

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF CALIFORNIA
 3 SAN JOSE DIVISION

4 KINDERSTART.COM LLC,) C-06-2057-JF
 et al.,)
 5)
 Plaintiffs,)
 6) San Jose, CA
 vs.) June 30, 2006
 7)
 GOOGLE, INC.,)
 8)
 Defendant.)
 9 _____)

10 TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE JEREMY FOGEL
 11 UNITED STATES DISTRICT JUDGE

12 A P P E A R A N C E S:

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1 San Jose, California June 30, 2006

2 P R O C E E D I N G S

3 THE COURT: All right. KinderStart
4 versus Google.

5 MR. YU: Good morning, Your Honor.

6 Gregory Yu appearing for KinderStart and
7 the class of Plaintiffs.

8 One more item. With your permission I
9 have my clients at the table. Is that
10 acceptable?

11 THE COURT: That's quite all right.

12 MR. KRAMER: Dave Kramer from Wilson
13 Sonsini for Google. With me are my partners Jon
14 Jacobson and Colleen Bal, and from Google senior
15 litigation counsel, Michael Kwun.

16 THE COURT: Good morning to everyone.

17 I think we can address this set of
18 motions fairly straightforwardly.

19 I'd like to set the anti-SLAPP motion
20 Aside for a minute because I think if you look at
21 the actual claims in the complaint and the motion
22 to dismiss that much of the potential problem
23 that's raised in the anti-SLAPP motion is going
24 to go away.

25 And I want to just say that this

1 anti-SLAPP statute is one that I've had a fair
2 opportunity to look at both in state court and
3 here in federal court, and clearly the origins of
4 that statute were to protect citizens who were
5 petitioning the government for redress of
6 grievances, go to a city council meeting and say
7 "we don't want developer X building a development
8 in our neighborhood because they are bad
9 developers and we don't like them," and the next
10 day the developer filing a lawsuit against the
11 residents for defamation and so on.

12 The anti-SLAPP statute was intended to
13 protect the exercise of traditional First
14 Amendment rights and it's kind of morphed into
15 something where you get these business disputes.
16 And, of course, people are speaking. If you open
17 your mouth you're speaking or if you write
18 something you're speaking, and, of course, the
19 public is interested in what you're saying if
20 you're selling something that they are interested
21 in or you're talking about something that's
22 interesting.

23 But I think there's a point at which
24 commercial speech is not what the legislature was
25 thinking of. And I've had occasion to visit that

1 frequently in cases that have been brought, as I
2 say, both in the state court and here.

3 So I see the anti-SLAPP motion somewhat
4 as a response to the First Amendment claims that
5 are being raised by KinderStart, and that's why I
6 want to start with the 12(b)(6) motion.

7 And I'm going to make these comments and
8 then I'm actually going to ask KinderStart's
9 counsel to respond first even though Google is
10 the moving party.

11 I'm curious as to what KinderStart could
12 say that it hasn't already said that would
13 establish that Google is a state actor or is
14 acting in any way that would bring it into the
15 First Amendment jurisprudence in terms of Google
16 violating the First Amendment rights of
17 KinderStart.

18 Looking at the allegations in the
19 complaint, I don't see it and I'm wondering if
20 there's anything further that could be added.

21 Similarly with the antitrust claim, I
22 understand the argument that Google has become so
23 big and so pervasive in the search engine world
24 that it's acquiring powers or influence that, you
25 know, starts to raise some of these concerns, but

1 it's not clear to me how the alleged conduct of
2 Google has any nexus to this alleged
3 monopolization that's going on, how it furthers
4 the objectives of the alleged antitrust activity
5 and I'm wondering if anything further can be
6 added there.

7 The common carrier claim, I'm interested
8 in how that can be distinguished, how this case
9 can be distinguished from Howard versus AOL. I
10 think it's hard to see how a search engine could
11 be a common carrier.

12 I think there may be a basis for a 17200
13 claim, but I'm curious as to how there's actual
14 harm and what the nexus is between the unfair
15 conduct and the actual harm that's alleged.

16 On the 17040 claim I'm curious as to how
17 there can be jurisdiction since there are no
18 purchases involved.

19 On the implied covenant of good faith
20 and fair dealing, my question really is how you
21 plead around the language in the contract which
22 specifically says there are no representations or
23 promises or guarantees that anyone will be ranked
24 in a particular way.

25 And I think I understand where the

1 defamation claim is coming from. I'll ask
2 Mr. Kramer on that when it's his turn, but on the
3 interference with contract claim you can't
4 interfere with your own contract, so what
5 contract is being interfered with and what more
6 could be added in aid of an amendment there.

7 So the bottom line is I think all of the
8 claims with the possible exception of the
9 defamation claim lack a certain degree of
10 specificity or they lack essential elements, and
11 my question is what additionally KinderStart
12 could allege given an opportunity to amend and
13 then I think it will be easier to frame the
14 question about the anti-SLAPP motion once I know
15 the answer to that.

16 Mr. Yu?

17 MR. YU: Thank you, Your Honor.

18 Shall I just take each claim one at a
19 time?

20 THE COURT: Sure.

21 MR. YU: Thank you.

22 THE COURT: And I realize there's a lot
23 here, but if you could be succinct, I would
24 appreciate it.

25 MR. YU: Sure.

1 THE COURT: Okay.

2 MR. YU: The First Amendment count 1,
3 there's two components, of course, and there are
4 different tests that are applied First Amendment
5 and then -- excuse me, California Free Speech.

