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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL E. PERSON, Plaintiff, -against- GOOGLE INC., Defendant.	ECF CASE 06 CV 4683 (RPP) (AJP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Dated: New York, New York
June 26, 2006

Carl E. Person (CP 7637)
Plaintiff, Pro Se
325 W. 45th Street - Suite 201
New York NY 10036-3803
Tel. (212) 307-4444; Fax (212) 307-0247
Email: carlpers@ix.netcom.com

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S <u>MOTION FOR A PRELIMINARY INJUNCTION</u>

I submit this memorandum of law in support of my motion for a preliminary injunction, returnable July 3, 2006 at 9:30 a.m. I request oral argument and an evidentiary hearing.

THE FACTS

Candidate for New York Attorney General – November 2006 Election

I am an attorney running for New York Attorney General. On May 20, 2006, I obtained 40% of the Green Party nominating convention votes and lost the nomination to my opponent, a Green Party leader for many years. My 40% vote was based on my 46 election issues (see Exhibit L to my moving declaration), particularly my main point of wanting to appoint a "Town Attorney General" in each of New York's 1,800 towns and villages, for decentralized enforcement of the rights of individuals and small businesses.

Pay-Per-Click Internet Advertising to Internet Searchers

Google is the main Internet company because of its search engine, which has become number one in a variety of ways (most indexed pages, most searches, fastest search time, superior technology, lowest price to Internet advertisers, lowest initial charges; quickest to get ads on line). Yahoo was the top Internet company for several years, and (through its purchase of Overture in 2003) took over Overture's role as the

only Internet company offering "pay-per-click" ("PPC") advertising. The advertisements are triggered when a searcher uses a "keyword" being used by an advertiser. When the advertiser's keyword is used by a searcher, the advertiser's ad (3-lines plus a 4th line showing the advertiser's website) is displayed alongside to and simultaneous with the search results. The user may be interested in the ad, because of its keyword connection to the search term(s), and if the searcher clicks on the ad (and goes to the advertiser's website or "landing page"). Yahoo (or Google or Microsoft/MSN) will charge for the click. Google's price range is from $.01 to $100.00 per click, and Yahoo has a minimum of $.10 per click.

My Plan to Win Election – Create 1,000,000 Email Addresses with NYS ZIP Codes at $.01+ Per Address

Starting in January, 2006, I began writing a series of websites for my election campaign, all dependent on Google's PPC offering known as "AdWords", in which the minimum per-click price is $.01. My plan (which I call my "AdWords Plan") is to create a permissive list of 1,000,000 residents in New York with their email addresses and ZIP Codes by advertising with Google's AdWords to attract New Yorkers to my websites, make them an offer of a free book for immediate downloading if they subscribe to my email list and give me permission to send emails to them (thus avoiding later spamming charges). At a cost of the minimum of $.01 per click, I could build a list for $10,000, plus the cost of the clicks that do not subscribe.

This list is intended to provide my candidacy with political contributions, volunteers, one person or a group of persons in each of New York's 1,800 towns and villages to promote my candidacy, obtaining publicity for me locally, holding fund-raisers, coordinating volunteers, managing my campaign locally, and doing the work required in a statewide campaign.

Google's AdWords Minimum Price of $.01 Per Click

I estimated that there are many thousands of keywords that are in little or no demand so that my use of them would not require more than the $.01 minimum per click. This amount, according to Google in describing its "auction" process, is automatically given to the last advertiser whose ad appears when a searcher uses the keyword in his/her search, provided there are no advertisers whose ad did not appear.

Thus, the number one ad in 8 displayed ads could be paying $50.00 or $100.00 per click, but the last ad would pay only $.01 per click, if there had been no ad of any other advertiser left out of the list of 8, and assuming my ad is last (and therefore entitled to the $.01 per-click price).

Google's Rigged Keyword Auction to Fix Keyword Prices at Higher Rates and Drive Many Less-Successful Advertisers Out of the Keyword Advertising Market

Unfortunately, Google has a variety of practices to ensure that I and others similarly situated cannot take advantage of the $.01 minimum per-click rate. Google (i) rejects the ads for failing to meet Google's non-objective Editorial Guidelines; (ii) Google rejects the bid of $.01 as too low in light of the clickthrough rate of my present and past advertising, the content of my ad, website and landing page; the clickthrough rate, and content of others competing for the keyword, and the lack of significant interest in the keyword; (iii) removing keywords of lesser advertiser interest from the market to require me and other advertisers to bid on the higher-value keywords we are trying to avoid; (iv) making the cost too high for me to justify running my ads, to make less competition for Google's favored high-volume advertisers, who are the winner as to most if not all of Google's elaborate rules; (v) providing eBay with the opportunity of running three generic ads as to keywords having no other interest, or interest of only 1 or 2 advertisers, in what appears to be a below $.01 charge and without any of the review of advertising copy, website and landing page content and clickthrough rate, as a favored advertiser of last resort, without enabling me to use or bid for such keywords, at $.01 or any other price; (vi) terminating my advertising without telling me, and my finding out only if I go to Google's AdWords website to learn that my ads have been terminated or made "inactive" for one or more "reasons"; and (vii) various other anticompetitive practices.

Google states:

> If an ad doesn't meet our Editorial Guidelines or Content Policy, we'll stop your ad from running, and you'll see the word **Disapproved** listed with that ad in your account.
>
> [Source: https://adwords.google.com/support/bin/answer.py?answer=6129&topic=26]

I Am Unable to Use Google's AdWords Paying 10 Or 100 Times the Per-Click Rate of Google's High-Volume Advertisers

I cannot run for New York Attorney General without my envisioned permissive email mailing list. AdWords' auction rules with the $.01 minimum price rules allow me to use relatively unwanted keywords and obtain interest in my candidacy at $.01 per click, but Google is denying me this opportunity.

