

\*\*E-Filed 03/16/2007\*\*

NOT FOR CITATION  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)

ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND

[re: docket no. 17]

Defendant Google, Inc. (“Google”) moves to dismiss the First Amended Complaint (“FAC”) of Plaintiff Carl E. Person<sup>2</sup> for failure to state a claim upon which relief can be granted. For the reasons discussed below, the motion will be granted with 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

<sup>1</sup> This disposition is not designated for publication and may not be cited.

<sup>2</sup> Plaintiff, acting *pro se*, states that he 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.<sup>3</sup>  
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 can be granted.

18 On November 27, 2006, the instant case was transferred to the Northern District of  
19 California. The operative complaint at the time of the transfer was the FAC, that is, Plaintiff's  
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22 <sup>3</sup> 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  
are (i) candidates for public office, (ii) offering unwanted personal goods for resale and/or (ii)  
[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 original complaint as amended as of right on August 3, 2006.<sup>4</sup> On January 5, 2007, this Court  
 2 issued an order relating the instant case to *KinderStart.Com, LLC v. Google, Inc.*, No. C 06-2057  
 3 JF (RS). On January 25, 2007, Google moved to dismiss the FAC for failure to state a claim  
 4 upon which relief can be granted. On February 9, 2007, Plaintiff moved for leave to file a  
 5 document that he entitled “First Amended Complaint,” but that in fact would have been, in light  
 6 of Judge Patterson’s earlier ruling, a second amended complaint. The proposed pleading  
 7 includes more factual detail and adds claims under California law.<sup>5</sup> On February 13, 2007, the  
 8 Court granted in part and denied in part Plaintiff’s motion and instructed Plaintiff that he “should  
 9 be prepared to argue why leave to amend should be granted in the event that the Court grants the  
 10 motion [to dismiss].” February 13, 2007 Order 2. On February 20, 2007, Plaintiff filed  
 11 opposition to the motion to dismiss. The Court heard oral argument on that motion on March 9,  
 12 2007.

## 13 2. Factual Background

14 Plaintiff is an attorney, businessperson, and candidate for statewide office in New York,  
 15 and a customer of Google’s “AdWords” services. FAC ¶ 8. Plaintiff alleges the following:  
 16 Google is a global technology leader focused on improving the ways people connect with  
 17 \_\_\_\_\_

18 <sup>4</sup> To the Court’s knowledge, no single document exists that incorporates the amendments  
 19 made to the complaint on August 3, 2006. Since the amendments do not disrupt the numbering  
 20 of paragraphs in the original complaint, the Court will cite to the FAC using the numbering of the  
 original complaint and of the amendments.

21 <sup>5</sup> The proposed complaint includes 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 information. FAC ¶ 11. Google maintains the world’s largest index of web sites and other  
2 content. *Id.* AdWords is a program used by businesses to promote their products and services  
3 with targeted advertising. *Id.* Such advertisements appears either to the right of or above a  
4 searcher’s displayed search results and are designated as “sponsored.” FAC ¶ 23. The  
5 advertisements are triggered by a searcher’s use of a keyword designated by a Google advertiser.  
6 FAC ¶ 20. Google auctions these keywords to potential advertisers, FAC ¶ 24, and charges the  
7 auction winner when a user clicks on the sponsored link. FAC ¶ 21, 27. Google previously  
8 advertised five cents as its minimum per-click price and fifty dollars as the maximum per-click  
9 price, but changed these amounts to one cent and one hundred dollars, respectively, in 2005.  
10 FAC ¶ 24.