6 I think overall the construct of the
7 search engine is it's aligned with content. So
8 the building up of the data base with the Library
9 of Congress copying library content, those are
10 all bases to make the entire index searchable.
11 So you are combining. As we've alleged and
12 explained in the brief, there's a combination of
13 all that content together.

14 So piling up a lot of content in a room
15 is one thing, but you match it up with a search
16 engine. And Your Honor appreciates there's a lot
17 of power behind the control and delivery of that
18 information.

19 So the key components here in the claim
20 is that there is control here and the state actor
21 issue, as you know, in the cases there's four
22 independent tests in the Ninth Circuit.

23 THE COURT: I know that and you've
24 discussed the cases, but I'm still having a
25 fundamental problem. You know, there was a

1 period of time when newspapers were the main way
2 that people got information and there was a
3 period of time when electronic media were the way
4 that people got most of their information. And
5 now we've kind of evolved into search engines.

6 How is Google different from any other
7 search engine other than the fact that it's
8 bigger than they are? And are you saying that
9 any search engine that has this type of data base
10 is a state actor?

11 MR. YU: Your Honor, this is no
12 different in extension from the whole line of
13 shopping mall cases. So certainly if the Supreme
14 Court said that one shopping mall is subject to
15 free speech restrictions, there's, of course, an
16 obvious consequence to other shopping malls.

17 And this is the same concept. The size
18 and dimensions of the forum, if you will, are
19 closely related to dimensions and scope of the
20 forum. So in a search engine, yes, there are
21 specific fact-driven circumstances that have to
22 be considered in each case.

23 Google is admittedly the largest search
24 engine. So with each case just like in the
25 California cases you've got a close analysis of

1 the different types of apartment complexes or
2 shopping malls or private stores like Albertsons,
3 there's a very close inquiry as to what is the
4 forum we're looking at. This is the largest
5 search engine.

6 THE COURT: Well, let me just stop you
7 right there and I hope you don't mind my just
8 dialoguing because it will help me.

9 MR. YU: Sure.

10 THE COURT: In the Robins case, which is
11 one of the leading cases in the Supreme Court and
12 in California, the shopping mall cases, they talk
13 about you have content-based restrictions on
14 speech by the Pruneyard Shopping Mall, and that's
15 not okay. That's unconstitutional.

16 This isn't a content-based situation, is
17 it? I mean, it's one where it's not -- it's not
18 that Google doesn't like products for children.
19 It's -- the allegations taken as true are simply
20 that Google doesn't like competing search engines
21 and KinderStart is a smaller boutique search
22 engine.

23 How does that implicate any kind of
24 First Amendment issue? It's competition. I
25 mean, you have some unfair competition claims and

1 I think they ultimately may have a little more
2 force to them, but where did you get a First
3 Amendment issue? Does the mere fact that Google
4 is so big mean that they have to function as if
5 they were the Government?

6 MR. YU: That's not Plaintiffs' argument
7 because we are not saying that the size of the
8 search engine requires protection. What we're
9 looking at is the stated guidelines that Google
10 sets forth in the webmaster guidelines. Some of
11 them are technical. Some of them are there. But
12 what's missing is not what's stated, but there's
13 any catch-all reason that Google states for
14 removing content, removing a web site completely.

15 So I think there's a careful distinction
16 between what is stated facially and what may be
17 actually happening.

18 And that's why we believe that the
19 motion to dismiss is premature in that regard
20 because we have instances and potential class
21 members who have varied types of treatment and
22 some of it is more open and contested, some of it
23 is hidden.

24 So the danger we see here is that if
25 there are unseen practices, which we can produce

1 if we move to the discovery phase, there is
2 underneath that some content exercise. Some of
3 it obviously is not going to come out of the
4 webmaster guidelines and say we're going to block
5 all certain material.

6 THE COURT: You don't have a class here
7 that says Google is giving a rating of zero to
8 every business that's owned by people of X
9 origin. I mean, if you had that, I mean this
10 would be I think a closer call. But you don't
11 have that. I mean, you have -- you just say
12 Google has delisted us and we don't know why they
13 did and it was arbitrary and contrary to our
14 expectations, and that somehow morphs into a
15 First Amendment claim. I don't see it.

16 MR. YU: Your Honor, how do we elicit
17 that type of information or evidence if the
18 entire operation, whether it's page rank
19 valuation or blockage, which is a far worse
20 consequence in our opinion -- if we don't have
21 access to that evidence and the entire system and
22 the algorithm and the whole process is buried
23 inside the bowels of Google, then Plaintiffs I
24 admit are handicapped because there is some
25 anticipation and some evidence that we have for

1 various potential class members that there are
2 some unseemly practices going on behind them.

3 THE COURT: But it seems to me the way
4 litigation works is you can't just file a blanket
5 lawsuit saying we think we're going to find some
6 stuff and we want to take discovery. You have to
7 have a good faith basis for asserting the claim
8 and you have to articulate what that claim is,
9 and then if you find things in discovery that you
10 didn't expect or you get more specificity than
11 you had before, you can amend your complaint.