Google's Monopoly of Keyword-Targeted Internet Advertising

Google has a monopoly in the market, for "keyword-targeted Internet advertising" with its pay-per-click pricing including the auction system. See ¶¶ 24-37 under the heading "Google's Monopoly" and ¶¶ 38a through 38-ff in my moving declaration. There are only two other significant competitors: Yahoo, which started the market with its predecessor GoTo.com/Overture (acquired in 2003) and now Microsoft's MSN (hereinafter "MSN"), which entered the U.S. market in May, 2006. [Note: GoTo.Com went public in 1999; on 9/10/01 changed its name to Overture; and became profitable in 2002. Source: 9/10/01 GoTo.com press release published at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=OVER&script=412&layout=-6&item_id=236312]

By reason of Google's larger body of indexed Internet pages (3 times the size of Yahoo), Google's faster indexing and response to searches; Google's marketing of its desktop search add-on to put Google's search option onto the toolbar of many millions of computer users in the United States; Google's superior technology that Yahoo is unable to duplicate; Google's consolidation and expansion with its new 4-story plant, and other in my moving papers. Google is number one and gaining ground. *E.g.*, Google's 1st Quarter 2006 revenues are up 79% over 2005.

A 6/23/06 article in the *San Francisco Chronicle* entitled "Merrill Lynch analyst says Microsoft should buy Yahoo – Report says merger would help in battle against rival Google", stating in part:

> The report, by Justin Post of Merrill Lynch, said the combination would create the Web's biggest company and better position Microsoft to do battle against bitter rival Google Inc., the Mountain View search giant. * * *
>
> Analysts agree that Microsoft was late to focus on its Internet business and is now investing heavily to catch up. But the efforts, such as building a search engine and a search advertising network, have yet to pay off.

Microsoft's urgency is heightened by Google steadily gaining market share in search at the expense of its rivals, according to Post. Google controlled 49 percent of the U.S. market in May, compared with 29 percent by Yahoo and 11 by Microsoft's MSN, according to Nielsen/NetRatings.

http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/24/BUGG3JJIGB1.DTL

The anticompetitive practices of Google are designed to shut out the smaller users and allow Google to concentrate on and favor large, high-volume advertisers who can be expected to grow much faster than small, low-volume users and give Google even greater market share in the relevant advertising market and the highly-related search engine market. The only three competitors in the former market are the largest three competitors in the latter market. There are more than 1,000 search engines, but only 3 count.

Features of Keyword-Targeted Internet Advertising Making It Not Reasonably Interchangeable with Traditional Advertising Media

The Keyword-Targeted Internet Advertising market is unique because of the existence of many features not available for the most part (or at all) in any other form of advertising. These features are:

1.. The ads are all online at the moment of display.

2.. It allows advertisers to reach persons searching for a product, service or supplier at the same moment of a potential customer's searching for a supplier or contact, through the presentation of a 3-line ad alongside the search results for the keyword used for the search.

3.. The searcher, if interested, clicks on the ad and, by hyperlink in the online ad, jumps to the website or landing page of the advertiser.

4.. The advertisers (in proportion to the information provided in their ads) get an immediate, highly-qualified lead (qualified by the lead himself/herself) for whatever the advertiser is selling or offering (such as airplanes, elephants, political candidacy, job information or advice, legal services, imported diapers, carbon dioxide or anything else anyone might be interested in acquiring or learning about.

5.. All this at a minimum price of $.01 per click (as to Google) or $.10 per click as to Yahoo. This price difference is a competitive factor that prevents any meaningful competition by Yahoo.

6.. The Google AdWords advertiser is able to go online with advertising **in minutes**: the Yahoo advertiser has to wait 7 days. unless willing to pay a $199 fee for Yahoo's "Fast Track" service. to use Yahoo employees to prepare advertising copy and thereby shorten the review procedure to 3 days. This difference is another competitive factor that prevents meaningful competition by Yahoo.

7.. There usually is no production cost for the ads [but see Yahoo's "Fast Track" service].

8.. The price for the ad is supposedly by auction.

9.. Copy testing can take place accurately and within hours.

10.. The efficiency of the ad is determined accurately and near instantaneously.

11.. The advertiser only pays when someone responds to his/her ad (by clicking on the ad).

12.. Can place advertising on AdWords at any time. 24 hours per day. including holidays. Yahoo. Yahoo takes longer because of its human review process. a competitive factor that prevents meaningful competition by Yahoo.

13.. Advertising [with Google] is place by computer without human intervention.

14.. Payment is made by credit card without human intervention or decision.

15.. No telephone calls or Internet communications are made with any salesperson.

16.. The advertisers come from virtually every one of the 18,500 towns. villages and cities in the United States. an estimated one million advertisers for Google (and far fewer for Yahoo and MSN).

17.. Thousands of these advertisers can place their order with Google. Yahoo or MSN at the same time because of the system and software developed for this type of advertising.

18.. An instant ad is created for the customer. going online in seconds (for Google ads).

19.. The advertiser is provided tools to track the efficiency of each of the advertiser's ads.

20.. There is alleged bidding for use of keywords and for the placement of the advertiser's ad in relation to other advertisers (or prospective advertisers) bidding for use of the same keyword: in the case of Google. the auction process is manipulated by Google to fix prices at higher levels than the auction would otherwise provide and Google removes keyword inventory to increase the bids for the remaining keywords.

21.. The advertiser is given access to the most relevant searches from the billions of searches taking place each day (within the search engine system selected, *i.e.*, Google, Yahoo or MSN).

22.. Google advertisers can have a budget as low as $.01 per day with no minimum monthly expenditure required: whereas, Yahoo has a monthly minimum required expenditure of $20 (even if Yahoo provides an insufficient number of impressions and clicks).

