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12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION
 16

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

19 Plaintiffs,)

20 v.)

21 GOOGLE INC., a Delaware corporation,)

22 Defendant.)

CASE NO.: C 06-2057 JF (RS)

**DEFENDANT GOOGLE INC.'S
 NOTICE OF MOTION AND
 MOTION TO DISMISS THE FIRST
 AMENDED COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Before: Hon. Jeremy Fogel
 Date: June 30, 2006
 Time: 9:00 a.m.
 Courtroom: 3

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on June 30, 2006 at 9:00 a.m., or as soon thereafter as
3 counsel may be heard by the above-entitled Court, located at 280 South First Street, Courtroom
4 3, 5th Floor, San Jose, California, 95113, in the courtroom of the Honorable Jeremy Fogel,
5 defendant Google Inc. (“Google”) will and hereby does move the Court, pursuant to Rule
6 12(b)(6) and Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing the
7 First Amended Complaint (“FAC” or “Amended Complaint”) in its entirety. This motion is
8 based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed
9 herewith, the Declaration of Bart E. Volkmer and the exhibits attached thereto, the pleadings and
10 papers on file herein, and upon such other matters as may be presented to the Court at the time of
11 the hearing.

12 **MEMORANDUM OF POINTS & AUTHORITIES**

13 **I. INTRODUCTION**

14 The Amended Complaint, in almost 200 paragraphs, raises what amounts to a single
15 question: Who should determine how an Internet search engine identifies those websites that are
16 most likely to be of relevance to its users? Since its inception, Defendant Google, like every
17 other search engine operator, has made that determination for its users, exercising its judgment
18 and expressing its opinion about the relative significance of websites in a manner that has made
19 it the search engine of choice for millions. Plaintiff KinderStart contends that the judiciary
20 should have the final say over that editorial process. It has brought this litigation in the hopes
21 that the Court will second-guess Google’s search rankings and order Google to view
22 KinderStart’s site more favorably. If KinderStart were right, and websites could use the courts to
23 dictate what the results of a search on the Google search engine should be, neither Google nor
24 any other search engine could operate as it would constantly face lawsuits from businesses
25 seeking more favorable positioning. Fortunately, KinderStart’s position finds no support in the
26 law.

27 KinderStart’s approach has been tried before. Over the years, authors who felt their
28 books belonged on bestseller lists, airlines who thought their flights should be featured more

1 prominently in airline flight listings, bond issuers dissatisfied with their ratings, and even website
 2 owners angry about Google's ranking of their sites, have turned to litigation seeking to override
 3 such judgments. Each time, the courts have rejected such claims, recognizing that private
 4 businesses have a right to express these opinions freely. KinderStart's many legal theories do not
 5 justify a different result. Because the First Amendment protects Google's right to share its
 6 opinions about the relative significance of websites, KinderStart's complaint must be dismissed.

7 **II. STATEMENT OF THE CASE**

8 **The Parties**

9 Plaintiff KinderStart.com LLC ("KinderStart") is a limited liability company with
 10 headquarters in Norwalk, California. FAC ¶ 4. KinderStart owns and operates KinderStart.com,
 11 a website providing information about parenting and related topics. *Id.* ¶ 19.

12 Google is a publicly-traded corporation headquartered in Mountain View, California that
 13 owns and operates Google.com. *Id.* ¶¶ 5, 26. Google "maintain[s] the largest, most
 14 comprehensive index of web sites and other content, and . . . make[s] this information freely
 15 available to anyone with an Internet connection." *Id.* ¶ 22. The index contains billions of
 16 webpages. *Id.* ¶ 34. Google's competitors in the search industry include Microsoft and Yahoo.
 17 *Id.* ¶ 58.

18 **Google's Search Engine**

19 Anyone with access to the Internet can search Google's index for free by inputting a
 20 keyword or search query into a field provided by Google. *Id.* ¶ 2. Google's "search engine"
 21 then locates websites or other data on the Internet that it believes relates to the query, and
 22 presents a list of such sites and information as "search results." *Id.*¹ These results are generated
 23 by a number of complex algorithms. FAC ¶ 27. In these results, Google expresses its view of
 24 the most relevant and useful web pages for a particular query and displays them in the order it

25
 26 ¹ The Ninth Circuit generally has described a search engine as follows: "When a keyword is
 27 entered, the search engine processes it through a self-created index of web sites to generate a
 28 (sometimes long) list relating to the entered keyword. Each search engine uses its own algorithm
 to arrange indexed materials in sequence, so the list of web sites that any particular set of
 keywords will bring up may differ depending on the search engine used." *Brookfield Commc'ns,
 Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999).

1 believes will be of most relevance to a user. *Id.* ¶ 28. To this end, Google does not engage in
2 any paid placement of search results. *Id.* ¶¶ 27-28. That is, a website will appear at the same
3 spot in Google’s search results regardless of whether the company or individual owning the
4 website has any business or financial relationship with Google. Further, if a website does not
5 conform to Google’s standards of quality, Google may choose not to include that site in its index.
6 *Id.* ¶ 44. Google explicitly discloses this practice: “We won’t comment on the individual
7 reasons a page was removed, and we don’t offer an exhaustive list of practices that can cause
8 removal.” *Id.*

9 **PageRank**

10 A component of Google’s search engine is a process called PageRank. *Id.* ¶ 32.
11 PageRank is a sophisticated algorithm that provides “a numerical representation of the relative
12 significance of a particular web site.” *Search King Inc. v. Google Tech., Inc.*, No. CIV-02-1457,
13 2003 WL 21464568, at *1 (W.D. Okla. May 27, 2003). One factor that affects the PageRank of
14 a website is the number of other websites that have linked to it. FAC ¶ 33. The PageRank that
15 Google assigns to a particular website is visible through use of the “Google toolbar” – a separate
16 software program that users may download and install. *See id.* ¶¶ 32, 87. “Google does not sell
17 PageRanks, and the web sites that are ranked have no power to determine where they are ranked,
18 or indeed whether they are included on Google’s search engine at all.” *Search King*, 2003 WL
19 21464568, at *1.

20 **AdSense**

21 Under Google’s AdSense program, third party websites enter into a contractual
22 agreement with Google (the “AdSense Agreement”) under which Google agrees to deliver
23 advertisements to those websites. FAC ¶ 30. If a user visiting the site of an AdSense participant
24 clicks on one of the ads Google delivers, the advertiser pays Google for the click. *Id.* Google
25 then splits this revenue with the AdSense participant. *Id.* In August of 2003, KinderStart
26 entered into the AdSense Agreement with Google under which Google agreed to provide
27 advertisements for display on KinderStart’s website. *Id.* ¶¶ 21, 162.
28

1 **Procedural Status**

2 KinderStart filed its original complaint on March 17, 2006, but never served it. After
3 nearly a month, KinderStart filed and served the FAC on April 12, 2006. While the original
4 complaint contained seven claims for relief and spanned 116 paragraphs, the FAC has ballooned
5 to nine claims set forth in 175 paragraphs.