12 But I don't think you get to file a
13 complaint saying, you know, we want to -- we
14 don't like the way we're being treating and for
15 all we know there are a lot of other people who
16 are being mistreated. So we want to file a class
17 action complaint and get into the -- get into the
18 belly of the beast and find out what's going on
19 there.

20 I think you have to say what your
21 problems are and then you can get discovery on
22 those and, if you turn things up that have
23 broader implications, so be it. But I'm having a
24 hard time seeing how your client has a claim that
25 Google is violating its First Amendment rights

1 because I'm still not convinced that Google is a
2 state actor.

3 MR. YU: The state action is once again
4 the size of the forum. We're going into
5 uncharted territory.

6 THE COURT: You certainly are.

7 MR. YU: Yes, we are. And so we've got
8 the movement from the physical realm. So you can
9 look at the California cases that are largely
10 physical and then you look at what the Supreme
11 Court has done starting with the shopping mall
12 case, the Marsh case.

13 So this is uncharted territory and with
14 the size and dimension and how there are
15 definitely indicia and hints and clear
16 indications that Google is basically taking all
17 over the content both libraries and other avenues
18 of society.

19 So, of course, this is deep concern from
20 a societal basis, but the claim here is that you
21 start with where is this forum and it's the
22 Internet, and the Supreme Court has made it very
23 clear the Internet is a broad forum.

24 THE COURT: Let's segue into the
25 antitrust claim and I hope I made my question

1 clear. I understand you're saying Google is
2 acquiring monopolistic characteristics. It's
3 getting so big and it's exercising so much
4 influence that's starting to happen.

5 You still have to have an actual injury
6 that results from that. So what is the nexus
7 between Google becoming the mega search engine
8 and what happened to your client? How do those
9 things line up? I mean, I know that they are
10 temporally related, but how do they line up in
11 terms of causation?

12 MR. YU: The allegations, Your Honor,
13 could not be more clear because with Google's --
14 excuse me, with KinderStart's own analysis in the
15 web logs they've shown that once it was out of
16 the index there was that sharp drop in both
17 traffic and in revenue for the company. So with
18 that deindexing or blockage or whatever term that
19 is used, all of that disappeared and it's no
20 longer on the index.

21 THE COURT: No, I understand that. I'm
22 sorry. I didn't make my question clear and I
23 think it's a hard question to ask. So let me try
24 again.

25 MR. YU: Yeah.

1 THE COURT: There's no question that at
2 or about the time your client was deindexed it
3 suffered a loss in revenue. I'm assuming that
4 that's true and you've alleged that very
5 clearly. So I'm not -- I don't have any problems
6 with the allegations that it happened, one thing
7 happened and the other thing happened.

8 My question is how does the illegal
9 monopolization on Google's part, which you've
10 alleged, how does that cause the injury that
11 you've alleged, what is the connection between
12 those two things, not -- I mean, there's no
13 question the delisting caused the injury, but
14 what does the delisting have to do with the
15 monopolization?

16 MR. YU: That's very clear because when
17 the mass of web sites and web designers and
18 marketers are all turning to Google as we've
19 alleged mostly to get visibility and traffic,
20 once the delisting happens, and Google assuming
21 as in this motion that it does have a dominant
22 share, then by virtue of removing one completely
23 out of the index and other search engine shares
24 are slipping, we've got a very straightforward
25 case where the monopolist, as we've alleged, is

1 able to put small companies and organizations
2 completely off the radar.

3 THE COURT: Well, for what reason? Why
4 are they doing it?

5 MR. YU: The reason as alleged -- well,
6 there's two -- there's counts 1 and 2. We don't
7 need the intent, as you know, in the --

8 THE COURT: No. But how does it further
9 the anti-competitive purpose? That's what I'm
10 trying to get at. I mean, you've been very clear
11 as to what you think they've done, but how does
12 it further antitrust -- I mean, how does it
13 further monopolistic activity for them to do
14 that?

15 MR. YU: Well, even though this is an
16 inside-the-body complaint there's obviously a lot
17 of competition over localized content and
18 subject-driven content like KinderStart.

19 So to the extent that Google as a
20 company can look and see where are the
21 opportunities it can gain more market share both
22 in content, directories and geographics, it's
23 able to take out web sites completely, as has
24 happened here. This is a search engine and index
25 and directory.

1 THE COURT: Sure. What you're saying
2 is, and the complaint doesn't say this, but what
3 you're telling me is it could say this, that the
4 reason Google is doing what it's doing to your
5 client is because your client is a competitor.

6 MR. YU: That's right. That's how we've
7 alleged this.

8 THE COURT: All right. Well, I think
9 it's a little murkier than that, but what you're
10 saying to me now is clear. I understand what
11 you're saying to me now. You're saying that you
12 could in good faith allege facts that would
13 support that theory?

14 MR. YU: That's correct.

15 THE COURT: Just in the interests of
16 time, what I'd be interested in is why I
17 shouldn't just dismiss the common carrier claim.
18 I'm curious as to how you get around the Howard
19 case.

20 MR. YU: The Howard case was fact driven
21 and we know the difference between basic and
22 enhanced services. And there there was
23 stipulations and there's a lot of facts there as
24 to what AOL as an ISP does. I think we need to
25 look closely at the difference between an ISP and

1 a search engine.