11 Plaintiff alleges that “[s]omewhere along the way, AdWords was able to start  
12 overcharging its smaller customers such as Plaintiff by imposing requirements that increased the  
13 cost to Plaintiff and other small-business advertisers and made advertising by them unprofitable,  
14 while at the same time reducing the cost to high-volume advertisers (generally large  
15 corporations) to increase their profitability and use of AdWords.” FAC ¶ 19. “Google is  
16 requiring Plaintiff and other small-business advertisers to pay as much as 100 times or more per  
17 click than the amount per click paid by monopolizing and other large established advertisers who  
18 by their established name or trademark are able to get a substantially higher rate of clicks (or  
19 ‘clickthrough rate’ or ‘CTR’) for the same number of times their ads are served up to Google  
20 searchers.” FAC ¶ 28. “Google is requiring each of its advertisers to be as successful as a  
21 monopolist, and charging them substantially more (or denying them use of AdWords) if not.”  
22 FAC ¶ 29. “AdWords has monopoly power for a variety of distinguishing reasons . . . , with the  
23 result that Yahoo and Microsoft/MSN keyword-targeted Internet advertising are poor,  
24 undesirable substitutes for AdWords.” FAC ¶ 30A. “Google is extending its market monopoly  
25 in this way to every aspect of business in the United States and making existing monopolies  
26 larger, turning potential monopolies into monopolies, and preventing small and new businesses  
27 from competing.” FAC ¶ 30. In 2005, Google introduced the “Quality Score,” “quality-based  
28 minimum bids,” and “landing page quality,” which pertain to Google’s process for determining a

1 website's minimum bid required for a keyword to run. FAC ¶ 31. "Google then started to charge  
2 Plaintiff and its other small-business advertisers an additional amount per click based on  
3 apparent human evaluation of the website 'landing page' created by the advertiser . . . ." FAC ¶  
4 32. "Without consulting Plaintiff or other small-business advertisers, Google turns off most of  
5 the ads and labels them as 'inactive', having the effect of upsetting the advertiser's AdWords  
6 marketing program or refuses to allow ads to be placed for a variety of reasons, with the same  
7 discouraging effect." FAC ¶ 33.

8 Plaintiff alleges that Google has conspired with a number of other large corporations such  
9 as Amazon.com and eBay, Inc. in an effort to "increase its sales to the major advertisers . . . , and  
10 reduce if not eliminate the profitable use of AdWords by the Plaintiff and other small  
11 businesses." FAC ¶ 39. "AdWords has become an advertising boon for the large, successful,  
12 monopolizing companies, without having to compete significantly with smaller competitors."  
13 FAC ¶ 49. "Google has a monopoly, and controls pricing, terms, and whether the Plaintiff and  
14 other small businesses are able to make any use of AdWords to compete with AdWords large  
15 corporate customers." FAC ¶ 69.

## 16 II. LEGAL STANDARD

17 For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the  
18 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*  
19 *McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the  
20 complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*,  
21 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, dismissal may be ordered  
22 with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

23 On a motion to dismiss, the Court's review is limited to the face of the complaint and  
24 matters judicially noticeable. *North Star International v. Arizona Corporation Commission*, 720  
25 F.2d 578, 581 (9th Cir. 1983); *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.  
26 1986); *Beliveau v. Caras*, 873 F.Supp. 1393, 1395 (C.D. Cal. 1995). However, under the  
27 "incorporation by reference" doctrine, the Court also may consider documents that are referenced  
28 extensively in the complaint and accepted by all parties as authentic, even if they are not

1 physically attached to the complaint. *In re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d  
2 970 (9th Cir. 1999). “Under the ‘incorporation by reference’ rule of this Circuit, a court may  
3 look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary  
4 judgment.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

### 5 III. DISCUSSION

#### 6 1. Claims Under the Sherman Act

##### 7 a. Relevant Market

8 In order to make out a claim for attempted monopolization or monopolization, a plaintiff  
9 must define the relevant market. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997).

10 The relevant market is “the field in which meaningful competition is said to exist.” *Image*  
11 *Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). Failure to  
12 allege the relevant market is an appropriate ground for dismissal of a Sherman Act claim.

13 *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001). “A ‘market’  
14 is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would  
15 have market power in dealing with any group of buyers.” *Rebel Oil Co. v. Atlantic Richfield Co.*,  
16 51 F.3d 1421, 1434 (9th Cir. 1995). The Supreme Court has explained that the relevant market  
17 for antitrust purposes is determined by the choices available to consumers. *Eastman Kodak Co.*  
18 *v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992). In some instances, one brand of  
19 a product can constitute a separate market. *Id.* “The product market includes the pool of goods  
20 or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.”  
21 *Tanaka*, 252 F.3d at 1063.

