

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GOVERNMENT EMPLOYEES INSURANCE
COMPANY,

Plaintiff,

v.

GOOGLE INC., et al.,

Defendants.

Case No. 1: 04-CV-507 LMB TCB

**DEFENDANT GOOGLE INC.'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Government Employees Insurance Company (“GEICO”) survived Google Inc.’s (“Google”) motion to dismiss its complaint by speculating as to a variety of different ways that consumers might be harmed by seeing relevant advertisements alongside Google search results. GEICO speculated that any use of the keyword “geico” to deliver advertisements might confuse consumers, regardless of the text of the ads themselves or whether the company running the ad provided services remotely similar to GEICO’s. It speculated that a subset of advertisers might run confusing ad text, and that Google might be responsible for inducing them to do so. It even persuaded this Court that it was possible consumers would think *GEICO and Google* had a relationship because third party ads appeared alongside search results that were relevant to the term “geico.”

The time for speculation is over. GEICO has now had a full opportunity to collect facts and to survey Google users to find support for its theories. Even viewed in the light most favorable to GEICO, those facts tell a very different story than GEICO’s complaint. GEICO has come up with no evidence whatsoever that consumers are confused by the mere presence of a (to them invisible) keyword triggering the appearance of an ad result. GEICO did not try to find support for the theory that there was a GEICO-Google relationship—the theory that persuaded this Court to deny Google’s motion to dismiss.^{1/} Its surveys were instead directed at alleged confusion about the relationship between GEICO and advertisers. But GEICO’s own survey demonstrated that keywords themselves do not cause such confusion. When GEICO surveyed consumers about ads placed by the keyword “geico,” but without the word “geico” in the title or text of the ad, *not one* of those consumers was confused. The absence of any confusion whatsoever as to the use of GEICO’s marks as keywords is fatal to that theory of the case.

^{1/} Nor did it even try to offer evidence of the actual dilution necessary to support its trademark dilution claim.

That leaves GEICO with only one possible theory of confusion—that some advertisers might write ad text that confused consumers into thinking they were affiliated with GEICO, and that Google should somehow be responsible on a theory of indirect infringement for permitting those ads to run. But this indirect infringement theory suffers from three defects, each independently fatal to GEICO’s claim. *First*, even if an advertiser were infringing, Google does not induce that infringement. The advertiser is not writing its text at Google’s urging, and it is not acting as Google’s agent. The law of trademark inducement requires more than simply providing a publishing outlet for allegedly infringing text. *Second*, Google is an innocent infringer under Section 32(2) of the Lanham Act. Google’s trademark policy already prohibits advertisers from using the term “GEICO” (or any other trademark) in the text of any ad, whether or not the use of the term might confuse consumers. In an effort to prevent any chance of confusion, Google’s policy bends over backwards to favor trademark owners, preventing comparative advertising, licensed reselling, criticism and parody that uses the term “GEICO” in ad text, even though trademark law does not forbid those uses. In other words, Google already does more for GEICO than the law requires Google to do, making an injunction meaningless.^{2/} *Third*, the only relief GEICO could conceivably seek that Google does not already provide—a “zero tolerance” injunction against mistakes in applying Google’s trademark policy—is prohibited by Section 32(2) of the Lanham Act, because that relief would impose an impossible burden on Google to perfectly police content written by others and posted instantaneously on a website.

If, notwithstanding Google’s efforts to prevent confusion, GEICO thinks that there is an advertiser who is managing to confuse consumers without using the GEICO mark in the title or text of its ads, GEICO is free to sue that advertiser for trademark infringement. But it makes no sense to enjoin Google from selling any ads because of the remote possibility that an ad might

^{2/} GEICO is not entitled to damages for past infringement because those damages are prohibited by Section 1114, as we explain below, and because in any event GEICO can’t show that it has been injured at all by advertisements on the Google site. Thus, the only issue properly before this Court is whether GEICO should be entitled to injunctive relief.

slip through Google’s policy and end up confusing consumers. Doing so is inconsistent with the Lanham Act, with controlling law, and with common sense.

II. STATEMENT OF FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

A. Google Provides Users and Businesses With A Valuable Service At No Cost

The Google search engine provides countless search results to users around the world at no charge. Indeed, Google responds to hundreds of millions of searches per day from tens of millions of users. Declaration of Alana Karen (“Karen Decl.”), ¶ 2. Google also provides users with relevant advertisements from hundreds of thousands of advertisers. *Id.*

Google’s free search results are tailored to users’ queries. *Id.* at ¶ 3. When a user enters a search term, Google’s search engine reviews web pages that Google has indexed and returns a list of web pages ranked in order of relevance. *Id.* The list (known as “web” or “organic search results”) is based solely on relevance, not on payments to Google or anything else.^{3/} *Id.* In the case of searches for “GEICO,” Google’s search algorithm consistently returns the “geico.com” website as the first result. This is commonly the case for searches for a commercial entity with an active website. *Id.*

Google’s web search is not only free to the users who conduct the searches, but also to the businesses whose websites are featured in the web search results. Each day, tens of millions of users are directed from Google’s search engine to businesses all over the world—including to GEICO, which receives over a million free visits a year from Google, bringing GEICO tens of millions of dollars worth of free referrals. *See id.* at ¶ 25.

B. Google Is Able To Provide Its Services For Free Because It Generates Revenue Through Advertising

1. The AdWords Program Creates Relevant Sponsored Links

Google’s revenues are derived primarily from advertising. Google’s advertising program is called AdWords. AdWords advertisements appear on the Google.com website under the

^{3/} The exact method of determining relevance is complex and proprietary: it is based not only on the content to each web page, but also on the number and types of other websites that link to that web page, and dozens of other factors.

heading “Sponsored Links,” which is located on the right side of the organic search results. *Id.* at ¶ 5. Hundreds of thousands of advertisers participate in the AdWords program. *Id.* at ¶ 2.