2 And, as we've explained in the briefs,
3 Congress, Congressional intent, of course, was
4 there to protect the players in the Internet, but
5 I've looked at the distinction and definition
6 between "Internet information location tool" that
7 was in the Communications Decency Act and then
8 the "interactive computer service."

9 So even those cases including the Howard
10 case, it closely latched onto AOL and said AOL,
11 we basically have an e-mail system and content.
12 Google largely doesn't have native original
13 content. It is in a colloquial term a massive
14 link forum. It is collecting sites and pushing
15 them out, and so this is where we see it as an
16 information conduit.

17 And, as I've said in the briefs, no
18 court, and I believe the FCC has not spoken on
19 this, this issue about what is an information
20 location tool, is it is a common carrier or not,
21 I presume and I recognize that there is immunity
22 we've built in. But by providing immunity for a
23 specific category like the information location
24 tool that doesn't mean that Congress has
25 specifically said with intent that Internet

1 information location tools or search engines in a
2 general sense are clearly not common carriers.

3 THE COURT: Okay. And then the last
4 question I have for you at this stage, your
5 interference with contract claim. Whose contract
6 is being interfered with?

7 MR. YU: Well, we believe that something
8 that perhaps the general public doesn't
9 understand is that Google has a massive network
10 of advertisers. It's largely an advertising firm
11 monetizing all of that traffic. So it has a pool
12 of AdWords customers or advertisers. It has a
13 pool of AdSense customers, and KinderStart --
14 excuse me -- is an AdSense customer.

15 So it's an unusual setup in that this is
16 a massive integrated network where Google is the
17 overseer of all of the different players.
18 There's contracts going back and forth. Some web
19 sites have both sets of contracts. Some have
20 one.

21 And given that this is at such a
22 rudimentary stage of the lawsuit there are a lot
23 of contracts that are all there, and we have no
24 idea at this point that those contracts as one
25 site is slammed down that that traffic and

1 whatever value is there is impacting a different
2 site.

3 So it's not a neat and tidy situation
4 where we just have one contract out there and
5 then the two parties here. It's a massive
6 network that Google completely controls so
7 there's a --

8 THE COURT: Right. But the elements of
9 an interference with contract claim includes a
10 description of the contract that's being
11 interfered with under California law.

12 MR. YU: Yes.

13 THE COURT: And you haven't done that.

14 MR. YU: We haven't alleged that.

15 THE COURT: You can't say, well, we want
16 to take discovery and then we'll allege
17 contract. I mean, it's the same problem that I
18 was raising with regard to the First Amendment
19 claim. I mean, you have to have -- you have to
20 be able to allege the elements of the claim in
21 good faith before you can get to that point.

22 And the problem I have with your claim
23 for relief is that you don't -- you don't specify
24 what contract is being interfered with.

25 MR. YU: I understand that. I submit

1 the matter as is.

2 THE COURT: Okay. All right. Thank you
3 very much. I'll come back to you, but I'd like
4 to hear from Mr. Kramer.

5 MR. KRAMER: Thank you, Your Honor.

6 Let me speak to the defamation claim
7 since that's the one the Court asked about. In
8 order to state a claim for defamation under
9 California law KinderStart has to show that
10 Google made a provably false statement of fact
11 about KinderStart and, and, that an average
12 reader would understand it to be a provably false
13 statement of fact.

14 Now, in our papers we talked about the
15 first of those two elements. We talked about how
16 Google is not making a provably false statement
17 of fact in assessing page ranks to given sites,
18 and we offered up three reasons. I can touch on
19 them very briefly.

20 We said that as a matter of fact, as a
21 matter of law page ranks are subjective. They
22 reflect Google's opinions about the importance of
23 a site, and that's exactly what the Search King
24 court said.

25 THE COURT: But you're saying that those

1 opinions are founded on some type of objective
2 basis. And, again, just given the standard on a
3 12(b)(6) motion, if they are alleging that, okay,
4 they are telling the world that page ranks are
5 subjective and reflect Google's opinion, but they
6 are also saying Google forms those opinions on a
7 rational basis. And I think that's fairly
8 alleged.

9 And then -- and then the fact is, and,
10 again, we're in a 12(b)(6) stage, that the
11 ranking is being done for some other purpose.
12 It's being done because KinderStart is a
13 competitor, it's being done because KinderStart
14 is owned by people that Google doesn't like or,
15 you know, whatever the facts could be that would
16 be either arbitrary or discriminatory.

17 Then isn't the statement that the
18 rankings are being done on a reasonable basis
19 false?

20 MR. KRAMER: Well, no, Your Honor. I
21 don't think so.

22 I think that the complaint fairly read
23 contains an awful lot of allegations that explain
24 exactly how page ranks are being done, and
25 certainly there is part of it that is an

1 algorithm, although even with respect to that
2 algorithm, there is a subjectivity. There is the
3 decision as to which factors to consider and the
4 weight to be given to each factor.

5 But beyond that, and I think very
6 importantly, KinderStart itself acknowledges that
7 Google is not merely reporting the output of its
8 algorithm as a page rank. Rather, as KinderStart
9 alleges, Google is consistently and constantly
10 assessing sites' quality using stated and
11 unstated subjective quality guidelines, and it
12 identifies those quality guidelines in its
13 complaint.

