

No. 07-16367

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL E. PERSON, Plaintiff – Appellant

v.

GOOGLE, INC., Defendant – Appellee.

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

VOLUME 1 (of 3 volumes)

EXCERPTS OF RECORD

ER 1 through ER 13

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E-Filed 6/25/2007

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARL E. PERSON,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Case Number C 06-7297 JF (RS)

ORDER¹ GRANTING MOTION TO
DISMISS WITHOUT LEAVE TO
AMEND

[re: docket no. 46]

Defendant Google, Inc. ("Google") moves to dismiss the Second Amended Complaint ("SAC") of Plaintiff Carl E. Person² for failure to state a claim upon which relief can be granted. For the reasons discussed below, the motion will be granted without leave to amend.

I. BACKGROUND

1. Procedural Background

Plaintiff filed the initial complaint in this action on June 19, 2006 in the Southern District of New York. The initial complaint included six claims: (1) attempted monopolization and

¹ This disposition is not designated for publication and may not be cited.

² Plaintiff, acting *pro se*, is an attorney.

1 monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2: (2) conspiracy to
2 restrain trade and fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1: (3)
3 attempted monopolization and price fixing in violation of Section 340 of the Donnelly Act, N.Y.
4 Gen. Bus. Law § 340: (4) deceptive acts and practices in violation of N.Y. Gen. Bus. Law §§
5 349, 349-c: (5) false advertising in violation of N.Y. Gen. Bus. Law §§ 350, 350-e; and (6)
6 monopolization, conspiracy to fix prices, and discriminatory pricing in violation of the
7 Cartwright Act, Cal. Bus. & Prof. Code § 16720.

8 On July 27, 2006, Google moved to dismiss the complaint for improper venue and for
9 failure to state a claim upon which relief can be granted. On August 3, 2006, Plaintiff opposed
10 the motion and requested leave to amend his complaint by the addition of two paragraphs.³
11 Plaintiff did not add claims to his complaint. On September 20, 2006, one week after oral
12 argument on the motion, Plaintiff informed Judge Patterson that he wished to make further
13 amendments to his complaint. In a letter dated September 18, 2006, Judge Patterson determined
14 that Plaintiff had exercised his right to amend his complaint on August 3, 2006, and declined to
15 grant Plaintiff further leave to amend. On October 11, 2006, Judge Patterson granted the motion
16 to dismiss for improper venue without deciding whether Plaintiff stated a claim upon which relief
17 may be granted.

18 On November 27, 2006, the instant case was transferred to this Court. The operative
19 complaint at the time of the transfer was the FAC, that is, Plaintiff's original complaint as
20

21 _____
22 ³ The paragraphs were:

23 "95A. Google's anticompetitive activities as alleged are specifically intended to increase
24 Google's income, profits and of the keyword-targeted internet advertising market, and to deprive
25 competitors Yahoo, MSN and any others of income, profits and market share."

26 "146A. Plaintiff is a consumer as to his candidacy and part-time book selling activities and,
27 upon information and belief, many hundreds of thousands of AdWords advertisers during the
28 past 3 years are also consumers in their Google advertising activities, including consumers who
[sic] retired or self employed persons, acting part-time, offering goods or services to supplement
their income."

See Google Opposition to Motion for Leave to Amend Ex. B.

1 amended as of right on August 3, 2006.⁴ On January 5, 2007, this Court issued an order relating
2 the instant case to *KinderStart.Com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS). On January
3 25, 2007, Google moved to dismiss the FAC for failure to state a claim upon which relief may be
4 granted. On February 9, 2007, Plaintiff moved for leave to file a document that he entitled "First
5 Amended Complaint." but that in fact would have been, in light of Judge Patterson's earlier
6 ruling, a second amended complaint. That proposed pleading included more factual detail and
7 added claims under California law.⁵ On February 13, 2007, the Court granted in part and denied
8 in part Plaintiff's motion and instructed Plaintiff that he "should be prepared to argue why leave
9 to amend should be granted in the event that the Court grants the motion [to dismiss]." February
10 13, 2007 Order 2. On February 20, 2007, Plaintiff filed opposition to the motion to dismiss. The
11 Court heard oral argument on that motion on March 9, 2007. On March 16, 2007, the Court
12 concluded that the proposed complaint was legally insufficient and granted the motion to dismiss
13 with leave to amend ("March 16th Order"). The Court permitted Plaintiff to file a second
14 amended complaint, limited to the six claims asserted in the original complaint, within thirty
15 days.

