

EXHIBIT C
TO THE
DECLARATION OF
ROBERT D. KAPLAN

(HERRMANN DEPOSITION
TRANSCRIPT EXCERPTS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SELLIFY LLC,) No. 09CV 10268 (JSR)
Plaintiff,)
vs.) CONFIDENTIAL
AMAZON.COM INC.,)
Defendant.)

DEPOSITION UPON ORAL EXAMINATION OF
ERIC HERRMANN

3:47 p.m. to 4:51 p.m.

May 26, 2010

925 Fourth Avenue, Suite 2900

Seattle, Washington

Barbara L. Nelson, CCR

Court Reporter

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1 A P P E A R A N C E S

2

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2 INDEX OF EXAMINATION

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4 WITNESS: PAGE:

5 ERIC HERRMANN

6 Examination by Mr. Dehn 4

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13 EXHIBIT: DESCRIPTION: MARKED:

14 (No Exhibits Were Marked.)

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1 Whereupon,

2 ERIC ALFRED HERRMANN,

3 having been first duly affirmed, was examined and

4 testified as follows:

5

6 E X A M I N A T I O N

7 BY MR. DEHN:

8 Q Sir, could you please state your name for

9 the record?

10 A Eric Alfred Herrmann.

11 Q And Mr. Herrmann, what is it that you do for

12 a living?

13 A I manage the sponsored links business and

14 technical teams for Amazon.

15 Q And would you describe for us what your

16 duties are in that particular job? Actually, before

17 you even do that, can I ask you, do you have an

18 official job title?

19 A Yes. So my job title is Senior Manager of

20 Worldwide Paid Search.

21 Q Okay. And would you go ahead and tell us

22 what your job responsibilities are?

23 A Essentially overseeing the business, working

24 with finance to establish targets for the various

25 Amazon businesses worldwide, interacting with the

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1 various search engine vendors worldwide, overseeing

2 product roadmaps and new technical features, as well

3 as the development team.

4 Q Now, when you talk about paid search, I take

5 it you mean, sir, paid search that is initiated by

6 Amazon; correct?

7 A Yes, so paid search is defined as --

8 sponsored links is another term that's frequently

9 used. Ads that run on external search engines and

10 drive traffic to Amazon.

11 Q Okay. Now, there was a time, sir, was there

12 not, when members of the Amazon Associates Program

13 could engage in paid search and purchase sponsored

14 links and drive traffic to Amazon in that way;

15 correct?

16 A Yes.

17 Q Okay. Did your job at that time have

18 anything to do with that?

19 A No.

20 Q Okay. So your focus has strictly been on

21 sponsored links and paid search originating from

22 Amazon; correct?

23 A Correct.

24 Q Okay. How long have you been in your

25 current job?