14 So it's clear from KinderStart's own
15 allegations, and I understand this is a 12(b)(6)
16 standard, it's clear from their own allegations
17 that there is an enormous element of subjectivity
18 that is ongoing throughout this page rank process
19 that Google is assessing sites' qualities, and
20 that's inherently subjective.

21 So for the reasons that we stated in our
22 papers we don't think that there is any way that
23 any -- that you can demonstrate a provably false
24 statement of fact in large part because of their
25 own allegations on the subjectivity that's

1 involved.

2 THE COURT: What if the real criteria
3 that Google is using, again for the sake of
4 argument, aren't the ones that are alleged and
5 aren't the ones Google is holding out to the
6 world, but, in fact, Google is conspiring to
7 squash small competitors likes KinderStart? I
8 mean, what if that were the fair reading of the
9 allegation?

10 MR. KRAMER: Well, Your Honor, I still
11 think it becomes a matter of opinion, that it is
12 Google's view. And, in fact, they allege in
13 paragraph 33 of their complaint that it is simply
14 Google's view of whether a site is worth a user's
15 time.

16 There's no way that that -- even if
17 Google has a malicious intent with respect to its
18 expression of page rank, it's still expressing
19 its opinion, even if Google is improperly
20 motivated for that opinion.

21 THE COURT: Well, but if it's telling
22 the world that, yes, our opinion is subjective,
23 but we are using criteria 1 through 10 in order
24 to form that subjective opinion, and, in fact,
25 what they are really doing is not using criteria

1 1 through 10, they are using criteria number 11,
2 which is is this a competitor or not, I mean,
3 that set of facts, aren't they making a
4 misrepresentation to the community as to the type
5 of opinion they are forming and why they are
6 forming it and couldn't that support a defamation
7 claim?

8 MR. KRAMER: Well, Your Honor, I don't
9 think that's what's alleged here. I think that
10 what's alleged here is that Google uses stated
11 and unstated factors in assessing page ranking.
12 In assessing the quality of sites it uses some
13 factors that it identifies to the world and other
14 factors that it doesn't.

15 And under those circumstances there's
16 simply no way -- and I do want to get to this
17 average reader standard.

18 THE COURT: Sure.

19 MR. KRAMER: Because the Morningstar
20 case makes clear that that's a question of law to
21 be assessed by the court whether an average
22 reader would understand this to be anything other
23 than Google's opinion.

24 And when Google says we're assessing
25 sites constantly to determine their quality and

1 we use stated factors and unstated factors, and
2 you don't find how we're assessing these sites,
3 it's entirely up to us, but the ultimate opinion
4 is whether this site is worth your time in our
5 view.

6 There's only one way for an average
7 reader to understand that: Is this movie worth
8 my time? Is this book worth my time? Is this
9 site worth my time?

10 This is Google's view.

11 THE COURT: It's irrelevant if they have
12 a hidden agenda?

13 MR. KRAMER: Your Honor, it is always
14 irrelevant because it is ultimately Google's
15 opinion and Google's opinion is just as good as
16 anyone else's. Microsoft has got its own opinion
17 according to their allegations. Yahoo! has got
18 one of its own. It doesn't matter.

19 To the average reader this is always
20 going to be a subjective determination by Google
21 and the average reader gives Google the weight --
22 gives Google's opinion the weight that the
23 average reader chooses to give it, but it is
24 ultimately a subjective opinion.

25 So both because there's no provably

1 false statement of fact and because an average
2 reader would only understand it to be a
3 provable -- would only understand it to be a
4 matter of subjective opinion, there's no basis
5 for the defamation claim.

6 THE COURT: Okay.

7 MR. KRAMER: I do want to point out,
8 also, Your Honor, ironically that KinderStart
9 asks for discovery. It says we need discovery to
10 find out what page rank really means.

11 Well, in the absence of discovery the
12 average reader has to make that determination.
13 And what does Google tell the average reader?
14 Google tells the average reader that this is
15 simply whether a site is worth your time. So to
16 the average reader the standard is necessary --
17 the outcome -- sorry, the page rank statement is
18 necessarily a subjective opinion.

19 THE COURT: Okay. Let me actually move
20 on to another one, which I think is a somewhat
21 close call.

22 The contract does specifically say there
23 are no promises, the AdSense agreement, there's
24 no promises as to how you're going to be ranked
25 or anything like that. So you have no basis for

1 an expectation there.

2 It seems to me on its face that disposes
3 of the implied covenant claim, but there's
4 potentially a way I think that it doesn't and I
5 want to get your thoughts on it. And it goes
6 back to the hidden agenda point.

7 I mean, if they are not -- if you have a
8 reasonable expectation that -- that you will be,
9 you know, ranked in accordance with conventional
10 factors, of course, Google can do whatever it
11 wants within the contract stated and unstated.
12 But the contract couldn't be a license for an
13 illegal discrimination, for instance.

14 So isn't there at least some penumbra of
15 protection beyond the terms of the contract that
16 you're not going to use a factor which is --
17 would violate antitrust laws or would violate
18 some other public policy or law?

19 MR. KRAMER: Well, Your Honor, I think
20 the claim under those circumstances sounds in
21 antitrust law or discrimination law. I don't
22 think it sounds in the implied covenant because
23 the implied covenant expressly disclaims the
24 covenant -- sorry. The contract expressly
25 disclaims the covenant they seek to imply.