22 Plaintiff defines the relevant market in the FAC as “‘keyword-targeted Internet  
23 advertising’ in which advertisers pay to have their advertisements displayed (alone or among an  
24 ordered group of ads identified as such) near the search results obtained from Internet search  
25 engine (such as the search engines of Google and Yahoo) using the keyword(s) selected by the  
26 advertiser.” FAC ¶ 43. The Court finds no basis for distinguishing the Search Ad Market from  
27 the larger market for Internet advertising. Search-based advertising is reasonably interchangeable  
28 with other forms of Internet advertising. A website may choose to advertise via search-based

1 advertising or by posting advertisements independently of any search. The Search Ad Market  
2 thus is too narrow to form a relevant market for antitrust purposes. Accordingly, the Court will  
3 dismiss the monopolization and attempted-monopolization claims included in the FAC.

4 The proposed complaint defines the relevant market as the market  
5 for monetizing traffic at any one or more websites through a distributed  
6 computing system enabling the auction or sale of keyword-targeted internet  
7 advertising to competing advertisers from a database of advertisers with ads  
8 triggered by the specific search words used by free or paid, online Google-  
9 powered searches, initiated by users from browsers or www.google.com or other  
10 websites, of User-Designated Information Databases, and payment for the  
11 advertising, at a price per click determined by auction and/or Google, for each  
12 click on any of the displayed ads, collected by Google on an immediate or  
13 periodic basis, from a previously-designated and current source of payment for the  
14 advertiser, with the payments divided by agreement among Google, the owner of  
15 the website initiating the search, the advertiser, any agencies or brokers, and any  
16 others. Hereinafter, this described system is referred to as the 'Website Traffic  
17 Monetizing Market' and Google dominates this market.

18 Proposed Complaint ¶ 12. As so defined, the proposed market apparently would include almost  
19 anyone who hopes to turn a profit while either buying, selling, or consulting on the sale of  
20 keyword-advertising. Plaintiff also alleges that Google's "purpose is to foreclose competition in  
21 the business of developing website traffic and monetizing (or converting to revenue) the website  
22 traffic or hits for the benefit of the website owner, and to reduce the value of websites to their  
23 owners and enable Google to purchase or otherwise acquire them at less than their fair market  
24 value in a non-monopolized market." Proposed Complaint ¶ 19. The allegations at the end of  
25 this paragraph suggest that the relevant market might include anyone who operates a website.  
26 Thus, as presently framed, Plaintiff's definition of the relevant market is vague and overbroad.

27 b. Exclusionary or Anticompetitive Conduct

28 The core of both the FAC and Plaintiff's proposed new pleading appears to be a series of  
allegations that Google discriminates between large corporations that purchase AdWords  
keywords and small businesses that make similar purchases. However, beyond making  
conclusory allegations that Google acts as a monopoly and has denied access to an essential  
facility, Plaintiff fails to allege exclusionary or anticompetitive conduct. Although Plaintiff  
alleges high and discriminatory pricing, high prices, by themselves, are not anticompetitive or



1 exclusionary. *See Verizon Communications, Inc. v. Trinko*, 540 U.S. 398, 407 (2004). Absent  
2 predatory practices, discriminatory pricing does not threaten competition. *See Atlantic Richfield*  
3 *Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

4 Perhaps because of his failure to identify a relevant market, it is difficult to determine  
5 what types of competition Plaintiff believes are threatened by Google's actions. It may be that  
6 the competition at issue is between Google and other major Internet advertising providers, such  
7 as MSN and Yahoo, who are "poor, undesirable substitutes for AdWords," FAC ¶ 30A, but that  
8 does not appear to be the focus of the FAC. Instead, the FAC provides a somewhat confusing  
9 picture of Google's competitors and, as Plaintiff concedes, does not allege that Plaintiff himself  
10 is a competitor of Google. *See* Opposition 3. Nor do Plaintiff's monopolist-by-association  
11 allegations clarify his pleading, as they suggest that the competition at issue is for dominance of  
12 the Internet and the larger economy. *See e.g.* FAC ¶ 30 (alleging that Google "mak[es] existing  
13 monopolies larger, turn[s] potential monopolies into monopolies, and prevent[s] small and new  
14 businesses from competing"), FAC ¶ 66 (appearing to imply that Google is a monopolist because  
15 of its dealing with the "monopolist eBay"). Finally, while it appears that Plaintiff is concerned  
16 about the competition between small and large corporate advertisers who use Google's services,  
17 *see e.g.* FAC ¶¶ 49, 69, it is unclear if Plaintiff believes that Google has a stake in that  
18 competition. The proposed complaint suffers from similar deficiencies. While Plaintiff appears  
19 to attempt to allege more than discriminatory or high pricing, he still fails to state a claim with  
20 sufficient clarity.