23.. The market never runs out of space for an ad because of the pricing mechanism (alleged auctions) to increase the price per click until the weaker advertisers stop bidding or stop increasing their bid. *E.g.*, on 6/24/06 Yahoo displayed 58 ads for the keywords "hybrid automobiles"

24.. The auction takes place for the keyword within a fraction of a second and is decided within a fraction of a second from the time a user uses the keyword in a search.

25.. The advertising reaches into every town, village, county, block in the U.S. to display the advertiser's ad to any web searcher using the advertiser's selected keyword.

26.. A single advertiser's ads are displayed one at a time to reach 10,000, for example, instead of a single time to reach 10,000 (such as a single TV spot, radio spot, or newspaper or magazine ad).

27.. The advertiser's ad is put on the same page being viewed by the searcher as the search results are being displayed to him/her (with ads beyond number 10 or so carried over to the next page).

28.. Prior sales (or sold out inventory) are non-existent; you can bump an earlier advertiser by bidding a higher price (in absence of Google's practices of changing the bid).

29.. The ad appears the same (as to size, number of characters and size of characters in the heading, number of characters in the 2nd and 3rd lines: a link to a website or landing page of the advertiser; and the same color scheme as the competing ads of major, well-known high-volume advertisers; however, there are now options to permit use of graphics in keyword advertising:

Taken individually, newspaper, cable, magazine, radio, television and billboard advertising lack most of these characteristics, and are losing advertisers to this new medium still in its infancy. These features combined in one advertising medium make such medium not reasonably interchangeable with any

of the traditional advertising media. Keyword-targeted Internet advertising has opened up a new form of advertising for individuals. businesses, candidates for office, non-governmental organizations and governmental agencies that were not able to use advertising of the traditional type and, in addition. is causing an increasing movement of advertisers away from newspapers, particularly or most noticeably.

Barriers to Entry

In my moving declaration. at ¶¶ 38-a through 38-ff. I have described the main barriers to entry in the keyword-targeted advertising market in the United States. Even Microsoft, one of the largest monopolies of them all. is unable to compete successfully in this market, and is being urged by Wall Street to acquire Yahoo to give Microsoft's MSN a possible opportunity to catch up with Google in this market.

Plaintiffs' Irreparable Injury

I am qualified to be the New York Attorney General. with my 40 years of antitrust and civil rights litigation experience. I'm not as qualified for any other elective office. The opportunity to run for New York Attorney General comes only once in 4 years, and I am 70 years old.

I have to obtain a preliminary injunction prohibiting Google from continuing with its anticompetitive activities. The election is November 7, 2006. and I have to build and use my list between now and then to be able to have a chance to win. I am a far more qualified candidate than Jeanine Pirro (Republican nominee, with no opposition) or Andrew Cuomo (probable Democratic nominee).

I have to obtain a preliminary injunction as quickly as possible. or my candidacy will die. Use of AdWords is an improvement on MoveOn.Org's method of raising money. It used traditional advertising to build the email list, at a comparatively high cost per name. AdWords enables me to build a list for slightly more than S.01 per name and then be able to use such low-cost list to obtain contributions and workers.

Even if I am unable to win the election in November, 2006, my candidacy serves a needed purpose for me of publicity and greater public acceptance for my new political ideas (see Exhibit L) to compete with the prevailing political ideas that have resulted in loss of income. opportunity and standard of living for most Americans. and an unfair division of the economic pie.

THE RELIEF SOUGHT

I seek an Order under Rule 65. Fed. R. Civ. P., enjoining Google Inc. from offering any **keyword-targeted Internet advertising** in the United States or in New York State at Pay-Per-Click prices unless

> (i) the Pay-Per-Click price offered to be paid by the Plaintiff ... is fed into Google's auction system (and competes with other advertisers for a keyword and an advertising position), without adjustment of any offered per-click price ...:
>
> (ii) all words in the English language other than obscene or illegal words are made available as keywords to Plaintiff ... for Google's auction process, and that Google's minimum 1-cent price per click is automatically given to the Plaintiff ... who (a) is the only bidder for a keyword or (b) is assigned last place in the list of multiple advertisements served to a searcher by Google (with no lower bidder for the keyword);
>
> (iii) Google stops requiring the elimination of abbreviations and requiring other changes in lawful copy as to the advertisements of Plaintiff ...;
>
> (iv) Google stops terminating the ads of Plaintiff ... for allegedly failing to meet the clickthrough rate or other standards or requirements of Google: and
>
> (v) Google provides notice and an opportunity for Plaintiff ... to participate in any special deals Google makes available to any favored advertisers. such as eBay and Amazon.

REQUEST FOR EVIDENTIARY HEARING

I request an evidentiary hearing to put on witnesses to testify about the alleged market. keyword-targeted Internet advertising. the extent of the market and Google's share of it, the barriers to entry keeping everyone but Google. Yahoo and Microsoft MSN from competing, and the various anticompetitive practices of Google with respect to its alleged auction market for keywords. described in my moving papers.

ARGUMENT

I.

KEYWORD-TARGETED INTERNET ADVERTISING, WITH ITS PAY-PER-CLICK ADVERTISING, IS A UNIQUE AND DISTINCT SERVICE MARKET UNDER THE NATION'S ANTITRUST LAWS

Keyword-targeted Internet advertising is a new market, a service market. It was founded in 1999 by GoTo.com/Overture Services. Inc.. which was purchased by Yahoo in July. 2003. Meanwhile. Google. another Internet search engine. developed its own keyword-targeted Internet advertising system to

compete with Overture. Now. Microsoft/MSN ("MSN") has announced it is joining the competition in this market. as of May, 2006. and spending $2 billion to try to catch up. Annual revenues for this market are close to $10 billion. There are more than one thousand search engines. but only the 3 largest search engines (Google. Yahoo and MSN) are significant competitors in the keyword-targeted Internet advertising market.

