about geotargeting, Google was
perfectly entitled to attract such advertisers to the vastly more prominent AdWords program.
What Digital Envoy would have to show in this case is that an advertiser participated in the
allegedly unlicensed AdSense program (and would not otherwise have) *solely* because Google
offered geotargeting using Digital Envoy's data in AdSense. Digital Envoy has not and could
not possibly make such a showing.

1 As a result, Digital Envoy cannot show any causal connection between Google’s AdSense
2 revenues and its use of Digital Envoy’s data to enhance its geotargeting capabilities.

3 While the analysis need go no further, the causation problems in Digital Envoy’s unjust
4 enrichment theory are actually even more insurmountable. Even if one were to assume that
5 absent use of Digital Envoy’s data, Google might have displayed a different advertisement to a
6 user, there is simply no way to know whether or how often the user would have clicked on that
7 different advertisement so as to generate revenue for Google. Again, Digital Envoy cannot show
8 what might have happened in this alternate universe.¹² It thus cannot establish a “but for” causal
9 connection between Google’s use of Digital Envoy’s data and Google’s AdSense revenues.
10 Accordingly, Digital Envoy’s unjust enrichment claim fails as a matter of law.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Google respectfully requests that the Court grant it partial
13 summary judgment barring Digital Envoy from recovering damages from Google in this action, or
14 in the alternative limiting any such recovery to \$308,600, the amount paid by Google to Digital
15 Envoy under the License Agreement. Google further requests that the Court grant partial
16 summary judgment barring Digital Envoy from seeking damages for Google’s alleged trade secret
17 misappropriation under California Civil Code Section 3426.3(a).

18 Respectfully Submitted,

19 Dated: August 17, 2005

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

21 By: /s/ David H. Kramer
David H. Kramer

22 Attorneys for Defendant/Counterclaimant
23 Google Inc.

24 _____
25 ¹² It is quite possible that absent use of Digital Envoy’s data to *exclude* ads from the
26 selection process, Google would have been better off. Use of the data conceivably excluded
27 advertisers from the process who had offered Google a greater amount per click than that offered
28 for the ad that Google actually displayed. If such ads had been selected for display instead of
being excluded, clicks on those ads would have made Google more money than Google actually
made. Rose Decl. at ¶ 9.