AdWords does more than rent advertising space or produce Sponsored Links at random: Just as Google seeks to provide its users with the organic results that are most relevant to their queries, so too does Google seek to provide its users with the Sponsored Links that are most relevant to queries. *Id.* at ¶ 6. The AdWords Program achieves this, in part, by allowing advertisers select, for each of their Sponsored Links, the keywords that will cause those Links to appear. For example, an electronics store might choose to display its Sponsored Links to people searching for “computers.” *Id.* Alternatively, that same store could target one Link at users searching for “desktop computers,” and another at users searching for “laptop computers.” And that same advertiser might choose “Sony” as a keyword for Links for Sony products, and “Dell” for Dell products. *Id.*

AdWords advertisers bid on each keyword by indicating the maximum price they are willing to pay each time a user clicks on their Sponsored Link. *Id.* at ¶ 7. The actual price charged is a function of that maximum bid, together with the bids of other advertisers. *Id.* The placement of each Link (first, second, or lower in the Sponsored Links) is partly a function of price, but it is also a function of factors that increase relevance. *Id.* Thus the highest bidder will not always get the highest slot. *Id.*

2. The Keyword Tool Provides Advertisers With Related Keywords

To provide users with relevant Sponsored Links—and, at the same time, to assist advertisers in crafting campaigns that will reach interested users—Google created the Keyword Tool. *Id.* at ¶ 10. When an advertiser enters a proposed keyword, the Keyword Tool reviews data on prior searches, and returns a list of keywords that are closely related to the proposed keyword (i.e., similar words that empirically have appeared in related contexts). *Id.* For example, an advertiser entering “apple” in the Keyword Tool might get a list that includes “Apple iPod” and “golden delicious apple.” *Id.* Armed with this list, an advertiser can “fine tune” an ad campaign by adding additional keywords, changing the type of matching chosen for

a given keyword, or adding “negative keywords.” *Id.* A negative keyword modifies a keyword by excluding instances where the keyword and negative keyword appear together: a keyword of “Giants” with a negative keyword of “San Francisco” would trigger ads on searches for “Giants” or “New York Giants,” but not on searches for “San Francisco Giants.” *Id.* In the “apple” example above, if two advertisers—one who sells electronics and one who sells fruit—each entered “apple” and got the same list, the first might add “iPod” as a keyword and “golden delicious” as a negative keyword, while the other might do the opposite. *Id.*

The Keyword Tool is automated, and includes a prominent warning that the advertiser is responsible for avoiding illegal keywords. A copy of the main page of the Keyword Tool is attached as Exhibit D to the Declaration of Alana Karen.

3. Dynamic Keyword Insertion Automatically Places Keywords In The Text Of Sponsored Links

The AdWords program has an additional feature known as Dynamic Keyword Insertion, with which an advertiser can insert a special code that, upon display, will insert whatever search term the user typed into the advertiser’s ad,^{4/} much in the way a mail merge program will allow a user to insert different addresses into multiple copies of a form letter. Karen Decl. at ¶¶ 12, 13. For example, a record store could write a single ad with the headline “[keyword] CDs,” and then key that ad off hundreds of different artists. If a user types “Frank Sinatra,” the displayed ad will read “Frank Sinatra CDs”; another user, typing “Beatles,” will see “Beatles CDs.” *Id.* at ¶ 13. Thus, the Keyword Insertion Tool allows an advertiser that sells tens or hundreds of products to write a single Sponsored Link, rather than write a different Link for every keyword it uses.

4. The AdWords Editorial Guidelines Address Style And Content

Google has developed an extensive set of editorial policies governing what AdWords advertisers are permitted to include in their advertisements. *Id.* at ¶ 14. These guidelines address a wide range of issues. *Id.* Some govern purely stylistic issues, such as punctuation, repetition,

^{4/} Each Sponsored Link consists of four lines of text, the fourth of which is the URL to which the Sponsored Link will take the user. The other three contain whatever text the user (subject to Google’s editorial policies) chooses. Karen Decl. at ¶ 12.

and spelling. *Id.* Others bar content inappropriate to certain users (for example, material offensive to specific groups). *Id.* Still others bar advertisement of materials Google chooses not to be associated with (such as guns, tobacco, or hard alcohol). *Id.* And still others govern content that infringes intellectual property rights. *Id.* A copy of Google's current editorial policy is attached as Exhibit C to the Declaration of Alana Karen.

Importantly, the editorial guidelines are not the only vehicle for notifying AdWords advertisers that they must obey applicable laws. *Id.* at ¶ 9. Indeed, in addition to the Editorial Guidelines, advertisements are subject to the terms of numerous agreements that prohibit trademark infringement, including, *inter alia*, the AdWords Terms and Conditions. *See* Karen Decl., Exhs. A, B.

C. Google Has Gone Beyond What The Law Requires In Preventing Trademarks From Appearing In Sponsored Links

Google has a written policy for preventing trademark infringement by advertisers. *Id.* at ¶ 15. Under Google's policy, at the request of a trademark holder, Google will prohibit the advertiser from making any use of the trademark in the text or title of the Sponsored Links. *Id.* Because of the difficulty of making judgments about what uses of a trademark are and are not legal, Google made the decision to prevent *any* use of a trademark in the text or title of a Sponsored Link, even though some of those uses are undoubtedly lawful. *Id.* Advertisers might use a trademark term in their ad text for a variety of reasons: to lawfully compare their products to the trademark owner's, to advertise the availability of used goods for sale, to advertise the lawful resale or distribution of the goods in a local outlet or retail store, to offer services for trademarked goods, to criticize the trademark owner, or to parody the trademark. All of these uses of the trademark are lawful. Nonetheless, Google's policy forbids them all, so that Google can be sure of forbidding any use of the term that might be confusing. *Id.*

There are hundreds of thousands of registered trademarks in the United States, and still more unregistered marks and marks in foreign countries. *Id.* at ¶ 16. Further, some of the terms people claim to own as trademarks are in fact generic terms that advertisers are entitled to use to

describe their products or services. To identify a trademark and apply the policy, Google requires trademark owners to send Google a letter complying with a set of requirements listed on Google's website. *Id.* When Google receives such a letter, the letter is directed to the Trademark Assistance Group, which acts to comply with the trademark owner's request. This is a massive undertaking: Since January 2004, Google has received hundreds of notifications regarding trademarks each month, many of which require the removal of multiple trademarks and variations from the vast universe of Google advertisements. *Id.* at ¶ 21. Since June, 2004, Google, on average, had disapproved several hundred ads every week for trademark-related reasons. *Id.*

Google is constantly working to improve its processes for dealing with trademark issues. With regard to new Sponsored Links, Google is now able to block improper Links immediately, without waiting for manual review by its Trademark Assistance Group. *Id.* at ¶ 17. A tool called the "Autoreviewer" checks the ad text for banned trademarks while the advertiser is writing its ad. *Id.* The Autoreviewer immediately informs the advertiser of improper text, and the advertiser is forced to use a different term (or seek and obtain an exception before the ad will run). *Id.* Thus, once a trademark owner puts a complaint into the Google system, all new ads are reviewed automatically, as they are written, to prevent the use of that trademark. *Id.* Similarly, Google's "adtext monitor list" catches any new Sponsored Links that include a trademark and another word: if a trademark holder complains about "Apple," the adtext monitor list will catch any ad text that includes "Apple iPod," "Apple Mac," or any other addition to the term "Apple." *Id.* at ¶ 18.