16 On April 16, 2007, Plaintiff filed the instant SAC. It pleads two claims in the alternative:
17 (1) monopolization in violation of Sherman Act § 2; and (2) attempted monopolization in

18
19 ⁴ To the Court's knowledge, no single document exists that incorporates the amendments
20 made to the complaint on August 3, 2006.

21 ⁵ The proposed complaint included fifteen claims: (1) monopolizing and attempting to
22 monopolize in violation of Sherman Act § 2; (2) denial of use of essential facility to competitor
23 and denial of non-discriminatory use of AdWords in violation of Sherman Act § 2; (3)
24 conspiracy to fix prices and unreasonably restrain trade in violation of Sherman Act § 1; (4)
25 violation of the California Cartwright Act, Cal. Bus. & Prof. Code § 16720; (5) violation of the
26 California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000, *et seq.*; (6) violation of the
27 New York Donnelly Act, N.Y. Gen. Bus. Law § 340; (7) breach of contract; (8) rescission of
28 contract; (9) reformation of contract; (10) violation of the California Consumer Legal Remedies
Act, Cal. Civ. Code § 1770(a); (11) unfair competition in violation of Cal. Bus. & Prof. Code §
17200 *et seq.*; (12) false and misleading advertising in violation of Cal. Bus. & Prof. Code §§
17500-09; (13) class action claims under California law; (14) deceptive acts and practices in
violation of N.Y. Gen. Bus. Law §§ 349, 349-c; and (15) false advertising in violation of N.Y.
Gen. Bus. Law §§ 350, 350-e.

1 violation of Sherman Act § 1. On May 30, 2007, Google moved to dismiss the SAC for failure
2 to state a claim. Plaintiff opposes the motion. The Court heard oral argument on June 15, 2007.

3 2. Allegations Made by Plaintiff

4 The SAC contains the following material allegations, which the Court presumes to be
5 factual for purposes of the present motion. Plaintiff is an attorney, businessperson, and past
6 candidate for elective office. SAC ¶ 3.

7 [He] develops websites and website traffic to (i) create website income through
8 use or sale of Search Advertising directed to website visitors; (ii) create capital
9 values for his 10 Community Search Websites (including myclads.com) under
10 development; (iii) market his candidacy for public office in New York; (iv) obtain
clients; (v) market non-commercial, political and information websites to obtain
website traffic; and (vi) market his self-published books.

11 SAC ¶ 4. He is a competitor with Google "in the submarket or market of monetizing the traffic
12 of Community Search Websites." SAC ¶ 6. He has used Google's AdWords program as well as
13 comparable programs run by Yahoo, MSN, and 7Search. SAC ¶ 8.

14 Google maintains the world's largest index of web sites and other content. SAC ¶ 11.
15 AdSense is "Google's version of context or banner advertising." SAC ¶41(A). AdWords is a
16 search advertising program that enables "advertisers to hold back their ads until potential
17 customers were seeking information through a search." SAC ¶ 41(B). AdWords is an essential
18 facility "because it has not been able to be duplicated, competitively, by Yahoo or MSN." SAC ¶
19 80. Google discriminates among users and fails to give reasonable access to AdWords with the
20 goal of foreclosing competition. SAC ¶ 84. Google has attained a monopoly in, (or,
21 alternatively, has a dangerous probability of gaining monopoly power in) the market for search
22 advertising, defined as "website advertising that is triggered by a website or Internet search, with
23 the advertisement (and any others) displayed alongside the search results. Such advertising could
24 be purchased on a pay-per-click ("PPC"), cost-per-thousand ("CPM") or other basis;" and the
25 submarket of "monetizing the traffic of Community Search Websites through use of Search
26 Advertising." SAC ¶¶ 41(I), 44, 45, 98 (emphasis removed). Alternatively, "if the market turns
27 out to be 'all Internet Advertising' and not 'Search Advertising,' the submarket becomes the
28 market for monetizing the traffic of Community Search Websites through the use of Internet

1 Advertising.” SAC ¶ 44 (emphasis removed). Google has made extensive acquisitions, both
2 before and after gaining monopoly status. SAC ¶¶ 49(A)-(B). Ex. A.

