No. 07-16367

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL E. PERSON, Plaintiff – Appellant

v.

GOOGLE, INC., Defendant – Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARL E. PERSON
Plaintiff–Appellant, *Pro Se*
325 W. 45th Street - Suite 201
New York NY 10036-3803
212-307-4444

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

Page

TABLE OF CASES AND AUTHORITIES

Pages

Cases:

TABLE OF CASES AND AUTHORITIES (Cont'd)

Pages

Federal Statutes and Rules:

No. 07-16367

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL E. PERSON,	)	**(NO. C 06-7297-JF)**
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
GOOGLE INC.,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment dismissing the 2nd Amended Complaint (the "2AC") of Carl E. Person ("Person") pursuant to Rule 12(b)(6), Fed.R.Civ.P. Person alleged that he was an advertiser purchasing AdWords advertising from Google, Inc. ("Google") (ER34, ¶8). AdWords is an advertising system in which advertisers bid for the opportunity to have their advertising presented to computer users employing specified key words in their searches (ER34-35, ¶11 and ER47, ¶41-B). Person alleges that Google was charging advertisers (such as eBay) ½ cent

per click for AdWords advertising for which Google was charging Person 50 cents per click for the same key words (ER55-56, ¶49-V; ER62, ¶63; ER65, ¶¶ 70-71).

Person alleged that Google has a monopoly in the United States geographic market for the service markets of "search advertising" and the "monetizing of website traffic" for "Community Search Websites" also called "social networking websites" (ER49, ¶44; ER47 ¶41-C; and ER49, ¶41-I). Also, Person alleged that Google acquired its monopolies through a series of 65 or more acquisitions of technology companies (ER32, ¶2A; ER79, (ER34, ¶¶99A-99B; ER83-95, Ex. A).

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1337(a) and 15 U.S.C. § 15(a). In his 2nd Amended Complaint (the "2AC"), Person alleged that Google is monopolizing and attempting to monopolize search advertising and monetizing of websites in the geographic market of the United States through Google's acquisitions of 65 related technology businesses (ER49-50, ¶¶45-48; ER 80, ¶106; ER79 ¶¶99-A, 99-B), in violation of 15 U.S.C. §§ 1-2. This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291. The judgment of the District Court, dated June 25, 2007 (ER167-168), disposes of all claims and is a final judgment. The judgment was filed and entered on June 25, 2007 (ER34, ¶179). Person filed his Notice of Appeal on July 24, 2007 (ER179), which filing was timely, within 30 days of the entry of the judgment.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Person presents the following issues for review:

1.. Whether it was error to hold that Internet search advertising is not a relevant service market as a matter of law.

2.. Whether it was error to hold, as a matter of law, that the monetization of the traffic of Community Search Websites is not a service submarket under the search advertising market, or the market for all Internet advertising.

3.. Whether it was error to hold that Person did not allege Google's market share of the market for all Internet advertising.

4.. Whether it was error to hold that the filing of an amendment to the Second Amended Complaint would be futile.

5.. Whether it was error to hold that there is no remedy for an injured customer who was required to pay overcharges or discriminatory prices in a market monopolized through 65 acquisitions of technology companies.

6.. Whether it was error to hold, as a matter of law, that Google does not monopolize the submarket of monetization of traffic of Community Search Websites.

7.. Whether it was error to hold, as a matter of law, that Person should have filed a motion to reconsider the preceding motion to dismiss instead of his 2nd Amended Complaint.

8.. Whether it was error to hold that Person did not allege that he is a competitor of Google in the markets of creation, marketing and monetizing of the traffic of Community Search Websites.

STATEMENT OF THE CASE

Person filed his action in the Southern District of New York on June 19, 2006 (ER1). Google moved to dismiss the action or, alternatively, to transfer the action to Santa Clara County, California, the San Jose Division, based upon an agreement that Google requires each of its AdWords customers to approve, as a condition to becoming an AdWords customer. Person consented to the transfer rather than have his action dismissed for improper venue (ER2, ER173) and motion for a preliminary injunction rendered moot (ER22).

The action was transferred to San Francisco instead of San Jose, and Google moved to have the action transferred to San Jose, to be assigned to Judge Fogel, who was already assigned another antitrust action against Google (ER173-174), *Kinderstart.com.LLC v. Google, Inc.*, C 06-2057 JF (NDCA) (ER174, entry for Doc. No. 15). Person opposed the transfer (ER174 Doc. Nos. 12-13) arguing that the action should be considered an intellectual property case under Civil Local Rule 3-2(c), which exempts "Intellectual Property Actions" from the Ninth Circuit's Assignment Plan and thereby requires random selection among all Article III judges within the Northern District of California. Google's motion was granted

(ER174-175), and the action was assigned to Judge Fogel, in the San Jose Division (ER174-175).

Judge Fogel permitted Person to file his 2AC (ER3).

Google then moved to dismiss the 2AC under Rule 12(b)(6) for failure to state a claim (ER4). After a hearing (ER148-165), Judge Fogel granted the motion dismissing the 2AC (ER8).