A list of 29 features existing with keyword-targeted Internet advertising is set forth at pages 4-6 above under the heading beginning "Features of Keyword-Targeted Internet Advertising".

No other form of advertising has any substantial number of these features. making keyword-targeted Internet advertising a unique advertising medium, and not interchangeable with any of the traditional advertising media.

Cases show that the different types of advertising are treated as different product (i.e., service) markets for purposes of Sections 1-2 of the Sherman Act. 15 U.S.C. Sections 1-2.

"Metropolitan daily newspapers sold at wholesale" can constitute a relevant product market. *Paschall v. The Kansas City Star Company*. 695 F.2d 322. 326. 1982-83 Trade Cases P 65.104 (8th Cir. 1982). Also. "general circulation daily newspapers" was held to be a relevant market. *Alpert's Newspaper Delivery Incorporated v. The New York Times*, 876 F.2d 266, 268, 16 Media L. Rep. 1720. 1989-1 Trade Cases P 68.591 (2d Cir. 1989).

A related relevant market is the "market for representing college newspapers in the placement of national advertising" *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1472 (9th Cir. 1985): and another related market was determined to be the "production of television advertising" in a relevant geographic. *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478. 486 (5th Cir. 1966). Another court determined the relevant market to be either "advertising as a whole of Tunica County as a travel destination" or "specifically internet advertising". *Tunica Web Advertising, Inc. v. Barden Mississippi Gaming LLC*, 2005 WL 3488499 (N.D. Miss. 2005);

The 4th Circuit determined that "outdoor advertising" was a relevant product or service market, holding that that "billboards in the Columbia area are not substitutable with advertising in other media and that there is little, if any, cross-elasticity of demand". *Omni Outdoors Advertising, Inc. v. Columbia Outdoor*

Advertising, Inc., 891 F.2d 1127, 1142 (4th Cir. 1989) ("The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media.").

II.

KEYWORD-TARGETED INTERNET ADVERTISING IS SO UNIQUE THAT IT CANNOT HAVE CROSS-ELASTICITY TO BE REASONABLY INTERCHANGEABLE WITH OTHER TYPES OF ADVERTISING; TYPES OF ADVERTISING MEDIA ARE INHERENTLY DIFFERENT SERVICE MARKETS

In *Omni Outdoor Advertising, supra*, pages 1140-1142, the 4th Circuit discussed the cross-elasticity test for determining the boundaries of product [service] markets, saying in part:

> Seminal Supreme Court cases instructing us how to define a relevant product market include ... *Grinnell* ..., *Brown Shoe*, *du Pont* ... (1957) ... and ... *du Pont* ... (1956).... ... [R]ules have emerged governing the definition of relevant product market. The Court in *Brown Shoe* stated:
>
> > The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. ...
>
> It went on to introduce the rules defining submarkets. In determining the relevant product market in the Columbia area, however, we need judge only the reasonable interchangeability and cross-elasticity of demand between outdoor advertising, on the one hand, and television, newspapers, and radio, on the other. FN6
>
> FN6. We decide that the outdoor advertising industry in Columbia is an appropriate product market under the *du Pont* test. We would have arrived at the same result under *Brown Shoe*'s submarket concept, *i.e.*, the "practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." ....
>
> * * *
>
> ... In *du Pont*, the Court stated:
>
> > Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.
>
> *1141
>
> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

.... Cross-elasticity of demand has been defined as:
[T]he percentage change in the quantity demanded of a product resulting from a small percentage change in the price of the product. ....

The higher the cross-elasticity of demand between two products, the less will be the ability of a sole seller of one of the products to raise his price without suffering a reduction in sales volume so great as to offset the positive effect of the higher on profits.

R.A. Posner, Antitrust 437, 438 (1978); *see also* II P. Areeda & D. Turner, Antitrust Law, § 531, at 398-99 (1978).

In NCAA ... (1984) Justice Stevens, writing for the majority, approved a district court conclusion that college football broadcasts constituted a separate market of television programming on Saturday afternoon. This was supported, he said, by the district court's finding "that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience," and that "the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product."....

Although the product market discussion in *NCAA* involved the content of programs, we think that reasoning is generally applicable to advertisers' selectivity in choosing billboards, radio, television, or newspapers, singly or in combination. The patterns of competition in selling entertainment do not necessarily follow the patterns controlling competition in other industries because the qualities of specific entertainment that attract different audiences are each unique. FN7 So too the economic utility of a particular media for a particular purpose makes statements concerning general competition between them inconclusive as to whether each is a separate product market. We think this is demonstrated in *Times-Picayune* ... (1953). There, the Court, in considering the relevant product market in a newspaper tying case, said:

FN7. We think Professor Areeda's comment in his discussion of the case is significant: Of course, other programming was available at lower cost, although not necessarily at lower cost per viewer attracted by the program. Indeed, with respect to any class of program-baseball, all sports, theatrical films, situation comedies-other programs are available. Yet, there seems little doubt that a hypothetical monopolist of any significant program class could elevate its price above the level that would prevail under substantial competition within that program class. P. Areeda & H. Hovenkamp, Antitrust Law § 525.1, at 455 (Supp.1988).

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited *1142 number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small. Useful to that determination is, among other things, the [newspaper] trade's own characterization of the products involved. The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media.

The foregoing excerpts from *Omni Outdoor Advertising* make it clear that keyword-targeted Internet advertising, with the lengthy list of fundamental differences between it and all other forms of

advertising (see pages 5-7 above). compel the conclusion that there is no reasonable interchangeability and no sufficient cross-elasticity of demand to conclude that keyword-targeted Internet advertising is in the same market with any of the other types of advertising.

