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 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

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

13 Plaintiffs,

14 v.

15 GOOGLE, INC., a Delaware corporation,

16 Defendant.

Case No. C 06-2057 JF

**PLAINTIFF'S NOTICE OF MOTION,
 MOTION FOR SPECIFIED DISCOVERY
 ON DEFAMATION AND LIBEL, AND
 POINTS AND AUTHORITIES**

Judge: Hon. Jeremy Fogel
 Date: August 4, 2006, or sooner as
 may be ordered by the Court
 Time: 9:00 a.m.
 Courtroom: 5th Floor, Room 3

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 19 **NOTICE OF MOTION**

20 On the above captioned date and time, or on any earlier time as ordered, Plaintiff
 21 KinderStart.com LLC ("KSC") hereby moves the Court under Civil Local Rule ("L.R.") 7-2 to
 22 order specified discovery by KSC. The motion was calendared following consultation with
 23 Defendant Google's counsel. *Declaration of Gregory J. Yu*, attached hereto as Exhibit 1 ("*Yu*
 24 *Dec.*"), ¶ 5. This motion is supported by the following argument and all accompanying and/or
 25 referenced documents, declarations, exhibits as submitted, the pleadings and other documents on
 26 file herein, and upon such other material as may be submitted to the Court at the hearing on the
 27 motion. Further, it is concurrently filed with (1) Plaintiff's L.R. 6-3 Motion to shorten time, and
 28 (2) Plaintiff's L.R. 7-7 Motion to continue defendant's pending anti-SLAPP motion.

PLAINTIFF'S MOTION FOR SPECIFIED
 DISCOVERY ON DEFAMATION AND LIBEL

Case No. C 06-2057 JF

1 **I. INTRODUCTION**

2 When a powerful company first crafts then abuses a ubiquitous, yet secretive, measuring
3 stick, anti-SLAPP protection without discovery is patently unfair. This bodes poorly on a
4 plaintiff as KSC, which seeks relief from defamation and libel by Google, as alleged in Count
5 Eight of the First Amended Class Action Complaint (“FACAC”). More importantly, within the
6 Ninth Circuit premature relief as this directly contradicts Federal Rule of Civil Procedure 56. In
7 this regard, plaintiff does not seek an undue advantage in early discovery prior to the Rule 26(f)
8 case management conference. But if Google wants KSC under law to make its *prima facie* case
9 now rather than later on PageRank™ defamation, it must carry the burden with the benefit of
10 this requested relief. Should the Court be inclined to require Plaintiffs to demonstrate the
11 likelihood of success on Count Eight, KSC’s discovery on PageRank is now the only option.

12 **II. RELEVANT AND PROCEDURAL FACTS**

13 Defendant Google, the dominant worldwide search engine, has made PageRank™ the *de*
14 *facto* standard of Website ranking. As the lead Plaintiff, KSC challenges indiscriminate and
15 defamatory PageRank deflation at the behest of Google. A multitude of Websites, including
16 www.kinderstart.com (“KS.com”), have been sacked with ‘0’ PageRanks.

17 KSC has already lodged its opposition to Defendant’s pending anti-SLAPP motion on
18 two independent determinative grounds – (1) PageRank is indeed commercial speech that falls
19 under the exception of California Civil Code of Procedure (CCP) § 425.17, and (2) as a matter of
20 law, PageRank entails no public issue or public interest matter. In the event that the Court does
21 not reach either of these conclusions and is inclined to grant Defendant’s motion, discovery must
22 first be considered and, in Plaintiffs’ view, allowed.

23 To date, Plaintiffs have had absolutely nothing in discovery from Google on the merits of
24 its defamation count. To Plaintiffs, a PageRank of ‘0’ is an assertion of fact, and provably false,
25 based on the PageRank patent, algorithm, and fundamental mathematics. However,
26 comprehensive and essential evidence and bases to yield PageRank and a PageRank of ‘0’ for
27 any given Website lies within the exclusive control of Google. At a formal level, no discovery
28 may precede the case management conference under Fed. R. Civ. Pro. 26(f). Informal attempts

1 to garner such information have been unavailing. Google has resisted due to restraints of time
2 and assertion of trade secrets. *Yu Dec.*, ¶¶ 2-4.

3 **III. ARGUMENT IN SUPPORT OF THIS MOTION**

4 **A. Anti-SLAPP has Qualified Application in Federal Court**

5 Under California Code of Civil Procedure (“CCP”) § 425.16(b)(1), an anti-SLAPP
6 motion fails if “the plaintiff has established that there is a probability that the plaintiff will
7 prevail on the claim.” As to all parties to an action, “[a]ll discovery proceedings in the action
8 shall be stayed upon the filing of a notice of motion made pursuant to this section.” *Id.*, §
9 425.16(g). “The court, on noticed motion and for good cause shown, may order that specified
10 discovery be conducted notwithstanding this subdivision.” *Id.* California courts apply this
11 exception to the discovery stay if the requirements are met under the statute. *See e.g., Tuchscher*
12 *Development Enterprises, Inc. v. San Diego Unified Port District*, 106 Cal. App. 4th 1219,
13 1247, 132 Cal. Rptr. 2d 57 (2003).