Google also has created tools to address problems that arose in the past. *Id.* at ¶ 19. It used to be that the Trademark Assistance Group only had two ways to mark a trademark: either as not for keyword use or not for Sponsored Link use. *Id.* If—for example—a trademark owner objected to the use of its trademark in the *text* of a Link, but did not object to its use as a *keyword*, an advertiser's use of keyword insertion could result in that trademark inadvertently appearing in text of the advertiser's Sponsored Link. *Id.* Google has solved that problem: now

the Group can mark a trademark “keyword—no insertion,” which means that advertisers may bid on the keyword, but may not use the keyword insertion tool to place the keyword in their Sponsored Link. *Id.* Indeed, “keyword—no insertion” is now the default option for all trademark complaints. *Id.*

As noted above, once a trademark is on the adtext monitor list, new advertisements are checked automatically. *Id.* at ¶ 18. With regard to the millions of existing Sponsored Links that may already include a trademark at the time it is placed on the list, however, the process is more laborious. *Id.* at ¶ 20. Google continues to search manually to remove all existing improper Sponsored Links using the trademark as ad text. *Id.* Google does this by finding every advertiser who has bid on the trademark as a keyword, and then reviewing that advertiser’s account to locate and remove instances where the trademark appears in existing Sponsored Links. *Id.* Google is in the process of creating a tool that will search not only by keyword, but also by the text of all existing Sponsored Links. *Id.* In addition, of course, Google responds to any complaints identifying existing Sponsored Links that include trademarks. *Id.* at ¶ 21. Thus, Google is continuing to develop more efficient ways to catch the dwindling number of existing ads that are improper. *Id.* at ¶ 20.

Naturally, some problems remain. *Id.* at ¶ 21. Google still does not have a way to catch every possible spelling variation of a trademark—some new Sponsored Link may use a spelling variation that Google has not thought of. *Id.* Google, of course, continues to act on any complaints about ads that it has missed. *Id.*

D. Google Has Acted On Trademark Complaints By GEICO

GEICO first sent Google a trademark complaint on October 31, 2002. *Id.*, Exh. E. GEICO advised Google that “GEICO” and “GEICO Direct” were registered trademarks, and asked that Google “not permit the sale of any sponsored links on the Google search engine using these terms in whole or in part.” *Id.* On December 17, 2002, Google responded, asking GEICO to provide the additional information requested in Google’s Trademark Complaint Form, without which Google could not process the request. *Id.*, Exh. F.

GEICO did not respond until December 16, 2003—a year after Google asked for additional information. *Id.*, Exh. G. GEICO sent another trademark letter on April 26, 2004, and in less than a month, Google began disabling existing sponsored links that included GEICO’s marks, and added GEICO’s marks to the adtext monitor list so that the marks would not appear in future Links. *Id.*, Exhs. H, I.

E. GEICO’s First Amended Complaint Alleges Two Theories Of Infringement

GEICO has alleged that Google’s AdWords Program infringes GEICO’s marks in two ways. First, GEICO alleges that the appearance of sponsored links alongside the organic results causes “confusion as to whether GEICO is sponsoring, has authorized or is somehow affiliated with the products or services advertised on Defendants’ search engines.” First Amended Complaint (“FAC”) at ¶ 2. Second, GEICO alleges that when the text of a Sponsored Link incorporates GEICO’s marks, users may believe “that the advertisers provide accurate information about GEICO products or are somehow related to GEICO.” *Gov’t Employees Ins. Co. v. Google Inc.*, 330 F. Supp.2d 700, 704 (E.D. Va. 2004).

III. ARGUMENT

A. Applicable Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if Google demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; “the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the Court determines that this motion is properly made and supported, GEICO has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). GEICO must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’

designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

B. GEICO’s First Theory Fails Because There Is No Evidence That The Use Of Its Marks As Keywords Causes Confusion

It is critical to understand the two very different theories that underlie GEICO’s case. Under GEICO’s first theory, it is the use of its trademark as an (invisible) keyword causing Sponsored Links to appear that is illegal, regardless of the text of the Links themselves or who runs the websites to which they link. As an alternative theory, GEICO argues that the text of some Sponsored Links might be confusing, and that Google should be held responsible for permitting those Sponsored Links even though it did not write or approve the text.

1. Confusion Is An Essential Element Of GEICO’s Infringement Claims

To prove its first theory—that the use of its trademarks as keywords itself amounts to trademark infringement—GEICO must show that: “(1) that it possesses a mark, (2) that [Google] used the mark, (3) that [Google’s] use of the mark occurred ‘in commerce’, (4) that [Google] used the mark ‘in connection with the sale, offering for sale, distribution, or advertising’ of goods or services, and (5) that [Google] used the mark in a manner likely to confuse consumers.” *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001); 15 U.S.C. §§ 1114, 1125(a). As Google pointed out in its motion to dismiss, GEICO cannot satisfy the fourth of these requirements, because the use of a trademark as a *keyword* does not constitute trademark use at all, as long as the resulting advertisement does not use the trademark to identify the source of goods and services. *U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp.2d 723 (E.D. Va. 2003). For purposes of this motion, however, we focus on the fifth requirement: likelihood of confusion.

2. GEICO’s Own Expert Report Establishes That There Is No Evidence Of Confusion Caused By The Use Of Trademarks As Keywords

GEICO’s first theory—that the use of trademarks *as keywords* infringes its trademarks—fails because of a complete absence of proof. GEICO has adduced no evidence of anyone who has actually been confused by a Google Sponsored Link, or who has been misdirected to the

website of another while trying to reach GEICO's website. Declaration of Melanie D. Coates ("Coates Decl."), Exh. D (Motowylak Depo.) at p. 16:15-17:14; 49:22-52:23 (no evidence of actual confusion).^{5/}

Instead, GEICO relies entirely on the survey conducted by Dr. Gary Ford in an attempt to establish a *likelihood* of confusion.^{6/} With regard to confusion based on the use of the "Geico" trademark *as a keyword*, however, Dr. Ford's own work—GEICO's only evidence on this point—conclusively establishes that there is *no* likelihood of confusion.