1 It's one thing to allege injury outside
2 the contract that Google doing is something
3 independently wrongful, but you can't leverage
4 the contract in order to state that claim.

5 THE COURT: So, in other words, under
6 the terms of the contract you really could do
7 anything. They could -- they could -- you could
8 list them with a zero ranking for any reason, and
9 then if there were a complaint about there being
10 some malicious motive or illegal basis, then you
11 would just assert a claim under that statute or
12 that policy.

13 MR. KRAMER: That's certainly our
14 position, Your Honor.

15 And I think the notion that this
16 contract has anything to do with search rankings
17 or search results or page rank is somewhat
18 mystifying. This is a contract about
19 advertising. There's no mention of any placement
20 or any guaranteed placement.

21 And Google provides these ads to
22 KinderStart whether it's in their search rank --
23 whether KinderStart is in Google's search
24 rankings or not or whatever its ranking is.

25 So the covenant they seek to imply we

1 think cannot be fairly implied and it certainly
2 can't be fairly implied in the face of an express
3 disclaimer of the warranty they are seeking now.

4 THE COURT: What about 17200? As we all
5 know, that is a statute that has been interpreted
6 with breathtaking breadth. Why wouldn't that
7 apply here?

8 MR. KRAMER: Less so, Your Honor, in
9 light of Proposition 64.

10 THE COURT: Yes, absolutely.

11 MR. KRAMER: But we have two problems
12 with their 17200 claim. First, we don't think
13 they've alleged the predicate act, unfair,
14 unlawful or deceptive conduct sufficiently; and,
15 second, we don't think that they've identified
16 redressable injury.

17 The injury that they claim that they are
18 entitled to -- the remedies that they claim they
19 are entitled to are restitution and injunctive
20 relief. Restitution is clearly not available
21 here because there's not a situation in which
22 Google took anything from KinderStart. There's
23 nothing to give back. There's nothing to
24 restore. So restitution is not available. What
25 KinderStart wants is damages and that's not

1 available under 17200.

2 And then injunctive relief is not
3 available under the Tornillo case and the progeny
4 thereafter that makes clear that the Court can't
5 consistent with Google's First Amendment rights
6 force Google to carry a particular message or
7 express a particular message.

8 So there's no unfair, unlawful or
9 deceptive conduct in the first instance and
10 there's no redressable injury in the second.

11 THE COURT: Assuming that it could be
12 established that the real reason Google deindexed
13 KinderStart was because of a desire to hurt a
14 competitor, couldn't an injunction address that?

15 MR. KRAMER: Your Honor, with respect to
16 the antitrust aspects of the case --

17 THE COURT: No. I'm still on the 17200
18 aspect.

19 MR. KRAMER: I understand. But that
20 does get into the question of whether or not
21 there's been an antitrust claim stated. And I do
22 think that the Cel-Tech case makes clear that in
23 order to state a 17200 claim based on harm to a
24 competitor that what you need to demonstrate is
25 an incipient violation of the antitrust laws.

1 THE COURT: So they overlap.

2 MR. KRAMER: Correct. If they state an
3 antitrust claim we agree that a 17200 claim would
4 lie here.

5 And Mr. Jacobson would be happy to speak
6 to the antitrust issues, if the Court would like.

7 THE COURT: I would like to hear about
8 that because I think I get what KinderStart is
9 saying. I mean, they are saying Google holds
10 itself out as a search engine for the world and,
11 although we don't know all of the factors that go
12 into the algorithm and the listing, they can't do
13 it in a way that is illegal and what they are
14 trying to do is they are trying to squash their
15 small competitors like KinderStart. And that's
16 the big picture in the case.

17 And so my question is at a 12(b)(6)
18 stage couldn't you conceivably allege antitrust
19 activity under those circumstances?

20 MR. KRAMER: I'm going to let
21 Mr. Jacobson speak to that, Your Honor.

22 Thanks.

23 THE COURT: Thank you.

24 MR. JACOBSON: Thank you, Your Honor.

25 Jonathan Jacobson for Google.

1 The complaint as -- the amended
2 complaint, as Your Honor pointed out, is thin on
3 alleging any nexus between the activity assailed
4 and any increment to Google's alleged market
5 power.

6 Let's assume we get a second amended
7 complaint that fills in those gaps completely and
8 that the allegations are clear and sufficient.
9 The complaint still in our view needs to be
10 dismissed both under section 2 of the Sherman Act
11 and under 17200 because the allegations of
12 exclusionary conduct are insufficient under the
13 Supreme Court's decision in the Trinko case and
14 the Ninth Circuit's case decision in the MetroNet
15 case.

16 The core principle here, Your Honor, is
17 that assuming that this was done to hurt a
18 competitor, Google or any other monopolist has no
19 obligation to provide assistance to its rivals
20 and is in the general case entitled to
21 discriminate against its rivals, and KinderStart
22 here has alleged nothing that would make that
23 general proposition invalid.

24 And I want to give the Court, if you'll
25 bear with me, a few case examples and our brief

1 was very tight, as you know, and there are a
2 couple of cases that may be helpful to illustrate
3 this proposition that were not cited in the
4 brief.

5 One of them is a case called Bayou
6 Bottling against Dr. Pepper. It's 725 F.2d 300.

7 THE COURT: Be careful. I drink a lot
8 of Dr. Pepper.

9 MR. JACOBSON: And this case, the
10 decision in this case makes -- makes Dr. Pepper
11 more available. So we view it as a good case.