6 The FAC is brought as a putative class action on behalf of owners of websites who are
7 unhappy about the manner in which Google treats their sites in its search results, or are unhappy
8 about the PageRank Google assigns to their sites. *Id.* ¶¶ 88-91. KinderStart alleges that its poor
9 PageRank or placement in Google’s search results led to a decrease in user traffic, which in turn
10 led it to lose revenue from the AdSense program, and that Google should be held legally liable
11 for this chain of events. *Id.* ¶¶ 74-77.

12 KinderStart seeks relief based on a host of wildly divergent legal theories under state and
13 federal law, claiming that by choosing not to include the KinderStart.com website in its search
14 results and by assigning it a particular PageRank, Google: (1) violated KinderStart’s right to free
15 speech under the United States and California Constitutions; (2) violated the monopolization
16 provisions of Section 2 of the Sherman Act; (3) violated the Communications Act; (4) violated
17 California’s Unfair Competition Law and Unfair Practices Law; (5) breached the implied
18 covenant of good faith and fair dealing; (6) committed defamation and libel; and (7) negligently
19 interfered with a prospective economic advantage. *Id.* ¶ 96. At their core, all of these claims
20 challenge Google’s First Amendment right to do exactly what Google does best: comparatively
21 rank websites on the Internet and provide that information to the public.

22 **III. ARGUMENT**

23 Under Fed. R. Civ. P. 12(b)(6), a complaint will be dismissed where, assuming the
24 specific facts alleged to be true, and giving the plaintiff the benefit of all reasonable inferences,
25 the complaint does not state a claim on which relief can be granted. Pleading standards are
26 liberal, but “they are not so liberal as to allow purely conclusory statements to suffice to state a
27 claim that can survive a motion to dismiss under [Rule] 12(b)(6).” *Miller v. Continental*
28 *Airlines, Inc.*, 260 F. Supp. 2d 931, 935 (N.D. Cal. 2003). “[C]onclusory allegations of law and

1 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Ove v. Gwinn*, 264 F.3d
2 817, 821 (9th Cir. 2001).

3 **A. KinderStart States No Claim Under the First Amendment or the California**
4 **Constitution**

5 It is, to say the least, ironic that KinderStart invokes the First Amendment as the basis for
6 its primary claim for relief in this action. By asking this Court to dictate what Google must say
7 about KinderStart’s site, it is KinderStart, not Google, who contravenes the free speech
8 guarantees of the United States and California Constitutions.

9 Google is a private party, not a state actor. It thus can face no liability for alleged
10 violations of KinderStart’s right to speak. In contrast, Google has an absolute right to express its
11 views on the relative importance of websites through the operation of its search engine, and that
12 right cannot be usurped as KinderStart requests. For both reasons, KinderStart’s free speech
13 claims fail as a matter of law.

14 **1. Google Is Not a State Actor, and Therefore Has No Duty to Safeguard**
15 **KinderStart’s Right to Speak**

16 The First Amendment provides that “*Congress* shall make no law . . . abridging freedom
17 of speech.” U.S. Const. amend. I (emphasis added). Applied to the states through the Fourteenth
18 Amendment, “the constitutional guarantee of free speech is a guarantee only against abridgement
19 by government.” *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). Put differently, the First
20 Amendment governs state actors, not private parties. *Lugar v. Edmondson Oil Co.*, 457 U.S.
21 922, 937 (1982) (“Our cases have accordingly insisted that the conduct allegedly causing the
22 deprivation of a federal right be fairly attributable to the State.”)

23 The determination of whether a party is a state actor and obligated to safeguard the First
24 Amendment rights of others, is a pure question of law for the Court and is routinely decided on
25 motions to dismiss. *See, e.g., Howard v. America Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000)
26 (affirming dismissal of First Amendment claim against Internet service provider on ground that it
27 was not a state actor despite plaintiff’s contention that it is a “quasi-public utility” that
28 “involv[es] a public trust” and is responsible for Internet access and communications for millions

1 of users); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 441 (E.D. Pa. 1996)
2 (dismissing First Amendment claim against AOL as a matter of law on ground that it is not a
3 state actor); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003), *aff'd*, 2004
4 WL 602711 (4th Cir. 2004) (same); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp.
5 1015, 1025-26 (S.D. Ohio 1997) (dismissing First Amendment claim against Internet service
6 provider as a matter of law due to absence of state action). In this case, the question is easily
7 resolved. KinderStart's allegations make clear that Google is a for-profit, private corporation,
8 owned by its shareholders. *See* FAC ¶¶ 5 (Google is a Delaware corporation); 22, 28-29 (Google
9 filed 10-Ks with the SEC), 57 (discussing Google's annual revenues). It is not a state actor.

10 Not surprisingly, KinderStart pleads no facts to suggest Google satisfies the state action
11 requirement. The closest it comes is the conclusory assertion that Google performs a "state
12 function" by creating and managing a "universal, public, Internet-accessible index, archive and
13 repository of the world's Internet content . . . for use by the general public." FAC ¶ 105. But
14 this falls far short of the required pleading, because nowhere does KinderStart aver Google has
15 any relationship whatsoever with the government. *See George v. Pacific-CSC Work Furlough*,
16 91 F.3d 1227, 1231 (9th Cir. 1996) (affirming dismissal of complaint based on the First
17 Amendment which failed to "plead a nexus between the government and the complained-of
18 action").² Plaintiff does not allege that Google is funded by the government or that the
19 government directs, regulates, or plays any role whatsoever in Google's operations. It certainly
20 does not contend that the operation of search engines has ever been a state prerogative. Without
21

22 ² Google does not mean to suggest that the mere presence of some relationship with the
23 government transforms a private party into a state actor. To the contrary, courts have repeatedly
24 held that private businesses, even those with substantial, government-sponsored control over
25 Internet communications, are not state actors unless they effectively serve as agents for the
26 government. *See, e.g., Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999)
27 (corporation with government-authorized monopoly over Internet domain name system and
28 responsible for all Internet-related activity, not a state actor; management of Internet domain
name system not a "quintessential" government service); *Island Online, Inc. v. Network
Solutions, Inc.*, 119 F. Supp. 2d 289 (E.D.N.Y. 2000) (same); *Nat'l A-1 Adver., Inc. v. Network
Solutions, Inc.*, 121 F. Supp. 2d 156 (D.N.H. 2000) (same). In this case, however, the Court need
not evaluate the extent to which Google's activities are intertwined with the government's, as
KinderStart has not alleged (and could not, in good faith allege) any governmental involvement
at all.