STATEMENT OF FACTS

Person is an antitrust attorney (ER22, 33), a website developer (ER33), and starting in 2006 a candidate for public office (New York Attorney General) (ER34, ¶9) and was an AdWords advertiser purchasing keyword advertising through Google's auction system to market his services as a lawyer (ER33, ¶4-iv) , to develop traffic for his websites (ER33, ¶4), and to create a list of New York voters who might become interested in voting for Person during the 2006 general elections (ER34, ¶9) and still running for office (ER22).

Also, between the commencement of the action and the filing of the 2AC, Person created and started to market what he alleges are "Community Search Websites" (ER33, ¶5). Person defines these as websites in which the user contributes the information which other users come to the website to view, with one or more searches required to locate desired material (ER47, ¶47). These

searches enable Google to make billions of dollars through AdWords searches (ER67-68, ¶77).

Person, as an AdWords advertiser (ER34, ¶8), is required by Google to pay monopolistic rates for AdWords advertising to build traffic for Person's websites (ER65-66, 70-72, 74-75 ¶¶ 71, 82-83, 86, 89-E, 89-F). But Google will not allow Person to use AdWords to monetize Person's website traffic (ER50 ¶54), even though Google is permitting YouTube, MySpace, AOL and others to use AdWords to monetize their website traffic (ER32,38,51 ¶¶ 2, 23, 49-D).

Person made a written demand on Google for Google to permit Person to use AdWords to monetize his website traffic (ER50 ¶54).

Google charges major advertisers substantially lower prices for AdWords advertising than it charges to Person and other small advertisers, even though the keywords being used are the same. Thus, when eBay and Person use the same keyword for advertising, eBay is charged about ½ cent per click whereas Person is charged $.50 per click (ER55-56, 60-61, 64-66 ¶¶49-V, 57-59, 69, 71).

AdWords is "search advertising" and Google has a monopoly of the search advertising market. The other type of internet advertising is "display advertising", a market in which Google is trying to get started, through its acquisition of DoubleClick.

Google acquired its monopoly of search advertising, and the related market for monetization of websites, through a series of 65 or more acquisitions of technology companies. The specific acquisitions which Person alleges provided Google with technology for use in the search market, and have given Google its monopoly of such market, are alleged in ¶¶ 99-A and 99-B of the 2AC (ER79), which refers to specific allegations described in Exhibit A to the 2AC (ER83-95).

Person is unable to use any of the other search engines to provide the service available through AdWords (ER47-48 ¶¶ 41-D, 41-D-1, 41-E).

Person alleges that Yahoo, at the 2nd largest company in the search market, is falling so far behind Google that Yahoo is threatened with having to go out of business. ER67 ¶75; and ER 48 ¶41-E). Likewise, Microsoft is unable to compete effectively with Google (ER52 ¶¶49-E, 49-F), and Google's market share of the search market keeps climbing (ER67 ¶75). No other competitors are able to challenge Google (ER67 ¶76).

The barriers to entry are formidable, and outlined at length in the 2AC (ER50-58 ¶¶49-A through 49-JJ). News Corp. has lost the YouTube acquisition to Google because Google has deeper pockets than News Corp. (ER45 ¶40) and Microsoft lost the Doubleclick acquisition for the same reason; Google's purchase was to stifle Microsoft's competition (ER91-92 Ex. A ¶38; and ER54 ¶49-O).

Google's alleged monopoly of search advertising and website monetization is based on Google's domination of gathering, storage and retrieval of information in more and more forms (e.g. ER35 ¶13), which affects every market and activity (ER22) from government, publications, newspapers, law, religion, education, inventions, music, and finding oil substitutes, just to name a few of the tens of thousands of markets and activities affected by Google's monopoly.

A.. Alleged Facts Showing Existence of the Search Advertising Market

The factual allegations supporting the existence of the "search advertising market" are set forth in ¶¶ 21-41 and 49-C of the 2AC (ER38-49 and ER51):

[start of quotation from 2nd Amended Complaint]

> 22.. Subsequently, the search engines started selling and placing ads on websites having a perceived or arguable relevance to the advertiser's product, service or advertisement, with a clickthrough rate approximately 1/50th to 1/20th of the rate achieved by successful Search Advertising. The main difference (advertising written to be presented alongside keyword search results, versus advertising displayed to whoever happens to visit a website category) prevented the two types of advertising from being reasonably interchangeable under antitrust caselaw standards for determination of "reasonable interchangeability".
>
> * * *
>
> 27.. Search Advertising grew faster than any other segment of Internet advertising and now accounts for about 50% of all Internet advertising. From inception to the present, Search Advertising has been sold to advertisers only by search engines or their joint-venture partners or licensees, although both Forbes and FIM/MySpace have publicly indicated during the past 6 months

that they are going to break into the market (of monetizing their own Community Search Websites with Search Advertisements).

28.. The sellers of Search Advertisements (including Google and Yahoo) and independent companies have developed and acquired software tools for advertisers to determine the efficiency of their search advertising, and the management of potentially tens of thousands of ads and search terms to be used.