3 II. LEGAL STANDARD

4 For purposes of a motion to dismiss, the plaintiff’s allegations are taken as true, and the
5 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*
6 *McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the
7 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*,
8 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, dismissal may be ordered
9 with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

10 III. DISCUSSION

11 As the Court explained in the March 16th Order, in order to make out a claim for
12 attempted monopolization or monopolization, a plaintiff must define the relevant market.
13 *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997). The relevant market is “the field
14 in which meaningful competition is said to exist.” *Image Technical Services, Inc. v. Eastman*
15 *Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). Failure to allege the relevant market is an
16 appropriate ground for dismissal of a Sherman Act claim. *Tanaka v. University of Southern*
17 *California*, 252 F.3d 1059, 1063 (9th Cir. 2001). “A ‘market’ is any grouping of sales whose
18 sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing
19 with any group of buyers.” *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.
20 1995). The Supreme Court has explained that the relevant market for antitrust purposes is
21 determined by the choices available to consumers. *Eastman Kodak Co. v. Image Technical*
22 *Services, Inc.*, 504 U.S. 451, 481-82 (1992). In some instances, one brand of a product may
23 constitute a separate market. *Id.* “The product market includes the pool of goods or services that
24 enjoy reasonable interchangeability of use and cross-elasticity of demand.” *Tanaka*, 252 F.3d at
25 1063.

26 As it also explained in its prior order, the Court finds no basis for distinguishing the
27 alleged “search advertising market” from the larger market for Internet advertising. As discussed
28 in the prior order, search-based advertising is reasonably interchangeable with other forms of

1 Internet advertising. A website may choose to advertise via search-based advertising or by
 2 posting advertisements independently of any search. The "search advertising market" thus is too
 3 narrow to constitute a relevant market for antitrust purposes. The proposed sub-market of
 4 "monetizing the traffic of Community Search Websites through use of Search Advertising" is
 5 more specific than the proposed market, but it too fails to incorporate the non-search-based
 6 advertising with which search-based advertising is reasonably interchangeable. Accordingly,
 7 both the monopolization and attempted-monopolization claims in the SAC must be dismissed to
 8 the extent that they are premised upon the identification of "Search Advertising" as the relevant
 9 market.

10 The SAC contains few, if any factual allegations regarding Google's position in the
 11 "Internet advertising" market. Plaintiff does state: "[a]lternatively, if the market turns out to be
 12 'all Internet advertising' and not 'Search Advertising', the submarket becomes the market for
 13 monetizing the traffic of Community Search Websites through the use of Internet Advertising."
 14 While this statement apparently indicates what Plaintiff would attempt to plead in another
 15 amended complaint,⁶ the Court must decide whether further leave to amend is appropriate. For
 16 the reasons discussed below, the Court concludes that further amendment would be futile and
 17 that leave should not be granted.

18 Likely because of the absence of a properly-pleaded relevant market, it is hard to discern
 19 what types of competition Plaintiff believes are threatened by Google's actions. Plaintiff still
 20 fails to allege any facts that would render discriminatory pricing a violation of the antitrust laws.
 21 *See Verizon Communications, Inc. v. Trinko*, 495 U.S. 328, 340 (1990). Plaintiff's conclusory
 22 allegations of predatory behavior do not remedy this deficiency. *Bell Atlantic v. Twombly*, 127
 23 S.Ct. 1955, 1964-65 (May 21, 2007) (explaining that a plaintiff's obligation to state the ground
 24 for relief "requires more than labels and conclusions, and a formulaic recitation of the elements
 25

26 ⁶ In opposition to the motion, Plaintiff refers to the "search market." Opposition 11. The
 27 Court concludes that this reference is shorthand for the search advertising market, and that
 28 Plaintiff does not propose leave to file an amended complaint that identifies the search market as
 the relevant market. The Court has rejected such a proposed relevant market in the related case.
See Kinderstart v. Google, 2007 WL 831806 *5-6 (N.D.Cal. March 16, 2007).

1 of a cause of action will not do”) (citations omitted). As counsel for Google argued at the
2 hearing, Plaintiff does not explain how he is excluded from the AdWords program. Numerous
3 valid business reasons, many of which actually may heighten competition, might justify increased
4 prices for keywords that do not appear on Plaintiff’s websites. Nor is the SAC clear as to who is
5 a competitor of Google and who is a customer. To the extent that the SAC alleges that Plaintiff
6 is a competitor of Google, such competition would appear to involve the monetization of Internet
7 traffic - an extremely broad activity that would appear to encompass most website operators⁷ -
8 rather than Internet advertising. SAC ¶ 6. There is no reason to believe that allowing Plaintiff to
9 plead a different relevant market would alleviate these deficiencies, since they have appeared in
10 each of Plaintiff’s complaints to date.