1 more than its properly disregarded legal conclusion that Google performs a “state function,”
2 KinderStart cannot sustain its First Amendment claim.³

3 KinderStart’s claim for alleged violation of its free speech rights under California’s
4 Constitution fares no better. While California’s guarantee of free speech has, in the past, been
5 construed to provide slightly more protection than its federal counterpart, the California Supreme
6 Court has confirmed that the provision remains limited to actions by the state. *Golden Gateway*
7 *Center v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013, 1022-31 (2001) (holding that the
8 free speech clause of the California Constitution only protects against state action). The one
9 exception to the state action requirement in California is that the actions of a private owner of a
10 publicly-accessible shopping center may constitute state action for purpose of California’s free
11 speech clause. *See Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910 (1979), *aff’d*, 447
12 U.S. 74 (1980). Google’s search engine plainly does not fall within this very limited exception
13 which is applicable only where private property serves as the functional equivalent of a town
14 square. *See, e.g., Golden Gateway*, 26 Cal. 4th at 1033 (“private property must be public in
15 character before California’s free speech clause may apply”); *Albertson’s, Inc. v. Young*, 107
16 Cal. App. 4th 106 (2003) (rejecting claim that major supermarket should be treated as state actor;
17 California’s exception to state action requirement does not apply merely because property is
18 open to the public; rather, property must function as equivalent to town square); *Trader Joe’s*
19 *Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 432-437 (1999) (grocery store is not
20 open for public speech and therefore the free speech clause of the California constitution does
21 not apply to its conduct).

22 Google’s search engine bears no resemblance to a town square. Indeed, Google’s search
23 engine does not provide real (or personal) property that is open and free for public speech.

24
25 ³ In reality, KinderStart’s speech has in no way has been suppressed, or even affected, by
26 Google. KinderStart speaks through its website, KinderStart.com. Regardless of whether or
27 where KinderStart appears in Google’s search results, KinderStart is free to engage in the exact
28 same speech in the exact same way. KinderStart’s right to speak simply does not entitle it to free
promotion of its message via Google. *See, e.g., Pacific Gas & Elec. Co. v. Pub. Utilities*
Comm’n of Cal., 475 U.S. 1, 20-21 (1985) (striking down an order requiring utility company to
allow a political group to use its envelopes to distribute its speech).

1 While the public may use Google's service – its search engine – and review search results for
2 free, it is Google alone, not the public, who is speaking through those results. KinderStart
3 nowhere alleges that Google has ever opened its search engine or search results for public
4 discourse. In short, Google's index and its search results are a private forum for Google's
5 speech. *See Trader Joe's*, 73 Cal. App. 4th at 434 (grocery store not subject to California free
6 speech clause because it “opens its property to the public so the public can buy goods. It does
7 not offer its property for any other use”). Accordingly, California's free speech obligations
8 could not possibly apply to Google's search engine. KinderStart's claim under California's
9 Constitution cannot stand.

10 **2. Plaintiff Seeks Remedies That Would Violate Google's Constitutional**
11 **Right to Free Speech**

12 KinderStart's claims actually turn the First Amendment and the free speech clause of
13 California's Constitution on their heads. The speech that is threatened in this case is *Google's*.
14 As KinderStart itself has acknowledged, Google's search results and its PageRank reflect
15 Google's view of the relative significance of websites. FAC ¶ 56 (PageRank is a “relative
16 measure of the appeal, popularity and relevance of a Website on the Internet.”). Put differently,
17 Google's search results are themselves constitutionally protected speech in the form of opinions.
18 *Search King*, 2003 WL 21464568, at *4. As the *Search King* court held when faced with
19 precisely this issue, “PageRanks are opinions – opinions of the significance of particular web
20 sites as they correspond to a search query [They] are entitled to ‘full constitutional
21 protection. . . .’” *Id.* (explaining that “[o]ther search engines express different opinions, as each
22 search engine's method of determining relative significance is unique.”). In expressing its view
23 on the significance of a particular website, Google is engaged in precisely the same type of
24 speech that courts have repeatedly held to be protected. *See Blatty v. N.Y. Times Co.*, 42 Cal. 3d
25 1033 (1986) (defendant's decision not to include author's book in well-known “Best Sellers” list
26 held absolutely protected); *Jefferson County School Dist. v. Moody's Inv. Servs., Inc.*, 175 F.3d
27 848 (10th Cir. 1999) (defendant's decision regarding plaintiff's bond rating held absolutely
28 protected).

1 The very free speech guarantees that KinderStart purports to invoke serve as a bar to the
2 relief it seeks. Forcing Google to assign a certain PageRank to a website or to alter its search
3 results in a prescribed manner would amount to compelled speech in violation of the First
4 Amendment and California's Constitution. *See Hurley v. Irish-American Gay, Lesbian &*
5 *Bisexual Group of Boston*, 515 U.S. 557 (1995) (requiring defendants to alter the expressive
6 content of their parade violated the First Amendment); *Miami Herald Pub. Co. v. Tornillo*, 418
7 U.S. 241, 258 (1974) (striking down a law that required newspapers to conspicuously publish
8 replies to attacks on an election candidate's character); *ARP Pharmacy Svs., Inc. v. Gallagher*
9 *Bassett Svs. Inc.*, ___ Cal. App. ___, 2006 WL 1101613, at *8 (Apr 27, 2006) (affirming grant of
10 anti-SLAPP motion and ruling that a statute requiring prescription drug claims processors to
11 submit drug processing costs to their clients was unconstitutional because it improperly
12 compelled speech). For this reason as well, KinderStart's free speech claims cannot proceed.

13 **B. KinderStart States No Claim for Defamation or Libel**

14 KinderStart accuses Google of defamation and libel because Google has "determined and
15 presented for public viewing a PageRank of '0' when the Website KS.com of Plaintiff KSC is
16 visited and viewed by the public and cyberspace community." FAC ¶ 165. Google faced an
17 identical charge in the *Search King* case. There, the district court rightly dismissed the case
18 because Google's PageRank is an opinion not capable of being proved to be true or false and
19 because Google's display of its PageRank is absolutely protected speech under the First
20 Amendment. *See Search King*, 2003 WL 21464568, at *4. The result should be no different
21 here.

22 To state a defamation or libel claim under California law, a plaintiff must be able
23 demonstrate that defendant published a provably false statement of fact. *See Morningstar v.*
24 *Superior Court*, 23 Cal. App. 4th 676, 686 (1994) ("[t]he dispositive question . . . is whether a
25 reasonable fact finder could conclude the published statements imply a provably false
26 assertion."). This inquiry is a question of law for the Court. *Id.* at 686-87; *Seelig v. Infinity*
27 *Broad. Corp.*, 97 Cal. App. 4th 798, 810 (2002); *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d
28 1113, 1120 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036 (9th Cir. 2000) (dismissing defamation claim

1 with prejudice under Rule 12(b)(6) where statements at issue were not susceptible of being
2 proved true of false). Here, KinderStart cannot demonstrate that Google published a provably
3 false statement of fact.