21 c. Conspiracy to Restrain Trade

22 Google moves to dismiss Plaintiff's claim that Google conspires to restrain trade or  
23 monopolize on the basis that Plaintiff does not allege that Google conspires with competitors to  
24 fix prices. Indeed, as Google suggests, the FAC appears to allege that Google has agreed to high  
25 and discriminatory prices with a number of large clients. This is not actionable under the  
26 Sherman Act. *See 49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1468 (9th Cir.  
27 1986) ("[I]t is a longstanding antitrust principle that Section 1 of the Sherman Act does not  
28 preclude a party from unilaterally determining the parties with whom it will deal and the terms on



1 which it will transact business.”). The Court finds no argument in Plaintiff’s opposition  
2 explaining why this principle does not apply to the FAC; the Court concludes that it applies  
3 equally to the proposed complaint.

4 d. Reference to the Sarbanes-Oxley Act

5 Both the FAC and the proposed new complaint make reference to the Sarbanes Oxley Act  
6 of 2002, P.L. No. 107-204, and request injunctive relief thereunder. *See* FAC ¶¶ 106-08,  
7 Proposed Complaint ¶¶ 106-08. Plaintiff provides no meaningful explanation of the grounds on  
8 which he seeks relief under this act apart from stating that he believes it enables him to seek  
9 injunctive relief.

10 2. Claims Under New York Law

11 a. Claims Under the Donnelly Act

12 The third claim in the FAC alleges violation of the Donnelly Act, N.Y. Gen. Bus. Law §  
13 340, by monopolization, attempted monopolization, price-fixing, and unreasonable restraint of  
14 trade. FAC ¶¶ 130-35. Google moves to dismiss the claim on the basis that to the extent that the  
15 statute provides any basis for relief, its scope is constrained by federal law. Motion 12-13 (citing  
16 *People v. Rattenni*, 81 N.Y.2d 166 (1993), which explains that “[t]he Donnelly Act was modeled  
17 on the Federal Sherman Act of 1890, and thus we have observed that State antitrust law should  
18 generally be construed in light of Federal precedent and given a different interpretation only  
19 where State policy, differences in the statutory language or the legislative history justify such a  
20 result.” *Id.* at 171 (internal citations and quotation marks omitted).). Plaintiff provides no  
21 argument in response beyond the bare assertion that the claim is actionable. *See* Opposition 14.  
22 In light of this lack of argument, the Court concludes that the Donnelly Act claim suffers from  
23 the same defects as Plaintiff’s Sherman Act claims and is subject to dismissal. There appears to  
24 be no material difference between the Donnelly Act claim in the FAC and claim six of the  
25 proposed complaint.

26 b. Claims Under Other Sections of the General Business Law

27 The FAC asserts claims for deceptive acts and practices in violation of N.Y. Gen. Bus.  
28 Law §§ 349, 349-c and false advertising in violation of N.Y. Gen. Bus. Law §§ 350, 350-e.

1 Google moves to dismiss these claims on numerous bases. These claims appear to be based upon  
2 a theory that, after agreeing to a certain pricing structure, Google could not terminate the  
3 agreement and offer a different pricing structure. Such allegations are not sufficient to state a  
4 claim under N.Y. Gen. Bus. Law §§ 349, 349-c, 350, 350-e. These statutes require the allegation  
5 of consumer-oriented conduct, *see Exxonmobil Inter-America, Inc. v. Advanced Info. Eng'g*  
6 *Servs., Inc.*, 328 F.Supp. 2d 443, 447 (S.D.N.Y. 2004) (discussing requirements of section 349);  
7 *Maurizio v. Goldsmith*, 230 F.3d 518, 522 (2d Cir. 2000) (discussing requirements of section  
8 350), and the FAC does not contain sufficient allegations of such conduct. While Plaintiff may  
9 have paid Google to participate in the AdWords program, he is not a consumer in the sense of  
10 those sections, and he fails to state a claim upon which relief can be granted. The claims under  
11 N.Y. Gen. Bus. Law §§ 349, 349-c or §§ 350, 350-e that are included in the proposed complaint  
12 do not differ materially from those of the FAC. *See Proposed Complaint ¶¶ 251-277.*