No Cross-Elasticity or Reasonable Interchangeability in My Case

I. as an advertiser looking for individuals throughout the 1,800 towns and villages in New York State cannot afford space or classified ads in 1,800 local advertising media; and (even if I could) I would lose advertisers unable to leave the local advertising medium to reach me at one of my Internet websites and incur costs far beyond the $.01 per email address available in my chosen (Internet) advertising arket. I need a medium directly tied in to my Internet websites. a major unique feature for keyword-targeted Internet advertising. The cost of $.01 per lead with keyword-targeted Internet advertising in comparison to mass advertising with no guaranteed cost per lead makes keyword-targeted Internet advertising the only possibility for me and most other advertisers who have found out about such type of advertising. On the other hand. it probably is not useful for reaching a local audience such as in Riverhead. New York. More traditional advertising means (such as local newspaper. radio or television advertising) would be far more appropriate and not interchangeable. For my wide-area purposes (United States market and New York State submarket). the types of advertising other than keyword-targeted Internet advertising are useless and not interchangeable (whether or not Google is manipulating the auction results and monopolizing the market).

III.

GOOGLE HAS CREATED AND USED A MONOPOLY POWER TO EXCLUDE COMPETITORS AND FIX PRICES IN THE KEYWORD-TARGETED INTERNET ADVERTISING MARKET

Monopoly power is the power to exclude competition and fix prices in a relevant market [*U.S. v. Grinnell Corp.*, 384 U.S. 563. 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)] or "the existence of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent". *American Tobacco v. U.S.*, 328 U.S. 781, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946).

Under Section 2 of the Sherman Act. "it is not necessary that all competition be removed from market: test is not total foreclosure, but whether challenged practices bar substantial number of rivals or severely restrict market's ambit." *U.S. v. Dentsply Intern., Inc.*, 399 F.3d 181. 191 (9th Cir. 2005). The Court stated (at p. 186):

> A violation of Section 2 consists of two elements: (1) possession of monopoly power and (2) "'... maintenance of that power as distinguished from growth or development as a consequence of a superior product. business acumen. or historic accident." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480. 112 S.Ct. 2072. 119 L.Ed.2d 265 (1992) (citing United States v. Grinnell Corp., 384 U.S. 563, 571. 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)).

Google acquired its monopoly power by developing a superior search engine. crawler to compile website pages from the vast reaches of the Internet. to organize such material through indexes. arrays and algorithms to enable the material to be accessed in a fraction of a second to respond to thousands of simultaneous queries. to develop lower-cost processing through hundreds of thousands of servers hooked and working together to solve components of a search and reassemble the separate search results into a single result within a fraction of a second; to conduct at the same time bids of the various advertisers seeking to present their ads to persons using a keyword at the time a keyword is being used. and select and display the ad results simultaneous to the search results, among other things Google has been able to do.

The problem. however. is the series of restrictive practices that Google has imposed on use of its superior advertising service, practices that would be lawful except when being done in violation of Sections 1-2 of the Sherman Act.

Google's monopoly power is evidenced by its dramatic growth. coming from 2nd place (behind Overture and Yahoo) and swiftly passing Yahoo/Overture with ever increasing revenues and market-share percentages in the underlying search-engine market and in the keyword-targeted Internet advertising market that relies on the underlying search engine.

Further evidence of the Google monopoly is that with more than 1.000 search engines. only 3 companies are significant competitors in this huge (multi-billion dollar annual. fast-growing market):

Google. 2nd place Yahoo/Overture. with Microsoft announcing in May. 2006 that it is going to join the U.S. market and compete against Google. with the expenditure of $2 billion.

Furthermore. to maintain and increase its monopoly. Google has (in amazing secrecy) built a huge plant in The Dalles. Washington. to pull together its operations compete even more vigorously. imposing even greater barriers on anyone in the market trying to compete (i.e.. Yahoo/Overture) or anyone just announcing that it is going to come into the market (i.e.. Microsoft/MSN). With so many billions of dollars at stake. the barriers to entry are so obvious and vast that only Microsoft/MSN is going to try to start up competition (as of May. 2006). and the pre-existing competitor (Yahoo/Overture) continues to fall further behind. On 6/23/06. a Wall Street analyst's report was published in the San Francisco Chronicle that Microsoft should buy Yahoo to try to catch up with Google.

I have outlined a long list of barriers to entry under paragraph 38-a through 38-ff of my moving declaration (pages 13-19).

The power to exclude competition is happening with pre-existing competitor Yahoo. continuing to experience a decline in the market it once had alone. without competition: it is also happening to exclude more than 1.000 other natural competitors (the owners of the other search engines on Internet). any of whom needs a search engine to start any competition with Google in the keyword-targeted advertising market. but with no takers other than the largest other competitor of all in software and search engines: Microsoft/MSN. which is only now trying to play catch-up with its vast hoards of cash. with no assurance that it can create the technology and know-how Google's founders and controlling shareholders possess and use (Larry Page and Sergey Brin).

The present existence of monopoly power is demonstrated easily by Google's pricing structure. requiring me and others similarly situated to increase our bid 50 to 100 times. without driving us to a "competing" keyword-targeted Internet advertising system (Yahoo/Overture or MSN). because the differences are too great: the other two advertising systems are not readily interchangeable with Google's AdWords. lacking the depth of website pages in their respective databases; lacking the number of users of their search engines: lacking the interface with advertisers. including a competitive quality of performance

analysis tools: having far higher costs and too much of an overlap (meaning that I would be paying more than 10 times as much to acquire the same email address using Yahoo).

Google has dropped its minimum price to $.01 per click against Yahoo's $.10 minimum. in what could turn out to be a disaster for Yahoo/Overture, to lose its customers to Google offering a minimum price of 1/10th the amount charged by Yahoo.