Dr. Ford's survey (Exhibit B to the Declaration of Melanie D. Coates) tested respondents by having them type in "Geico" as the search term in a Google search, and then showing them a Google results page with both organic listings (i.e., unpaid search results ranked in order of relevance) and five Sponsored Links. Four of those sponsored links contained the "Geico" trademark, while the fifth did not.^{7/}

Dr. Ford concluded that, even when presented with four Sponsored Links that contained the term "Geico" in violation of Google policy, over 80% of respondents correctly identified links to GEICO's own website when asked "If you wanted to purchase automobile insurance

^{5/} Ms. Motowylak was GEICO's Fed. R. Civ. P. 30(b)(6) witness on evidence of actual confusion. Evidence of actual confusion is the best evidence of likelihood of confusion, and the best evidence of actual confusion is the testimony of a reasonably prudent purchaser who was in fact confused. See *Lone Star Steakhouse & Saloon v. Alpha of Va.*, 43 F.3d 922 (4th Cir. 1995); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 (4th Cir. 1996).

^{6/} As regards confusion allegedly caused by the use of "Geico" in the *text* of Sponsored Links, Dr. Ford's survey is fatally flawed, and Google's own expert survey and reports will establish that, properly measured, there is little if any likelihood of confusion. That question, of course, is not for summary adjudication, and—as Google's current policy already prohibits such use—is irrelevant to injunctive relief.

^{7/} Dr. Ford's survey was conducted in August, but for some reason he chose to use a Google screen shot from April. Google's policy forbids the use of the trademarks of others in the text of sponsored links, and—if the trademark owner objects—Google will disable (or "disallow") links that violate that policy. Google began blocking links containing "Geico" on May 24, 2004. Apparently, GEICO's counsel did not advise Dr. Ford of this fact. Coates Decl., Exh. C (Ford Depo.) at p. 100:18-101:17.

from GEICO where on this page would you ‘click’ first?”^{8/} Moreover, Dr. Ford concluded that users who would click on sponsored links first “were far more often confused because those links mentioned ‘saving money’ and/or getting ‘price quotes’ than because they mentioned Geico or Geico car insurance.” Coates Decl., Exh. B (Ford Report), at p. 6. In fact, of all of the users Dr. Ford concluded were confused as to how to reach GEICO’s website, “16.7% said that they would click first on a sponsored link for reasons other than that ‘Geico’ was mentioned, whereas *only 2.0% cited mention of ‘Geico’ or ‘Geico car insurance’.*” *Id.* (emphasis added).^{9/}

The most relevant portion of Dr. Ford’s survey for purposes of *this* motion, however, is not his main survey but his control survey. As Dr. Ford explains, the purpose of a control is to remove all of the allegedly infringing stimuli, and determine what level of confusion remains based on “background” causes. Thus, “the ‘control’ group is shown search results which have been excised of the material about which Geico is complaining.” *Id.* at 8, n. 1. In his control survey, Dr. Ford used the same organic results as in his “treatment group,” but replaced each of the Sponsored Links with sponsored links concerning Nike sneakers.^{10/} He then had the

^{8/} As noted in the report of Google’s expert Dr. Itamar Simonson (Coates Decl., Exh. A), this is the wrong question, as it fails to identify users who, knowing perfectly well that some of the sponsored links offered comparison quotes from other insurers, indicated that they would “comparison shop” before going to GEICO’s own site. The correct question is “where would you click if you wanted to go to Geico’s website.”

^{9/} Similarly, GEICO’s own expert concludes that “when ‘Geico’ appears along with insurance-related terms, it is often the insurance-related terms, rather than mention of ‘Geico’, that causes consumer confusion.” Coates Decl., Exh. B (Ford Report) at p. 7. But of course, confusion not engendered by trademark use is irrelevant: if one were to show consumers the front of an electronics store that proclaimed “Dozens of brands, cheap!” and then ask them whether they could buy Sony products there, a substantial percentage will say yes, simply because it is a reasonable assumption that a store selling dozens of brands will sell Sony products. But that confusion is not engendered by any trademark use.

^{10/} This control had an obvious problem: because it removed **both** the allegedly actionable use of “Geico” in the text of the links **and** the non-actionable “context” of mentions of insurance, price quotes, cheap rates, and the like, it utterly fails to aid in determining which of these is the source of confusion. Even ignoring the many other flaws of Dr. Ford’s methodology, the choice of control leaves him able to opine that there is confusion **either** from the use of the trademark “Geico” **or** from the insurance-related context of the advertisements, but not which. As noted above, his examination of the verbatim responses leads him to conclude that it is the latter—the non-actionable context—that is the primary source of confusion.

respondents search *using “Geico” as the search term*, and questioned them as in the treatment group. As he explained in deposition, rather than independently control for each potential source of confusion, he “decided to test all of those factors simultaneously versus none of them simultaneously.” Coates Decl., Exh. C (Ford Depo.), at p. 91:15-17.

In so doing, Dr. Ford did indeed succeed in removing all sources of confusion from his control, albeit inadvertently: he established that, by removing the use of the trademarked term *in the text* of the Sponsored Link, but by continuing to use “Geico” *as the search term*, the rate of confusion drops *to zero!* Of all of the 199 control group respondents, each of which used “Geico” as the search term, *not one* identified any of the sponsored links when asked where they would click first if trying to buy GEICO insurance. Coates Decl., Exh. B (Ford Report), at Table 9; Coates Decl., Exh. C (Ford Depo), at p. 118:5-120:11, 123:1-20. Similarly, when asked what site they would go to if clicking any of the sponsored links, *not one* said “Geico.” Coates Decl., Exh. B (Ford Report), at Table 11; Coates Decl., Exh. C (Ford Depo.) at p. 121:2-17 (“Q: And was anyone confused in the control group? A: No.”). Thus Dr. Ford concludes that the source of confusion is a combination of the use of the trademark in the text of the sponsored link and the context of the link, *not* the fact that the ad was triggered by the use of “Geico” as a keyword:

Thus, the only difference between the materials each group saw was the advertisements comprising the sponsored links. That is, the actual organic search results remained constant in the treatment and control stimuli. Therefore, since respondents were randomly assigned to the treatment and control groups, any difference in the percentage of consumers who were confused about whether the sponsored links belong to or are affiliated with GEICO *must be due to the positioning, heading and/or content in the sponsored links seen by the respondents in treatment group.*

Coates Decl., Exh. B (Ford Report), at p. 8.

