

SAN JOSE, CALIFORNIA

DECEMBER 1, 2008

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER 05-3649,
CLRB HANSON INDUSTRIES LLC, ET AL., VERSUS GOOGLE,
INC.

ON FOR DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT. TEN MINUTES EACH SIDE.

COUNSEL, COME FORWARD AND STATE YOUR
APPEARANCES.

THE COURT: DON'T BE SHY. TELL ME WHO
YOU ARE.

MR. SUSMAN: YOUR HONOR, I'M STEVE SUSMAN
OF SUSAN GODFREY ON BEHALF OF THE PLAINTIFF CLASS.

THE COURT: MR. SUSMAN.

MR. BIDERMAN: GOOD MORNING, YOUR HONOR.
DAVID BIDERMAN ON BEHALF OF GOOGLE.

THE COURT: MR. BIDERMAN. VERY WELL.
AND SO THIS IS YOUR MOTION, MR. BIDERMAN?

MR. BIDERMAN: IT IS, YOUR HONOR.

THE COURT: ALL RIGHT. DO YOU WANT TO
SPEAK FURTHER TO IT?

MR. BIDERMAN: I WOULD, AND I WOULD LIKE
TO RESERVE SOME TIME FOR REBUTTAL.

1 THE COURT: ALL RIGHT. WE'VE ALLOWED TEN
2 MINUTES FOR EACH SIDE FOR THIS. SO HOW MUCH TIME
3 DO YOU WANT FOR YOUR REBUTTAL?

4 MR. BIDERMAN: THREE MINUTES IS FINE,
5 YOUR HONOR.

6 THE COURT: GO AHEAD.

7 MR. BIDERMAN: YOUR HONOR, BASICALLY THE
8 PLAINTIFFS HAVE TRIED, I THINK, TO SORT OF CLOUD
9 THE ISSUE. BUT THIS CASE, THIS MOTION CAN COME TO
10 THREE VERY SIMPLE POINTS, AND I'M ADDRESSING THE
11 120 PERCENT RULE ISSUE.

12 THE COURT: RIGHT.

13 MR. BIDERMAN: BASICALLY THE COURT HAS
14 RULED ON MAY 14TH, 2008 THAT PLAINTIFFS AND GOOGLE
15 ENTERED INTO A CONTRACT WHICH SPECIFICALLY ALLOWED
16 GOOGLE TO CHARGE UP TO 120 PERCENT OF A DAILY
17 BUDGET. THAT'S POINT NUMBER ONE. SO THERE'S A
18 CONTRACT CLAIM.

19 THE ONLY CLAIM THAT IS LEFT IS A 17200
20 CLAIM FOR WHICH THERE NEEDS TO BE SOME TYPE OF
21 INJURY AFTER PROP 64. THAT'S POINT NUMBER ONE.

22 POINT NUMBER TWO IS WE SUBMITTED EVIDENCE
23 THAT, A, WE NEVER CHARGED THE PLAINTIFFS MORE THAN
24 120 PERCENT OF THEIR DAILY BUDGET; AND, B, THAT WE
25 NEVER CHARGED THE PLAINTIFFS MORE THAN THEIR DAILY

1 BUDGET TIMES EITHER THE NUMBER OF DAYS IN A MONTH
2 OR THE NUMBER OF DAYS IN A BILLING PERIOD, IF THE
3 BILLING PERIOD WERE SHORTER THAN A MONTH. THAT'S
4 THE SECOND POINT. SO WE HAVE SET FORTH OUR
5 EVIDENCE.

6 THE THIRD POINT IS THAT IN RESPONSE TO
7 THAT EVIDENCE, YOUR HONOR, WE HAVE SEEN NOTHING
8 FROM THE PLAINTIFFS, NOTHING, NO NEW DECLARATIONS,
9 NO NEW DEPOSITION TESTIMONY, NO EXCERPTS AT ALL
10 THAT HAVE SHOWN THAT THEY HAVE SUSTAINED ANY
11 COGNIZABLE INDEPENDENT INJURY AS REQUIRED UNDER
12 17204 PROPOSITION 64 THAT WOULD SHOW THAT THEY WERE
13 SOMEHOW DAMAGED BY OUR DELIVERY OF CLICKS WHICH ARE
14 ESSENTIALLY VISITORS TO THEIR SITE OVER THEIR DAILY
15 BUDGET ON ONE DAY VERSUS ANOTHER DAY.

16 AND, YOUR HONOR, I HAVE GIVEN THIS TO
17 COUNSEL. I JUST USE THIS AS AN ILLUSTRATION.

18 HERE'S -- THIS WOULD BE AN EXAMPLE OF A
19 \$10 DAILY BUDGET WITH A SEVEN DAY BILLING PERIOD,
20 JUST TO KEEP THINGS SIMPLE.

21 PLAINTIFFS ACKNOWLEDGE, AND THE COURT HAS
22 AGREED, THAT THEY WOULD AGREE THAT THEY WOULD TAKE
23 \$10 OF CLICKS, \$10 WORTH OF VISITORS TO THEIR SITE
24 ON ANY GIVEN DAY AND THEY WOULD AGREE THAT AS LONG
25 AS WE GOT TO \$10 THEY WOULD PAY THAT AMOUNT. THE

1 TOTAL IS \$70 WORTH OF CLICKS.

2 WHAT WE DO AND WHAT WE TELL THE
3 PLAINTIFFS WE DO AND WHAT THE CONTRACT SAYS WE CAN
4 DO IS BECAUSE WE CAN'T GUARANTEE THAT YOU'RE GOING
5 TO GET VISITORS ON YOUR SITE THROUGH YOUR
6 ADVERTISEMENTS ON A SPECIFIC DAY, THAT WE WILL
7 AVERAGE OUT THAT AMOUNT SUCH THAT WE'LL TAKE YOU UP
8 TO ABOVE 120 PERCENT OF YOUR DAILY BUDGET ON A
9 GIVEN DAY.

10 SO, FOR EXAMPLE, HERE IF THEY GOT \$8
11 WORTH OF CLICKS, WE TELL THEM THAT WE CAN TAKE THEM
12 UP TO \$12 WORTH OF CLICKS THE NEXT DAY OR \$8, \$12,
13 ET CETERA.

14 AND, YOUR HONOR, WHAT THE PLAINTIFFS HAVE
15 NOT DONE, THEY HAVE NOT SHOWN, DESPITE THERE WAS AN
16 INVITATION IN FOOTNOTE 8 TO YOUR HONOR'S PRIOR
17 RULING ON MAY 14TH, 2008 WHERE YOU SAID IF THEY
18 HAVE OVERCAPACITY PROBLEMS OR IF SOMEHOW THEY CAN'T
19 MAKE USE OF THOSE CLICKS, THAT COULD BE A
20 COGNIZABLE INJURY. THAT THEY HAVE NOT DONE THAT.