It should be remembered that Yahoo is not dependent on its revenues from keyword-targeted advertising, unlike Google. and Yahoo's competitive response to Yahoo reflects this fact. Yahoo with all of its other interests is not focusing on the market as much as Google. with telling. adverse results for Yahoo. The same happened with Microsoft/MSN. With all of its market domination problems worldwide in other markets (such as the software for personal computers). Microsoft/MSN was not focusing on the keywords-targeted advertising market. and is now saying publicly that it is going to try to play catch-up.

Google's acquisition and use of monopoly power has awakened Microsoft/MSN. but at this time there is no reason to believe that Microsoft/MSN will be able to stop Google with its growing monopoly. Wall Street recognizes that Microsoft is the only possible contender.

IV.

GOOGLE IS USING ANTICOMPETITIVE ACTIVITIES TO EXPLOIT AND MAINTAIN ITS MONOPOLY OF THE KEYWORD-TARGETED INTERNET ADVERTISING MARKET

Google's monopoly (as well as the business models of Yahoo/Overture and Microsoft/MSN) use an auction process to sell the right of advertisers to have their ads displayed (or displayed in a competitive order) to searchers using the keyword being bid on by the competing advertisers. It is this auction that is being unlawfully manipulated by Google. resulting in the denial of a true auction process for keyword use; increasing the price and profits for Google and making Google of greater interest to the favored high-volume advertisers who contribute most of the revenues and profits to Google: and working to

the disadvantage (fewer customers and lower revenues and profitability) to the two competitors (Yahoo/Overture and Microsoft/MSN).

Google has taken tens of thousands of keywords off the market (to manipulate the auction price of the other keywords) to require me and other advertisers to bid for the keywords having a greater demand, and thereby causing the price for such keywords to artificially climb higher, to give increased revenues and profits to Google, to impose an unwanted price increase on advertisers that hang in with Google in spite of these price increases, because of the lack of any viable competition, when the facts are known; and causing advertisers such as myself to drop out of most of the desired advertising because Google is demanding that my auction bid be substantially higher than I am able to pay, which refusal by me Google then uses to exclude my bid from consideration. It is anticompetitive to require me to pay 10 or 50 times more per lead (click) than being paid by companies that have the success to make greater income and profits out of a lead.

In other words, I have been willing to pay for keywords that nobody else wants, or with such limited demand that I would be entitled to the lowest price of $.01 per click, but Google takes my bid and re-evaluates the bid to convert it into something approximating 1/50th as low as my bid in fact is (i.e., my actual bid of $.05 per click is changed by Google through its manipulation of bids into 1/10th of a cent, and Google then advises me that I will have to increase my bid to $.50 or so to be able to have my ad appear with the keywords at issue. Google then takes my new bid of $.50 (which I will be charged per click) and reduces it to 1/50th and enters it in its auction system as $.01 per click, and allows me in some cases to be an advertiser as if I had bid only $.01, when in fact I was forced to bid $.50 and will be charged $.50 per click, even though every other advertiser is paying less per click. This is not an auction; it is price fixing by a monopolist exercising its monopoly power.

This manipulation of the auction market enables Google to make huge unearned profits for itself in a variety of ways. First of all, it forces me to pay 50 times more per click than I should be paying. The lowest price of $.01 per click should be mine if I am the only advertiser for the keyword or I am the last ad displayed (say number 8 of 8 displayed ads) and no other advertiser was left out. Yet, when you see Google displaying 58 ads for the keywords "hybrid automobiles", you can see than Google is manipulating

prices and inventory when the last ad displayed for 99.9% of searches (i.e., those that do not have 58 ads) do not give the last advertiser the $.01 minimum per-click price. When advertisers go along with these huge price increases, they are driving up the auction price of the keywords, enabling Google to make more revenues and profits from its monopoly. But I have seen no evidence that any of the major advertisers have refused to participate in the auction process merely because of Google's artificial manipulation of the price, to require higher prices for keywords than would exist in absence of Google's manipulation of the auction price. This is evidence that no other competitor is an adequate substitute for the advertiser and that they continue to profit from AdWords monopolistic, anticompetitive system.

Google also discourages small advertisers from using AdWords by a copy review process that halts the advertising of small advertisers without notice, as part of Google's scheme to stop small advertisers from making use of the low advertising rates available to favored high-volume advertisers (including eBay and Amazon), but which Google is not making available to low-volume advertisers.

For example, Google is letting eBay and Amazon run the same set of ads (3 different types in the case of eBay) to tens of thousands of different keywords without any competition, or with only 1-2 other advertisers, enabling eBay and Amazon to obtain the $.01 per click price, and probably discounted by Google to something substantially less (perhaps $.005 or lower per click) but at the same time not making most of such keywords available to me or any other advertisers. There are many tens of thousands of words for which eBay and/or Amazon are the only advertisers, keywords which, upon information and belief, are not available to me at any price, or at least at the minimum price of $.01 per click, even though there is no demand by any other bidding advertiser for any of such keywords. It seems safe to say that Google is choosing these favored keywords for eBay and Amazon and that they are willing to take any inventory Google is willing to release to them.

This is another way that Google is manipulating its auction system, by pulling keywords off the market and forcing me and other advertisers to bid for keywords already in greater demand, with the result that the keyword prices go up artificially, or I and others similarly situated remove our selves from the rigged auction market.

These are anticompetitive practices by a monopolist that should not be taking place. They are distorting the market and auction prices with the result that Google is obtaining unjustified profits and competitors are put at an even greater disadvantage. and overall prices for advertising remain higher than they should.

It is also price fixing by contract, combination and conspiracy in violation of Sections 1-2 of the Sherman Act.

V.