This conclusion—that any confusion stems from the content of the advertisement itself, rather than the use of the trademark as a search term—is confirmed by Dr. Ford’s treatment group results. In response to the question “If you wanted to purchase automobile insurance from Geico, where would you click first?” Dr. Ford reports a confusion rate of 20.1% (i.e., 20.1% of the 204 respondents identified one of the sponsored links). Coates Decl., Exh. B (Ford Report),

at Table 9. But as noted above, four of those five Sponsored Links contained the word “Geico.” One did not: the link to www.InsureCom.com. Significantly, for the Sponsored Link that did *not* contain the word “Geico,” only 1% (two individuals) chose that link.^{11/} And when one examines the verbatim responses from those two users, they reveal that even those two respondents were not confused at all; neither thought that InsureCom.com was GEICO, but rather both indicated other reasons for clicking there first: one said “I think there will be at least a few companies who will give me a quote at the same time so I can pick the cheapest one quickly and easily,” and the other said “it says free.” *Id.* at p. 128:1-19; 140:2-5.

Thus, GEICO’s own expert survey establishes that the use of a trademark as a keyword—as distinct from its use in the visible text of the advertisement—causes no confusion. As this is GEICO’s *only* proffered evidence, there is no question of disputed fact on this point, and summary judgment in Google’s favor is mandated.

3. GEICO Has Not Produced Evidence Of The Type Of Confusion Identified By The Court

In denying Google’s motion to dismiss, the Court identified the following possible confusion: “defendants’ offer of plaintiff’s trademarks for use in advertising could falsely identify a business relationship or licensing agreement between defendants and the trademark holder. In other words, when defendants sell the rights to link advertising to plaintiff’s trademarks, defendants are using the trademarks in commerce in a way that may imply that defendants have permission from the trademark holder to do so.” *Gov’t Employees Ins. Co.* 330 F. Supp.2d, at 704. Thus, the potential confusion identified by the Court was *not* about the relationship between advertisers and GEICO, but instead was limited to the business relationship between Google and GEICO, specifically, whether advertisers were confused into thinking that Google had permission to offer GEICO’s trademarks in commerce.

^{11/} Percentages this low are evidence of lack of confusion, not likelihood of confusion. *See, e.g., IDV N. Am. Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815, 831 (E.D. Va. 1998) (finding that survey results of 2.4% prove “the absence, rather than the presence, of likely confusion”).

GEICO's only evidence of confusion, however, is its user surveys, which do not address the relationship between Google and GEICO. Indeed, GEICO's user surveys do not even mention the relationship between Google and GEICO. Instead, the surveys focus on the relationship between *advertisers* and GEICO. GEICO has presented *no* evidence that Google somehow led advertisers (or users) to believe that Google and GEICO have a business relationship or that Google has permission to use GEICO's marks in commerce.

4. GEICO Has Not Produced Any Evidence Of Initial Interest Confusion

Some courts have held that “an infringement action may be based on a claim that the alleged infringement creates initial consumer interest, even if no actual sale is completed as a result of the confusion. In the cyberspace context, the concern is that potential customers of one website will be diverted and distracted to a competing website. The harm is that the potential customer believes that the competing website is associated with the website the customer was originally searching for and will not resume searching for the original website.” *Bihari v. Gross*, 119 F. Supp.2d 309, 319 (S.D.N.Y. 2000). GEICO, however, has apparently abandoned this theory, making no attempt to adduce any evidence that users, having clicked on Sponsored Links, either believe that the advertiser's own website is GEICO's or fail to reach GEICO's own website should they choose to.

5. GEICO's Inability To Prove Confusion Dooms Its Contributory Infringement Claims Based on Keyword Use

GEICO's pleadings regarding indirect infringement—contributory infringement, inducement, and vicarious infringement—are not clear as to whether they are directed at the use of keywords by advertisers or the use of the term “GEICO” in the ads themselves. To the extent GEICO intends to claim that Google is indirectly liable for the purchase of *keywords* by advertisers, its claim must fail for the same reasons its direct infringement claim failed.

To prove any sort of indirect infringement, GEICO must show that there is an underlying act of direct infringement that Google has induced, to which Google has contributed, or for which Google should be vicariously responsible. It goes without saying that there can be no

contributory liability if there is no infringement to contribute to. *See Proctor & Gamble Co. v. Haugen*, 317 F.3d 1121, 1128 (10th Cir. 2003) (identifying “[t]he elements of a contributory liability claims [as] (1) supply of a product and (2) knowledge of direct infringement” (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264-65 (9th Cir. 1996))). Thus, as a threshold matter, GEICO must present evidence of infringement by advertisers. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 983-86 (9th Cir. 1999).

As noted above, GEICO has not presented a shred of evidence of confusion caused by advertisers’ use of its marks as keywords. Thus, GEICO cannot meet the most basic requirement for a claim of contributory infringement: infringement by a third party.

6. GEICO’s Inability To Prove Confusion Also Dooms Its False Representation Claim

To the extent GEICO’s false representation claim is centered on the use of *keywords* by advertisers, its claim also fails without proof of confusion. The elements of a claim for false representation under 15 U.S.C. § 1125(a) are: “(1) a designation (2) in connection with goods or services (3) when the designation is likely to cause confusion, mistake, or deception as to (4) the affiliation, connection or association of defendant with another person or as to the origin, sponsorship, or approval of defendant’s goods or services by another person.” *See J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27:13* (2000); 15 U.S.C. 1125(a)(1)(A).

GEICO cannot meet its burden of proving these elements because it cannot show likelihood of confusion, mistake or deception caused by the use of its marks as keywords. The test is the same as for trademark infringement, and GEICO can’t avoid the requirements of the Lanham Act by pleading under section 1125(a). *See New West Corp. v. NYM Co.*, 595 F.2d 1194 (9th Cir. 1979) (“Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical—is there a ‘likelihood of confusion’?”). *Id.* at 1201.

C. GEICO Is Not Entitled To Any Relief On Its Second Theory—That The Use Of Its Marks In The Text Of Sponsored Links Is Trademark Infringement Which Google Induces or to Which It Contributes

GEICO’s alternative theory is that some—but not all—advertisers whose ads appear in conjunction with a search for “geico” are themselves engaged in trademark infringement because the *text* of those ads confuses consumers, and that Google should be held responsible for that confusion because it permitted the ads to appear.