29.. Search Advertising, having a specific maximum number of characters in any ad, is fast and easy to create, and enables advertisers to get online (after an ad approval process) immediately or within a day or so, depending on the seller, with advertising budgets that can be as low as $1 to $5 per month, in contrast to Non-Search Advertising * * *.

30.. * * * when a Search Advertiser is offered an opportunity to add Non-Search Advertising to his/her Search Advertising purchase ..., the advertiser refuses the offer more than 80% of the time....

31.. ... Search Advertising is approximately 50 to 100 times more effective than Non-Search Advertising, produces more than 20 times the revenue for Google; ....

32.. Upon information and belief, a statistically relevant (projectible) survey can establish that among Search-Advertising advertisers, Search Advertising is not reasonably interchangeable with any form of Non-Search Advertising for ... reasons, including:

A.. Customer perception derived from the press that Google has won the search battle and that Google's emphasis on Search Advertising (accounting for 95% of Google's revenues) is superior to Non-Search Advertising; * * * 3/27/07 *International Herald Tribune* article stating "Yahoo, ...has fallen a distant second behind Google in Internet search and search-related advertising"; * * *.

* * *

C.. 50% of Internet purchases are made after a keyword search to determine where to make the purchase;

D.. Web searchers as a group obtain more relevant information from Search Advertising than any type of Non-Search Advertising;

E.. Search Advertising is less expensive;

F.. Search Advertising is more efficient; * * *

H.. Search Advertising has superior tools to manage the ads and keywords involved in substantial advertising campaigns;

I.. A search advertiser can start with a monthly budget as low as approximately $5.00, but contracts to display banner ads generally involve commitments of several hundred dollars or more;

J.. A search advertiser can generally withdraw all scheduled advertising at any time without notice and without penalty;

K.. A Search advertiser does not need any graphics artist or programmer to get started;

L.. Payments are simplified by use of credit cards * * *;

M.. Measurement of efficiency of most types of Non-Search Advertising is substantially less possible than with Search * * *;

N.. The risk of advertiser's loss as to Search Advertising is absorbed to a greater extent by the seller of the advertising than with Non-Search Advertising;

O.. Selection of advertising targets is more under the advertiser's control with (keyword) Search Advertising than with Non-Search Advertising, ... the advertiser ... knows more about his/her product or service than the seller of advertising ...;

P.. Search Advertising is largely automated and immediate, whereas Non-Search Advertising generally is labor intensive and delayed, [with] a substantial amount of discussions, negotiations....

Stage 3 - Monetizing Website Traffic

33.. Search engines had an inherent advantage over other websites. Search engines had users looking for all types of information, so that searches using the leading search engines created greater opportunities for advertisers than trying to place advertising directly on specialized websites. This created vast amounts of income for search engines which collected and indexed the content provided to the public for free by millions of website publishers....

* * *

34A.. In some of its AdSense agreements with website publishers, Google ... has paid more than 100% of the AdSense income to the website, in what amounts to an agreement by Google to share its related Search Advertising income with the website without publicly revealing that Google is helping any websites monetize their traffic by splitting Google's Search Advertising income.

35.. Until Google's deal with AOL (12/05), MySpace (8/06) and YouTube (11/06), search engines kept their Search ... monetizing activities to the search traffic (... users) of the search engine and its licensee competitors, and website publishers were restricted to the tiny per-ad revenues produced by ... Non-Search Advertising.

36.. ... Google was in a position to use its Search Advertising facility (and monopoly) to monetize anyone's website, and that Google chose to do so with search competitor AOL.com, Community Search Website YouTube.com ...; and Community Search Website MySpace.com (which Google licensed to have Search Advertising displayed ... MySpace is guaranteed $900 million for 3.5 years....

37.. These 3 transactions by Google involving the display of Google Search Advertising on third-party websites (or a website being purchased by Google for such purpose) is the start of the 3rd stage of Internet – the use of Search Advertising to compensate web publishers for their efforts through monetizing their website traffic.
38.. The monetizing of website traffic using highly profitable Search Advertising is a new, emerging market, and most suitable (*i.e.*, most profitable) for large "community" websites ... having a

vast range of user created information being added to it -- with a website search engine to locate information therein (or from the web at large).

39.. Various website owners have recognized this market, including the Plaintiff, Google (through its 3 transactions described above), MySpace.com's C.E.O. (see ¶ 40 below). Using Search Advertising to monetize the traffic of a third-party website is fundamentally different from all other means of monetizing website traffic because Search Advertising is the most profitable (as seen by Google's own revenues from 2000 to the present) and context, banner, display, pop-up and other types of advertising to monetize are too labor intensive and so less profitable that they constitute no significant competition to monetizing by Search Advertising.

40.. News Corp.'s President and C.E.O.... Chernin [said] ... that News Corp. will try to concoct the next YouTube on its own, via an in-house R&D group, [and] "I think we should be striving to create as many businesses ourselves as we can [for ... monetizing the website traffic with Search Advertising]".