21 THEY HAVE NOT INTRODUCED ANY EVIDENCE
22 WHATSOEVER THAT GIVEN THESE EXTRA CLICKS ON A
23 TUESDAY SOMEHOW CAUSED THEM ANY DAMAGE INSTEAD OF
24 GETTING THOSE CLICKS ON A MONDAY. NO EVIDENCE
25 WHATSOEVER.

1 THEY HAVE PUT FORTH NOTHING THAT WOULD
2 SUGGEST THAT THESE EXTRA CLICKS WERE SOMEHOW LESS
3 VALUABLE THAN THE CLICKS THAT THEY RECEIVED ON AN
4 EARLIER DAY. THEY SUBMITTED NO EVIDENCE THAT THEY
5 DIDN'T ACTUALLY RECEIVE VISITORS TO THE SITE. NO
6 EVIDENCE, YOUR HONOR, NONE WHATSOEVER THAT SUGGESTS
7 THAT THEY DIDN'T ACTUALLY GET BENEFITS FROM THOSE
8 CLICKS BECAUSE THEY GOT VISITORS TO THE SITE.

9 SO THIS IS WHAT THEY HAVE DONE. THEY
10 HAVE NOT ALLEGED THAT THERE HAS BEEN ANY DAMAGE.
11 AN EXAMPLE WOULD BE SUPPOSE IT'S 11:59 P.M. ON A
12 MONDAY, THEY GET \$8 WORTH OF CLICKS. TUESDAY,
13 12:01 THEY GET \$2 WORTH OF CLICKS. THEY HAVEN'T
14 SHOWN ANY DAMAGE FROM THAT BASICALLY SPREADING
15 THOSE CLICKS OVER TIME WHATSOEVER.

16 INSTEAD, YOUR HONOR, WHAT THE PLAINTIFFS
17 HAVE SAID IS THAT THEY BASICALLY SAID THIS IS WHAT
18 THEY WANT BECAUSE THEY WANT TO NEVER GO OVER THEIR
19 DAILY BUDGET. BUT THE TRUTH IS, YOUR HONOR, IS
20 THAT THIS IS, IN FACT, WHAT PLAINTIFF STERN
21 TESTIFIED IS THAT WHAT PLAINTIFFS WANT IS THIS:
22 THEY WANT THE EXTRA CLICKS, THEY TAKE THE EXTRA
23 CLICKS, THEY BENEFIT FROM THE EXTRA CLICKS, BUT
24 WHAT THEY WANT TO DO IS ESSENTIALLY GET SOMETHING
25 FOR NOTHING AND THEY WANT TO PAY FOR THIS THE LOWER

1 AMOUNT. AND THAT'S WHAT THEY'RE TRYING TO DO IN
2 THE LAWSUIT.

3 AND, YOUR HONOR, UNDER PROPOSITION 64
4 THEY HAVE TO HAVE SOME KIND OF AN INDEPENDENT
5 INJURY, AND THEY HAVE NOT ALLEGED ANY.

6 AGAIN, THE COURT INVITED THEM.

7 THE COURT: LET ME SLOW YOU DOWN.

8 MR. BIDERMAN: SURE.

9 THE COURT: AS TO THE ORANGE HYPOTHETICAL
10 LET'S ASSUME THAT IT IS WHAT THE PLAINTIFFS WANT,
11 WHAT IS THE DIFFERENCE IN THE BILLING BETWEEN THE
12 WHAT LOOKS LIKE PURPLE, OR IS THAT BLACK? I CAN'T
13 TELL.

14 MR. BIDERMAN: IT'S BLUE, YOUR HONOR.

15 THE COURT: WHAT IS THE DIFFERENCE
16 BETWEEN THE BLUE HYPOTHETICAL AND THE ORANGE
17 HYPOTHETICAL WITH RESPECT TO WHAT IS BILLED?

18 MR. BIDERMAN: THIS IS A HYPOTHETICAL BUT
19 IN THIS EXAMPLE IT WOULD BE 65 BECAUSE IT WOULD
20 NEVER GO OVER THEIR DAILY BUDGET.

21 AND THE POINT IS, YOUR HONOR --

22 THE COURT: WHY ARE THEY BILLED MORE IN
23 THE BLUE HYPOTHETICAL?

24 MR. BIDERMAN: BECAUSE BLUE IS WHAT WE
25 ACTUALLY DO, YOUR HONOR.

1 THE COURT: I KNOW. BUT WHY DO THEY BILL
2 MORE? WHY ARE THEY BILLED IN EXCESS OF THEIR DAILY
3 BUDGET?

4 MR. BIDERMAN: BECAUSE AS THE COURT HAS
5 RULED, WE'RE ALLOWED TO TAKE THEM UP TO 20 PERCENT
6 ABOVE THEIR DAILY BUDGET ON A GIVEN DAY. SO WE
7 WILL LOOK AT THIS. THEY HAVE AGREED THEY WILL PAY
8 \$70. THEY HAVE \$70 WORTH OF CLICKS HERE, AND THEY
9 HAVE \$70 WORTH OF CLICKS HERE. THEY GOT THE \$70
10 WORTH OF CLICKS. THEY GOT THE BENEFIT.

11 THE ONLY BENEFIT IS THAT THE CLICKS WERE
12 NOT SPREAD OUT, BUT WE CAN'T SPREAD THEM OUT
13 BECAUSE WE CAN'T CONTROL WHETHER SOMEBODY IS GOING
14 TO VISIT THEIR SITE.

15 THE COURT: BUT THE ORANGE HYPOTHETICAL
16 IS POSSIBLE.

17 MR. BIDERMAN: YOUR HONOR, THE ORANGE
18 HYPOTHETICAL IS POSSIBLE TO DO, BUT THAT'S NOT THE
19 WAY WE DO IT. IT'S NOT THE WAY WE ARRANGE TO DO
20 IT, AND IT'S NOT THE WAY THE AGREEMENT PROVIDES.

21 AND OUR POINT HERE, FOR PURPOSES OF THIS
22 MOTION, IS THAT IF THEY'RE TO SAY THAT THE ORANGE
23 HYPOTHETICAL IS WHAT THEY WANT, THEY HAVE TO SHOW
24 UNDER PROPOSITION 64 THAT THEY WERE SOMEHOW INJURED
25 BY RECEIVING THESE CLICKS ON A TUESDAY RATHER THAN

1 A MONDAY.

2 IN OTHER WORDS, THEY HAVE GOT TO SAY,
3 IT'S -- PROPOSITION 64 SAYS, ONE, THEY HAVE TO SHOW
4 AN INJURY AND IN FACT; AND, TWO, THAT THEY LOST
5 MONEY OR PROPERTY.