To make out an indirect infringement claim, GEICO must provide evidence (1) that Google “intentionally induced another to infringe” GEICO’s marks; or (2) that Google continued “to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.” *Inwood Labs., Inc.*, 456 U.S., at 854. More specifically, GEICO must present proof that a particular advertiser ran an ad that confused consumers into thinking that it was a GEICO ad, and that Google unlawfully contributed to that infringement. *See Lockheed Martin Corp.*, 194 F.3d, at 983-86 (contributory infringement requires a showing that the defendant materially contributed to a third party’s infringement of a mark). Unlike the standard in patent and copyright cases, the standard for indirect infringement in trademark cases is truly narrow. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 439 n.19 (1984) (noting that “narrow standard for contributory trademark infringement” has little bearing on indirect infringement standards in copyright and patent law).

1. GEICO Has Presented No Evidence That Google Induced Infringement

Putting aside the lack of evidence regarding infringement by advertisers, GEICO has not presented any evidence that Google has intentionally induced any advertisers to use—much less infringe—any GEICO trademark. Google does not write or suggest ad text for its advertisers.^{12/}

^{12/} It is true that the Dynamic Keyword Tool permits advertisers to generate titles for their ads with the assistance of an automatic computer program run by Google. But as we explained above, Google’s policy forbids, and seeks to automatically block, the use of that Tool to insert a trademark in the title of an advertisement. Google employees further review ads in response to complaints to make sure that the trademark does not appear in ad titles. Given these policies, no reasonable factfinder could conclude that Google was encouraging or inducing an advertiser to use a trademark.

Its policy makes advertisers aware of the trademark laws, and prohibits infringing use. Karen Decl., at ¶¶ 9, 15. Further, as detailed above, Google does not merely rely on that policy in the abstract, but rather goes out of its way to prevent advertisers from using a trademark in the text of the ads, using both automated features to prevent it and manually searching for uses that might have slipped through the cracks. *Id.* at ¶¶ 15-20. Given these policies, even if advertisers manage to sneak through the use of a trademark, and if that use does in fact turn out to be confusing—things GEICO has not demonstrated—it can hardly be said that Google is causing or encouraging the resulting infringement. Thus, the first basis for secondary liability enunciated in *Inwood* cannot apply in this case. *See also Perfect 10, Inc. v. Visa Int’l Service Assoc.*, 2004 WL 1773349 at *6 (N.D. Cal. Aug. 5, 2004) (dismissing trademark inducement claim despite the fact that “the complaint contains the allegation that Defendants ‘are knowingly inducing’ the alleged infringing conduct,” because “there are no facts presented in the complaint that support such an allegation”).

2. GEICO Has Presented No Evidence That Google Continued To Do Business With An Advertiser That Google New, Or Should Have Known, Was Particularly Likely To Infringe GEICO’s Marks

Contributory liability occurs only if the defendant “continues to supply a product knowing that the recipient is *using the product to engage in trademark infringement.*” *Fonovisa, Inc.*, 76 F.3d, at 264 (emphasis added). For example, a defendant has been found liable for continuing to provide “blank, time-loaded cassettes to his customers even though he knew that they used the cassettes to engage in trademark infringement.” *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1457 (C.D. Cal. 1996).

Contributory liability for the provision of a service is extremely rare in trademark law, and requires that the defendant directly control and monitor the third party infringer. *See Lockheed Martin Corp.*, 194 F.3d, at 984; *Fonovisa*, 76 F.3d at 264 (explaining that “providing the site and facilities for known infringing activity is sufficient to establish contributory liability”). The Ninth Circuit has instructed that when “weighing a fact pattern in the contributory infringement context . . . [the court must] consider the extent of control exercised by

the defendant over the third-party's *means of infringement.*" *Lockheed Martin*, 194 F.3d at 984 (emphasis added).

Google does not control the advertisers or the text they write, any more than newspaper publishers, billboard owners, or television stations control their advertisers. It does, as noted above, do its best to search the text they wrote to make sure it contains no trademarks, whether or not the use of those trademarks is legal. But it would be perverse in the extreme to hold that Google contributes to infringement by trying to stop it, when it would face no liability at all if it simply let advertisers write whatever text they wanted.

Further, contributory infringement requires the defendant to undertake conduct knowing that they are helping an infringer. GEICO has proffered no evidence whatsoever suggesting that Google is aware of infringing activity and permits it to continue. Indeed, the undisputed evidence is to the contrary—whenever Google is notified of potentially confusing ad text or discovers that text on its own, it blocks the use of that text.

3. GEICO's Inability To Prove Confusion Also Dooms Its Vicarious Infringement Claims

To prove vicarious infringement, GEICO must show that an advertiser is infringing its marks *and* that Google and that Advertiser have a partnership, authority to bind one another, or control over the infringing product. *Hard Rock Café Licensing Corp. v. Concession Serv., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992) (explaining that vicarious liability requires "a finding that the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product."). Google and its advertisers are independent parties. While they sign contracts, they are not partners or agents and have no authority to bind each other in transactions with third parties. Indeed, since GEICO is itself an advertiser with Google, for GEICO to contend otherwise would be to assert that GEICO itself is liable for any act of infringement that it accuses Google of.

D. Injunctive Relief Is The Only Relief Available Against An Innocent Infringer Such As Google

Even if GEICO could prove that the use of its marks by advertisers in the text of Sponsored Links causes confusion, and that Google should be held liable for that confusion as an indirect infringer, the only relief the law permits against Google is an injunction.^{13/} Section 32(2) of the Lanham Act, codified at 15 U.S.C. § 1114(2), limits GEICO’s relief to a prospective injunction because: (1) Google is a publisher or distributor of electronic communications; and (2) Google is an innocent infringer. *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp.2d 409, 419 (S.D.N.Y. 2001). Specifically, Section 1114(2) provides:

(B) Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of Title 18, the remedies of the owner of the right infringed or person bringing the action under section 1125(a) of this title as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to *an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications*. The limitations of this subparagraph shall apply only to innocent infringers and innocent violators.

