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Vol. IX, Tab 41 - Ex. I - Hagan Deposition from GEICO (Google Managing Counsel - Trademarks)

Rose Hagan
Google

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1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

4
5 GOVERNMENT EMPLOYEES INSURANCE
6 COMPANY.

7 Plaintiff,

8 vs. Case No. 1:04CV507

9
10 GOOGLE, INC., and
11 OVERTURE SERVICES, INC.
12 Defendants.

13 DEPOSITION OF ROSE HAGAN
14 ATTORNEYS' EYES ONLY
15 TAKEN PURSUANT TO RULE 30(b)(6)
16 THURSDAY, SEPTEMBER 30, 2004
17 VOLUME 1
18 PAGES 1 to 228

19
20 REPORTED BY: COLLEEN H. MILLER, CSR NO. 6197
21 CERTIFIED REALTIME REPORTER
22
23
24
25

1 APPEARANCES (CONTINUED)

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GECKO

None

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14 Policy Change Transition Plan Discussion"
15 dated February 23, 2004, Bates Numbers
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24 Interrogatories Number 6
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1 for me?
 2 MR. OSSOLA: I've long forgotten the
 3 question. Well, I'll just restate it.
 4 BY MR. OSSOLA:
 5 Q. On page 2 of Exhibit 2 --
 6 COURT REPORTER: 3.
 7 BY MR. OSSOLA:
 8 Q. -- 3, "Significant potential revenue
 9 impact," did you understand that to be referring to
 10 the impact of changing the policy?
 11 MR. PAGE: Let me object. I'll instruct
 12 her not to answer on the grounds that it calls for
 13 attorney work product. Why don't you just ask her
 14 what it says, not what her understanding was at the
 15 time and you'll get the same answer without asking for
 16 her work product.
 17 (Marked question indexed.)
 18 MR. OSSOLA: I know what it says. I don't
 19 need to ask her whether it says "Significant potential
 20 revenue impact." If you want to instruct her not to
 21 answer, Mike, instruct her and it will be among the
 22 things we'll take up, but I'm asking her a question --
 23 MR. PAGE: Let me by proposing a form of
 24 that question that I will allow her to answer.
 25 MR. OSSOLA: All right.

1 total revenue?
 2 A. I think it refers to 7 percent total
 3 revenue derived from the AdWords program.
 4 Q. I see. Because it --
 5 A. We have revenue from other sources that is
 6 not related to ads.
 7 Q. But this says driven by trademarked
 8 keywords.
 9 A. Uh-huh.
 10 Q. Maybe I don't understand this.
 11 Does the reference to 7 percent total
 12 revenue driven by trademarked keywords mean that 7
 13 percent of Google's total revenue was driven by the
 14 AdWords program?
 15 A. No.
 16 Q. What specifically does it mean?
 17 A. Google derives revenue from several
 18 sources. This refers to 7 percent of total revenue
 19 derived from the AdWords program can be tied to
 20 trademarked keywords.
 21 Q. Okay. Okay. And that is -- is what he
 22 was saying here is that that 7 percent was not -- of
 23 revenue derived from the AdWords program was not --
 24 was not being derived under the old policy?
 25 MR. PAGE: Objection. Vague and ambiguous

1 MR. PAGE: All right. Unfortunately I
 2 don't have the question. Could you read back the
 3 question that he asked to me. While I throw this
 4 computer out a window.
 5 (Record read.)
 6 MR. PAGE: If you ask it as, significant
 7 revenue impact, does that refer to, et cetera --
 8 MR. OSSOLA: Fine.
 9 MR. PAGE: -- I'll allow her to answer.
 10 MR. OSSOLA: Very good.
 11 BY MR. OSSOLA:
 12 Q. Does significant potential revenue impact
 13 refer to the impact of changing the trademark policy?
 14 A. Yes, it does.
 15 Q. And we're talking about -- and again
 16 the -- the significant potential revenue impact is
 17 referring to the potential revenue impact on Google of
 18 changing the trademark policy, correct?
 19 A. Correct. Google and its syndication
 20 partners.
 21 Q. The statement is made that about 7 percent
 22 total revenue driven by trademarked keywords, do you
 23 see that under the -- under this topic?
 24 A. Yes, I see that.
 25 Q. Did that refer to 7 percent of Google's