4 In *Search King*, plaintiff attacked Google's alleged reduction in PageRank for several of
5 its websites, including a rank of "4" for one website and a rank of "0" for another. *Search King*,
6 2003 WL 21464568, at *1. Plaintiff alleged that Google reduced these ranks "purposefully and
7 maliciously" because plaintiff was competing with Google. *Id.* at *2. The court recognized that
8 the PageRank Google assigns to any particular website is "the numerical representation of the
9 relative significance of a particular website [and] is fundamentally subjective in nature." *Id.* at
10 *3. The court found unimportant any statements made by Google regarding the objective nature
11 of the PageRank algorithm: "Just as the alchemist cannot transmute lead into gold, Google[']s . .
12 . statements as to the purported objectivity of the PageRank system cannot transform a subjective
13 representation into an objectively verifiable fact." *Id.* at *4. The court concluded: "there is no
14 conceivable way that to prove that the relative significance assigned to a given web site is false."
15 *Id.*

16 This ruling comports with common sense: while many of the variables that comprise the
17 ultimate PageRank are based on mathematical algorithms, those algorithms are written by
18 humans who subjectively determine which aspects of a website should be deemed relevant to an
19 assessment of a site's significance, and then subjectively determine how much weight to give
20 each factor. *Search King*, 2003 WL 21464568, at *3-4. The end result – the PageRank –
21 expresses Google's opinion regarding the relative importance of websites on the Internet. *See*
22 FAC ¶ 56 (PageRank represents "a relative measure of the appeal, popularity and relevance of a
23 Website on the Internet."). Internet users, as well as other companies operating search engines,
24 hold divergent opinions regarding qualities that make a website "important," but there is no
25 possible way to objectively measure importance, which is inherently in the eye of the beholder.
26 *Search King*, 2003 WL 21464568, at *4 ("Other search engines express different opinions, as
27 each search engine's method of determining relative significance is unique.") Google simply
28 offers its own point of view on the issue. This expression cannot be proved false. KinderStart

1 cannot, therefore, state a claim for libel or defamation. *See Aviation Charter, Inc. v. Aviation*
 2 *Research Group/US*, 416 F.3d 864, 871 (8th Cir. 2005) (air safety rating for a carrier could not
 3 be proved true or false where it was “a subjective interpretation of multiple objective data points
 4 leading to a subjective conclusion about aviation safety”); *Jefferson County*, 175 F.3d at 855
 5 (bond rating of “negative outlook” was not provably false: “[l]ike the statement of a product’s
 6 value, a statement regarding the creditworthiness of a bond issuer could well depend on a myriad
 7 of factors, many of them not provably true or false”); *TMJ Implants, Inc. v. Aetna, Inc.*, 405 F.
 8 Supp. 2d 1242, 1252 (D. Colo. 2005) (resulting opinion from a multi-factor evaluation of a
 9 medical device was protected because it was based “at least in part, on factors not provably true
 10 or false”); *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 971 (1993) (statements made in
 11 performance review were not actionable as libel because they “were statements of opinion, not
 12 false statements of fact”).

13 KinderStart’s defamation claim also fails for the related reason that Google’s expression
 14 manifested in PageRank is itself protected by the First Amendment. In *Search King*, the court
 15 applied Oklahoma law and found that PageRank was protected speech and therefore could not
 16 give rise to tort liability. *Search King*, 2003 WL 21464568, at *4. Google’s speech associated
 17 with PageRank is absolutely protected under the First Amendment and cannot support a
 18 defamation or libel cause of action.⁴

19 **C. KinderStart States No Claim for Negligent Interference with Prospective**
 20 **Economic Advantage**

21 KinderStart’s Ninth Claim for Relief is labeled “Negligent Interference with Prospective
 22 Economic Advantage.” The allegations underlying this claim, however, accuse Google of
 23 “wrongful interference with the contractual relationship” between Google and KinderStart
 24 regarding the AdSense program. FAC ¶¶ 174-75. If that is indeed KinderStart’s claim, it must
 25 fail because parties to a contract cannot sue one another for interference with their own contract.
 26

27 ⁴ To the extent that KinderStart claims that Google’s failure to include KinderStart’s website
 28 in the Google web index (as opposed to the assignment of a particular PageRank) is implicitly
 defamatory, *Blatty* bars such a claim as a matter of law. *Blatty*, 42 Cal. 3d at 1045-48.

1 *See Kasparian v. County of Los Angeles*, 38 Cal. App. 4th 242, 262 (1995) (interference with
2 contract claim “can only be asserted against a stranger to the relationship”); *Applied Equip.*
3 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994) (“the tort cause of action for
4 interference with a contract does not lie against a party to the contract”).

5 Even if KinderStart were alleging that Google interfered with an as yet-unidentified
6 advantage unmoored from the AdSense Agreement, its claim still cannot survive. KinderStart
7 has not pled and cannot show that Google’s alleged interference was “independently wrongful”
8 apart from the interference itself, as required by *Della Penna v. Toyota Motor Sales, USA, Inc.*,
9 11 Cal. 4th 376, 393 (1995). *See Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1189 (1998)
10 (invoking the “independently wrongful” requirement in the context of a negligent interference
11 claim). To the contrary, the allegedly interfering conduct at issue – choosing not to include the
12 KinderStart website in Google’s index – could not be independently wrongful as a matter of law
13 because Google’s right to speak in the form of its index is absolutely protected. *See Blatty*, 42
14 Cal. 3d at 1045-48 (First Amendment bars tortious interference claim); *Search King*, 2003 WL
15 21464568, at *4 (same).

16 **D. KinderStart States No Claim Under the Sherman Act**

17 Counts 2 and 3 of the Amended Complaint allege claims for attempted monopolization
18 and monopolization (respectively), of markets defined as the “Search Engine Market,” the
19 “Search Ad Market,” and the “Website Rating Market” in violation of Sherman Act § 2.
20 Although the means and mechanisms by which Google is being accused of monopolizing these
21 markets are entirely unclear (itself a sufficient reason for dismissal), the essence of the claims
22 appears to be that Google’s exercises of its free speech rights – the so-called “PageRank
23 devaluation and Website Blockage” – have harmed KinderStart as a competitor in the alleged
24 Search Engine and Search Ad markets. FAC ¶¶ 118, 128-33.

25 Even assuming that KinderStart has alleged sufficient facts to establish the relevant
26 markets it asserts, as well as Google’s “monopoly power” within those markets, its claims under
27 Section 2 of the Sherman Act still fail. A plaintiff suing under Section 2 must also prove that the
28 defendant has engaged in predatory or exclusionary conduct. *See Verizon Commc’ns Inc. v. Law*

1 *Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to
2 innovate, the possession of monopoly power will not be found unlawful unless it is accompanied
3 by an element of anticompetitive conduct.”); *accord, e.g., Spectrum Sports, Inc. v. McQuillan*,
4 506 U.S. 447, 457-60 (1993). In this case, however, the complaint’s allegations on that score are
5 insufficient as a matter of law. Removing KinderStart from Google search results and/or
6 lowering its PageRank are not predatory because the antitrust laws do not obligate business
7 firms, even monopolists, to come to the aid of their rivals. *See Trinko*, 540 U.S. at 407-10
8 (“insufficient assistance in the provision of service to rivals is not a recognized antitrust claim”);
9 *see Covad Commc’ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) (same).

10 KinderStart describes itself as a competitor of Google’s in the Search Engine market and
11 the Search Ad Market. Accepting those allegations as true, it is inconceivable that laws designed
12 to *promote* competition among rivals would require one search engine to promote another
13 through a prominent display in its search results, or by giving the rival a high favorable
14 PageRank. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373-80 (7th
15 Cir. 1986). If KinderStart’s complaint had merit, then Yahoo, Microsoft, Ask.com, and every
16 other search engine would have the same complaint and be entitled to the same remedy. The
17 courts would be embroiled in determining whether Google should list Yahoo first, or Ask, or
18 KinderStart, depending on the query. As the Supreme Court explained in *Trinko*, 540 U.S. at
19 408, enforced assistance of rivals is to be avoided because it “requires antitrust courts to act as
20 central planners, identifying the proper price, quantity, and other terms of dealing – a role for
21 which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate
22 the supreme evil of antitrust: collusion.”