15 U.S.C.A. § 1114(2) (emphasis added).

1. Google Is A Distributor Of Electronic Communications

Google meets the first prerequisite for application of Section 32(2): it is a publisher or distributor within the meaning of the statute. Providers of Internet services, such as Google, distribute “electronic communications,” as those terms are used in Section 32(2):

“Congress amended Section 32(2) in 1988 to include electronic media. As defined in the Electronic Communications Privacy Act, the term “electronic communication,” used in Section 32(2), means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system

^{13/} GEICO would, of course, be free to sue the advertisers who are allegedly confusing consumers. But notably, it has not bothered to do so.

that affects interstate or foreign commerce” Moreover, “[p]roviders of Internet services ... have traditionally been viewed as subject to the Electronic Communications [Privacy] Act.”

Gucci Am., Inc., 135 F. Supp.2d, at 420.

2. Google Is An Innocent Infringer

a. Google Exceeds the *Gucci* Standard for Innocent Infringement

Google also meets the second prerequisite for application of Section 1114(2): it is an innocent infringer. In *Gucci America v. Hall & Associates*, the court defined an “innocent infringer” as follows: “Although [t]he phrase ‘innocent infringer’ is not defined in the statute, it has been construed to embrace the ‘actual malice’ standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), *i.e.* an infringer is ‘innocent’ unless it acted either (1) with knowledge of the infringement or (2) with reckless disregard as to whether the material infringed the trademark owner’s rights.” *Gucci Am., Inc.*, 135 F. Supp.2d, at 419-420 (internal citations and quotation marks omitted); *see also N.B.A. Props. v. Unterainment Records*, 1999 WL 335147, at *13-14 (S.D.N.Y. May 26, 1999). Drawing this definition from the First Amendment defamation context makes sense as, like the libel laws, Section 32(2) is designed to protect publishers from liability for the contents of materials they did not author.

GEICO cannot show that Google acted with either knowledge of, or reckless disregard for, infringement of GEICO’s marks. First, Google already blocks *any* new ad text that includes GEICO’s marks, whether or not the ad text is improper, doing far more than could reasonably be expected of an intermediary. Karen Decl. at ¶¶ 15-20. Second, once Google receives a trademark complaint, Google removes any improper ads identified and, if requested, conducts its own search for additional improper ads. *Id.*

Google already blocks all new Sponsored Links that include trademarks in the text (assuming the trademark holder has complained), regardless of whether or not the use of the trademark is improper. *Id.* at ¶ 15. As noted above, the Autoreviewer looks at the keywords and text of all new Sponsored Links, and notifies the advertiser immediately if the advertiser attempts to use a blocked trademark in its Sponsored Link. *Id.* at ¶ 15. Thus, Google voluntarily

does more than GEICO could achieve with an injunction: Google blocks *any* use of trademarks in new Sponsored Links, not just infringing use. As stated in Google’s motion to dismiss, there are many legitimate uses of GEICO’s marks. To begin with, it is well recognized that comparative advertising is not only permissible, but encouraged. In *August Storck K.G. v. Nabisco, Inc.*, 59 F.3d 616 (7th Cir. 1995), the Seventh Circuit found that the “use of a rival’s mark that does not engender confusion about origin or quality is therefore permissible. The use is not just permissible in the sense that one firm is entitled to do everything within legal bounds to undermine a rival; it is beneficial to consumers. They learn at a glance what kind of product is for sale and how it differs from a known benchmark.” *Id.* at 618; *see also Diversified Mktg, Inc. v. Estee Lauder, Inc.*, 705 F. Supp. 128, 132 (S.D.N.Y. 1988) (finding that “one can capitalize on a market or a fad created by another *provided that it is not accomplished by confusing the public into mistakenly purchasing the product in the belief that the product is the product of the competitor*”).

In addition to comparative advertising, sites criticizing GEICO are not infringing GEICO’s marks. *See Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp.2d 1161 (C.D. Cal. 1998) (finding it inappropriate to use trademark law as a weapon to suppress criticism of a company on the Internet). Likewise, authorized dealers are not infringing GEICO’s marks. *See Patmont Motor Werks, Inc. v. Gateway Marine, Inc.*, 1997 WL 811770 (N.D. Cal. 1997) (finding that a retailer can use a brand name on its website ads selling that branded product without a license from the trademark owner). The same is true of sites that parody GEICO. *See L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26 (1st Cir. 1987) (finding that editorial parody was not commercial use, but a parody).

Despite the fact that many advertisers may use GEICO’s marks in an entirely legitimate manner, Google, as explained above, blocks *all* use of GEICO’s marks in the text of new Sponsored Links. If anything, Google has shown excessive regard—not disregard—for the rights of trademark holders by blocking all Sponsored Links that include trademarks. It would be inequitable to conclude that Google was willfully facilitating infringement when it blocks

future use of trademarks in Sponsored Links, acts expeditiously to remove any potentially infringing material it finds, and removes even material that is clearly not infringing in order to resolve any doubts in the trademark owner's favor.

b. Even Under A Lesser Standard, Google Is An Innocent Infringer

Courts around the country have recognized that the legislative history of the 1989 amendment to the Lanham Act states that the word “innocent” is intended to encompass the actual malice standards set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. *See, e.g., N.B.A. Props.*, 1999 WL 335147, at *15 (noting that “[g]iven the legislative history and the stringent requirements under the actual malice standard, it is doubtful that the objectively reasonable standard espoused by the NBAP is the appropriate standard”).

Since 1989, however, a few courts, including the Fifth Circuit, have adopted a lesser “objectively reasonable standard,” at least with regard to print publications. *Mid-South, Inc. v. BellSouth Telcomms., Inc.*, 269 F.3d 523, 526 (5th Cir. 2001). Google meets this standard as well: the undisputed facts establish that Google had no knowledge of any violation and that it had no improper motive. Indeed, the facts show that Google adopted a policy that eliminated all new Sponsored Links that included trademarks, whether or not the Links were infringing. Google also continued to respond to all trademark owner complaints.

Courts in other cases have explained the policy rationale behind denying damages claims against innocent Internet intermediaries like Google. In *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), a plaintiff sued America Online for failing to promptly remove defamatory messages after the plaintiff provided notice of the messages. In affirming the trial court's grant of AOL's motion for judgment on the pleadings, the Fourth Circuit found that if the plaintiff were allowed to proceed, computer service providers “would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the

continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.” *Id.* at 333. While *Zeran* involved Section 230 of the Communications Decency Act, which by its terms does not apply to trademark cases, it aptly summarizes the sound public policy behind the limitation on damages liability in Section 1114(2).