6 AN INJURY IN FACT MEANS SOMETHING THAT IS
7 A COGNIZABLE INJURY. IT'S NOT JUST A CLAIM WHICH
8 THEY SET FORTH IS THAT WE DIDN'T WANT THOSE CLICKS.
9 THAT'S NOT ENOUGH. THAT COULD BE A CONTRACTUAL
10 REMEDY, BUT AS THE COURT SUGGESTED IN FOOTNOTE A,
11 THEY COULD COME FORTH AND TRY TO SAY, YOU KNOW,
12 GEE, WE COULDN'T ACCEPT THESE EXTRA CLICKS THAT
13 DAY. THE VISITORS WEREN'T AS GOOD. THEY HAVE
14 CAPACITY PROBLEMS. WE COULDN'T SHIP THAT DAY.
15 THEY HAVEN'T PUT FORTH ANY EVIDENCE OF THAT.

16 IN FACT, YOUR HONOR, THE EVIDENCE THAT
17 THEY PUT FORTH IS WHEN THEY DID HAVE CAPACITY
18 PROBLEMS, THEY WOULD PAUSE AND THEY WOULD JUST SHUT
19 DOWN THE SITE ENTIRELY AND PAUSING IS STILL PART OF
20 THE CASE BUT NOT PART OF THIS MOTION.

21 THE COURT: WELL, PART OF WHAT I HAVE TO
22 KEEP TRACK OF AS I LISTEN TO BOTH OF YOU TODAY, AND
23 I'LL GIVE YOU A MOMENT TO RESPOND, IS THAT THIS IS
24 A MOTION THAT CHALLENGES THE STANDING OF THE
25 CLAIMS.

1 MR. BIDERMAN: EXACTLY.

2 THE COURT: IT IS NOT A MOTION WHERE I'M
3 NOW ADJUDICATING WHETHER OR NOT THERE IS A REMEDY
4 THAT SHOULD BE AWARDED AT THE END OF THE EVIDENCE
5 IN THE CASE.

6 AND SO THE QUESTION OF STANDING IS, IS
7 THERE A COGNIZABLE CLAIM UNDER CALIFORNIA LAW WHICH
8 REQUIRES INJURY?

9 AS LONG AS IT APPEARS TO THE COURT THAT
10 WHAT GOOGLE CALLS A DAILY BUDGET IS REALLY A
11 PERIODIC BUDGET AND NOT A DAILY BUDGET, IT SEEMS TO
12 ME THAT I HAVE TO AT LEAST THEORETICALLY FIND THAT
13 THERE IS A CLAIM THAT CAN BE STATED, WHETHER OR NOT
14 THERE ARE PEOPLE OUT THERE WHO FIT THAT CATEGORY IS
15 A DIFFERENT MATTER, BUT A CLAIM CAN BE STATED
16 BECAUSE ONE WHO SIGNS UP FOR A DAILY BUDGET IS
17 DIFFERENT THAN ONE WHO SIGNS UP FOR A MONTHLY
18 BUDGET OR A PERIODIC BUDGET.

19 AND ALTHOUGH I AGREE WITH YOU THAT IN THE
20 WORLD OF ELECTRONIC ADVERTISING IT WOULD BE
21 SURPRISING THAT THERE ARE INDIVIDUALS WHO WOULD
22 COMPLAIN ABOUT RECEIVING MORE ADVERTISING THAN THEY
23 BUDGETED AS LONG AS THEY ARE BILLED THE SAME.

24 ON A DAILY BASIS, THEY ARE INDEED NOT
25 ONLY RECEIVING MORE THAN THEY BUDGETED BUT THEY ARE

1 BEING BILLED FOR MORE THAN THEY BUDGETED AND THAT
2 IS THE REASON THAT I HAVE LEFT THIS ONE ASPECT OF
3 IT.

4 IF YOU HAVE IT ON A CONTRACT BASIS, THERE
5 IS A LIMITED GROUP THAT I HAVE EVEN ALLOWED ON A
6 CONTRACT BASIS BUT UNDER 17200 THE PROBLEM IS THAT
7 GOOGLE MAINTAINS AND CONTINUES TO MAINTAIN THAT
8 IT'S PERMISSIBLE TO CHARACTERIZE THIS AS A DAILY
9 BUDGET.

10 BUT EVERY PRESENTATION I HAVE HEARD
11 PRESENTS IT'S A PERIODIC BUDGET.

12 MR. BIDERMAN: CORRECT, YOUR HONOR.

13 THE COURT: ALL RIGHT.

14 MR. BIDERMAN: BUT THE POINT HERE IS THAT
15 THE PLAINTIFFS UNDER 17200, IT IS A STANDING
16 MOTION, THEY REALLY HAVE TO PROVE SOME KIND OF AN
17 INJURY, AND UNDER RULE 56 THEY ARE SPECIFICALLY
18 REQUIRED TO COME FORTH WITH SOME EVIDENCE OF SOME
19 INJURY.

20 THE COURT HAS SUGGESTED WAYS THAT THEY
21 COULD BE INJURED. THEY HAVE NOT COME FORTH WITH
22 THAT EVIDENCE.

23 I WOULD REFER THE COURT TO THE CASE AS
24 THAT WE CITED, THE CELLCO CASE WHERE ESSENTIALLY
25 A --

1 THE COURT: BUT ISN'T THAT MORE
2 APPROPRIATELY A MOTION FOR SUMMARY JUDGMENT ON
3 SAYING THAT THERE IS LIABILITY BUT NO DAMAGES?

4 I MEAN, IF YOU BRING IT AS A STANDING
5 ISSUE, I TAKE A DIFFERENT LOOK AT IT THAN I DO IF
6 YOU'RE BRINGING IT AS A MOTION WHERE I'M TRYING TO
7 ADJUDICATE THE CASE.

8 MR. BIDERMAN: WE'RE NOT ASKING YOU TO
9 ADJUDICATE THE CASE. WE'RE JUST SAYING THAT THEY
10 HAVE TO ALLEGE AND PROVE AN INJURY TO HAVE STANDING
11 UNDER PROPOSITION 64. THEY DON'T HAVE STANDING
12 UNDER PROPOSITION 64 BECAUSE THEY HAVE NOT SET
13 FORTH AS REQUIRED UNDER RULE 56(E)(2) SPECIFIC
14 FACTS SHOWING THAT, IN FACT, THEY WERE INJURED.

15 THE COURT: BUT IF THEY BUDGET \$10 AND I
16 KNOW THAT THIS COULD BE A THOUSAND DOLLARS.

17 MR. BIDERMAN: SURE. ABSOLUTELY.

18 THE COURT: OR A HUNDRED THOUSAND
19 DOLLARS. BUT IF THEY BUDGET \$10 AND YOU ADMIT THAT
20 ON A GIVEN DAY THAT THEY BUDGET \$10, THEY WILL BE
21 CHARGED MORE THAN \$10, THEN THEY HAVE STATED AN
22 INJURY.