23 Although a monopolist is under no general duty to assist its competitors, the courts have
24 recognized a few very limited circumstances in which “a refusal to cooperate with rivals can
25 constitute anticompetitive conduct and violate § 2.” *Trinko*, 540 U.S. at 408 (citing *Aspen Skiing*
26 *Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). But no court has ever
27 suggested that Section 2 liability could stem from a failure to rank a rival in the manner in which
28 the rival would prefer. On the contrary, the courts presented with that kind of fact pattern have

1 invariably held that there is no Section 2 violation. *Jefferson County*, 175 F.3d at 859-60; *Alaska*
2 *Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541-43 (9th Cir. 1991).

3 KinderStart seeks to invoke the so-called “essential facilities doctrine,” under which
4 some courts have held that liability may be imposed “when one firm, which controls an essential
5 facility, denies a second firm reasonable access to a product or service that the second firm must
6 have in order to compete with the first.” *Alaska Airlines*, 948 F.2d at 542. There is significant
7 doubt whether the essential facilities doctrine survived the Supreme Court’s 2004 decision in
8 *Trinko*. See 540 U.S. at 410-11 (“We have never recognized such a doctrine.”). But even if it
9 did, it would be of no use to KinderStart. Under the Ninth Circuit’s decision in *Alaska Airlines*,
10 Google’s search engine is not an essential facility as a matter of law because “[a] facility . . . will
11 be considered ‘essential’ only if control of the facility carries with it the power to *eliminate*
12 competition in the downstream market.” 948 F.2d at 544 (emphasis in original). Plaintiff does
13 not (and indeed cannot) allege that Google’s search results or PageRanks empower it to eliminate
14 competition from other search engines or websites. By KinderStart’s own admission, it still gets
15 “hits” generated from other referring sites. FAC ¶ 80. The very existence of Yahoo, MSN, Ask,
16 and other search engines precludes any argument that Google is an “essential facility.”

17 Moreover, even if the complaint is liberally construed as one of a customer, rather than a
18 competitor, KinderStart still has no claim. The Second Circuit’s decision in *Official Airline*
19 *Guides, Inc. v. FTC*, 630 F.2d 920, 923-24 (2d Cir. 1980), involving the OAG’s systematic
20 discrimination against commuter airlines in its listings, is squarely on point. The case involved
21 OAG’s refusal to list commuter lines in the same portions of its monopoly airline flight guide
22 where the major airline listings were found. The Second Circuit acknowledged that this was a
23 practice that put the commuter carriers at a significant competitive disadvantage. It nevertheless
24 concluded that the OAG had no antitrust-based duty to its customers, and therefore no duty to list
25 the commuter carriers in the more prominent space that they desired, and dismissed the case
26 accordingly. The same result is warranted here.

27 Finally, even if KinderStart’s antitrust allegations otherwise stated a claim, dismissal
28 would still be required under the Tenth Circuit’s analysis in *Jefferson County School*, 175 F.3d

1 859-60. In that case, the plaintiff school district declined to select Moody's to rate its new bond
 2 offering; Moody's responded by rating the bonds anyway and providing a "negative outlook,"
 3 which the school district alleged to be false. Just like KinderStart here, the school district alleged
 4 that this was attempted and actual monopolization. But because the complaint was attacking
 5 protected speech, the court held that the claims were properly dismissed under Rule 12(b)(6). *Id.*
 6 ("the First Amendment does not allow antitrust claims to be predicated solely on protected
 7 speech."). KinderStart's antitrust claims fail for the same reason.

8 **E. KinderStart States No Claim Under Cal. B&P Code Section 17045**

9 KinderStart alleges on information and belief that Google engaged in "price
 10 discrimination" by secretly offering special benefits, services and privileges to certain websites –
 11 which Plaintiff does not identify – and not to others, such as KinderStart.com. FAC ¶ 156. The
 12 only benefit, service or privilege that KinderStart identifies is the "higher placement" of these
 13 unidentified Websites over those of KinderStart and the "California Subclass" on Google's
 14 search results pages. *Id.* KinderStart further alleges, in conclusory fashion, that this conduct by
 15 Google tended and tends to destroy competition in violation of California Business &
 16 Professions Code § 17045. FAC ¶ 158.

17 Even a cursory review of the statute upon which KinderStart purports to rest its claim
 18 reveals the claim as specious. Under Section 17045:

19 The *secret* payment or allowance of rebates, refunds, commissions, or unearned
 20 discounts, whether in the form of money or otherwise, or *secretly* extending to
 21 certain purchasers special services or privileges not extended to all *purchasers*
purchasing upon like terms and conditions, to the injury of a competitor and where
 such payment or allowance tends to destroy competition, is unlawful.

22 Cal. Bus. & Prof. Code § 17045 (emphasis added). In this case, KinderStart nowhere alleges that
 23 it was *purchasing* anything from Google, let alone that it was purchasing placement in Google's
 24 search results.⁵ Similarly, KinderStart nowhere alleges that it made any purchases from Google
 25 on like terms and conditions *vis-a-vis* its competitors. Plaintiff's claim under section 17045 must
 26

27 ⁵ KinderStart could not make such an allegation. Google does not sell PageRank or
 28 placement in its search results. *See Search King*, 2003 WL 21464568, at *1 ("Google does not
 sell PageRanks."); *see also* FAC ¶ 28.

1 be dismissed for this reason alone. *See Diesel Elec. Sales & Serv., Inc. v. Marco Marine San*
2 *Diego, Inc.*, 16 Cal. App. 4th 202, 216 n.5 (1993); *Eddins v. Redstone*, 134 Cal. App. 4th 290,
3 332-35 (2005) (summarizing case law regarding statutory requirement of “purchasing upon like
4 terms and conditions”).

5 Separately, KinderStart’s own allegations regarding the public display of Google’s search
6 results make it impossible for it to plead or prove that Google engaged in the *secret* delivery of
7 placements to some website owners and not to others. *See* FAC ¶ 2 (plaintiff avers that Google’s
8 search results are publicly accessible). The placement of KinderStart.com relative to competing
9 websites in Google’s search results is anything but secret. If KinderStart wishes to find out how
10 Google is ranking its supposed competitors in relation to KinderStart.com, it can simply query
11 Google’s search engine and examine the results.⁶ Accordingly, KinderStart’s Section 17045
12 claim fails for the additional reason that it has not and cannot allege the secrecy of the “higher
13 placement” that Google has supposedly extended to KinderStart’s competitors.