GOOGLE'S GRAND SCHEME OF FORCING EVERY ADVERTISER TO BE AN IMMEDIATE ADWORDS SUCCESS (WITH A HIGH CLICKTHROUGH RATE) IS AN ILLEGAL SCHEME TO FIX KEYWORD PRICES, RESTRICT AD AND WEBSITE CONTENT OF ADVERTISERS, AND RESTRAIN THE COMPETITION OF ADVERTISERS OF NEW PRODUCTS, SERVICES AND IDEAS AND NEW COMPANIES

Google has obviously determined that if every advertiser could be as successful as the most successful advertisers (such as eBay, Amazon. Dodge. Lexus. Honda) Google would be able to maximize its profits. When searching in Google for "hybrid automobiles" on June 24, 2006. Google served me at one time with 58 different ads. including ads of Dodge, Lexus and Honda. Obviously the demand for use of the keyword "hybrid" brings out the maximum bid of $100, or something close to it, with 58 advertisers being selected for presentation. Of course this raises the issue why Google for other keywords cuts off the list of served ads at 3 to 8 ads, while rejecting my ads and the ads of other smaller companies with less name or brand recognition and with obviously less prospects for a high clickthrough rate.

Google's system for reviewing my bid and determining that I must bid 10 or 20 times as much or not be allowed to advertise is a pretty weighty undertaking for software to undertake at the moment a user has used a keyword in question. This review by Google includes its "Site Quality" and "Landing Page" reviews of my websites and landing pages: Google's evaluation of the contents of my websites, my landing pages and my ads in comparison with other advertisers; Google's review of my past clickthrough rate with prior, unrelated advertising. Google's estimate of my present clickthrough rate if it were to allow my ad: Google's comparison of my clickthrough rate with the clickthrough rate of Honda, eBay or some other

established advertiser competing for the same keyword; and then the application of Google's Editorial Guidelines to my advertising copy for the AdWords ads. Some of this review appears to take place at the moment a searcher is using a keyword I have already bid on.

This whole review procedure is unrealistic and anticompetitive. It places an unreasonable burden on advertisers trying to break into the market with a new idea, new product, new service or with a new, unknown company and, on the other hand, favors large successful high-volume advertisers with establish names and brands (with expected high clickthrough rates) by eliminating potential competition for them. It is a *per se* price and product-fixing (or advertising-copy fixing) practice that is most destructive of competition and adversely affects all relevant product and service markets, political markets, governmental markets – everything capable of being advertised.

The whole ideas that you can require bids prices to be adjusted to a computer's evaluation of millions of websites as to the tens or hundreds of millions of different offers and topics is absurd, and is obviously just a scheme to force me and others to pay higher and higher per-click prices until we have no profit left, and with Google winding up with what should be my profit, and benefiting the high-volume advertisers (with a higher clickthrough rate) now having reduced competition which Google prevent us from competing.

It is a violation of Sections 1-2 of the Sherman Act to conspire to eliminate a product and to increase the price of a competing product not eliminated. *U.S. v. American Radiator & Standard Sanitary Corporation*, 433 F.2d 174, 192, 1970 Trade Cases P 73.331 (3d Cir. 1970).

General Cinema Corp. v. Buena Vista Distribution Co., 532 F.Supp. 1244, 1256-57 (C.D. Cal.), aff'd 681 F.2d 594 (9th Cir. 1982) condemned as *per se* illegal price fixing "split of product agreements" under which movie theater operators and agreed to divide "first rights of negotiation" with film distributors for newly-released feature films.

In *State of Arizona v. Cook Paint & Varnish Co.*, 391 F.Supp. 962, 965 (D.Ariz. 1975) the court, in a Section 1 conspiracy case, used language appropriate for application to a manipulated auction, such as Google's AdWords auctions:

> ... all for the purpose of restraining trade, increasing the price of the product to users and creating an artificial market for the product' and (2) 'fixing uniform, arbitrary and non-competitive price levels at which the product is sold'. Among the alleged effects of this conspiracy were that 'prices of the product sold by defendant corporations to plaintiffs and others were raised, fixed, stabilized, and maintained at non-competitive levels' and that 'competition between the among defendants was restricted and suppressed and purchasers of the product including plaintiffs, have been deprived of the benefits of free and open competition'.

Product restrictions have been held to be violations of the Sherman Act. See *U.S. v. Standard Oil Co.*, 1973 WL 858 (N.D. Ohio. 1973) (product restrictions in service stations; Section 1 case involving a consent decree). Also, see *U.S. v. U.S. Gypsum Co.*, 67 F.Supp. 397, 415 (D. DC 1946) (improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products). *U.S. v. Women's Sportswear Mfg. Ass'n*. 336 U.S. 460, 462, 69 S.Ct. 714 (1949) (trade association required giving to members in good standing with named union all available work at comparable prices, forbade rebates and required equitable division of work among association members, held: imposed an illegal restraint on interstate commerce. Sherman Act, § 1).

The listed restrictions imposed by Google on advertisers of all types is a restriction of much greater consequence than any previously discussed by any court. Google's restrictions are being imposed across the board as to every industry, all political candidates, all governmental organizations, all new companies with new and improved products and services: all old and successful companies. It is not possible to create such restrictions and have a competitive economy. All that Google is doing is try to cater to major, high-volume advertisers by finding fault with advertisers who do not have the same name or brand recognition to obtain, right away, a high clickthrough rate, and either force us to pay more per click than our competitors (when our profit margins clearly require an **equal or lower** price per click) or drive us out of the marketplace for keywords for the benefit of Google's favored advertisers.

The practice is obviously illegal and should be stopped right away, by preliminary injunction and later by a permanent injunction.

VI.

