

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MARKET AMERICA, INC.

Plaintiff,

v.

GOOGLE INC. and
LTECH CONSULTING, LLC,

Defendants.

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Civil Action No.: 1:09-cv-00494-GMS

JURY TRIAL DEMANDED

**LTECH CONSULTING, LLC'S JOINDER IN THE MOTION
AND BRIEF FILED BY DEFENDANT GOOGLE INC. AND
LTECH'S OPENING MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS COUNTS I, II AND III OF THE AMENDED COMPLAINT**

Defendant LTech Consulting, LLC (LTech), by and through its undersigned counsel, hereby joins the motion of defendant Google Inc. (Google) to dismiss Counts I, II and III of the Amended Complaint, joins the Opening Brief of Defendant Google Inc. in Support of Its Motion to Dismiss Counts I, II, and III of the Amended Complaint (Google's brief), and submits this opening memorandum in support of LTech's motion to dismiss Counts I, II and III of the Amended Complaint.

MEMORANDUM

Although LTech joins in the entirety of Google's brief and relies upon the argument set forth therein, LTech is submitting this memorandum to highlight certain facts specific to LTech.

First, like the License Agreement between plaintiff Market America, Inc. (Market America) and Google (see pages 5-6 of Google's brief), the Services Agreement between Market America and LTech contains an integration clause that provides:

Entire Agreement & Modification. This Agreement represents the entire agreement between the parties as to the matters referenced

herein and is not subject to change or modification except by written agreement signed by both parties.

Exh. A to Google's Brief, ¶11.

Second, like the License Agreement between Market America and Google, which contains provisions entitled "Disclaimer" and "LIMITATION OF LIABILITY" (see pages 6-7 of Google's brief), the Services Agreement between Market America and LTech contains a capitalized provision entitled "Limitation on Warranties and Cap on Liability." Exh. A to Google's Brief, ¶18. In pertinent part, that provision states:

FOR A PERIOD OF SIX (6) MONTHS FOLLOWING COMPLETION OF THE SERVICES, THE SERVICES AND ALL CREATED WORKS, PRE-EXISTING WORKS AND LTECH EXISTING SOFTWARE PROVIDED TO CLIENT WILL BE IN COMPLETE CONFORMITY WITH (I) THE [STATEMENT OF WORK] AND (II) ANY OTHER SPECIFICATIONS MUTUALLY AGREED UPON IN WRITING IN THE FORM OF CHANGE ORDERS EXECUTED BY EXECUTIVES OF CLIENT AND LTECH. IN THE EVENT OF ANY BREACH OF THIS WARRANTY, LTECH'S SOLE RESPONSIBILITY, AND CLIENT'S SOLE REMEDY, IS FOR LTECH TO PROMPTLY AND DILIGENTLY REMEDY ANY DEFECTS AT NO COST TO CLIENT....OTHER THAN AS STATED HEREIN, LTECH MAKES NO REPRESENTATIONS, WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, WITH RESPECT TO THE DELIVERABLES OR SERVICES PROVIDED PURSUANT TO THIS AGREEMENT, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

EXCEPT WITH RESPECT TO AMOUNTS SUBJECT TO INDEMNIFICATION PURSUANT TO SECTION 10 ABOVE, THE MAXIMUM LIABILITY OF LTECH OR ITS EMPLOYEES, AGENTS OR CONTRACTORS (AND CLIENT'S MAXIMUM REMEDY) WITH RESPECT TO SERVICES OR GOODS PROVIDED OR TO BE PROVIDED UNDER THIS AGREEMENT OR WITH RESPECT TO ANY CLAIM OF ANY KIND ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL IN NO EVENT EXCEED THE TOTAL FEES PAID. IN NO EVENT SHALL LTECH, CLIENT OR THEIR RESPECTIVE EMPLOYEES, AGENTS OR

CONTRACTORS BE LIABLE (AND COMPANY SHALL HAVE NO REMEDY) (I) UNDER ANY THEORY INCLUDING CONTRACT OR TORT (INCLUDING NEGLIGENCE AND STRICT PRODUCTS LIABILITY) FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES.

Exh. A to Google's Brief, ¶18.

In filing this action and then amending its original complaint, Market America is trying to rewrite its contract with LTech by asserting claims for fraud and non-contractual remedies.

Third, like the License Agreement between Market America and Google (see page 7 of Google's brief), the Services Agreement between Market America and LTech contains a choice-of-law provision: "This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to the conflict of laws provisions thereof" Exh. A to Google's Brief, ¶16.

With respect to Counts I and II of the amended complaint -- which allege fraudulent inducement and fraud, respectively -- Market America has not alleged facts to plausibly support an essential element of its claims against LTech. Specifically, Market America has not alleged facts to plausibly support the allegation that LTech knew that its statements were false or that LTech was recklessly indifferent to the truth of its statements. See Google's Brief at 9-17.

As for Count III, which asserts a claim for "Rescission for Failure of Consideration," the Services Agreement between Market America and LTech contains no provision requiring LTech to provide a GSA that would search between 30 million and 90 million products in under a second. See Exh. A to Google's Brief. Because Market America does not allege that LTech failed to perform a contract term, there can be no rescission of the Services Agreement. See Google's Brief at 17-19.

WHEREFORE, LTech respectfully requests that the Court consider this Joinder and Opening Memorandum and grant LTech's motion to dismiss Counts I, II and III of the amended complaint.

**COLE, SCHOTZ, MEISEL,
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DATED: October 19, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed LTECH CONSULTING, LLC'S JOINDER IN THE MOTION AND BRIEF FILED BY DEFENDANT GOOGLE INC. AND LTECH'S OPENING MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS COUNTS I, II AND III OF THE AMENDED COMPLAINT with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the following:

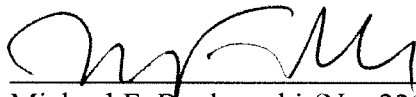
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I hereby certify that on October 19, 2009, I have mailed by United States Postal Service, the document(s) to the following non-registered participants:

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