14 **F. KinderStart States No Claim Under the Communications Act**

15 KinderStart’s claim against Google under the Communications Act is frivolous. The
16 provision of the Communications Act upon which KinderStart bases its claim prohibits
17 “common carriers” from discriminating in the services they provide. *See* 47 U.S.C. § 201. But
18 KinderStart does not and could not possibly allege facts to suggest that Google is a common
19 carrier subject to this regulatory regime.⁷

22 ⁶ This situation stands in stark contrast to the problem to which Section 17045 is addressed:
23 a manufacturer from whom a large retailer has extracted special concessions that the
24 manufacturer might well prefer to keep secret from other retailers. *See ABC Int’l Traders, Inc. v.*
25 *Matsushita Elec. Corp. of Am.*, 14 Cal. 4th 1247, 1267 (1997). In that context, the retailer
discriminated against has no way to identify the secret privileges the manufacturer is providing
to his competitor. There is nothing remotely similar at issue here.

26 ⁷ KinderStart’s claim is truly nonsensical. A search engine, by its very nature, serves to
27 prioritize one site over another based on its view of what information is most likely to be of
28 interest to users. *See generally, Brookfield Communications*, 174 F.3d at 1045 (discussing
operation of search engines). If KinderStart is correct that a search engine is a common carrier,
the search engine’s discrimination among sites, and hence its entire operation, would be
unlawful.

1 A common carrier is a service that “makes a public offering to provide *communications*
2 *facilities* whereby all members of the public who choose to employ such facilities may
3 *communicate or transmit intelligence of their own design and choosing.*” *FCC v. Midwest Video*
4 *Corp.*, 440 U.S. 689, 701 (1979) (interpreting definition of “common carrier” in 47 U.S.C §
5 153(h)) (emphasis added); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct.
6 2688, 2697 (2005) (affirming FCC’s determination that broadband Internet service providers are
7 not common carriers under the Communications Act); *Howard*, 208 F.3d 741 (affirming
8 dismissal of alleged discriminatory practices claim against Internet service provider under
9 Communications Act as a matter of law on grounds that ISP was not a common carrier). Google
10 does no such thing. It simply operates a website offering an Internet search engine. FAC ¶ 2.
11 Google does not, and is not alleged to, provide communications facilities. Indeed, it does not,
12 and is not alleged to, “carry” anything. Google’s search engine certainly does not, and is not
13 alleged to, enable users to communicate material of their choosing to others. To the contrary,
14 according to KinderStart, Google alone selects the information displayed to users of its search
15 engine. *Id.*⁸

16 KinderStart seems to believe that Google qualifies as a common carrier merely because
17 its website is open to the public and provides hyperlinks allowing users to connect to other sites.
18 But virtually every website is open to the public, and virtually every site provides hyperlinks
19 pointing users to other sites. There is no absolutely no authority for the proposition that these

21
22 ⁸ KinderStart’s own allegations regarding Google’s operations make clear that Google
23 provides “enhanced” rather than basic services to its users by collecting user queries and
24 returning search results from Google’s index of websites. FAC ¶ 2; *See In re Second Computer*
25 *Inquiry*, 77 F.C.C.2d 384, 417-23, 1980 WL 233301 (Apr. 7, 1980) (final decision); 47 C.F.R. §
26 64.702(a) (“[E]nhanced service’ shall refer to services . . . which employ computer processing
27 applications that act on the format, content, code, protocol or similar aspects of the subscriber’s
28 transmitted information; provide the subscriber additional, different, or restructured information;
or involve subscriber interaction with stored information.”). The Federal Communications
Commission, charged with interpreting and enforcing the Communications Act has made clear
that providers of “enhanced services are not regulated [as common carriers” under Title II of the
[Communications] Act.” *Id.* *See also Howard*, 208 F.3d at 752-53 (ISP not a common carrier
because it provides enhanced rather than basic services); *Brand X*, 125 S. Ct. at 2697 (cable
provider not a common carrier because it provides enhanced services). KinderStart’s common
carrier charge, and thus its Communications Act claim, fail for this reason as well.

1 functionalities transform mere websites into regulated common carriers under the
2 Communications Act.⁹

3 In fact, a recent amendment to the Communications Act makes clear that Congress does
4 not intend for online services to be regulated as common carriers. In the Telecommunications
5 Act of 1996 (amending the Communications Act and codified at § 47 U.S.C. 230(c)), Congress
6 stated its desire “to preserve the vibrant and competitive free market that presently exists for the
7 Internet and other interactive computer services, unfettered by Federal or State regulation.” 47
8 U.S.C. § 230(b). Congress went on to explain that: “Nothing in this section [of the
9 Communications Act] shall be construed to treat interactive computer services as common
10 carriers or telecommunications carriers.” 47 U.S.C. § 223(e)(6). No such statement would have
11 been necessary if, as KinderStart contends, interactive computer services, like Google, were ever
12 intended to be classified as common carriers in the first place. *See Parker v. Google Inc.* ___ F.
13 Supp. 2d ___, 78 U.S.P.Q.2d 1212, 1218 (E.D. Pa. 2006) (Google is an interactive computer
14 service subject to the protections of 47 U.S.C. § 230); *Novak v. Overture Servs., Inc.*, 309 F.
15 Supp. 2d 446, 452-53 (E.D.N.Y. 2004) (same). Indeed, this statute demonstrates Congress’
16 explicit intent to prevent such a classification.

17 The analysis goes no further. Google is not a common carrier and KinderStart’s claim for
18 violation of the Communications Act should be dismissed out of hand.

19 **G. KinderStart States No Claim Under Cal. B&P Code Section 17200 et. seq.**

20 KinderStart vaguely asserts that, by engaging in all of the conduct alleged in the
21 Amended Complaint, Google has committed one or more acts of unfair competition in violation
22 of Cal. Bus. & Prof. Code § 17200 *et seq.* FAC ¶¶ 146. However, KinderStart has failed to state
23 a claim for two reasons. First, KinderStart’s allegations are insufficient to establish Article III
24

25 ⁹ Courts have uniformly held that even Internet Service Providers are not common carriers,
26 though they carry user-created communications, such as email, and carry user requests for
27 information from one point to another. *See, e.g., America Online, Inc. v. GreatDeals.Net*, 49 F.
28 Supp. 2d 851, 855-57 (E.D. Va. 1999); *CompuServe Inc.*, 962 F. Supp. 2d at 1025; *Religious
Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1369 n.12 (N.D. Cal.
1995). If ISPs that actually serve to transport user communications are not common carriers,
mere search engines like Google certainly cannot be.

1 standing for *any* of its 17200 claims. Second, KinderStart has failed to allege conduct by Google
2 that violates California’s Unfair Competition Law (“UCL”), whether that conduct is
3 characterized as unfair, unlawful, or fraudulent, or as false or deceptive advertising.

4 **1. KinderStart Has No Standing to Assert Any 17200 Claim Because It**
5 **Can Identify No Redressable Injury**

6 KinderStart’s allegations do not satisfy the “case or controversy” limitation of Article III
7 requiring that a plaintiff have standing in order to bring *any type of claim* in federal court. *See*
8 *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (hereinafter
9 “*Stevens*”). A litigant must specifically set forth facts sufficient to satisfy both the “causation”
10 and “redressability” prongs of Article III’s standing requirements by showing that his injury
11 “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable
12 decision.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted); *see also Nike,*
13 *Inc. v. Kasky*, 539 U.S. 654, 667 (2003). KinderStart’s unfair competition claims are all subject
14 to dismissal because it has not, and cannot, identify any *redressable* injury.