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<p>1 A Almost three years.</p> <p>2 Q Okay. What did you do before that?</p> <p>3 A For the year prior to that, I worked in a</p> <p>4 different capacity on the team. I was the development</p> <p>5 manager of that team.</p> <p>6 Q Okay. What about before that?</p> <p>7 A Before that, I spent about five years at EMC</p> <p>8 and Legato, a company that was actually purchased by</p> <p>9 EMC, doing backup and recovery software.</p> <p>10 Q What is your education, sir?</p> <p>11 A I hold a degree in mathematics from the</p> <p>12 University of Washington, with a minor in computer</p> <p>13 science, and a master's degree in software engineering</p> <p>14 from Seattle U.</p> <p>15 Q Sir, I just alluded to the fact that there</p> <p>16 came a time, did there not, when Amazon changed its</p> <p>17 policy with respect to its associates and informed</p> <p>18 them that it would no longer pay for their paid search</p> <p>19 efforts; is that correct?</p> <p>20 A That is correct.</p> <p>21 Q Were you part of that decision?</p> <p>22 A I did a lot of the fundamental research that</p> <p>23 drove that decision, yes.</p> <p>24 Q Okay. What generally did that research show?</p> <p>25 A It showed that --</p>	<p>1 you had a 10 percent allowable efficiency and the</p> <p>2 keyword's running at five percent, that represents an</p> <p>3 arbitrage opportunity for -- potentially, for an</p> <p>4 affiliate. An affiliate could jump in, outbid us for</p> <p>5 that term, and in essence get paid at a ten percent</p> <p>6 rate for something we were already getting at five</p> <p>7 percent. So that's the fundamentals of the arbitrage</p> <p>8 opportunity.</p> <p>9 Q Okay. My understanding is that when the</p> <p>10 policy first changed in 2009, that it applied only to</p> <p>11 North America?</p> <p>12 A That's correct.</p> <p>13 Q Is that correct?</p> <p>14 A Mm-hmm.</p> <p>15 Q What was the reason for that?</p> <p>16 A We had two main reasons. One, we had I</p> <p>17 think more conclusive data in the U.S. at that time,</p> <p>18 and two, given the size of my team and sort of the</p> <p>19 complexity of the problem of enacting such a large</p> <p>20 change, we typically do that country by country, and</p> <p>21 frequently we'll start with the U.S. in a lot of our</p> <p>22 technical rollouts, given that we have the natural</p> <p>23 advantage that my team speaks English and it's a lot</p> <p>24 easier for us to handle problems and issues and</p> <p>25 monitor the ads in a country where we're comfortable</p>
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<p>1 MR. WANG: I'm sorry, before you answer,</p> <p>2 again, and I know we've done this --</p> <p>3 MR. DEHN: Confidential?</p> <p>4 MR. WANG: -- in the last two depositions,</p> <p>5 but we would ask, because of the nature of this</p> <p>6 testimony, that this deposition be marked</p> <p>7 confidential, as well.</p> <p>8 MR. DEHN: That's fine.</p> <p>9 THE WITNESS: I think the main findings were</p> <p>10 that it showed that in many cases these affiliates</p> <p>11 were actually arbitraging our existing campaigns and</p> <p>12 not really adding value to Amazon through that</p> <p>13 channel.</p> <p>14 Q Okay. Could you please explain to an</p> <p>15 outsider like me what you mean by arbitraging?</p> <p>16 A Certainly. So the Amazon system operates --</p> <p>17 well, we run our business based upon efficiency</p> <p>18 targets. So we're willing to spend X dollars to make</p> <p>19 Y dollars in sales. And our system is designed to</p> <p>20 optimize to those targets for different product</p> <p>21 categories.</p> <p>22 We offered affiliates essentially the same</p> <p>23 rates. However, in a keyword market, you can be in a</p> <p>24 situation where a given keyword might be running at a</p> <p>25 better efficiency than the allowable. So let's say</p>	<p>1 with the language, as opposed to let's say Japan. So</p> <p>2 typically, yeah, we'll test in the U.S., move to other</p> <p>3 locations.</p> <p>4 Q All right. Now, I understand that there</p> <p>5 were further rules changes in this year that changed</p> <p>6 the rules regarding free search, as well as paid</p> <p>7 search; is that correct?</p> <p>8 A Could you clarify --</p> <p>9 Q Yeah, I'll tell you my understanding.</p> <p>10 A -- on the free search?</p> <p>11 Q My understanding is that while Amazon</p> <p>12 instructed its associates sometime in 2009 that it</p> <p>13 would not pay referral fees based on purchases arising</p> <p>14 out of paid search, sponsored links, that at that time</p> <p>15 it continued to pay referral fees on purchases derived</p> <p>16 from free search. In other words, the free search</p> <p>17 results on Google and so forth, on search engines.</p> <p>18 A Mm-hmm.</p> <p>19 Q My understanding is that in March of 2010,</p> <p>20 that was changed. You don't pay for results coming</p> <p>21 from free search, either. Is that your understanding,</p> <p>22 as well?</p> <p>23 A That is my understanding. However, I'm not</p> <p>24 certain that was as a result of a policy change. It</p> <p>25 was my understanding that -- and again, it was my</p>