THE ACTIVITIES OF GOOGLE CONSTITUTE UNLAWFUL PRICE FIXING BY CONTRACT, COMBINATION AND CONSPIRACY IN UNREASONABLE RESTRAINT OF TRADE IN VIOLATION OF SECTIONS 1-2 OF THE SHERMAN ACT

Each of the Google advertisers is required to agree to the terms of a written advertiser's agreement as part of a Google process for new advertisers. I checked a box indicating that I agreed to the terms of the agreement when I first started to use AdWords back in November, 2003. During June, 2006, I tried to download a copy of the present form of agreement used with new advertisers, but did not do so because of a term in the agreement requiring advertisers (including me) to keep the agreement confidential. I do not understand why confidentiality is being required. The current form of agreement dated 5/23/06 (containing a confidentiality provision) can be seen by anyone at https://adwords.google.com/select/TCUSbilling0406.html.

Google has perhaps one million advertisers, who are bound to the terms and guidelines being imposed by Google on all advertisers, including the "Editorial Guidelines" (Exhibit B to moving declaration) and the "Site Quality and Landing Page Guidelines" (Exhibit C to moving declaration). Major advertisers with dedicated webmasters, great name and brand recognition wind up getting high clickthrough rates, probably without any appreciation of the content of the website by persons who click on the ad and visit the site for the first time. But smaller advertisers with a new product or service and with no name or brand recognition require more effort to attract prospective customers, and will naturally have a lower clickthrough rate. Google's pretense that it can increase my ability to sell persons on my ideas with canned website and ad copy content and copy rules is absurd. It merely gives Google an excuse to charge me more money per click (for the profit of Google) or take me out of the market (thereby favoring Google's successful high clickthrough customers selling books, hybrid cars or products or services with an existing market.

Google's restrictions on website content, website appearance, ad content, ad copy, clickthrough rates in comparison to successful advertisers, taking keywords off the market, giving favored $.01 or lower

per click pricing to eBay and Amazon, and the other practices described in my moving declaration are a contract (i.e., the written agreements with all of Google's advertisers), combination (of Google and all of its customers) and conspiracy (among Google, the alleged Co-Conspirators identified in the complaint, and advertisers like myself who are victims of the conspiracy that we are forced to join to be able to attempt to advertise in this new medium being monopolized by Google.

The activities of Google are illegal under Sections 1-2 of the Sherman Act.

VII.

THE PLAINTIFF IS BEING IRREPARABLY INJURED IN HIS CANDIDACY FOR NEW YORK ATTORNEY GENERAL

I have explained how I am being irreparably injured, at page 7 above and at ¶¶ 39-65 of my moving declaration, at pages 19-26. I incorporate this material by reference. To summarize, I am a highly qualified candidate for New York Attorney General with important election issues (see Exhibit L) and I have a workable plan for being elected as an independent candidate. My AdWords Plan is to build a list of 1 million email addresses (with ZIP Codes) of New York residents at a cost of slightly more than $.01 per name (or $10,000 + for the entire list, mostly to be paid by contributions solicited from the list as it is being created), offering free PDF copies of my three books and other useful information to persons who click on my AdWords keyword ads, and then with this "permissive" mailing list, use the list to obtain contributions and volunteer workers and local campaign coordinators throughout New York State's 1,800 towns, villages and cities. Howard Dean did this with MoveOn.Org but **without** the huge advantage of keyword-targeted Internet advertising to make list building possible at slightly above $.01 per name.

VIII.

PLAINTIFF HAS DEMONSTRATED HIS ENTITLEMENT TO GRANT OF THE REQUESTED PRELIMINARY INJUNCTION

Preliminary injunction relief is appropriate when a plaintiff establishes "(1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in [plaintiff's] favor." *Wisdom Imp. Sales Co., L.L.C. v. Labatt Brewing Co.*. 2003 U.S. App. LEXIS 16153 (2d Cir. 2003), quoting from *TCPIP Holding Co., Inc. v. Haar Communications, Inc.*, 244 F.3d 88, 92 (2d Cir. 2001).

I have met this standard. I have established the likelihood that without the requested preliminary injunction I am unable to run as an independent candidate for New York Attorney General (November 7, 2006 election); and that I have a likelihood of success on the merits (that Google has a monopoly in the stated relevant market and is unlawfully using the monopoly through the stated practices described by me) or that I have raised sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in my favor. I stand to lose the election to statewide office if I do not obtain the injunctive relief; whereas Google, if it is enjoined obtains more advertising and revenues for its advertising system.

IX.

PLAINTIFF IS ENTITLED TO AN EVIDENTIARY HEARING TO SUBPOENA WITNESSES TO TESTIFY ABOUT MARKET SHARE, PROFITS, BARRIERS TO ENTRY, ANTICOMPETITIVE PRACTICES

Because of the lack of product line reporting in the financial statements of Google. Yahoo and Microsoft, I am unable to provide accurate revenues for the three companies in the relevant market. keyword targeted Internet advertising in the United States (and the submarket of New York, where I have my candidacy for statewide office). I need to subpoena witnesses to testify on these financial matters as well as

barriers to entry, market share, Google's anticompetitive practices and other relevant matters. I have made a sufficient showing of need to call witnesses. *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987).

It is requested, accordingly, that an evidentiary hearing be granted.

Also, it is requested that oral argument take place as to my motion.

CONCLUSION

For the reasons set forth above, it is respectfully requested that my motion for a preliminary injunction be granted, that an evidentiary hearing be held on the matter, and that the trial on the merits of my complaint (as to liability) be advanced and consolidated with the hearing on my application for a preliminary injunction.

Dated: **New York, New York**
June 26, 2006

Respectfully submitted,

Carl E. Person (CP 7637)
Plaintiff, Pro Se
325 W. 45th Street - Suite 201
New York NY 10036-3803
Tel. (212) 307-4444; Fax (212) 307-0247
Email: carlpers@ix.netcom.com