* * *

A-1.. On 12/15/06, ... David Kirkpatrick, Fortune senior editor ... stated that keyword-targeted advertising [e.g., AdWords] gets a 10% or 20% clickthrough rate whereas conventional banner ads (not keyord based [e.g., AdSense]) have a clickthrough rate not exceeding 1% [and] ... that "Today Google overwhelmingly dominates the search business."

B.. "AdWords" – Google's Search advertising system ... enabled advertisers for the first time to reach potential customers at the precise moment of their demonstrated interest, which makes this type of ad much more cost effective than other types of advertising ....

* * *

D.. "Essential Facility" – Google's system for selling and placing Search Advertising on Community Search Websites to monetize the website traffic. Google's website monetizing system is so efficient and profitable that (with an 8% cost of sales during 2006) that no

competing system based on any competing search engine is reasonably interchangeable with Google's system, and the advertisers will pay about twice as much per click for use of a specific keyword than they will pay per click to competing companies such as Yahoo and MSN. This means that Google monetizes website traffic at about twice the rate as its nearest Search Advertising competitor and many times more than the top context or display ad competitor, DoubleClick, ... acquired during April, 2007.

D-1.. Search Advertising sold by lesser competitors of Google cannot become reasonably interchangeable with Google by lowering their prices because their inventory of searches is substantially less (requiring the website to return to Google to obtain the benefits of the larger inventory and the temporary use of the lesser competitor exhausts part of the Search Advertising market available more efficiently through Google). Google's competitors do not effectively compete. They merely sell an incremental expansion of the website's monetizing program, primarily to unsophisticated website owners who are unaware of the differences....

E.. "Google Competitors" – Google competes with Yahoo Search Marketing, MSN Ad Center, 7Search and other search engines offering search advertising, but the competition is ineffective and Google has a monopoly in the Search Market and Website Monetizing Submarket, making Google's AdWords business an Essential Facility, both as to advertisers seeking to advertise on Internet for website visitors (in competition with Google) through Search Advertising (including Plaintiff) and as to all Community Search Website owners attempting or potentially attempting to create Community Search Websites and increase and monetize the traffic on their websites in competition with Google (including Plaintiff).

F.. "Non-Search Advertising" – any Internet advertising that is not Search Advertising, such as banner, space, context or pop-up....

* * *

I.. "Search Advertising" – website advertising that is triggered by a website or Internet search, with the advertisement (and any others) displayed alongside the search results. * * *

* * *

C.. The acquisition of the largest company in Internet display advertising, including an auction system for Internet display advertising, is a strong indication that Search advertising is a different market from Non-Search advertising, a market so different that Google was not in it to any appreciable extent before the April, 2007 DoubleClick acquisition.

[end of quotation from 2nd Amended Complaint]

Person's allegations above should be given appropriate consideration as provable facts based on his own experience with the purchase of search advertising through 10 search engines including Google's AdWords, Yahoo, MSN and 7Search (ER34 ¶8) and by virtue of his experience as an antitrust lawyer (ER22, 33).

Person offered to the Court below a quick means of showing the lack of interchangeability between search advertising and non-search advertising, through a projectible survey of internet advertisers (see ER40 ¶ 32 quoted above at p. 9). Also, Person urged the Court below, during oral argument (ER162), to see what relevant-market arguments Google would make before the Federal Trade Commission concerning Google's proposed acquisition of Doubleclick, Inc., as follows:

> ... now they're moving into the nonsearch market like gangbusters probably ... telling the FTC that the search market is different that they're really now acquiring in the banner market because they have no presence there. I think we ought to see at least what Google is telling the FTC. I think it has to be inconsistent with what they're maintaining here.

B.. Person as a Customer and Competitor of Google; and Person's Injuries

Person alleges that he is an actual competitor of Google, in the submarket or market of monetizing the traffic of Community Search Websites (ER33-34 ¶¶4-7). Person has developed two such websites (www.myclads.com and www.attydb.com) and has 8 others under development (ER33-34 ¶¶4-7).

Person is a purchaser of search advertising from about 10 search websites, including Google, Yahoo and MSN (ER34 ¶8). From 2003 to September 18, 2006, Person had 1,417,314 of his ads presented to Google users in a total of 20 campaigns, and paid Google a total of $1,466.67 for a total of 3,533 user clicks at an average cost of $.42 per click, and a clickthrough rate ranging from a high of 3.09% to a low of zero % (ER34 ¶8).

Person purchased Google AdWords (search) advertising as a lawyer, to develop legal business (ER33 ¶ 4); as a book publisher, to sell books written and published by Person (ER33 ¶ 4); as a candidate for NYS Attorney General during 2006 (ER33, 34 ¶¶ 4 and 9); and to promote traffic at Person's websites (ER33-34 ¶¶ 5 and 8). Also, Person purchased similar search advertising from 9 other search engines, including Yahoo, MSN and 7Search (ER34 ¶¶ 8).

Person's alleged injuries as a Google competitor are described in ER73-75 ¶¶ 89A – 89K, including the loss of traffic monetization (income), capital value, compound growth and market share for Person's Community Search Websites.