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<p>1 understanding that our policy was that that traffic 2 was generally not allowed. I think we just stepped up 3 our enforcement on that point. 4 Q Do you play any role in creating or in 5 modifying the operating agreement with the Amazon 6 Associates? 7 A No. Let me re -- I did have -- I did do 8 some review work over the actual text of the policy 9 changes that went into effect regarding redirectors, 10 but I didn't make any material contribution to that. 11 Q What's your annual budget for paid search at 12 Amazon? 13 A That varies from year to year. Which year 14 are you -- 15 Q Let's say 2009. 16 A 2009, I believe we spent close to \$250 17 million. 18 Q Did that exceed spending for paid search in 19 2008? 20 A Yes. 21 Q By how much? 22 A I would estimate 30 to 40 percent. 23 Q Did that increase have anything to do with 24 the policy change? 25 A The policy change did affect that increase.</p>	<p>1 was accounted for, I take it, by other factors; 2 correct? 3 A Yes, growth being an obvious one. 4 Q Growth in -- 5 A In the business. As traffic on the web 6 grows, you know, that proportionately impacts the 7 (inaudible.) 8 THE REPORTER: I'm sorry, impacts the what? 9 THE WITNESS: The sponsored links channel. 10 MR. WANG: I warned the court reporter that 11 you talked faster than the other two witnesses. 12 That's okay. So do the two of us. 13 Q And to be precise about that, how does the 14 growth in traffic impact the sponsored links channel? 15 A Well, it's typically in proportion. So as 16 Amazon's business grows, as Internet usage grows, you 17 know, that -- you know, those are certainly large 18 factors governing the growth of the sponsored links 19 channel. 20 Q Well, I'm looking to see if I can break it 21 down to something even simpler than that. I mean, is 22 it because you're buying more keywords or because the 23 keywords get more expensive or -- 24 A I see. 25 Q -- or other factors?</p>
<p style="text-align: right;">Page 11</p> <p>1 Instead of having, you know, the redirectors pay the 2 search engine directly and, you know, have us 3 essentially pay them, the situation changed so that we 4 were paying the search engine directly. So yes, that 5 did impact the -- 6 Q Is it fair to say that one of the reasons 7 for the policy change was that you thought that your 8 keyword cost would go down? 9 MR. WANG: Objection to the form. You can 10 answer. 11 THE WITNESS: Yeah, we believed that we 12 would see, by removing the arbitrage opportunity, we 13 believed that, yes, we would see benefits and 14 efficiency. 15 Q Okay. Did that occur? 16 A Yes. 17 Q How can you tell? 18 A Simple time series analysis. 19 Q Maybe to you it's simple. I'm sorry. Go 20 ahead. 21 A Yeah, it's basically taking a snapshot of 22 particular search queries and keywords before and 23 after the event and observing the efficiencies there. 24 Q So that when your spending on paid search 25 went up between 2008 and 2009, the rise in spending</p>	<p style="text-align: right;">Page 13</p> <p>1 MR. WANG: Objection to the form. You can 2 answer. 3 THE WITNESS: So the factors -- the factors 4 impacting us, we tend to see more traffic on the same 5 keywords. As we receive traffic to the Web site, our 6 automated systems generate more keywords, which in 7 turn leads to more traffic. So all of those factors 8 certainly help build growth in the channel. 9 Q I see. Has the price of purchasing those 10 keywords gone up? 11 A Over which period? Year-to-year? 12 Q Well, between -- yeah, between 2008 and 13 2009, because that's what we're going to be 14 discussing. 15 A Between 2008 and 2009, there was certainly 16 some keyword inflation, although the general cost per 17 click actually suffered a little bit as a result of 18 the economic downturn around this time last year. 19 Q Okay. And what are the indications for 20 2010? Is your budget increasing? 21 A The budget is certainly increasing. It 22 looks -- so yes, we're growing there. 23 Q How does -- do you have a sense of what the 24 percent increase is? 25 A Worldwide, probably around 30 percent.</p>

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1 Q How does your -- how does the budget for
 2 paid search compare to Amazon's budget for
 3 conventional advertising, if you know? And by
 4 conventional, I would mean both print and digital and
 5 other media, but not in the paid search realm.
 6 MR. WANG: Objection to the form.
 7 THE WITNESS: Yeah, I don't have a good
 8 answer for you there. I don't know quite how that
 9 budget stacks up against some of the other channels.
 10 Q Okay. You wouldn't know what the proportion
 11 of your -- of paid search -- I'm sorry, let me say it
 12 again.
 13 You don't have a sense of what the
 14 proportion of the paid search advertising budget is to
 15 the rest of Amazon's advertising budget?
 16 A I have a sense of the proportion, but I
 17 don't think I'd be able to give a very accurate
 18 answer.
 19 Q Do you have a best estimate or a range?
 20 MR. WANG: Objection to the form.
 21 THE WITNESS: Thirty percent, something in
 22 that range.
 23 Q Do you know whether referral fees to
 24 associates is considered part of Amazon's advertising
 25 budget?