11 The Court asked Plaintiff at oral argument whether he could plead further facts in support
12 of his claim. The only additional facts offered by Plaintiff pertained to the difficulty of a public
13 interest group in purchasing certain keywords under the AdWords program. Such facts would be
14 largely repetitive of Plaintiff’s allegations regarding his inability to afford certain keywords
15 relative to his prior political activities. They would not address the deficiencies that the Court
16 has identified previously with respect to anticompetitive or exclusionary conduct allegations or
17 the definition of the relevant market, nor would they address the lack of specific allegations with
18 respect to Google’s position in the Internet advertising market.

19 The SAC does not include allegations pertaining to Google’s position in the larger
20 Internet advertising market, but a news article provided by Plaintiff in opposition to the motion
21 indicates that Google is projected to have a thirty-two percent share of the Internet advertising
22 market in 2007. Person Decl. Ex. R. Whether or not it is appropriate for the Court to take
23 judicial notice of this figure, Google’s purported share of the Internet advertising market is
24 significantly less than its alleged seventy percent share of the search advertising market. SAC ¶
25 46. Accordingly, it is highly unlikely that Plaintiff could allege a monopolization or attempted
26 monopolization claim with respect to the overall Internet advertising market, particularly to the

27
28 ⁷ The Court has held that the market definition “Website Traffic Monetizing Market” is
vague and overbroad for this reason. March 16th Order 7.

1 extent that he seeks to proceed on an "essential facilities" theory.

2 Moreover, viewing the market in terms of the proposed submarket likely would render
3 the definition vague and overbroad as it would encompass not only online advertising companies
4 but also community sites that place Google advertisements. Plaintiff does not explain how
5 Google is in competition with such sites. While the Court need not decide whether the SAC
6 complies with Fed. R. Civ. P. 8(a), which requires a "short and plain statement of the claim," it
7 notes that Plaintiff has struggled to limit his complaints to alleged injuries he has sustained
8 personally as opposed to speculation about injury to Google's large-scale competitors, such as
9 Yahoo. Permitting Plaintiff to expand his definition of the relevant market likely would
10 aggravate this problem.

11 Finally, the Court gave explicit direction to Plaintiff in the March 16th Order that he
12 should amend the relevant market alleged in his complaint. However, instead of following this
13 direction, Plaintiff alleged an almost identical relevant market, while alleging additional facts
14 that he believed would show that the Court erred in its initial determination. The proper means
15 of seeking reconsideration of the March 16th Order would have been a motion for
16 reconsideration. The adequacy of the definition of a relevant market is largely a question of law
17 and nothing in Plaintiff's factual allegations alters the Court's previous conclusion that search-
18 based advertising is reasonably exchangeable with Internet advertising that is not search-based.⁸

19 **IV. ORDER**

20 Good cause therefor appearing, IT IS HEREBY ORDERED that the motion to dismiss is
21 GRANTED without leave to amend.

22
23 DATED: June 25, 2007

24
25 
26 JEREMY FOGEL
United States District Judge

27
28 ⁸ Plaintiff provides no meaningful argument in support of his request to allow discovery into the appropriate market definition.

1 This Order has been served upon the following persons:

2 Jonathan M. Jacobson jjacobson@wsgr.com, ageritano@wsgr.com

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E-Filed 3/16/2007

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KINDERSTART.COM, LLC, a California limited liability company, on behalf of itself and all others similarly situated,

Plaintiffs,

v.

GOOGLE. INC., a Delaware corporation,

Defendant.

Case Number C 06-2057 JF (RS)

ORDER¹ GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND, DENYING SPECIAL MOTION PURSUANT TO CAL. CIV. CODE § 425.16, AND DENYING MOTION TO STRIKE AS MOOT

[re: docket nos. 16, 49, 51, 52, 54, 59]

Defendant Google, Inc. ("Google") moves to dismiss the Second Amended Complaint ("SAC") of Plaintiff KinderStart.com, LLC ("KinderStart"), pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.² Google also moves specially to strike the fourth claim of the SAC pursuant to California's "anti-SLAPP" statute, Cal. Code Civ. Pro. § 425.16. Finally, Google moves to strike the entire SAC for perceived structural insufficiencies

¹ This disposition is not designated for publication and may not be cited.