12 THE COURT: I just wanted to disclose
13 any potential conflict.

14 MR. JACOBSON: The relevant allegation
15 there was that a Pepsi bottler said that the Coke
16 bottler in Lake Charles had 80 percent of the
17 market and it couldn't compete effectively unless
18 it got space in Coke vending machines and
19 coolers. And the Court of Appeals for the Fifth
20 Circuit said, no, Coke is under no obligation to
21 help its competitors.

22 There's another case, a Ninth Circuit
23 case of great importance called CalComp against
24 IBM. That case is 613 F.2d 727. In that case
25 IBM intentionally redesigned its main frame so

1 that the new releases were incompatible with
2 peripherals supplied by independent peripheral
3 suppliers.

4 They sued saying that this change in the
5 configuration of IBM PCs was done so that IBM
6 could monopolize the peripheral aspects of the
7 market. The Ninth Circuit threw the case out.
8 The Ninth Circuit said that IBM was under no
9 obligation to provide any assistance to its
10 rivals.

11 More recently the MetroNet case after
12 remand from the Supreme Court in the Ninth
13 Circuit. That was a case in which Qwest in
14 Seattle had previously allowed resellers to take
15 the discounts available to large Centrex-type
16 phone operations and resell those to smaller
17 companies that didn't have the necessary volume.

18 You could get the volume discount that
19 the reseller could get and then use those to
20 basically arbitrage and get a lower price to the
21 smaller customers. And Centrex revised its
22 pricing model so that that was no longer
23 permissible, and MetroNet sued.

24 And the Ninth Circuit after remand from
25 the Supreme Court in the Trinko case said

1 notwithstanding that change of policy MetroNet is
2 under no obligation to assist its rivals.

3 That is the fundamental proposition
4 here. Unless there is no conceivable set of
5 facts under which the actions in question do
6 anything other than harm rivals -- that's the
7 standard from the Aspen case, what's left of the
8 Aspen case after Trinko -- the Plaintiff has not
9 alleged exclusionary conduct sufficiently for
10 purposes of section 2 or even on an incipient
11 basis under 17200.

12 And, Your Honor, we have in the
13 complaint itself in paragraphs 44 and 55 the
14 obvious reasons why at least in theory a search
15 engine might want to not promote in its page
16 ranks or not promote in its search results a
17 competing web site, the lack of original content,
18 the fact that it's just another search engine.

19 If KinderStart were correct in this
20 case, what would stop Yahoo! from coming into
21 court and saying, well, Google is not promoting
22 Yahoo! sufficiently? What would prevent
23 Microsoft from coming in and saying, well, Google
24 is not promoting Microsoft sufficiently?

25 These kinds of claims, Your Honor,

1 result -- if allowed to stand, result in the
2 antithesis of the competition that the antitrust
3 laws are designed to encourage.

4 We don't want Google or other companies
5 helping out their rivals. We want them competing
6 against them. That's why the exclusionary
7 conduct standard that we articulate in our brief
8 is so important to maintain the procompetitive
9 purposes of the antitrust laws.

10 THE COURT: Thank you.

11 MR. JACOBSON: Thank you.

12 THE COURT: All right. Mr. Yu, I'll
13 give you a couple of minutes of reply time and
14 then I want to talk about scheduling.

15 MR. YU: Your Honor, I want to first
16 deal with the defamation count right away.

17 I noticed during the oral argument that
18 Defendants didn't mention the Search King case.
19 And Search King we believe under the local rules,
20 3-4, the appellate rules and the Supreme Court,
21 we should not even be touching or looking at the
22 Search King case.

23 Now, I'm not asking Your Honor to advise
24 us whether it has any value to this case, but I'm
25 sure, Your Honor, you're aware of those rules.

1 Just related to that I noticed in a
2 recent case Google, in fact, litigating against
3 Microsoft in this division last fall and Google
4 attempted to use Local Rule 3-4 to knock out an
5 unreported case that Microsoft raised.

6 THE COURT: Well, I'm not going to --
7 I'm not going to use unreported cases in making
8 my decision.

9 MR. YU: Okay. I now want to address
10 the opinion versus fact. And apparently their
11 thinking may be that page rank is locked in
12 stone, it's in a tank, and there's no changes. I
13 would like to just mention one thing because I
14 did read about the opinion in Search King.

15 I just noticed a progression in what's
16 going on with Search King. In that case the
17 judge said that page rank is from 1 to 10. Now
18 in this motion to dismiss admitted as true, now
19 it's zero to 10. And then in the reply that
20 Google offers it seems to want to analogize that
21 to insignificant, somewhat significant and very
22 significant.

23 This system of ranking was created by
24 Google and not only has it monetize it but it
25 also reduced it down to a mathematical

1 calculation.

2 I would like to just mention one point
3 about the human actor because any testing or
4 verification obviously requires a human being.
5 Facts don't -- opinions just don't come out.
6 There's an opinion.

7 There is a case that I noticed, and it
8 wasn't cited in our briefs, but it's out of the
9 Ninth Circuit, Suzuki versus Consumers Union.
10 And that's 330 F.3d 1110.