23 THE VERY FACT THAT YOU WILL CHARGE THEM
24 MORE -- IN OTHER WORDS, WHY SHOULD GOOGLE BE THE
25 ONE TO DETERMINE THAT ON THE SECOND DAY THEY REALLY

1 OUGHT TO EXCEED THEIR BUDGET?

2 MR. BIDERMAN: YOUR HONOR, ONE, BECAUSE
3 YOUR HONOR HAS RULED THAT WE CAN AS A MATTER OF
4 CONTRACT.

5 THE COURT: RIGHT, BUT I'M NOT TALKING
6 CONTRACT.

7 MR. BIDERMAN: I UNDERSTAND. I
8 UNDERSTAND. BUT, TWO, I REALLY THINK THE LAW IS
9 FAIRLY CLEAR UNDER PROP 64. THEY HAVE TO COME
10 FORWARD WITH SOMETHING THAT SAYS THAT I WAS HURT BY
11 THOSE EXTRA \$2 ON TUESDAY, AND THEY HAVEN'T DONE
12 THAT, YOUR HONOR. BUT WE REQUEST THAT THE COURT
13 CONSIDER THAT, LOOKING AT THE PROP 64 CASE THAT WE
14 CITED, CELLCO, CHAVEZ.

15 THE COURT: LET ME TRY THIS ONE MORE
16 TIME.

17 MR. BIDERMAN: SURE.

18 THE COURT: WHY IS IT NECESSARY TO SAY
19 MORE THAN THE FACT THAT I HAVE BEEN CHARGED MORE
20 THAN I BUDGETED? TO BE HURT MEANS TO BE -- I SET A
21 BUDGET AND THAT'S SOMETHING I WANT TO MAINTAIN AND
22 THE REPRESENTATION IS MADE THAT I CAN SET IT ON A
23 DAILY BASIS, INDEED I CAN CHANGE IT DURING THE
24 COURSE OF THE DAY.

25 MR. BIDERMAN: SURE.

1 THE COURT: BUT I CAN SET IT ON A DAILY
2 BASIS.

3 AND THE ADMISSION ON THE PART OF GOOGLE
4 IS THAT WE WILL NOT HONOR THAT BUDGET. WE WILL
5 CHARGE YOU MORE THAN ON THE DAY.

6 MR. BIDERMAN: AND WE TELL THEM.

7 THE COURT: WHY ISN'T THAT PROOF OF HARM?

8 MR. BIDERMAN: BECAUSE JUST SAYING THAT
9 YOU DIDN'T WANT THOSE CLICKS AND YOU DIDN'T WANT
10 THOSE VISITORS ISN'T PROOF OF HARM JUST AS IN
11 CHAVEZ THE PLAINTIFF SAID, "I THOUGHT THE SOFT
12 DRINKS WERE MADE IN SANTE FE. I DIDN'T WANT THEM
13 BECAUSE THEY WERE MADE IN SANTE FE." AND THE COURT
14 SAID, "YEAH, BUT THE SOFT DRINKS ARE JUST AS
15 VALUABLE EVEN THOUGH THEY'RE MADE IN CALIFORNIA."

16 HERE, WHAT IT SHOULD HAVE DONE AND WHAT
17 THEY COULD HAVE DONE AND SAID, LISTEN, ON THIS
18 SECOND DAY I JUST HAD TOO MANY VISITORS TO MY SITE.
19 I COULDN'T ACCEPT THOSE CLICKS. THOSE CLICKS
20 WEREN'T VALUABLE TO ME. I COULDN'T SHIP.
21 SOMETHING SPECIFIC THAT SAYS, OR THESE VISITORS
22 JUST WEREN'T AS VALUABLE. SOMETHING THAT SAYS AND
23 THE COURT REFERRED TO THAT IN FOOTNOTE 8.
24 BASICALLY THE COURT SAID, IF THERE'S A PROBLEM WITH
25 CAPACITY, AND I CAN'T USE THOSE CLICKS, FINE.

1 BUT ONCE WE -- YOUR HONOR, THE BURDEN IS
2 ON THEM TO PROVE STANDING, AND THEY HAVE TO COME
3 FORTH WITH MORE THAN JUST A BALD STATEMENT THAT
4 THEY DIDN'T WANT THOSE CLICKS.

5 THE COURT: LET ME TURN TO YOUR OPPONENT
6 AND SAVE THE REST OF YOUR TIME FOR REBUTTAL.

7 MR. BIDERMAN: THANK YOU.

8 THE COURT: DO YOU HAVE A SMALL VERSION
9 OF YOUR CHART THERE?

10 MR. BIDERMAN: I DO.

11 THE COURT: THANK YOU.

12 MR. BIDERMAN: LET ME APPROACH, YOUR
13 HONOR.

14 THE COURT: MR. SUSMAN.

15 MR. SUSMAN: THANK YOU, YOUR HONOR. YOUR
16 HONOR, GOOGLE'S THIRD IN AN APPARENTLY NEVER ENDING
17 SUCCESSFUL PARTIAL SUMMARY JUDGMENT MOTION SERIES
18 IS AN ATTEMPT TO MAKE IT IMPOSSIBLE TO CERTIFY ANY
19 CLASS OR TO SO LIMIT THE CLAIMS OF THE NAMED
20 PLAINTIFFS THAT GOOGLE WILL BE ABLE TO SET UP THE
21 ARGUMENT THAT THEY LACK THE ABILITY TO REPRESENT
22 THE CLASS EVEN THOUGH THEY HAVE SIMILAR CLAIMS,
23 THEY'RE NOT IDENTICAL CLAIMS.

24 FOR THE PURPOSE OF THE UCL AND FAL
25 CLAIMS, PLAINTIFFS HAVE SUFFERED INJURY, IN FACT,

1 YOUR HONOR, BECAUSE THEY HAVE LOST MONEY. THEY
2 WERE CHARGED AND PAID FOR CLICKS THAT THEY DID NOT
3 SEEK, EXPECT, OR REQUEST.

4 GOOGLE'S CLAIM THAT THIS IS NOT ENOUGH IS
5 BASED NOT ON FOOTNOTE 8 BUT FOOTNOTE 10 OF THE
6 COURT'S OPINION IN DENYING GOOGLE'S SECOND MOTION
7 FOR SUMMARY JUDGMENT.

8 THE COURT IN THAT SAID THREE THINGS:

9 FIRST WHETHER THERE WAS AN ACTUAL INJURY
10 IS NOT DIRECTLY AT ISSUE IN THE PARTIES' BRIEFS;

11 SECOND, THE COURT SAID THAT THERE ARE
12 TRIABLE ISSUES OF FACT AS TO WHETHER A CUSTOMER
13 WOULD SUFFER ACTUAL INJURY;

14 THIRD, THE COURT SAID AN EXAMPLE OF
15 ACTUAL INJURY MIGHT BE OVEREXPOSURE ON CERTAIN DAYS
16 WHICH WOULD CREATE DIFFICULTIES IN MEETING DEMAND
17 AND MAINTAINING CUSTOMER SATISFACTION.