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1 A Yes, it is.
 2 Q Do you have any knowledge as to what the
 3 approximate percentage of your advertising budget
 4 associate payments comprises?
 5 A I think I'd be even less precise there, to
 6 be honest.
 7 Q Would it be more or less than what you pay
 8 in paid search?
 9 A It would be more than paid search.
 10 Q It would be more?
 11 A Yes.
 12 Q If you -- I'm sorry.
 13 A I think I should offer a clarification.
 14 Q Yeah.
 15 A Associates spend is derived from a lot of
 16 different buckets. So that could include content
 17 sites, deal and coupon shops, comp shops, as well as
 18 sort of core associates, bloggers and the like, so --
 19 as well as redirectors, so they're -- you know, taken
 20 as a whole, it's a very large program.
 21 Q You used the word redirectors a couple
 22 times. Could you provide a working definition of what
 23 you understand redirectors to be?
 24 A Certainly. A redirector is an associate who
 25 drives traffic through placing ads on Google and the

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1 other search engines, so paid search.
 2 Q Okay. Does Amazon still, to this day, pay
 3 referral fees to redirectors?
 4 A We do not.
 5 Q Okay. And when did that cease?
 6 A It's -- well, in the U.S. and North America,
 7 it ceased in May 1st of last year. We had a staged
 8 shutdown. I believe the UK was February 1st, and
 9 March 1st was essentially the rest of the world, so
 10 Germany, France, Japan, et cetera.
 11 Q Okay. So at this point, Amazon's policy
 12 would be not to pay any referral fees to redirectors
 13 at all; correct?
 14 A Correct.
 15 Q How can -- strike that.
 16 Following the May 1st, 2009 change in
 17 policy, and at that time you stopped paying referral
 18 fees to North American redirectors; correct?
 19 A Correct.
 20 Q I'm glad I understand what that word means,
 21 because it's so much easier to say than what I was
 22 trying to say previously.
 23 What did Amazon do, if anything, to identify
 24 whether it was still receiving traffic from
 25 redirectors?

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1 A With regard to the May 1st shutdown?
 2 Q Correct.
 3 A So we had a couple of things in place. So
 4 the payment system, the associates tracking and
 5 payment system was modified to allow us to whitelist
 6 and blacklist certain affiliate tags. And so that
 7 approved -- gave us a way of filtering and spotting
 8 sessions that had come in through the redirector
 9 channel.
 10 We also did a fair amount of manual
 11 observation. Unfortunately, we have no automated way
 12 of detecting or scraping the actual ad text out on
 13 Google and Yahoo and the other search engine vendors'
 14 Web sites. It goes against our terms and conditions
 15 with those vendors.
 16 So as a result, the only way we were able to
 17 sort of check to make sure that we were getting
 18 compliance, beyond some filtering on the backside, to
 19 make sure that anybody that didn't comply wasn't paid,
 20 was to break things up and look at things manually.
 21 So for about a month or so, my team --
 22 everybody on the team took, you know, a hundred
 23 keywords and would literally manually go and check
 24 them on, you know, a quasi-daily basis to determine,
 25 you know, whether or not, you know, whether or not our