1 and assumes facts.
 2 THE WITNESS: I don't believe that's
 3 correct.
 4 BY MR. OSSOLA:
 5 Q. Under the -- under the -- under the
 6 current policy -- what was referred to on this page is
 7 the current policy -- trademarks could not be
 8 keywords, right?
 9 MR. PAGE: Objection. Assumes facts. It
 10 misstates her prior testimony.
 11 BY MR. OSSOLA:
 12 Q. You can answer.
 13 A. That slide refers to current policy which
 14 is what we've been describing as the old policy.
 15 Q. Right.
 16 A. The old policy provided that upon
 17 complaint, we would take down.
 18 Q. I understand.
 19 A. It was not proactive.
 20 Q. I understand. Why wasn't it proactive?
 21 A. It's impossible to know what all the
 22 trademarks in the world are and who is authorized to
 23 use them. So there would be no way for a search
 24 engine to proactively say this must be a trademark and
 25 you are not authorized to use it. We had to wait for

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None

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1 reduce user confusion?
 2 A. It was one of the factors that went into
 3 our decision to move forward with the new policy.
 4 Q. Did you have any factual basis for making
 5 the statement to him that the new policy was designed
 6 to reduce user confusion?
 7 A. Yes.
 8 Q. What was that?
 9 A. Can I ask my counsel a question of
 10 privilege?
 11 MR. OSSOLA: Yes.
 12 THE VIDEOGRAPHER: Off the record at 12:13
 13 p.m.
 14 (Off the record.)
 15 THE VIDEOGRAPHER: Back on the record at
 16 12:15 p.m.
 17 BY MR. OSSOLA:
 18 Q. The pending question is what was your
 19 factual basis for making the statement to him that the
 20 new policy was designed to reduce user confusion?
 21 MR. PAGE: Let me just admonish you to
 22 omit from your answer the content of any
 23 attorney-client communications.
 24 THE WITNESS: Generally if terms are used
 25 in the ad text, if trademark terms are used in the ad

1 text by parties who are not the trademark owner, there
 2 seems to be more user - potential user confusion
 3 about whether or not that advertiser is somehow
 4 affiliated with the trademark owner or offers those
 5 products.
 6 BY MR. OSSOLA:
 7 Q. And how do you know that?
 8 MR. PAGE: Same admonishment.
 9 THE WITNESS: I'm not sure I can answer
 10 that without disclosing work product or
 11 attorney-client privilege.
 12 BY MR. OSSOLA:
 13 Q. Isn't that what you were telling
 14 Mr. Degret, that the new policy was attempting to
 15 reduce user confusion by not allowing advertisers that
 16 weren't affiliated with the trademark owner to use
 17 trademarks in their ad text or files?
 18 A. That is what I told him.
 19 Q. Okay. And you were intended to -
 20 intending to convey to him, weren't you, what you just
 21 testified to, that there's a potential for more user
 22 confusion if - as to whether the advertiser is
 23 affiliated with a trademark owner if the trademark is
 24 used in the text of the ad?
 25 A. Correct.

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None

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1 Q. And what was the factual basis, if any,
 2 for the statement that - for that statement that you
 3 were making to Mr. Degret?
 4 MR. PAGE: Same admonishment.
 5 THE WITNESS: I don't believe I can answer
 6 that without disclosing privileged information.
 7 MR. OSSOLA: I don't believe that facts
 8 that she is aware of that support a statement made to
 9 a third party is privileged, but if you want to make
 10 that instruction, that's fine.
 11 MR. PAGE: Suppose I send you a letter
 12 that - in which I tell you my client's innocent and
 13 you ask me "How do you know that?" do you get to get
 14 the answer to that question from me just because I
 15 told you he was innocent?
 16 MR. OSSOLA: I'm just saying that - I'm
 17 not going to debate unrelated hypotheticals -
 18 MR. PAGE: Okay.
 19 MR. OSSOLA: - but you're - are you
 20 instructing her not to answer?
 21 MR. PAGE: I'm instructing her to omit -
 22 to exclude from her answer attorney work product or
 23 the content of attorney-client communications. She
 24 may be able to answer without disclosing them.
 25 BY MR. OSSOLA:

1 Q. But your testimony is that you can't,
 2 right?
 3 A. Correct.
 4 Q. So am I correct that you were making a
 5 statement to Mr. Degret regarding user confusion based
 6 on facts that you were aware of at the time but you
 7 believe you cannot now disclose because of attorney
 8 work product, attorney-client privilege?
 9 A. Correct.
 10 Q. Further on down on page 1 you say that we
 11 came to the conclusion that Internet users are not
 12 likely to be confused by seeing advertisements on a
 13 page.
 14 What did you mean by that?
 15 A. That the mere fact that ads appear on a
 16 page is not necessarily confusing to Internet users.
 17 Q. Did you mean appear on a page as a result
 18 of the use of a trademark as a search term?
 19 A. That could be encompassed in it. Just
 20 more generally people - Internet users are not
 21 confused merely because ads appear on a page. There
 22 has to be something more.
 23 Q. And how do you know that?
 24 A. Once again, I'm not sure I can answer
 25 without disclosing attorney-client or work product