18 GOOGLE RELIES ON THE NOT DIRECTLY AT
19 ISSUE DISCLAIMER TO AVOID THE TRIABLE ISSUE OF FACT
20 CONCLUSION. YET IT CEASES UPON THE EXAMPLE TO
21 SUGGEST THAT WITHOUT EVIDENCE OF DIFFICULTIES
22 CAUSED BY OVEREXPOSURE THE PLAINTIFFS HAVE NOT BEEN
23 INJURED SIMPLY BY HAVING BEEN BILLED AND PAID FOR
24 SOMETHING THAT THEY DID NOT REQUEST OR WANT.

25 NOW, THE PLAINTIFFS, WE ARE UPSET WITH

1 HAVING TO RESPOND TO SUCCESSIVE MOTIONS FOR SUMMARY
2 JUDGMENT ON ISSUES THAT COULD HAVE BEEN RAISED
3 PREVIOUSLY, BUT I WANT TO GO TO THE MERITS OF THEIR
4 LACK OF INJURY AND FACT ARGUMENT BECAUSE, FRANKLY,
5 I AGREE THAT IT HAD BEEN FULLY BRIEFED IN THE
6 PARTIES' BRIEF. I DON'T THINK THE PARTIES INTENDED
7 ITS EXAMPLE IN FOOTNOTE 10 TO BE AN EXCLUSIVE TYPE
8 OF INJURY.

9 THROUGHOUT ITS BRIEF IN SUPPORT OF ITS
10 MOTION FOR THIRD SUMMARY JUDGMENT, GOOGLE CLAIMS
11 THAT IT IS SOMEHOW RELEVANT THAT, QUOTE,
12 "PLAINTIFFS PAID NO MORE THAN THEY AGREED TO PAY
13 AND THAT PLAINTIFFS RECEIVE," QUOTE, "THE BENEFIT
14 OF THEIR BARGAIN."

15 THIS IS A RED HERRING BECAUSE FOR
16 PURPOSES OF THE UCL AND FAL CLAIMS IS NOT WHETHER
17 PLAINTIFFS PAID MORE THAN THEY AGREED TO PAY BUT
18 RATHER WHETHER THEY PAID MORE THAN ORDINARY
19 ADVERTISERS WOULD HAVE REASONABLY EXPECTED TO PAY.

20 IF THE BENEFIT OF THE BARGAIN WAS NOT SO
21 PROMINENT THAT A REASONABLE CONSUMER WOULD
22 NECESSARILY SEE IT, IF IT WAS HIDDEN WITHIN AN
23 ADWORDS AGREEMENT OF OVER A HUNDRED PAGES IN
24 LENGTH, THEN, AS THIS COURT HAS PREVIOUSLY HELD,
25 PLAINTIFFS HAVE A UCL, FAL CLAIM, AND THOSE CLAIMS

1 ARE BASED ON GOOGLE'S STATEMENTS ABOUT CUSTOMERS
2 CONTROL OVER THEIR DAILY BUDGET.

3 AND I'M QUOTING THE COURT NOW, QUOTE,
4 "IMPLYING IF NOT OUTRIGHT AFFIRMING THAT THE DAILY
5 BUDGET IS THE MAXIMUM CHARGE CUSTOMERS WILL INCUR
6 ON ANY GIVEN DAY," CLOSED QUOTE.

7 TO ARGUE THAT ADVERTISERS SHOULD HAVE NO
8 RIGHT TO COMPLAIN ABOUT HAVING TO PAY FOR CLICKS
9 THAT THEY DID NOT SEEK, REQUEST, OR EXPECT IS LIKE
10 ARGUING, YOUR HONOR, IF YOU TAKE YOUR CAR TO A CAR
11 WASH AND THEY OFFER YOU ALL OF THESE SERVICES, THIS
12 MENU OF SERVICES, AND YOU SAY, "I JUST WANT THE
13 BASIC WASH."

14 AND THE CAR GOES THROUGH THE CAR WASH AND
15 INSTEAD OF WASHING YOUR CAR THEY ALSO APPLY WAX TO
16 IT. AND THEY SUBMIT TO YOU A LARGER BILL THEN YOU
17 EXPECTED OR REQUESTED. ARE YOU PROHIBITED -- DO
18 YOU NOT HAVE STANDING TO COMPLAIN THAT YOU ARE
19 BEING BILLED, IN FACT, IF YOU PAID THE BILL, NOT
20 REALIZING THAT YOU WERE BEING CHARGED, WOULDN'T YOU
21 HAVE STANDING TO COMPLAIN THAT YOU ARE GETTING --
22 YOU ARE HAVING TO PAY FOR SOMETHING THAT YOU DIDN'T
23 WANT, YOU DIDN'T REQUEST, AND YOU DIDN'T SEEK?

24 THEY -- THAT'S STANDING AND IT'S NOT AN
25 ANSWER FOR THEM TO SAY, WELL, THE WAX JOB DIDN'T

1 HURT YOUR CAR.

2 WELL, ACTUALLY THE WAX JOB WAS GOOD FOR
3 YOUR CAR. SO WHY ARE YOU COMPLAINING?

4 I DON'T CARE WHETHER IT WAS GOOD FOR MY
5 CAR OR NOT. I DON'T CARE WHETHER IT HELPED OR NOT.
6 I DIDN'T WANT IT. I SHOULDN'T HAVE TO PAY FOR IT.

7 GOOGLE SAYS, AND WE AGREE, THAT A
8 PLAINTIFF CANNOT ESTABLISH INJURY OR STANDING TO
9 SUE UNDER THE UCL SIMPLY BY SHOWING THAT THE
10 DEFENDANT COMMITTED A DECEPTIVE PRACTICE.

11 BUT THE NAMED PLAINTIFFS IN THIS CASE
12 SHOW THAT THEY, IN ADDITION, WERE DECEIVED TO PAY
13 EXTRA FOR SOMETHING THAT THEY DID NOT WANT.

14 GOOGLE SAYS, AND WE AGREE, THAT
15 PROPOSITION 64 WOULD BE MEANINGLESS IF MERE PROOF
16 OF A VIOLATION WERE ENOUGH TO ESTABLISH INJURY AND
17 FACT AND STANDING TO SUE. BUT THIS IS NOT THE
18 SITUATION DESCRIBED IN THE LEGISLATIVE HISTORY OF
19 PROPOSITION 64 WHERE, QUOTE, "PRIVATE ATTORNEYS ARE
20 FILING LAWSUITS FOR COMPETITION, WHERE THEY HAVE NO
21 CLIENT WHO HAS BEEN INJURED, IN FACT, UNDER THE
22 STANDING REQUIREMENTS OF THE UNITED STATES
23 CONSTITUTION," CLOSED QUOTE.