These injuries result from Google's refusal to permit Person to use the AdWords system for monetizing Person's website traffic, and on terms comparable to Google's terms to YouTube, MySpace and AOL, among others.

Also, Person as a competitor has been injured by Google's acquisition program, which substantially suppresses the ability of competitors to compete with Google in the monetization of websites and deprives Person of any meaningful alternatives to use of Google's AdWords (ER75, 58 ¶¶ 89-G, 51)

Person as a customer of Google has been injured by having to pay excessive, discriminatory prices for AdWords advertising (ER65-66, 70-72, 74-75 ¶¶ 71, 82-83, 86, 89-E, 89-F), which amount to overcharges resulting from the illegally-acquired monopoly of Google. Whereas eBay pays ½ cent per click for its AdWords advertising, Person is required to pay 100 times as much to present his 4-line ad at the same time in response to the same search (when eBay and Person bid on the same key word). EBay thus obtains a lead at a cost of ½ cent, whereas Person at the same time is required to pay $.50 for a lead. (ER60, 62 ¶¶ 57-58, 63).

In support of its discriminatory pricing policy, Google will not accept advertisements to fill out page 1 of the search results to manipulate the auction price (by reducing the inventory after knowing how many bidders exist for a key word) (ER 61-62, 65 ¶¶ 60, 71); will not permit use of lower-value keywords (ER61-62 ¶ 61) to manipulate the inventory and auction price; requires Person to

be as profitable to Google as eBay, by increasing Person's price to 100 times the amount per click paid by eBay (ER62 ¶ 62); and misleads advertisers by falsely stating that they can improve their landing page to obtain clickthrough results similar to eBay (ER61 ¶ 59), which is not possible because of the difference in offered product/service and the brand recognition, among other factors (ER61-62 ¶¶ 59, 62); and by pulling keywords off the market, to manipulate inventory of keywords (ER66 ¶ 72).

C.. AdSense Is Not Reasonably Interchangeable with AdWords

Google argues that website owners are able to monetize their website traffic through Google's AdSense advertising (ER 104-105). Person's 2AC fully addresses that argument. AdSense and all other non-search advertising accounts for less than 5% of Google's revenue (ER35 ¶12); AdSense advertising is selected by website context and not on search terms (ER39 ¶25); search advertising is 50 to 100 times more effective than non-search advertising (ER40 ¶31); Google turns over more than 100% of its AdSense revenues to some favored website owners, because of the inadequacy of AdSense revenues in comparison to Google's AdWords revenues (ER 43 ¶34A); AdSense clickthrough rate is less than 1% in contrast to AdWords clickthrough rate between 10% and 20% (ER45-47 ¶¶41A-1, 41B); AdSense delivers ads to a website when a visitor appears, and not in response to any search by the visitor (ER 69 ¶79). With exceptions to the favored

customers, Google does not provide any revenue sharing for AdWords advertising place on an owner's website; instead, Google provides sharing of income from its substantially less productive AdSense advertising (ER 70-71 ¶¶82-84). AdSense is used to make website owners believe, contrary to fact, that they are monetizing their website traffic at the highest, AdWords rate (less a percentage to Google) when in fact they are obtaining a low monetization rate for the website's traffic (implied from ER43 ¶34). Google only monetizes at the higher, AdWords rate for its favored customers: YouTube, MySpace, AOL (Exhibit A, (ER32, 38, ¶¶2A, 23; and ER88, 90-91, Exhibit A, ¶¶23, 31, 33).

SUMMARY OF THE ARGUMENT

The Court below erred when it disregarded the substantial amount of alleged facts showing that Internet search advertising is a market (or submarket) within the market for all Internet advertising. Search advertising is so different and so effective that it is not at all reasonably interchangeable with any other type of Internet advertising.

By failing to hold that search advertising is a relevant market, the Court erred when making its other decisions. The Court erred in holding that the multi-billion market for monetization of the traffic of Community Search Websites could not be a submarket of the alleged search advertising market.

The Court erred when it failed to see that Person alleged that he is a competitor of Google in the creation, development, marketing and monetization of Community Search Websites (also known as social networking websites). Person has created two such sites and has an additional 8 websites in preparation.

Person argues that his 2AC should not have been dismissed, and alternatively that the Court below erred in holding that any further amendments would be futile. Person argues that he already alleges that Google dominates the submarket for monetization of the traffic of Community Search Websites, whether or not the overall market is search advertising or all Internet advertising. This is a claim for monopolization of the search market and attempted monopolization of the overall Internet advertising market, and alleged submarkets.

Google acquired (or is threatening to acquire) its monopoly not by in-house creation, but by a series of 65 acquisitions of technology companies, giving Google the technology (through patents, know-how and trade secrets primarily) to prevent Yahoo and Microsoft/MSN from effectively competing with Google.

Person is hurt through having to pay advertising prices to Google that are 100 times the amount paid to Google for the same keyword advertising by eBay, and by preventing Google's search competitors from offering a service as good as the AdWords system for search advertising and for monetization of website traffic.