Under these standards, Google’s conduct is entirely reasonable. Google already is blocking new Sponsored Links that include trademarks, and, as described above, Google is diligently working to remove all existing Sponsored Links that include trademarks. But the manual review of the hundreds of thousands of ads per day run on Google to ensure compliance with the rights of hundreds of thousands of different trademark owners will never be perfect. And even that imperfect review comes at a cost to consumers and free speech, as Google is forced by fear of trademark liability to forbid legal as well as possibly infringing uses of a mark in ad text. For the reasons explained by the *Zeran* court, the law does not and should not punish the failure to achieve the impossible by imposing damages every time a mistake is made.

3. The Innocent Infringer Limitation On Damages Applies To GEICO’s Other Claims

All of GEICO’s infringement claims fall under either Section 1114 itself or 15 U.S.C. 1125(a). Therefore, all the claims are subject to the innocent infringer portion of 15 U.S.C. 1114(2), which explicitly states: “Notwithstanding any other provision of this chapter, the remedies given to the owner of a right infringed under this chapter or to a person bringing an action under section 1125(a) or (d) of this title”

E. An Injunction Is Also Improper Under Section 1114(2), As It Would Delay Publication Of Google’s Search Results

As set forth above, Section 1114(2) bars damages claims against an intermediary like Google. It also places significant limits on the allowable scope of injunctive relief. An injunction against future use of GEICO’s marks would violate 15 U.S.C. Section 1114(2)(C), which states:

Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 1125(a) of this title with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter *where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice*, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

15 U.S.C.A. § 1114(2)(C) (emphasis added).

Google is a real-time publisher: it provides an instantaneous response to both user queries and advertiser submissions. Karen Decl., at ¶ 4. Indeed, as the number in the upper right hand corner of every Google search shows, the results of a search of over 4.2 billion Web pages are posted in a fraction of a second. *Id.* If the Court were to require Google to guarantee that there is not a single existing Sponsored Link with any of hundreds of thousands of trademarks in its text, Google would have no choice but to prevent the display of each of millions of Sponsored Links pending manual review of the text. *Id.* at ¶ 22.

Courts have not hesitated to deny injunctive relief under 1114(2) in such a situation. For example, in *Hendrickson v. eBay*, 165 F. Supp.2d 1082 (C.D. Cal. 2001), a trademark owner brought an action against eBay, which had listed offers to sell allegedly infringing copies of a motion picture. The plaintiff sought an injunction restraining eBay “from any further displaying and or transmitting of *any* false and or misleading advertisements in connection with the sale/distribution of the ‘counterfeit’” copies of the movie. *Id.* at 1095. The court rejected such an injunction on the ground that “such an injunction would effectively require eBay to monitor the millions of new advertisements posted on its website each day and determine, on its own, which of those advertisements infringe Plaintiff’s Lanham Act rights.” *Id.* eBay, like Google here, blocked infringers when it became aware of them. The court refused to enjoin it from blocking infringers it wasn’t aware of, and this Court should do the same here.

F. GEICO Has Presented No Evidence Of Actual Dilution, An Essential Element Of A Claim For Trademark Dilution

The Supreme Court has held that proof of actual dilution, not just the likelihood of dilution, is required to establish a violation of the Lanham Act Section 43(c) anti-dilution provisions. *Moseley v. Victoria's Secret Catalogue, Inc.*, 537 U.S. 418 (2003). Thus, GEICO must show “actual injury to the economic value of its mark with regard to its dilution claim.” *Huthwaite, Inc. v. Sunrise Assisted Living, Inc.*, 261 F. Supp.2d 502, 516 (E.D. Va. 2003).

GEICO has presented no evidence of actual injury. Indeed, its damages expert’s report does not even mention dilution. Summary judgment is therefore appropriate on this claim as well.

G. In Any Event, GEICO Has Not Presented Any Evidence Of Damages

Finally, GEICO’s claims fail for an additional, fundamental reason: even taking all of GEICO’s assumptions concerning confusion, causation, and lost profits at face value—a dubious proposition at best—GEICO cannot establish any harm to it. This is because what GEICO presents as damages are actually nothing of the sort, but rather merely a small diminution in a massive *windfall* Google provides it.

As noted above, Google has created the world’s largest search engine, which daily allows tens of millions of people to find whatever they are looking for, anywhere on the Internet, for free. This is not only a boon to users: it is also a boon to those who seek to sell products to those users. Every day, thousands of people are directed to GEICO’s website by Google, where many of them purchase GEICO insurance. GEICO pays nothing for these referrals, which instead are financed entirely by Google’s advertising revenues—the very advertising GEICO now seeks to stop.

Exhibit B to the Declaration of Michael Page (“Page Decl.”) filed under seal, sets forth daily data for a three-month period this summer, showing the total number of queries by Google users for “GEICO” and the daily number of “clicks” to GEICO’s website from Google’s *organic*

results. Each day, Google sends roughly 3,000 customers to GEICO *for free*. This is more than 1 million customers a year.

GEICO's complaint in this case is that a fraction of this *free* business may not reach it: by GEICO's own count, it claims to have lost 222,893 clicks for all of 2003, and 123,630 clicks through September 1, 2004. Page Decl., Exh. A. These are wildly inflated figures: they are based on the unsupportable assumptions that (1) every person who ever clicked on a sponsored link displayed in connection with a GEICO search did so because they were confused, (2) every one of those persons was initially trying to go to the GEICO website to purchase an insurance policy, and (3) none of those persons ever actually got to GEICO's site. But even *accepting* these wild assumptions, the "damages" claimed are nothing of the sort, as they are merely a small fraction of the windfall flow of customers Google sends to GEICO daily. Google is under no obligation to provide this steady flow of business to GEICO, and GEICO pays nothing for that flow. A small reduction in a windfall is not damage.

When one calculates the net effect of Google's actions on GEICO's business, the result is a gain to GEICO of many tens of millions of dollars. Those calculations are based entirely on GEICO's own expert's figures, which are set forth in the accompanying declaration of Michael H. Page ("Page Decl.").^{14/}

CONCLUSION

For the foregoing reasons, Google requests the Court to grant this Motion and enter judgment in Google's favor on all causes of action.

^{14/} As those figures are based upon material designated as Attorney's Eyes Only by GEICO, they are not reproduced herein, but instead are set forth in the Declaration of Michael H. Page, filed concurrently herewith under seal.

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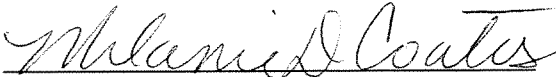
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