24 NOR IS THIS LIKE THE BUCKLAND CASE THAT
25 THEY RELY ON IN THEIR BRIEFS, WHERE A PLAINTIFF, A

1 CONSUMER ADVOCATE SUSPECTED THE PLAINTIFFS'
2 MARKETING AND PACKAGING WAS MISLEADING AND BOUGHT
3 THEIR PRODUCT SOLELY TO PURSUE -- TO FILE A LAWSUIT
4 COMPLAINING ABOUT IT.

5 CLRB HANSON INDUSTRIES AND HOWARD STERN
6 MEET THE DUAL REQUIREMENTS OF PROPOSITION 64. THEY
7 ARE TWO.

8 FIRST, THEY HAVE STANDING UNDER THE
9 UNITED STATES CONSTITUTION BECAUSE THEY SUFFERED.
10 THE BUCKLAND CASE AGAIN, AND MANY FEDERAL CASES,
11 QUOTE, "AN INVASION OF A LEGALLY PROTECTED INTEREST
12 WHICH IS, A, CONCRETE AND PARTICULARIZED; AND, B,
13 ACTUAL OR EMINENT OR NOT CONJECTURAL OR
14 HYPOTHETICAL.

15 SECOND, THEY MEET THE SECOND PRONG OF
16 PROPOSITION 14 BECAUSE THEY LOST MONEY AS A RESULT
17 OF HAVING BEEN BILLED AND HAVING PAID FOR SOMETHING
18 THAT THEY DID NOT ORDER.

19 GOOGLE SAYS THAT IT IS SOMEHOW MATERIAL
20 THAT PLAINTIFFS WERE HAPPY TO RECEIVE CLICKS IN
21 EXCESS OF THEIR DAILY BUDGET, BUT JUST BECAUSE
22 YOU'RE HAPPY TO RECEIVE SOMETHING YOU DIDN'T ORDER
23 LIKE A WAX JOB DOESN'T MEAN THAT YOU LOSE ANY
24 STANDING TO COMPLAIN ABOUT HAVING TO PAY FOR IT.

25 GOOGLE PROTESTS IT'S NOT FAIR THAT

1 PLAINTIFFS SHOULD GET A WINDFALL OF FREE CLICKS AND
2 TO RESPOND TO THAT WE CITED IN OUR BRIEF THE IDEA
3 THAT YOU CANNOT COMPLAIN ABOUT SOMEONE NOT PAYING
4 FOR SOMETHING THAT YOU GAVE THEM BUT THEY DIDN'T
5 REQUEST.

6 LET ME GO -- SO THAT'S OUR STANDING
7 POINT, YOUR HONOR, WE MEET PROPOSITION 64. AND HE
8 CAN TALK ABOUT PROPOSITION 64 AND IS TALKING ABOUT
9 THE ATTORNEY GENERAL, MY BRINGING A CASE FOR
10 SOMEONE WHO HAS NO CLAIM AT ALL. THAT'S NOT THIS
11 CASE AND IT'S NOT THE BUCKLAND CASE EITHER.

12 NOW, LET ME GO TO THEIR SECOND POINT
13 WHICH HE HAS NOT ADDRESSED WHICH IS IN HIS BRIEFS
14 BECAUSE I WANT TO DEAL WITH THAT.

15 GOOGLE CONCEDES THAT THE NAMED PLAINTIFFS
16 HAVE STANDING FOR OVERCHARGES THAT THEY WERE BILLED
17 AND PAID BEFORE THEY LEARNED ABOUT HOW THE 120
18 PERCENT RULE OPERATED.

19 SO GOOGLE BACKS OFF THE CLAIM IT MADE IN
20 ITS OPENING BRIEF THAT PLAINTIFFS LACK STANDING AND
21 NOW WANTS THE COURT TO ACCEPT THE DATES OF OCTOBER
22 21, 2003 FOR STERN AND THE SECOND QUARTER OF 2004
23 FOR HANSON AS BEING THE DATES WHEN THEY ACQUIRED
24 KNOWLEDGE AND WHEN THEIR CLAIM SHOULD BE CUT OFF.

25 BUT THE QUESTION IS, YOUR HONOR,

1 KNOWLEDGE OF WHAT? THAT GOOGLE HAD PERIODICALLY
2 CHARGED THEM 120 PERCENT OF THEIR DAILY BUDGET OR
3 THAT GOOGLE HAD A POLICY AND PRACTICE WHEREAS
4 GOOGLE CALLS IT A RULE, 120 PERCENT RULE OF
5 CHARGING EVERYONE 120 PERCENT OF THEIR DAILY
6 BUDGET?

7 TO BE SURE THE PLAINTIFFS COMPLAINED WHEN
8 THEY LEARNED THAT THEY THOUGHT THAT THEY HAD BEEN
9 OVERBILLED. THEY COMPLAINED AND ASKED FOR AN
10 EXPLANATION AND A REFUND. THAT EVIDENCE IN NO WAY
11 ESTABLISHES AS A MATTER OF LAW THAT THE PLAINTIFFS
12 WERE THEN AWARE THAT GOOGLE HAD 120 PERCENT RULE
13 THAT APPLIED TO EVERYONE OR THAT THEY HAD ANY IDEA
14 OF HOW THAT RULE OPERATED.

15 LET ME GO TO THEIR FINAL POINT, YOUR
16 HONOR. AND THIS IS I THINK IMPORTANT FOR CLEARING
17 UP THE CASE, AND I DO WANT TO MAKE SOME CONCESSIONS
18 HERE.

19 WITH GOOGLE'S CLARIFICATION THAT IT DOES
20 NOT SEEK SUMMARY JUDGMENT AS TO CUSTOMERS WHO PAUSE
21 AND THE CHANGES IN DAILY BUDGETS WITHIN A DAY HAVE
22 NOTHING TO DO WITH THE TWO PARTIAL MONTH SCENARIOS
23 IDENTIFIED BY THE COURT AS GIVING RISE TO A BREACH
24 OF CONTRACT CLAIM, WE CONCEDE THAT IN NO PERIOD OF
25 TIME THAT A PARTICULAR DAILY BUDGET WAS IN EFFECT

1 AND A CAMPAIGN NOT PAUSED WERE THE NAMED PLAINTIFFS
2 CHARGED MORE THAN THEIR PARTICULAR DAILY BUDGET
3 MULTIPLIED BY THE NUMBER OF DAYS IN THAT PERIOD.

4 IN ITS OPINION DENYING GOOGLE'S FIRST
5 MOTION FOR SUMMARY JUDGMENT, THE COURT IDENTIFIED
6 THREE GROUPS OF ADVERTISERS WHO HAVE VIABLE BREACH
7 OF CONTRACT CLAIMS.