By reason of the way in which Google acquired its monopoly, Person argues that there is a remedy for Person, including repayment of overcharges and discriminatory-price excesses, by rolling back Google's prices to what it is charging its most favored customers (such as eBay), and to enjoin Google from charging discriminatory prices as long as Google continues to dominate the relevant markets.

Finally, it was error for the Court below to hold that Person should have filed a motion to reconsider rather than the 2nd Amended Complaint. The 2nd Amended Complaint is actually the only amended complaint, and it does contain materially-different allegations from any of the preceding pleadings, including the recent DoubleClick acquisition and the allegation that Google is attempting to monopolize the submarket of monetizing website traffic of "Community Search Websites" under the overall market for Internet advertising of all types. (Compare the 3/9/07 hearing transcript – ER14-30 -- with the 6/15/07 transcript –ER148-165 -- to see the major differences.)

STANDARD OF REVIEW

The standard for review of all issues presented below is *de novo*. *Perfect 10, Inc. v. Visa International Service, Association*, 494 F.3d 788, 794 (9th Cir. 2007).

THE ARGUMENT

I. PERSON RAISED AN ISSUE OF FACT AS TO THE EXISTENCE OF SEARCH ADVERTISING AS A MARKET AND THAT IT IS NOT INTERCHANGEABLE WITH BANNER, DISPLAY AND OTHER TYPES OF INTERNET ADVERTISING

The Court below held as a matter of law that search advertising is interchangeable with all other types of Internet advertising (ER6): "The adequacy of the definition of a relevant market is largely a question of law...." (ER8)

Market definition and market power are questions of fact. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 363-364 (9th Cir. 1988), citing *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir. 1982) (The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved ...").

Person's 2AC provides substantial allegations, if proved, for a jury to find that search advertising is a market separate from other internet advertising.

The court below erred in making a factual determination that "the Court finds no basis for distinguishing the alleged 'search advertising market' from the larger market for Internet advertising. As discussed in the prior order, search-based advertising is reasonably interchangeable with other forms of Internet advertising. A website may choose to advertise via search-based advertising or by posting advertisements independently of any search." (ER 5-6). This language was taken

(with minor modifications) from p. 8 of the Court's 03/16/07 Order Granting Motion to Dismiss in the *Kinderstart* case (ER 12).

The Court below appears not to have understood at least half of Person's problem. Person, as a candidate for public office, a lawyer, book publisher, and owner of various websites, wanted to run advertising for his political candidacy, law practice, books and to stimulate traffic for his websites. The Court below seems to have viewed Person as a website rather than as an advertiser.

Whether search advertising is interchangeable or not with non-search Internet advertising is a question of fact, and it was an error of law to dismiss Person's 2AC for alleged failure to state a relevant service market.

II. PROPOSED SUBMARKET OF MONETIZING THE TRAFFIC OF COMMUNITY SEARCH WEBSITES ALSO RAISED AN ISSUE OF FACT

The Court below determined as a matter of law that search advertising is reasonably interchangeable with all other types of Internet advertising (ER6) and that Person's submarket of "monetizing the traffic of community search websites" could not exist if Person's "search advertising market" did not exist (ER7-8).

At page 6 of the 6/25/07 Order (ER6), the Court below held that the proposed submarket also "fails to incorporate the non-search-based advertising with which search-based advertising is reasonably interchangeable", and dismissed

the Section 1 and Section 2 claims (to the extent "they are premised upon the identification of 'Search Advertising' as the relevant market").

For the reason set forth under argument "I." above, the decision was erroneous as a matter of law. Person's "search advertising market" has adequate allegations of factual support.

III. PERSON ALLEGED THAT GOOGLE DOMINATES THE SEARCH ADVERTISING MARKET WITH A 70% SHARE AND HAD A SMALL (5%) SHARE OF THE NON-SEARCH ADVERTISING MARKET; GOOGLE'S SHARE OF THE OVERALL INTERNET ADVERTISING MARKET IS CALCULABLE FROM PERSON'S ALLEGATIONS

The Court below stated that Person's 2AC "contains few, if any factual allegations regarding Google's position in the "Internet advertising" market (ER6).

Person's 2AC made it clear that Google had a 75% market share of search advertising (ER50 ¶46 and ER53 ¶49-L) and that only 5% of Google's income came from non-search advertising (ER35 ¶ 12; and ER41 ¶32-A). Also, Person alleges that search advertising is about 50% of all Internet advertising (ER39 ¶27) and steadily increasing as to Google's search-advertising share (ER50 ¶46) and as to search-advertising's share of overall Internet advertising (ER80 ¶103), alleging that Google's only two significant challengers (Yahoo and Microsoft/MSN) cannot "stop Google's growth and ever-increasing power in the relevant market", which includes the alternative alleged relevant market of "all Internet advertising" (ER49-50 ¶45).