14 In federal court, however, anti-SLAPP is under a different regime. Within the Ninth
15 Circuit, discovery cannot be blocked by a trial court in a summary proceeding as an anti-SLAPP
16 procedure. In *Metabolife International, Inc. v. Wornick*, 264 F. 3d 832, 846 (9th Cir. 2001), the
17 court held: “Because the discovery-limiting aspects of § 425.16(f) and (g) *collide with the*
18 *discovery-allowing aspects of Rule [Fed. R. Civ. Pro.] 56*, these aspects of subsections (f) and
19 (g) *cannot apply in federal court.*” (emphasis added) (*quoting Rogers v. Home Shopping*
20 *Network, Inc.*, 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999)). Overall, the Ninth Circuit in
21 *Metabolife* followed the Supreme Court’s interpretation of Rule 56(f) that discovery is required
22 “where the moving party has not had the opportunity to discover information that is essential to
23 its opposition.” *Id.*, 264 F.3d at 846 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
24 n. 5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

25 Here, Google essentially is using anti-SLAPP on the defamation count to gain summary
26 judgment when no discovery is to be had by KSC on key elements, including PageRank
27 determination and its supposed accuracy or alleged inaccuracy. An anti-SLAPP proceeding
28 where plaintiff is expected to show probability of success on the merits properly requires

1 discovery by plaintiff. To meet the threshold of probability, plaintiff is to make its *prima facie*
 2 case with all evidence, affidavits and declarations offered in support be credited to plaintiff.
 3 *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 830, 33 Cal. Rptr. 446 (Cal. Ct. App. 1994).

4 **B. Discovery Should be Allowed When Google is the Total Master of PageRank.**

5 A CCP § 425.16 motion should not proceed in certain cases where all the facts lie within
 6 the purview and control of a defendant seeking to strike the cause of action. One Federal court
 7 in this Circuit held:

8 if a defendant desires to make a special motion to strike based on the plaintiff's lack of
 9 evidence, the defendant may not do so until discovery has been developed sufficiently to
 10 permit summary judgment under Rule 56. Once the nonmoving party has been given the
 11 opportunity to conduct discovery, the special motion can be heard and attorney's fees will
 be available as provided in § 425.16(c).

12 *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999) (*citing*
 13 *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F.3d 1208, 1217-18 (9th
 14 Cir. 1999), *republish.* 190 F.3d 963 (1999), *cert. denied.*, 530 U.S. 1203, 120 S. Ct. 2196, 147 L.
 15 Ed. 2d 232 (2000). Certainly, under *Global Telemedia International, Inc. v. Does 1-35*, 132 F.
 16 Supp. 2d 1261, 1271 (C.D. Cal. 2001), discovery is not meaningful where the evidence sought is
 17 irrelevant to the issue of fact or opinion of the speech in question. One key example for the need
 18 for plaintiff's discovery prior to adjudication of an anti-SLAPP motion is where essential
 19 knowledge held by the defendant or available witnesses to support plaintiff's case in chief are
 20 not yet obtained. *Lafayette Morehouse, Inc. v. Chronicle Publishing Company*, 37 Cal. App. 4th
 21 855, 868, 44 Cal. Rptr. 2d 46 (1995).

22 PageRank, originating from one of Google's founders, is the result of a computer
 23 algorithm known only to Google. The exact means and method of computing PageRank for
 24 KS.com and all the Websites of other Class members are formulated and performed exclusively
 25 by Google on its own computers with its staff of engineers. *Declaration of Randall McCarley*,
 26 attached hereto as Exhibit 2, ¶ 6. For these reasons, the test of whether PageRank is chosen by a
 27 human decision-maker on a case-by-case basis or generated by an algorithm within a computer
 28 is only ascertained by reasonable discovery of Google's technical processes and data for

1 calculating a PageRank for KSC and this Court to consider. Such discovery goes to the heart of
2 the factual dispute behind the defamation claim that PageRank is not a mere opinion but a
3 provably false statement of numerical value. Procedurally, if Google believes there is no merit
4 to the defamation count, the court ought to allow discovery on the disputed factual issue prior to
5 deciding on the likelihood of success. Further, it makes entirely equitable sense. When a
6 defendant as Google would use an extraordinary weapon as anti-SLAPP to continue defaming a
7 competitor with a '0' PageRank as in the case of KSC, it would be patently unfair to block the
8 truth behind a calculation of '0' PageRank which lies in the hands of no other actor but Google.