11 And this seems very close to what we're
12 dealing with because Suzuki had an automobile and
13 Consumer's Union hid from the public its bases
14 for analyzing the rollover potential of a car.
15 So the court had to delve underneath that opinion
16 that this car is unsafe and they looked to the
17 methodology of testing whether or not it was
18 drivable and safe.

19 So I'm just saying Google can't have it
20 both ways. If it's going to assert an opinion
21 but hide from the public those facts, then
22 there's no basis that the audience or the reader
23 can judge what is a page rank of zero.

24 THE COURT: Well, that was -- that was
25 really the point I was addressing to Mr. Kramer

1 and I think you have some cases that address
2 that. I'll certainly take a look at that.

3 MR. YU: Okay.

4 THE COURT: All right. Thank you.

5 MR. YU: And would you like me to
6 address something about the antitrust issue or
7 are you comfortable with it?

8 THE COURT: I think we covered that.

9 MR. YU: Okay.

10 THE COURT: What I'd like to do is we
11 have some unfinished business and I'd like to
12 figure out how we're going to take care of that.

13 The hearing on the injunction was
14 continued and I don't immediately recall the date
15 that I gave you.

16 MR. YU: I believe Your Honor indicated
17 that the hearing date would be set in this time.

18 THE COURT: Right. Okay. Good. That's
19 what I think is the most appropriate way to do
20 it.

21 I can tell you -- I can't tell you
22 exactly what it's going to say, but I can tell
23 you that the order I'm going to issue is going to
24 require amendment of the complaint.

25 And I'll get the order out as soon as I

1 can. Probably, you know, a week is realistic and
2 then it will take time to comply with that order,
3 file a second amended complaint and then Google
4 is entitled to review that and file a response.
5 And then assuming they file another motion to
6 dismiss, we probably will not be able to get a
7 hearing on that for a while.

8 So I'm thinking we ought to set the
9 hearing on the preliminary injunction maybe in
10 September. And that would allow the proceedings
11 on the pleadings to be concluded by then. In
12 other words, we'll know whether we have any
13 viable claim and we'll know what we're looking at
14 in terms of the preliminary injunction whether
15 there's any claim that would support one.

16 MR. YU: Your Honor, may I add a comment
17 about that?

18 THE COURT: Sure.

19 MR. YU: The basis for the preliminary
20 injunction was just count 1. So given that the
21 papers rest as they are and it's calendared out
22 in September, would there be an opportunity to
23 refile the preliminary injunction with
24 alternative grounds?

25 THE COURT: Well, wait and see -- wait

1 until you get the motion -- I guess what I'm
2 trying to say is I don't want to have a hearing
3 on a preliminary injunction where I have a claim
4 that is either -- well, let's say that the claim
5 on which the preliminary injunction rests has
6 been dismissed with leave to amend. Let's say
7 that that's the situation we're in.

8 MR. YU: Yes.

9 THE COURT: I would be reluctant to
10 entertain a preliminary injunction under those
11 circumstances. I would want to have a claim that
12 has survived the 12(b)(6) motion or was likely
13 to. And that's why I was thinking September.

14 MR. YU: Okay.

15 THE COURT: So I'm not precluding you
16 from asserting any grounds you want. What I'm
17 saying is that I'm not inclined to even have a
18 hearing on a preliminary injunction until we have
19 an operative complaint in this case.

20 But, you know, we'll know soon enough
21 whether we have an operative complaint. I'll get
22 a decision out. Google can then decide what it's
23 going to do about that. You know, it's
24 conceivable there might be a claim that I just
25 denied the 12(b)(6) motion on, but I don't know

1 whether that would be one that would support an
2 injunction.

3 You know, it's just one where you're
4 going to need to look at the order and decide
5 what you want to do, but I just didn't want to
6 have a premature hearing on a preliminary
7 injunction.

8 So why don't we reserve a date for any
9 additional motions including the anti-SLAPP. I'm
10 deliberately deferring that, and in the Ninth
11 Circuit actually as a result of a case I had a
12 couple years ago it's okay to do that, the
13 Verizon case. I want to see what we're looking
14 at in terms of a complaint before deciding
15 whether we have an anti-SLAPP problem or not.

16 So the hearing date I'm going to give
17 you is September 29th. Is that a date that
18 everyone is available?

19 MR. KRAMER: Your Honor, they
20 confiscated my calendar on the way in. It's
21 electronic.

22 THE COURT: That's a serious matter.

23 MR. KRAMER: I think September 29th will
24 be fine, though.

25 THE COURT: All right. September 29th

1 for any subsequent motions. And you need to
2 contact my assistant to confirm that, but I'll
3 let her know that that's the date I've given
4 you. Okay? And then we'll do a CMC and we'll do
5 whatever is left of the anti-SLAPP motion and
6 we'll do a hearing on any subsequent pleading
7 motions at the same time.

8 MS. BAL: Your Honor, one other
9 scheduling matter. We do have a CMC scheduled
10 for July 28th. Are we postponing that?

11 THE COURT: Yes. I'm going to push
12 everything to the September 29th date.

13 MS. BAL: Thank you.

14 THE COURT: Okay?

15 All right. The matter is submitted and
16 thank you very much.

17 MR. KRAMER: Thank you, Your Honor.

18 MR. YU: Thank you, Your Honor.

19 (Whereupon, the proceedings concluded.)

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1 CERTIFICATE OF REPORTER

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I, Peter Torreano, Official Court Reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

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