² Unless otherwise indicated, references to Rules hereinafter will refer to the Federal Rules of Civil Procedure.

1 KinderStart's first claim alleges attempted monopolization in two markets under Section
2 of the Sherman Act, 15 U.S.C. § 2. SAC ¶¶ 207-08. KinderStart identifies these two markets
3 as: (1) the "Search Market," which consists of search engine design, implementation, and usage
4 within the United States; SAC ¶ 34; and (2) the "Search Ad Market," which consists of a
5 "universe of advertisers who seek and pay for online advertising [and who] target and reach
6 Internet browsers and users of search engines." SAC ¶ 38. Google allegedly participates in the
7 Search Ad Market through the AdWords and AdSense programs, *id.*, and derives at least ninety-
8 eight percent of its total company revenue from search-related advertising. SAC ¶ 43.

9 In order to make out a claim for attempted monopolization, a plaintiff must define the
10 relevant market. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997). The relevant
11 market is "the field in which meaningful competition is said to exist." *Image Technical Services,*
12 *Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). To prevail on such a claim, a
13 plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy
14 competition, (2) predatory or anticompetitive conduct directed toward accomplishing that
15 purpose, (3) a dangerous probability of success and (4) causal antitrust injury. *Forsyth*, 114 F.3d
16 at 1477.

17 The Court concluded in its July 13th Order that KinderStart had failed to allege facts
18 sufficient to support each of the four elements of an attempted monopolization claim. The Court
19 also noted that KinderStart had not sufficiently described the markets relevant to its claim. The
20 SAC suffers from essentially the same defects. To the extent that the Search Ad Market is
21 severable from the Search Market, KinderStart does not have standing to bring a claim for
22 attempted monopolization of the Search Ad market.

23 i. Relevant Market

24 Failure to allege adequately the relevant market is an appropriate ground for dismissal of
25 a Sherman Act claim. *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th
26 Cir. 2001). "A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a
27 hypothetical cartel, would have market power in dealing with any group of buyers." *Rebel Oil*
28

1 *Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). The Supreme Court has
2 explained that the relevant market for antitrust purposes is determined by the choices available to
3 consumers. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992).
4 In some instances, one brand of a product can constitute a separate market. *Id.* “The product
5 market includes the pool of goods or services that enjoy reasonable interchangeability of use and
6 cross-elasticity of demand.” *Tanaka*, 252 F.3d at 1063. The allegations of the SAC are
7 insufficient to meet this standard.

8 KinderStart has failed to allege that the Search Market is a “grouping of sales.” It does
9 not claim that Google sells its search services, or that any other search provider does so. Rather,
10 it states conclusorily that “[a]ny search engine must be free to the user because of past user
11 experience and expectations with search engines and due to the preexisting governmental and
12 technological policy of Internet freedom and Internet neutrality.” SAC ¶ 54. KinderStart cites no
13 authority indicating that antitrust law concerns itself with competition in the provision of free
14 services. Providing search functionality may lead to revenue from other sources, but KinderStart
15 has not alleged that anyone pays Google to search. Thus, the Search Market is not a “market” for
16 purposes of antitrust law.

17 Nor has KinderStart alleged adequately that the Search Ad Market is a relevant market.
18 KinderStart argues that the Search Ad Market is distinct from other forms of advertising on the
19 Internet and that it should be considered as such for purposes of antitrust analysis. However,
20 there is no logical basis for distinguishing the Search Ad Market from the larger market for
21 Internet advertising. Because a website may choose to advertise via search-based advertising or
22 by posting advertisements independently of any search, search-based advertising is reasonably
23 interchangeable with other forms of Internet advertising. The Search Ad Market thus is too
24 narrow to constitute a relevant market.

25 KinderStart might have argued that the Search Market and the Search Ad Market
26 combine to form one market for antitrust purposes. However, such a combined market, even if
27 alleged, would suffer from the same lack of breadth that renders the Search Ad Market
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- (1) The Motion to Dismiss is GRANTED without leave to amend.²⁵
- (2) The Special Motion Pursuant to Cal. Civ. Code § 425.16 is DENIED.
- (3) The Motion to Strike is DENIED as moot.

DATED: March 16, 2007



JEREMY FOGEL
United States District Judge

²⁵ KinderStart's pending motion for a preliminary injunction, filed on May 26, 2006, is denied as moot.

CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2007, I caused to be served via U.S. mail one true and correct copy of the foregoing **Excerpts of Record - Volume I** - properly addressed to the following:

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