15 To support a finding of redressability, plaintiff must demonstrate “a ‘substantial
16 likelihood’ that the requested relief will remedy the alleged injury in fact.” *Stevens*, 529 U.S. at
17 771. KinderStart’s Section 17200 claims establish nothing of the kind because the remedies
18 under Section 17200 are limited to restitution and injunctive relief. *See Korea Supply Co. v.*
19 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).

20 With respect to restitution, no relief can be granted because KinderStart does not allege
21 that it paid Google anything. *Korea Supply*, 29 Cal. 4th at 1149 (“object of restitution is to
22 restore the status quo by returning to the plaintiff funds in which he or she has an ownership
23 interest”); *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177 (2000) (restitution
24 award is for “money that had once been in the possession of the person to whom it [is] to be
25 restored”); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 697-98 (2006)
26 (same). The injunction KinderStart seeks to remedy the alleged injury in fact – deflated
27 PageRank values and reductions in search engine referrals – is also unavailable as a matter of
28 law. *See* FAC ¶ 151. The First Amendment bars KinderStart from obtaining an injunction

1 compelling Google to speak and evaluate the KinderStart website or include KinderStart in its
2 index. *See, e.g., PG&E*, 475 U.S. at 20-21 (striking down order requiring utility company to
3 allow political group to use its envelopes to distribute group’s speech); *Miami Herald*, 418 U.S.
4 at 258 (striking down law requiring newspapers to conspicuously publish replies to attacks on
5 election candidate’s character); *ARP Pharmacy*, 2006 WL 1101613, at *8 (striking down law
6 requiring prescription drug claims processors to submit drug processing costs to their clients).
7 Because it has not stated a claim for entitlement to either of the remedies provided by the UCL,
8 KinderStart’s unfair competition claim should be dismissed under Rule 12(b)(1).

9 **2. KinderStart Fails to State a Claim Under Any Prong of California’s**
10 **Unfair Competition Claim**

11 Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice and
12 unfair, deceptive, untrue or misleading advertising.” KinderStart has failed to state a claim under
13 any of these prongs.

14 **a. KinderStart Fails to State a 17200 Claim Based on Fraudulent**
15 **Business Acts or Deceptive Advertising**

16 KinderStart’s allegations based on fraudulent business acts or deceptive advertising fail
17 to state a claim under California’s UCL for two reasons. First, KinderStart has not identified any
18 allegedly deceptive statements forming the basis for its claim. Second, KinderStart’s allegations
19 fail to comply with Proposition 64, which created a standing requirement for claims brought
20 under the UCL.

21 KinderStart vaguely alleges that Google’s AdSense Program Agreement constitutes false
22 advertising under the UCL because it is likely to deceive “members of the public” – a group that
23 presumably includes KinderStart itself, although this fact is not alleged – into believing that by
24 participating in the AdSense program, they will realize “adequate value and financial benefit.”
25 FAC ¶ 149. This claim fails for the most basic of reasons: it does not identify a specific
26 representation or statement by Google either within or without the AdSense Program Agreement
27 to the effect that participants in the AdSense program would realize “adequate value and
28 financial benefit.” *Id.* Under the false advertising and fraud provisions of the UCL, a plaintiff

1 must plead *facts* showing that the defendant made a deceptive representation. *Bardin v.*
2 *DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1275 (2006) (sustaining demurrer under the
3 UCL where the statement in question “merely concludes the public would likely be deceived,
4 without pleading any facts showing the basis for that conclusion”).

5 Additionally, in order to plead an unfair competition claim following the passage of
6 California’s Proposition 64 in November 2004, KinderStart must show that it has suffered actual
7 injury in fact and that “such injury occurred *as a result of* the defendant’s alleged unfair
8 competition or false advertising.” *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194
9 (S.D. Cal. 2005) (dismissing false advertising and unfair competition claims for lack of standing)
10 (emphasis added); *Chip-Mender Inc. v. Sherwin-Williams Co.*, No. C 05-3465, 2006 WL 13058,
11 at *10 (N.D. Cal. Jan. 03, 2006) (dismissing unfair competition claim for failure adequately to
12 allege standing); *Aureflam Corp. v. Pho Hoa Phat I, Inc.*, 375 F. Supp. 2d 950, 955 (N.D. Cal.
13 2005) (dismissing unfair competition claim).¹⁰ In the context of a claim involving fraud or false
14 advertising, such as KinderStart’s here, a plaintiff who fails to allege that it actually relied on
15 false or misleading statements to its detriment cannot possibly show that it was suffered an injury
16 in fact “as a result of” the false or misleading statements as required by Proposition 64. *Laster*,
17 407 F. Supp. 2d at 1194. Nowhere in the Amended Complaint does KinderStart allege that it
18 actually relied on *any* representation by Google, in the AdSense Program Agreement or
19 elsewhere, and been injured as a result. KinderStart has failed to state a claim for relief under the
20 statutory standing requirement effectuated by Proposition 64.

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25 ¹⁰ Prior to the passage of Proposition 64, a UCL plaintiff in California state court did not
26 need to demonstrate any injury whatsoever, let alone causation, and could file suit as a private
27 attorney general. *Laster*, 407 F. Supp. 2d at 1193. For this reason, a substantial body of the pre-
28 Proposition 64 jurisprudence in the area of false advertising is no longer good law. Of course,
Section 17200 litigants in federal court have always been constrained by Article III’s standing
requirement, which KinderStart also fails to satisfy, because of the Supremacy Clause. *See Nike*,
539 U.S. at 661 (plaintiff who brought UCL claim as a private attorney general in state court
“would not have had standing to commence suit in federal court”).

1 **b. KinderStart Fails to State a 17200 Claim Based on Unfair**
2 **Business Acts**

3 To state a claim of unfair competition under the “unfair” prong of the Unfair Competition
4 Law, KinderStart must show “conduct that threatens an incipient violation of an antitrust law, or
5 violates the policy or spirit of one of those laws because its effects are comparable to or the same
6 as a violation of the law, or otherwise significantly threatens or harms competition.” *Cel-Tech*
7 *Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186-87 (1999). This
8 KinderStart has failed to do.

9 The “unfair” prong of the UCL is the California state equivalent of section 5 of the
10 Federal Trade Commission Act’s prohibitions against unfair methods of competition. *See Cel-*
11 *Tech*, 20 Cal. 4th at 185-86. In *Official Airline Guides*, 630 F.2d at 923-24, the Second Circuit
12 Court of Appeals held that conduct identical in all relevant respects to Google’s alleged conduct
13 did not violate section 5 of the FTC Act. There, the FTC alleged that the OAG, which
14 maintained airline schedule listings critical to travel agents and travelers, systematically
15 discriminated against commuter carriers by listing their flights less prominently, inaccurately,
16 and sometimes not at all, thus harming competition between certificated and commuter carriers.
17 Even though the Second Circuit agreed that the OAG had “arbitrarily” refused to publish the
18 connecting flight schedules of commuter carriers, the Court held that the monopolist OAG’s
19 challenged practice of discriminating among its customers in its listings did not violate section 5
20 of the FTC Act.