13 3. Claims Under California Law

14 a. Cartwright Act Claim

15 The FAC asserts a claim under the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700-70.  
16 Google moves to dismiss the Cartwright Act claim on the same basis that it moves to dismiss the  
17 Donnelly Act claim. Motion 12-13 (citing *Freeman v. San Diego Ass'n of Realtors*, 77  
18 Cal.App.4th 171, 183 n.9 (1999) (“In analyzing [plaintiff’s] Cartwright Act claims we frequently  
19 examine federal precedent because the Cartwright Act is similar in language and purpose to the  
20 Sherman Act. However, federal precedents must be used with caution because the acts, although  
21 similar, are not coextensive.”)). Plaintiff offers no explanation as to how the substance of his  
22 Cartwright Act claim differs from that of his Sherman Act claims. *See Opposition 14.* The  
23 Court concludes that this claim is also subject to dismissal.

24 b. Other Claims Under California Law

25 The proposed complaint adds eight additional claims under California law, none of which  
26 is legally sufficient as presently framed.

27 i. Secret Rebates Injuring Competition in Violation of the California Unfair  
28 Practices Act, Cal. Bus. & Prof. Code §§ 17000, *et seq.*

1 Plaintiff fails to allege a secret rebate or discount that would constitute a violation of this  
 2 statutory section. It is not clear from this proposed claim that Google is alleged to have done  
 3 anything more than offer a bulk discount. Moreover, the claim is built on implication and lacks  
 4 factual specificity.

5 ii. Breach of Contract and the Implied Covenant of Good Faith and Fair  
 6 Dealing<sup>6</sup>

7 Plaintiff's proposed breach of contract claim states a number of alleged provisions of the  
 8 AdWords agreement, Proposed Complaint ¶¶172 A-O, and then alleges that "Google has  
 9 intentionally failed to live up to, and has breached, each of [these] AdWords Promises." *Id.* ¶  
 10 173. Plaintiff does not explain how the alleged provisions relate to the specific language and  
 11 terms of the AdWords agreement. Nor does Plaintiff allege exactly how Google breached the  
 12 agreement. Instead, he attempts to link Google's IPO, Plaintiff's political campaigns, the  
 13 complexity of AdWords, and the reasonable expectations of small business owners.

14 iii. Rescission of Contract Under Cal. Civ. Code § 1689(b)

15 Plaintiff's proposed rescission claim, pled in the alternative to his reformation claim,  
 16 lacks factual specificity because it is built around expansive readings of what Google implied by  
 17 making a number of unambiguous and uncontroversial statements.<sup>7</sup>

18 iv. Reformation of Contract to Delete Illegal Venue Provision

19 Plaintiff may not challenge the venue provision in the AdWords contract because Judge  
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21 <sup>6</sup> Neither the breach of contract claim nor the reformation of contract claim identifies the  
 22 law under which it is brought. Reading them in the context of the rest of the proposed complaint,  
 23 the Court concludes that Plaintiff intended to bring them under California law.

24 <sup>7</sup> For example, the proposed complaint includes the following two paragraphs that  
 25 describe representations by Google:  
 26 "C. That Google was conducting a legitimate auction in which the highest bidder was able to  
 27 obtain the best ad position;  
 28 D. Impliedly, that Google was not manipulating the auction results through arbitrary, subjective  
 evaluations of the Plaintiff's ad copy, website, or landing page to require the Plaintiff to bid 10,  
 20, 50 or 100 times the minimum price to be able to have the Plaintiff's ad run at all (in the least  
 favorable position)."  
 Proposed Complaint ¶¶ 191 C-D.