8 HOWEVER, AT HIS DEPOSITION, MR. SAMMET, A
9 GOOGLE REPRESENTATIVE, TESTIFIED THAT GOOGLE NEVER
10 CHARGED ANYONE IN THE FIRST TWO GROUPS WHERE THE
11 CAMPAIGNS INVOLVE NEITHER PAUSING NOR MIDDAY
12 CHANGES IN THE DAILY BUDGET, MORE THAN THE DAILY
13 BUDGET TIMES THE NUMBER OF DAYS WHEN THE DAILY
14 BUDGET WAS IN EFFECT.

15 IN THE RELIANCE OF THAT TESTIMONY WE HAVE
16 TENDERED YESTERDAY TO GOOGLE A THIRD AMENDED
17 COMPLAINT THAT REMOVES THE PARTIAL MONTH SCENARIOS
18 AS BREACH OF CONTRACT CLAIMS. THIS CONCESSION OF
19 REMOVING THEM DOES NOT AFFECT OUR UCL OR FAL
20 CLAIMS, AND WE STILL ASSERT THAT THE EXCESS CHARGES
21 IN THE DAILY BUDGET WERE DECEPTIVE AND UNFAIR.

22 THE CONCESSION ALSO DOES NOT AFFECT THE
23 NAMED PLAINTIFFS' BREACH OF CONTRACT CLAIMS FOR
24 EITHER BEING PART OF A GROUP OF CUSTOMERS WHO
25 PAUSED THEIR ADVERTISING CLAIMS OR BEING PART OF A

1 FOURTH GROUP THAT THE COURT IDENTIFIED IN A
2 FOOTNOTE IN ITS LAST OPINION, THAT IS, THOSE WHOM
3 DURING A CAMPAIGN GOOGLE OVERSERVED OR AS THE COURT
4 SAID FRONTLOADED AND THEN OVERCHARGED BEFORE THERE
5 WAS ANY DEFICIT TO MAKE UP.

6 GOOGLE STATES IN ITS BRIEF THAT ITS
7 PARTIAL MOTION HAS NOTHING TO DO WITH EITHER THE
8 EXPECTATIONS OR CONTRACTUAL RIGHTS OF THE
9 ADVERTISERS WHO CHANGED THEIR DAILY BUDGETS DURING
10 THE COURSE OF A SINGLE DAY.

11 DURING SAMMET'S DEPOSITION TESTIMONY WE
12 LEARNED, YOUR HONOR, THAT WHAT THEY DO, WHEN YOU
13 CHANGE YOUR BUDGET DURING THE COURSE OF THE DAY,
14 THEY TAKE THE HIGHEST BUDGET IT WAS DURING THE
15 COURSE OF THE DAY.

16 SO, FOR EXAMPLE, IN THE FIRST FEW HOURS
17 OF THE DAY IT WAS \$100. AND THE ADVERTISER REDUCES
18 IT, AS HE CAN, TEN TIMES DURING THE DAY HE CAN
19 REDUCE USE AMOUNT OF HIS BUDGET. THEY STILL CAN'T
20 APPLY THE 120 PERCENT RULE TO THE HIGHEST THE DAILY
21 BUDGET EVER WAS.

22 WE CLAIM THAT THAT WAS ITSELF A DIFFERENT
23 BREACH OF CONTRACT THAN WE HAVE ALLEGED. IT'S
24 INCLUDED IN OUR THIRD AMENDED COMPLAINT AND, THAT
25 IS, YOU CAN'T TELL ADVERTISERS YOU CAN CONTROL HOW

1 MUCH YOU SPEND IN A DAY, NOT IN A SEGMENT OF A DAY
2 BUT YOU CAN CONTROL HOW MUCH YOU SPEND IN A DAY BY
3 LOWERING YOUR BUDGET THROUGH THE DAY AT LEAST TEN
4 TIMES.

5 AND WE CLAIM THAT WHERE THEY CONTINUED TO
6 USE THE HIGHEST SEGMENT OF THE DAY, THE FIRST
7 SEGMENT WHERE THE BUDGET WAS LOWERED DURING THE
8 DAY, THAT IS A CLEAR BREACH OF CONTRACT.

9 THE COURT: LET ME UNDERSTAND -- I
10 UNDERSTAND YOUR ARGUMENT AND MUCH OF WHAT YOU'RE
11 NOW TELLING ME I UNDERSTAND FROM THE PLAINTIFFS'
12 POSITION, THIS THIRD AMENDED COMPLAINT, IS THAT
13 SOMETHING THAT YOU'RE DOING BY STIPULATION?

14 MR. SUSMAN: I HAVE GIVEN -- YOUR HONOR,
15 IT WAS IN THE COURSE OF GETTING READY FOR THIS THAT
16 I TRIED TO CLEAN IT UP. I SENT IT TO THEM
17 YESTERDAY. THEY HAVE A RED LINED COPY. THEY HAVE
18 NOT HAD AN OPPORTUNITY TO LOOK AT IT. THEY WILL --
19 I'LL ASK THEM WHETHER THEY WILL CONSENT AND IF THEY
20 WILL NOT, WE WILL HAVE TO FILE A MOTION.

21 MR. BIDERMAN: YOUR HONOR, WE GOT IT LATE
22 IN THE EVENING LAST NIGHT. WE HAVEN'T REVIEWED IT.

23 THE COURT: WELL, I WON'T CONSIDER
24 ANYTHING ABOUT THAT UNTIL I HAVE IT BEFORE ME.

25 MR. BIDERMAN: THAT'S FAIR.

1 THE COURT: YOU RESERVED SOME TIME FOR
2 REBUTTAL.

3 MR. BIDERMAN: I DID, YOUR HONOR. JUST
4 ON THE -- THE PLAINTIFFS' CAR WASH EXAMPLE ISN'T,
5 IN FACT, EXACTLY CORRECT BECAUSE YOU HAVE TO
6 REMEMBER THAT THESE PLAINTIFFS DON'T ADVERTISE FOR
7 MORE THAN ONE DAY.

8 THE CAR WASH EXAMPLE WOULD BE IF YOU GO
9 THROUGH THE CAR WASH ON DAY ONE AND YOU DON'T GET
10 YOUR DEODORIZER AND YOU GO THROUGH THE CAR WASH ON
11 DAY TWO AND YOU PAY -- I'M SORRY. YOU GO THROUGH
12 THE CAR WASH ON DAY ONE AND YOU SAY I AGREE I'LL
13 TAKE THE CAR WASH AND THE DEODORIZER. YOU GO
14 THROUGH THE CAR WASH ON DAY ONE, YOU DON'T GET THE
15 DEODORIZER. YOU GO THROUGH THE CAR WASH ON DAY
16 TWO, WE GIVE THE DEODORIZER ON DAY TWO.

