

E-Filed 6/26/06

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NOT FOR CITATION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

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

Plaintiffs,

v.

GOOGLE, INC., a Delaware corporation,

Defendant.

Case Number C 06-2057 JF (RS)

ORDER¹ DENYING PLAINTIFF'S REQUEST UNDER LOCAL RULE 7-7 TO CONTINUE HEARING ON DEFENDANT'S SPECIAL MOTION TO STRIKE

[re: docket no. 31]

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Plaintiff has filed an administrative request to continue the hearing on Defendant's special motion to strike pursuant to California Civil Procedure Code § 425.16 ("anti-SLAPP motion") to allow for discovery relating to Plaintiff's defamation and libel claim. For the reasons discussed below, Plaintiff's request will be denied.

I. BACKGROUND

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Defendant's filed its anti-SLAPP motion on May 2, 2006, asking this Court to strike three claims from Plaintiff's First Amended Complaint ("FAC"): (1) Claim One, Violation of Right to

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

1 Free Speech Under the United States Constitution and California Constitution, (2) Claim Eight,
2 Defamation and Libel, and (3) Claim Nine, Negligent Interference with Prospective Business
3 Advantage. The anti-SLAPP motion is scheduled to be heard June 30, 2006.

4 On June 16, 2006, Plaintiff filed a request under Civil Local Rule 7-7 requesting that the
5 hearing on Defendant's § 425.16 motion be continued to allow for discovery regarding
6 Defendant's PageRank—which Plaintiff contends is necessary to show a probability of success
7 on its defamation and libel claim. Plaintiff simultaneously filed a motion for specified discovery
8 and a request under Civil Local Rule 6-3 for an accelerated hearing on the discovery motion.

9 II. DISCUSSION

10 “A court considering a motion to strike under the anti-SLAPP statute must engage in a
11 two-part inquiry. First, a defendant ‘must make an initial prima facie showing that the plaintiff’s
12 suit arises from an act in furtherance of the defendant’s rights of petition and free speech.’ . . .
13 Second, once the defendant has made a prima facie showing, ‘the burden shifts to the plaintiff to
14 demonstrate a probability of prevailing on the challenged claims.’” *Vess v. Ciba-Geigy Corp.*
15 *USA*, 317 F.3d 1097, 1110 (9th Cir. 2003) (quoting *Globetrotter Software, Inc. v. Elan Computer*
16 *Group, Inc.*, 63 F. Supp. 2d 1127, 1129 (N. D. Cal. 1999)). “[A] defendant's anti-SLAPP motion
17 should be granted *when a plaintiff presents an insufficient legal basis for the claims* or ‘when no
18 evidence of sufficient substantiality exists to support a judgment for the plaintiff.’” *Metabolife*
19 *Int’l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (emphasis added, citations omitted).

20 Plaintiff contends that discovery is necessary to show a probability of success on its
21 defamation and libel claim. On that basis it argues that discovery should be addressed before
22 disposition of the anti-SLAPP motion. Plaintiff relies on *Metabolife*, in which the Ninth Circuit
23 stated that “[i]f this expedited procedure were used in federal court to test the plaintiff’s evidence
24 before the plaintiff has completed discovery, it would collide with Federal Rule of Civil
25 Procedure 56.” *Metabolife*, 264 F.3d at 846 (9th Cir. 2001).

26 There is no indication that Defendant’s anti-SLAPP motion is being used to test
27 Plaintiff’s evidence. Defendant contends that all three claims challenged under the anti-SLAPP
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1 motion fail as a matter of law, such that no amount of discovery would allow the Plaintiff to
2 demonstrate a probability of success on the merits. Special Motion to Strike, pp. 7-9. Defendant
3 relies on uncontested facts and Plaintiff's own allegations in arguing that it has made its initial
4 prima facie showing. Special Motion to Strike, pp. 3-5. For its part, Plaintiff argues that the
5 motion fails as a matter of law, arguing that Defendant's PageRank falls under an exception for
6 commercial speech set forth in California Civil Procedure Code § 425.17 and does not qualify as
7 free speech in connection with a public issue. Plaintiff's Opposition, pp. 3-9. The need for
8 discovery thus is dependent upon Defendant's and Plaintiff's potentially dispositive legal
9 arguments. *See* Plaintiff's Opposition, pp. 14.

10 As it is not clear that disposition of Defendant's anti-SLAPP motion will require
11 consideration of factual matters to which discovery would be relevant, Plaintiff has not shown
12 that hearing the motion before discovery will be prejudicial to Plaintiff. Should it become clear
13 during or after the hearing that the motion cannot be decided as a matter of law, then at that point
14 the Court will allow for any discovery necessary to avoid prejudice to either party.

15 **III. ORDER**

16 Good cause therefore appearing, IT IS HEREBY ORDERED that Plaintiff's motion to
17 continue the hearing on Defendant's anti-SLAPP motion is DENIED. The Court will defer
18 consideration of Plaintiff's motion under Civil Local Rule 6-3 and its motion for specified
19 discovery until after the June 30, 2006 hearing.

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21 DATED: June 26, 2006
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25 JEREMY FOGEL
26 United States District Judge
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