9 Moreover, striking the defamation count guarantees unbridled freedom to Google to
10 continue PageRanking any site with a '0'. This amounts to defamation and libel if a '0'
11 PageRank is mathematically impossible under available commentary on PageRank. Google's
12 Website on "Google Information for Webmasters" states: "Sites may be blocked from our index
13 because they do not meet the quality standards necessary to assign *accurate* PageRank."

14 <http://www.google.com/support/webmasters/bin/answer.py?answer=40052> (emphasis added).

15 Clearly Google is intent as ever to produce "accurate" PageRanks. Plaintiffs are committed to
16 prevail on the defamation and libel count, but all facts, bases and processes to generate a
17 PageRank lie completely under the dominion of Google. Therefore, Plaintiffs propose certain
18 subject matter on Exhibit 4 attached hereto, which is a Specified Discovery Plan.

19 Furthermore, an additional element to establish defamation affecting certain public
20 figures or public issues is the presence of malice by defendant. In *Sharper Image Corp. v.*
21 *Consumers Union*, 2004 U.S. Dist. LEXIS 23204 (N.D> Cal. Nov. 9, 2004), further discovery
22 was requested by plaintiff to ascertain the presence of malice for its defamatory claim against by
23 the consumer rating agency. This information about Google's intent, motivation, and internal
24 and external communications behind PageRank devaluation is almost all within the control of
25 Google. KSC has never received any notice or explanation as to the cause for the Blockage and
26 '0' PageRank against KS.com. *Declaration Of Victor B. Goodman in Support of Plaintiff's*
27 *Motion For Preliminary Injunction Against Further Free Speech Violations*, on file herein as
28 Exhibit 2 thereto, Docket no. 16, and attached hereto as Exhibit 3, ¶ 5,. Accordingly, plaintiffs

1 submit the proposed Specified Discovery Plan.

2 A serious problem persists because Google wants its universe of PageRank protected for
3 contradictory reasons. On one hand, it desires that all of cyberspace trusts PageRank as
4 objective and accurate. On the other hand, it wants PageRank completely safe from inquiry or
5 verification, even when it drops a '0' PageRank on any Website Google so chooses. All the
6 means to verify the accuracy of PageRank lie in the hands of Google.

7 **C. Plaintiffs Are Entitled to Specified Discovery on PageRank.**

8 Although CCP § 415.16(g) is not binding upon this Court based on the *Erie* doctrine and
9 the Ninth Circuit's holding in *Metabolife*, the statute is instructive in one respect. The trial court
10 may allow "specified discovery" on the relevant subject matter. At this time, KSC is not entitled
11 to, nor is it seeking, a wide-ranging sweep of any and all information concerning Defendant and
12 its business practices. In *Metabolife*, the defendant news media firm allegedly defamed an
13 herbal supplement company about the medical dangers of the supplement that one could die
14 from ingesting it. Also, the firm stated that "every expert" consulted by them stated that the
15 product was not safe. There, the plaintiff was the manufacturer of its own product and could
16 consult with any number of experts on the safety of the supplement. However, when the media
17 asserted anti-SLAPP protection, the trial court denied plaintiff the opportunity to ask defendant
18 for its list of all experts consulted. The Ninth Circuit reversed that ruling plaintiff could not test
19 the veracity of the media firm's statement because this list was not furnished by defendant to
20 plaintiff. Therefore, KSC is entitled to discovery as to all the variables, input and calculations
21 used or made by Google to generate a PageRank of '0' for KS.com. This information rests
22 within Google alone. KSC should look at this material, under a suitable protective order.

23 **IV. CONCLUSION.**

24 Before the Court considers Google's desire to strike the defamation and libel count,
25 discovery of the methodology and motives behind PageRank becomes absolutely necessary for
26 Plaintiffs. Defendant's § 425.16 motion preemptively and willfully tendered the issue of
27 whether the PageRank algorithm and PageRank is a statement of fact that is provably false.
28 Limited discovery here as set forth in the Specified Discovery Plan would afford Plaintiffs a

1 meaningful and equitable opportunity to carry its burden of proof of the likelihood that a ‘0’
2 PageRank is both provably false and defamatory and, if necessary, that there was malice behind
3 the provably false statements of PageRank. Without such discovery of facts, documents and
4 witness within Google’s control, a hearing and ruling on the extraordinary anti-SLAPP relief
5 sought at this time would violate Federal Rule of Civil Procedure 56.

6 Based on the foregoing argument of Plaintiffs and the entire file herein, Plaintiff urges
7 that this Motion to be granted, and that the Specified Discovery Plan attached as Exhibit 4 be
8 approved by the parties and ordered by the Court. Plaintiffs further request that the Magistrate
9 Judge assist in developing and securing suitable execution and enforcement of such plan on a
10 timely basis.

11 Dated: June 16, 2006

GLOBAL LAW GROUP

12 By: _____/s/ Gregory J. Yu
13 Gregory J. Yu, Esq.
14 Attorney for Plaintiff KinderStart.com LLC and
for the proposed Class and Subclasses

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