Also, Person alleged that from inception through 2006 advertising income produced 99% of Google's revenues (ER34-35 ¶11). Person alleged that Google had an 8% cost of sale for its search advertising revenue in 2006 (ER47-48 ¶41-D) and a 25% to 30% cost of sale for its AdSense (non-search) advertising revenue, after deducting acquisition costs (ER45-46 ¶41-A).

Also, Person alleged that Google has more than a 80% share of the dollar amount of revenue obtained from monetizing the traffic of Community Search Websites using Search Advertising; and more than a 67% share of the dollar amount of revenue obtained from monetizing the traffic of Community Search Websites using any type of Internet Advertising (ER50 ¶ 47) (thus supporting the attempted monopolization claim).

The foregoing allegations are substantial and specific regarding Google's position in the "Internet advertising" market, and are sufficient allegations to support Person's alternative alleged market of "all Internet advertising" (c.f. p. 6 of the Court's 06/25/07 Order (ER 6) for the attempted monopolization claim.

IV. THE COURT BELOW ERRED WHEN DENYING PERSON'S MOTION FOR LEAVE TO MAKE NON-FUTILE AMENDMENTS

The Court below held (ER6) "that further amendment would be futile and that leave should not be granted".

In the Conclusion of Person's memorandum in opposition to Google's motion to dismiss, Person made the following request: "that the Plaintiff be granted leave to file a further amended complaint to the extent such amendments are determined by the Court to be non-futile." (ER147)

Based on the argument in "III." above, Person would have been able to add additional information about the size and market share of the overall Internet advertising market, and should have been given the opportunity to do so, to support Person's attempted monopolization claim. This argument is made as an alternative to Person's main argument that he had already alleged in the 2AC sufficient detail about such alleged market so that no amendment was necessary.

V. DISCRIMINATORY PRICING AND OVERCHARGING BY AN ILLEGALLY-ACQUIRED MONOPOLY IS ACTIONABLE

The Court below held (ER6) "Plaintiff still fails to allege any facts that would render discriminatory pricing a violation of the antitrust laws."

Person has alleged that Google acquired a monopoly in the various alleged relevant markets (ER79, 166), as follows:

> 49.. The following facts are barriers to entry facing Google competitors in the relevant markets and submarket, and support Plaintiff's allegation of Google's monopoly:
>
> A.. Google has acquired about 65 technology companies from 2001 to the present (a list and description of such acquisitions is set forth in **Exhibit A** hereto – and see ¶¶ 99-A and 99-B below for a list of the most significant acquisitions which enabled Google to acquire and combine to obtain its present monopolies in the relevant markets

> and submarket), at a cost of about $7-$8 billion in cash and stock, to enable Google to increase its share of Internet searches and of the Relevant Market and Relevant Submarket without growth from within, for the purpose of depriving competitors in the respective markets of market share and drive them out of business.

Although the benefits of owning a monopoly include the ability to charge whatever the market will bear, or to put small businesses out of business by charging, say, twice the per-unit amount charged to major customers, an illegally-acquired monopoly (such as Google's monopoly acquired through 65 acquisitions of technology companies) is in a different position. Google is required to reduce its price to the pre-monopoly level. See *Deiter v. Microsoft Corp.*, 436 F.3d 461, 463-464 (4th Cir. 2006) (Microsoft's illegal use of monopoly powers to overcharge customers; illegal acquisition or maintenance of monopoly power with overcharges because of the injury to or absence of competition – p. 467); *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 377, 47 S.Ct. 400 (1927) (not entitled to monopoly profits, but to "normal profits").

The antitrust injury requirement is met when consumers (such as Person) are prevented from purchasing at a lower-cost from the defendant's competitors by reason of defendant's monopolizing activities. *Harrison Aire, Inc. v. Aerostar International, Inc.*, 423 F.3d 374 (3rd Cir. 2005). Person has alleged this at RT69=60. 82 ¶¶ 51-53, 84 (Google's monopolizing activities decrease competition and increase costs to consumers).

Person is injured by Google's willfully-acquired monopoly because Google is able to charge Person and other consumers excessive prices for AdWords search advertising, purchased at www.google.com and displayed in response to millions of online Google searchers (as distinguished from being displayed at any of Person's websites). Person was charged 100 times as much as eBay for ads appearing in search results to Google searchers at the same time. Google would not have been able to overcharge Person but for Google's illegally-acquired monopoly and resulting diminution of competition among competing search engines such as Yahoo and Microsoft/MSN.

Overcharges can be recovered from an illegal monopolist, with injunctive to prevent future overcharges. *City of Mishawaka, Ind. v. American Elec. Power Co., Inc.*, 465 F.Supp. 1320, 1339 (N.D.Ind., 1979). The remedies are not available preliminarily, but appropriate only after monopolization established and suitable remedies are considered to undo the effects of the monopoly. *SCM Corp. v. Xerox Corp.*, 1974 WL 880 p. 3 (D. CT 1974), *aff'd* 507 F.2d 358 (2nd Cir. 1974). Also, see *Sports Racing Services, Inc. v. Sports Car Club of America, Inc.*, 131 F.3d 874, 883 (10th Cir. 1997) (direct purchaser may recover full amount of overcharge); and *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 376-377 (D. D.C. 2002) (consumer overcharges).