1 Patterson has found that provision enforceable.

2 v. Violation of the California Consumer Legal Remedies Act, Cal. Civ. Code  
3 § 1770(a)

4 The “underlying purpose” of the California Consumer Legal Remedies Act is “to protect  
5 consumers against unfair and deceptive business practices.” Cal. Civ. Code § 1760. A consumer  
6 is “an individual who seeks or acquires, by purchase or lease, any goods or services for personal,  
7 family, or household purposes.” Cal Civ. Code § 1761(d). Since Plaintiff’s stated purpose for  
8 using AdWords is commercial and political, he is not a consumer under the definition of the act  
9 and may not bring an action on basis of the facts alleged.

10 vi. Unfair Competition in Violation of Cal. Bus. & Prof. Code § 17200 *et seq.*

11 Plaintiff seeks damages under Cal. Bus. & Prof. Code § 17200 *et seq.* However, that act  
12 provides for injunctive relief and penalties, not damages. *See* Cal. Bus. & Prof. Code §§ 17202-  
13 03, 17206.

14 vii. False and Misleading Advertising in Violation of Cal. Bus. & Prof. Code  
15 §§ 17500-09

16 The proposed claim for false and misleading advertising lacks factual detail in that it does  
17 not identify the false and misleading statements allegedly made by Google. Proposed Complaint  
18 ¶¶ 232-40.

19 viii. Class Action Claims Under California Law

20 As Google notes, Plaintiff may not pursue claims as a class representative and at the same  
21 time serve as counsel to that class. *See In re. Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 257,  
22 260 (N.D. Cal. 1996). Moreover, a purported class representative may not represent a class  
23 unless he is able to state a claim upon which relief can be granted.

24 4. Further Leave to Amend

25 Having considered the procedural history of the case, the Court concludes that it should  
26 permit Plaintiff to amend his claims. As Judge Patterson noted, “[t]hough it does appear that  
27 Plaintiff’s claims will be difficult to sustain, it does not appear that they are ‘clearly doomed.’”  
28 October 11, 2006 Order 14-15, Kramer Decl. Ex. G. Accordingly, Plaintiff may file a second

1 amended complaint within thirty days of the date this order is filed. Any amended complaint  
2 shall be limited to the six claims<sup>8</sup> included in the original complaint.<sup>9</sup> Plaintiff should consider  
3 including only a subset of those claims.<sup>10</sup>

4 **IV. ORDER**

5 Good cause therefor appearing, IT IS HEREBY ORDERED that the motion to dismiss is  
6 GRANTED with leave to amend. Plaintiff shall file any amended complaint within thirty days of  
7 the issuance of this order.<sup>11</sup>

8  
9 DATED: March 16, 2007

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11  
12 JEREMY FOGEL  
United States District Judge

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21 <sup>8</sup> The proposed complaint splits the original claim under section two of the Sherman Act  
22 into two separate claims. If Plaintiff concludes that he must split his Sherman Act § 2 claims and  
23 assert one claim for attempted monopolization and another for monopolization, he may do so,  
thereby raising the total number of claims in the amended complaint to seven.

24 <sup>9</sup> This restriction is ordered without prejudice to a future motion for leave to amend the  
25 complaint if Plaintiff is able to state a viable claim in an amended complaint.

26 <sup>10</sup> The Court did not reach Google's argument that the entire proposed complaint would  
27 be subject to dismissal under Fed. R. Civ. P. 8, but, if appropriate, it will consider a similar  
argument as to an amended complaint.

28 <sup>11</sup> To the extent that Plaintiff's motion to file an amended complaint, filed on February 9,  
2007, was not disposed of by the Court's order on February 13, 2007, that motion is denied.

1 This Order has been served upon the following persons:

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

3 David H. Kramer dkramer@wsgr.com, dgrubbs@wsgr.com

4 Notice will be delivered by other means to:

5 Sara Ciarelli  
Wilson Sonsini Goodrich & Rosati  
6 12 East 49th Street, 30th Floor  
New York, NY 10017

7 Susan B. Creighton  
Wilson Sonsini Goodrich & Rosati  
8 12 East 49th Street, 30th Floor  
9 New York, NY 10017

10 Meredith K. Kotler  
Wilson Sonsini Goodrich & Rosati, P.C.  
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13 325 W. 45th Street, Suite 201  
New York, NY 10036-3803

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