17 THE COURT: AND I WANTED THE DEODORIZER
18 ON DAY ONE. WHAT IF I HAD A HOT DATE? IT DOESN'T
19 DO ME ANY GOOD ON DAY TWO.

20 MR. BIDERMAN: AND IF THEY WANT, THAT'S
21 THE KIND OF EVIDENCE WE WERE LOOKING AT. THEY
22 DIDN'T HAVE THE HOT DATE EVIDENCE, JUDGE.

23 THE COURT: I UNDERSTAND THE PROBLEM. I
24 UNDERSTAND THE PROBLEM. I THOUGHT YOU ALL WERE
25 GOING TO RESOLVE THIS CASE AFTER MY LAST ORDER.

1 I HAD PROMISES FROM YOU ALL THAT YOU WERE
2 CLOSE TO RESOLVING THE CASE, AND YOU GAVE US ONE
3 MORE CLARIFICATION AND I WILL GIVE YOU
4 CLARIFICATION ON THIS.

5 AND I DO BELIEVE THAT THERE IS STANDING
6 ALLEGED, AND I'LL PUT IT IN WRITING SO THAT YOU
7 HAVE IT BECAUSE I CONTINUE TO REGARD THE
8 REPRESENTATION OF A DAILY BUDGET AS A MATTER OF
9 SUBSTANCE. AND ALTHOUGH OUT OF THE REALITIES OF
10 THE WORLD BILLINGS ARE DONE ON PERIODS OTHER THAN
11 DAYS, TECHNICALLY A PERSON CAN SAY, I ONLY WANT TO
12 ADVERTISE ON A SINGLE DAY AND EACH DAY THEN BECOMES
13 A MATTER OF A NEW CONTRACT, A NEW BUDGET, A NEW
14 PERIOD FOR BILLING PURPOSES AND IT SEEMS TO ME THAT
15 AS LONG AS IT'S CALLED DAILY BUDGET, YOU HAVE TO
16 LIVE UP TO THAT WITH RESPECT TO CONSUMER
17 EXPECTATIONS.

18 IT WOULD BE EASY TO CHANGE IT TO A
19 PERIODIC BUDGET BY SIMPLY CALLING IT A PERIODIC
20 BUDGET AND BECAUSE I THINK ON A CONTRACTUAL BASIS
21 IT IS EXPLAINED TO BE A PERIODIC BUDGET BUT THAT
22 DOESN'T END THE STATUTORY OBLIGATION TO CONSUMERS
23 TO TREAT IT AS YOU CALL IT WHICH IS AS A DAILY
24 BUDGET.

25 SO I AM INTENDING TO DENY THE MOTION FOR

1 PARTIAL SUMMARY JUDGMENT AS IT'S PHRASED ON THIS
2 BASIS.

3 THERE ARE SOME OTHER THINGS IN HERE THAT
4 WE HAVEN'T TALKED ABOUT HERE TODAY THAT THE COURT
5 HAS CONSIDERED, BUT IT SEEMS TO ME THAT THIS CASE
6 HAS LANGUISHED A LITTLE BIT BASED UPON THIS.

7 I'M HEARING THAT WE'RE NOT AT A POINT --
8 ARE YOU HERE TODAY FOR CASE MANAGEMENT?

9 MR. SUSMAN: YES, WE ARE, YOUR HONOR.

10 MR. BIDERMAN: WE HAVE ONE AT 10:00, YOUR
11 HONOR.

12 THE COURT: LET ME HAVE YOU STAND BY,
13 TOO. I HAVE ONE MORE MOTION I THINK.

14 MR. BIDERMAN: SURE.

15 THE COURT: AND THEN WE CAN TALK ABOUT A
16 SCHEDULE OF WHAT YOU NEED TO DO NEXT ANTICIPATING
17 THE ORDER THAT I INDICATED.

18 MR. SUSMAN: THANK YOU, YOUR HONOR.

19 MR. BIDERMAN: AND I WOULD JUST ASK THE
20 COURT TO CONSIDER, BECAUSE IT WILL HELP IN
21 ASSESSING THE CLAIMS AND RESOLUTION ENTERING THE
22 ORDER, WHICH IS ESSENTIALLY OUR FALLBACK POSITION
23 WHICH IS BECAUSE THERE IS A CAUSATION ELEMENT IN
24 17204, THAT IS, THE DAMAGES HAVE TO BE, QUOTE, "AS
25 A RESULT OF THE VIOLATION" WITHOUT SAYING WHEN THEY

1 LEARNED OR WHAT IS SUFFICIENT TO CAUSE THEM TO
2 LEARN. ONCE THEY LEARNED OF THE WAY THAT THEY DID
3 CHARGE FOR OUR BILLING, I DO NOT BELIEVE THAT THEY
4 CAN SAY THAT THE QUOTE-UNQUOTE, "FALSE
5 ADVERTISING," SOMEHOW CAUSED THEIR INJURY AND THAT
6 WILL HELP US IN TERMS OF ASSESSING THE CASE.

7 MR. SUSMAN: I'M NOT REALLY GOING TO HELP
8 VERY MUCH, YOUR HONOR, BECAUSE I NEVER CONTESTED
9 THAT. I MEAN, I'M NOT GOING TO SAY -- THE QUESTION
10 IS WHEN WE LEARNED WE WERE BEING OVERBILLED VERSUS
11 WHEN WE LEARNED THEY HAD A POLICY OF OVERBILLING
12 PEOPLE AND COMPLAINING THAT IT WASN'T GOING TO DO
13 ANY GOOD.

14 AT THE LATER POINT IN TIME, WE CAN'T
15 CONTINUE TO BE DECEIVED AND RECOVER FOR IT. I
16 READILY ADMIT THAT. IT'S NOT EVEN AN ISSUE HERE.
17 SO YOU DON'T HAVE TO ENTER SOME DECLARATORY
18 JUDGMENT ON SOMETHING THAT IS NOT EVEN AN ISSUE.

19 THEIR PAPERS WANTED YOU TO PICK TWO DATES
20 WHICH WERE THE DATES ESTABLISHED BY SOME DISCOVERY
21 THUS FAR OF WHEN THEY FIRST COMPLAINED ABOUT BEING
22 OVERBILLED. THAT'S NOT THE SAME AS KNOWLEDGE OF
23 THE 120 PERCENT RULE.

24 AND SO THAT WOULD BE APPROPRIATE. AND
25 THAT'S NOT GOING TO INTERFERE WITH OUR SETTLEMENT

1 OF THE CASE.

2 THE COURT: LET'S TALK AT THE CASE
3 MANAGEMENT CONFERENCE MORE ABOUT THIS.

4 MR. SUSMAN: THANK YOU.

5 MR. BIDERMAN: THANK YOU, YOUR HONOR.

6 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER
7 WERE CONCLUDED.)