Because of its illegally-acquired monopoly, Google should be required as long as it maintains the monopoly to charge non-discriminatory prices to its AdWords customers similar to the non-discriminatory pricing required of a patent holder granting non-exclusive licenses under its patent.

VI.. GOOGLE MONOPOLIZES THE SUBMARKET OF MONETIZATION OF COMMUNITY SEARCH WEBSITE TRAFFIC; AND IS ATTEMPTING TO MONOPOLIZE THE SAME SUBMARKET FOR ALL INTERNET ADVERTISING

The Court below stated (ER7) "it is highly unlikely that Plaintiff could allege a monopolization or attempted monopolization claim with respect to the overall Internet advertising market." (ER32, 35 ¶¶ 2A, 12; ER74 ¶89-E; ER78 ¶¶98-B, 98-C) The monetization of Community Search Websites occurs through search advertising primarily, so that whether the market is all Internet advertising or search advertising does not make a significant difference. The former supports the monopolization claim; the latter supports the attempted monopolization claim.

The Court erred because Person alleged the submarket of monetization of community websites occurred through the more profitable search advertising.

VII.. PERSON'S SECOND AMENDED COMPLAINT HAD SUBSTANTIAL CHANGES NEEDING AMENDMENT: ADDITION OF OVERALL INTERNET ADVERTISING MARKET AS ALTERNATIVE MARKET FOR ATTEMPTED MONOPOLIZATION; AND GOOGLE'S DOUBLECLICK ACQUISITION

The Court below stated (ER8) "The proper means of seeking reconsideration of the March 16th Order would have been a motion for reconsideration."

Person, in his 2AC, added the community search submarket to the market for all Internet advertising, curing Judge Fogel's problem as to attempted monopolization; and added Google's just-announced Doubleclick acquisition, which indicated that Google considered display and banner advertising to be a different market from Google's dominated search market. These additions warranted Person's proceeding by amendment rather than motion to reconsider. The Doubleclick acquisition occurred after the March 16, 2007 Order.

VIII.. PERSON IS IN COMPETITION WITH GOOGLE AS TO THEIR RESPECTIVE INTERESTS IN COMMUNITY SEARCH WEBSITES

The Court below stated (ER8) "Plaintiff does not explain how Google is in competition with such [community] websites." Person alleges that Google "is in the business of creating, acquiring, building and monetizing Community Search Websites for its own account, and monetizing Community Search Websites owned by a limited number of Google's competitors." (ER34-35 ¶11) Person also alleges:

> 4.. Person develops websites and website traffic to (i) create website income through use or sale of Search Advertising directed to website visitors; (ii) create capital values for his 10 Community Search Websites (including myclads.com) under development * * *.
>
> 5.. Person is in the business of building and monetizing website traffic for his Community Search Websites (10 under development, featuring visitor-supplied content and a search engine for locating desired content) through planned sale of Search Advertising to

advertisers, to appear when website visitors express what they are then seeking through any website or Internet searches they conduct from Person's websites.

6.. In this respect, Person is an actual competitor of Google (in the submarket or market of monetizing the traffic of Community Search Websites).

Also, see ¶¶ ER32 ¶2A; ER43-44 ¶36; ER45 ¶40 (News Corp. is a competitor of Google through their respective community search websites); ER48 ¶41-E; ER51 ¶49-B; ER54 ¶49-O; ER58 ¶¶50-51; ER59 ¶53; ER65-66 ¶71; ER66-72 ¶¶73-87; and ER74 ¶89-E; and ER79 ¶99-B).

STATEMENT OF RELATED CASES

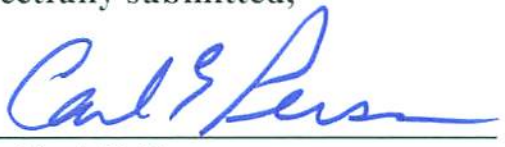
Kinderstart.com, LLC v. Google, Inc., C 06-2057 JF, is a related case and still may be on appeal, as to unrelated issues.

CONCLUSION

For the reasons stated above, Person respectfully requests that the Court reverse the decision of the Court below, and remand for further proceedings.

Dated: **New York, New York**
October 31, 2007

Respectfully submitted,



Carl E. Person
Plaintiff-Appellant, 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

CERTIFICATE OF SERVICE

I, Carl E. Person, declare:

I am the plaintiff in this action and fully familiar with the facts stated herein, and make this declaration to certify that on October 31, 2007, I served on

David H. Kramer, Esq.
Wilson Sonsini Goodrich & Rosati
Professional Corporation
650 Page Mill Road
Palo Alto CA 94304-1050

Jonathan M. Jacobson, Esq.
Wilson Sonsini Goodrich & Rosati, P.C.
12 E. 49th St. - 30th Floor
New York NY 10017-8203

by mail addressed as per above the following document:

BRIEF FOR PLAINTIFF-APPELLANT

Executed under the penalty of perjury.

Dated: October 31, 2007

Carl E. Person