21 Under the holding in *Official Airline Guides*, Plaintiff’s allegations that Google denied
22 “automated search engine referrals to websites of Plaintiff KSC” and “falsely and artificially
23 calculate[ed] and present[ed] a deflated PageRank” (FAC ¶ 148) fail to state a claim under the
24 UCL and must be dismissed. Moreover, because the actions on which KinderStart premises
25 liability are protected by the First Amendment, they certainly cannot be “unfair” under the UCL.
26 *See Jefferson County*, 175 F.3d at 859-60; *Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal.
27 App. 4th 1134, 1147 (2003) (“A business practice that might otherwise be considered unfair or
28 deceptive cannot be the basis of a section 17200 cause of action if the conduct has been deemed

1 lawful”); *Blatty*, 42 Cal. 3d at 1048-49 (unfair competition claim could not be premised on
2 protected speech).

3 **c. KinderStart Fails to State a 17200 Claim Based on Unlawful**
4 **Business Acts**

5 As established above, each of KinderStart’s claims based on laws other than the UCL
6 itself must be dismissed for failure to state a claim. KinderStart therefore cannot base its 17200
7 claim on Google’s allegedly “unlawful” business acts. *See Violante v. Communities Southwest*
8 *Dev. & Const. Co.*, 41 Cal. Rptr. 3d 673, 678 (2006) (dismissing UCL claim where there was no
9 underlying wrongful conduct).

10 In sum, whether for lack of standing or for failure to allege conduct sufficient to state a
11 claim, KinderStart’s unfair competition claims must be dismissed.

12 **H. KinderStart States No Claim for Breach of the Implied Covenant**

13 According to KinderStart, it “contracted into” the advertising program, known as
14 AdSense, that Google offers to third party websites. FAC ¶¶ 160, 162. KinderStart also
15 obtusely states that the agreement governing the AdSense Program (the “AdSense Agreement”)
16 contained an implied covenant of good faith and fair dealing. *Id.* ¶ 160 (alleging “the AdSense
17 Program necessarily contemplates” an implied covenant). And while never expressly identifying
18 any breach, KinderStart’s seventh claim for relief appears to charge Google with breaching the
19 implied covenant in the AdSense Agreement by failing to include KinderStart in its search
20 results. FAC ¶ 162.

21 The first step in determining whether a contract contains an implied covenant is to
22 examine the express terms of the contract. *See Lundin/Weber Co. v. Brea Oil Co.*, 117 Cal. App.
23 4th 427, 432 (2004). Under the terms and conditions of the AdSense Agreement, Google agrees
24 to provide advertisements for display on a particular website and to share with the publisher of
25 that website the revenues that Google earns if users click on the ads. *See AdSense Agreement*,

1 ¶¶ 1, 11; Volkmer Decl., Ex. A.¹¹ The website publisher agrees, *inter alia*, to display the
2 advertisements and comply with certain technical specifications. *Id.* at ¶ 2.

3 Google's duties under the AdSense Agreement apply irrespective of whether the
4 publisher's site appears in Google's search results, regardless of the position in which that site
5 may appear, and regardless of the PageRank that Google may assign to the site. The AdSense
6 Agreement, in other words, is simply about serving advertisements and sharing revenue that
7 those ads may generate. The agreement has nothing to do with Google's search results.
8 Nevertheless, KinderStart asks the Court to invent and insert a covenant into the AdSense
9 Agreement, obligating it to provide AdSense participants preferential treatment in Google's
10 search results. Specifically, KinderStart claims that this supposed covenant requires Google to
11 include all AdSense participants in Google's search results and to provide them some
12 unspecified level of "traffic volume" and "appeal" from Google users.

13 The covenant KinderStart concocts is far afield from anything contemplated by the
14 AdSense Agreement. Nothing in the text of the agreement could possibly be read as even
15 hinting at a promise by Google to promote the websites of AdSense participants or ensure them a
16 certain level of "traffic volume." The AdSense Agreement concerns the delivery of
17 advertisements; nothing more. As a matter of law, a covenant of good faith can only be implied
18 to protect the express terms of a contract. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 690
19 (1988) (affirming dismissal of tortious breach of implied covenant claim); *Jo Kim v. Regents of*
20 *the Univ. of Cal.*, 80 Cal. App. 4th 160, 164 (2000) (affirming dismissal of breach of implied
21 covenant claim). A covenant cannot be used to further objectives that are not contemplated by
22 the contract. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373
23 (1992). KinderStart seeks to engraft onto the AdSense Agreement a covenant that fundamentally
24 alters the very nature of the Agreement. For this reason alone, its claim must fail.

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27 ¹¹ The provisions of the agreement are properly before the Court for purposes of this motion
28 as a consequence of KinderStart's reference to the agreement in the Amended Complaint. *See Van*
Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002).

1 KinderStart's claim suffers from a second and more fundamental flaw: its hypothetical
 2 covenant is at odds with the express provisions of the AdSense Agreement. The agreement
 3 affirmatively rejects the notion that Google has *any* obligation to drive traffic to participating
 4 sites or to ensure they receive some level of advertising revenue:

5 Google makes no guarantee regarding the level of impressions of Ads or clicks on
 6 any Ad or Referral Button, the timing or delivery of such impressions and/or
 7 clicks, the completion of Referral Events, or the or the amount of any payment to
 be made to You under this Agreement.

8 AdSense Agreement, ¶ 8; Volkmer Decl., Ex. A. More telling still, *Google expressly disclaims*
 9 *all warranties, express or implied, regarding "SEARCH, REFERRALS, AND OTHER SERVICES*
 10 *..."* *Id.* ¶ 9. That is, Google makes clear that it is not making express or implied guarantees to
 11 AdSense participants about Google's search services, referrals or any other service that Google
 12 may operate. In short, the implied obligation that KinderStart seeks to impose upon Google is
 13 expressly refuted by the AdSense Agreement. For this reason as well, KinderStart's implied
 14 covenant claim thus fails as a matter of law. *See Lundin/Weber*, 117 Cal. App. 4th at 436
 15 ("where parties have chosen not to extend [an] obligation . . . a court should not insert
 16 obligations in direct conflict with the limitation expressed by the parties"); *Baymiller v.*
 17 *Guarantee Mut. Life Co.*, No. SA CV99-1566, 2000 WL 33774562, at *4 (C.D. Cal. Aug. 3,
 18 2000) (dismissing implied covenant claim with prejudice where proposed covenant was at odds
 19 with the express provisions of the agreement).

20 **IV. CONCLUSION**

21 For the foregoing reasons, Google respectfully requests that the Court dismiss the
 22 Amended Complaint in its entirety, with prejudice.

23
 24 Dated: May 2, 2006

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25
 26 By: /s/ David H. Kramer
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27
 28 Attorneys for Defendant
 Google Inc.