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1 who was redirected.
 2 Q But, and I guess -- and I guess the -- as we
 3 sit here today, though, I guess you don't really need
 4 to make that distinction anymore, because whether it
 5 comes from free search or paid search, it's all
 6 forbidden; correct?
 7 MR. WANG: Objection to the form. You can
 8 answer.
 9 THE WITNESS: Actually, we still have to
 10 make that determination, because if it comes from --
 11 or it's still difficult to make that determination,
 12 because if it comes from free search or paid search
 13 and someone has their browser settings set to a
 14 position where the referring URL information is null,
 15 that's still going to get through and we were going to
 16 wind up paying. So it's still very important for us
 17 to continue to monitor that.
 18 Q You had testified earlier about how, when
 19 the rules changed in May, effective May 1 of 2009, to
 20 -- so that redirectors would no longer be paid, you
 21 and your team did certain work to try to identify
 22 redirectors; correct?
 23 A Yes.
 24 Q Okay. Did you focus on a particular group
 25 in trying to find, in trying to target redirectors?

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1 A Yes. We -- again, we were able to only look
 2 at a very limited number of queries, due to the fact
 3 that we had to do it manually. And so as a result, we
 4 took the queries upon which -- essentially an ordered
 5 list of the queries for which the redirectors had
 6 gotten the most traffic, as well as some of our top
 7 terms, to ensure that redirectors weren't stepping in
 8 and arbitraging those terms. I think we did
 9 approximately 1,000 or 2,000 queries.
 10 Q With respect to those redirectors you looked
 11 at who were seeming to drive a lot of traffic, was
 12 there a threshold or a cutoff that you used to
 13 determine whether you were going to take a look at
 14 them or not?
 15 A We were less concerned about how much
 16 traffic the redirector drove and more concerned about
 17 covering the top queries. You know, of course given
 18 the hundreds and, you know, hundreds of thousands and
 19 millions of queries that come in, you know, on a very
 20 consistent, hourly basis, we were -- you know, we were
 21 just scratching the surface, but we wanted to get the
 22 queries that saw the most traffic.
 23 Q So in determining which ones to look at, did
 24 you use as a criterion those redirectors who were
 25 seeming to drive the most traffic?

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1 A No, it was strictly based on the queries
 2 that we witnessed driving the most traffic.
 3 MR. DEHN: Can we take a two-minute break?
 4 I think I'm almost done.
 5 MR. WANG: Sure.
 6 (Recess taken from 4:32 to 4:35 p.m.)
 7 Q I'll show you, sir, a document that was
 8 marked as Tarpey Number 5 in Tarpey's deposition.
 9 A Mm-hmm.
 10 Q Can you identify that document, sir?
 11 A Yes, this was an e-mail I received from my
 12 Google account rep after I had notified her about this
 13 ad.
 14 Q Okay. And how did the -- well, when you say
 15 this ad, what ad are you referring to, sir, so we have
 16 it for the record?
 17 A The Beware the SCAM Artists ad.
 18 Q Okay. How did you become aware of that ad
 19 in the first place, sir?
 20 MR. WANG: You should, in answering this, to
 21 the extent there were discussions with Counsel, just
 22 don't discuss the content of those discussions.
 23 THE WITNESS: Mm-hmm. Yes. So I received
 24 an e-mail notification from Kathy Sheehan, another
 25 Amazon employee.

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1 Q And without asking you the content of what
 2 Kathy may have discussed with you -- Kathy is, in
 3 fact, an attorney who works for Amazon; correct?
 4 A Yes.
 5 Q And having received a communication from
 6 Ms. Sheehan, what did you do, if anything?
 7 A I believe the first thing I did was to
 8 determine whether or not this was indeed an Amazon ad.
 9 If our -- you know, it was -- I believe she'd asked me
 10 if it was. It clearly wasn't. It's not our ad text.
 11 We wouldn't run an ad like this.
 12 And you know, I decided at that point, or at
 13 that point I believe I -- I believe Anne Tarpey was
 14 brought into the conversation. I'm not a hundred
 15 percent sure. And you know, that the -- and I was --
 16 and I essentially made the call to Google, to the
 17 Google account rep, to see if they could do something
 18 about bringing down this ad, since we had, you know,
 19 been unable to do so at that point.
 20 Q What was Google's response?
 21 A Essentially what you see in the e-mail. The
 22 account manager forwarded this to the policy team. I
 23 don't have any direct access to that team. And that
 24 was -- that was, in essence, it for my participation.
 25 Q Do you know one way or the other whether