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 12 Google Inc.

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

17 KINDERSTART.COM, LLC, a California)
 18 limited liability company, on behalf of itself)
 and 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
 FOR SANCTIONS AGAINST
 KINDERSTART.COM AND GREGORY
 J. YU PURSUANT TO FED. R. CIV. P.
 RULE 11**

Before: Hon. Jeremy Fogel
 Date: December 8, 2006
 Time: 9:00am
 Courtroom: 3, 5th Floor

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1 **NOTICE OF MOTION & MOTION FOR SANCTIONS**

2 PLEASE TAKE NOTICE that on December 8, 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 seek an order imposing sanctions against plaintiff
6 KinderStart LLC (“KinderStart”) and its litigation counsel Gregory J. Yu for violation of Fed. R.
7 Civ. P. 11 (“Rule 11”).

8 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
9 and Authorities filed herewith, the supporting declaration of Matthew Cutts and the exhibits filed
10 therewith, the pleadings and papers on file herein, and upon such other matters as may be
11 presented to the Court at the time of the hearing.

12 **POINTS AND AUTHORITIES**

13 **I. INTRODUCTION AND FACTUAL BACKGROUND**

14 By this motion, Google requests that the Court enter an order pursuant to Rule 11 of the
15 Federal Rules of Civil Procedure sanctioning plaintiff KinderStart and its counsel, Gregory J.
16 Yu, for filing a Second Amended Complaint (“SAC”) that contains specious allegations that lack
17 any factual foundation and were made without a reasonable and competent inquiry.

18 KinderStart and its counsel have been warned about such conduct. At the hearing on
19 Google’s motion to dismiss KinderStart’s First Amended Complaint (“FAC”), the Court advised
20 KinderStart’s counsel that factual allegations must be supported by investigation: “the way
21 litigation works is you can’t just file a blanket lawsuit saying we think we’re going to find some
22 stuff and we want to take discovery. You have to have a good faith basis for asserting the claim
23 and you have to articulate what that claim is” June 30, 2006 Hearing Tr. at 12:3-8. Despite
24 that express admonishment, following dismissal of the FAC with leave to amend, KinderStart
25 submitted an SAC that, to the extent that it can be understood, contains at least three types of
26 frivolous allegations:

- 27 ▪ Allegations that Google “skews” its search results and “reserves the number one top
28 result” for entities who provide Google with payment or other forms of consideration.
 See SAC ¶¶ 130, 131, and 135; Declaration of Matthew Cutts (“Cutts Decl.”), ¶ 2.

- 1 ▪ Allegations – based on a supposed representation by Google that KinderStart distorts by
2 selectively excising relevant language – that Google represents that it will always display
3 a notice when it removes a listing from its search results, but does not do so. SAC ¶¶
4 60(c), 89, 136, 147, 238, 243, and 266(f); Cutts Decl., ¶¶ 3-4.
5 ▪ Allegations that Google removes certain websites from its search engine results and
6 lowers PageRanks for political and religious reasons. SAC ¶¶ 99, 166, 167 and 257;
7 Cutts Decl., ¶ 5.

6 These allegations are simply false and could not have been the product of a reasonable
7 and competent inquiry. Inclusion of these allegations in the SAC violates Rule 11 and merits the
8 imposition of monetary and non-monetary sanctions on KinderStart and its counsel. While
9 Google understands that a request for Rule 11 sanctions is not to be undertaken lightly, sanctions
10 are appropriate here, where KinderStart and its counsel act as if they are unconstrained by the
11 rules of civil practice.

12 II. **ARGUMENT**

13 A. **The SAC Includes Frivolous Factual Allegations That Violate Rule 11**

14 Rule 11 of the Federal Rules of Civil Procedure states in pertinent part that:

15 By presenting to the court . . . a pleading, . . . an attorney . . . is certifying that to
16 the best of the person’s knowledge, information, and belief, formed after an
17 inquiry reasonable under the circumstances, . . . (3) the allegations and other
18 factual contentions have evidentiary support, or, if specifically so identified, are
19 likely to have evidentiary support after a reasonable opportunity for further
20 investigation or discovery

19 Fed. R. Civ. P. 11(b)(3). The Supreme Court has held that at the “heart of Rule 11” is the
20 message conveyed by the signer’s certification that he “has conducted a reasonable inquiry into
21 the facts and the law and is satisfied that the document is well grounded in both” *See*
22 *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 554
23 (1991).¹

24 “Filing a complaint in federal court is no trifling undertaking. An attorney’s signature on
25 a complaint is tantamount to a warranty that the complaint is well grounded in fact and ‘existing

26
27 ¹ *Business Guides* was decided prior to the 1993 amendments to Rule 11, but those
28 amendments do not alter the requirements that litigants conduct a reasonable inquiry into the
29 factual basis of a claim and “stop and think” before initially making legal or factual contentions.
30 *See* 1993 Advisory Committee Notes to Fed. R. Civ. P. 11.

1 law'" *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). "Where . . . the
2 complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong
3 inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective
4 perspective, and (2) if the attorney has conducted 'a reasonable and competent inquiry' before
5 signing and filing it." *Id.*; see also *Montrose Chemical Corp. of Calif. v. American Motorists Ins.*
6 *Co.*, 117 F.3d 1128, 1133 (9th Cir. 1997). Subjective bad faith is not required under Rule 11; the
7 inquiry is objective. See *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th
8 Cir. 2003).

9 The allegations from the SAC described above are baseless and could not have been the
10 product of a reasonable and competent inquiry because they are plainly false. Moreover, with
11 respect to KinderStart's attribution to Google of a distorted quotation, KinderStart's counsel is
12 directly attempting to deceive the Court. By filing a complaint containing false and misleading
13 allegations, KinderStart has violated Rule 11. See *Truesdell v. S. Cal. Permanente Medical*
14 *Group*, 293 F.3d 1146, 1153-54 (9th Cir. 2002) (upholding sanctions against counsel under Rule
15 11 where complaint stated allegations that counsel "must have known were false").

16 **1. Allegations of Payment in Return for Search Result Positioning**

17 Paragraphs 130, 131, and 135 of the SAC allege that Google skews its web search results
18 and "reserve[s] the number one top placement" for website owners, advertisers and other entities
19 who provide Google with various forms of "consideration." See SAC ¶ 131. These allegations
20 are false, and therefore cannot have been based on *any* evidence uncovered by counsel for
21 KinderStart, since no such evidence exists. Indeed, the intentional vagueness of these allegations
22 betrays their fictional nature. Notably, KinderStart does not reveal: (1) the entities to whom
23 Google allegedly offered "top positions in search results" (SAC ¶ 130(b)); (2) the specific
24 "conditions and consideration" that Google allegedly accepted in return for "top positions" (*id.*);
25 (3) the keywords that were allegedly associated with this practice (SAC ¶ 131); or (4) the source
26 of these allegations, if any.

27 Simply put, Google does not accept, and has not accepted, payment or consideration of
28 any kind in exchange for position or inclusion in its web search results. See Cutts Decl., ¶ 2.

1 KinderStart and its counsel have falsely alleged otherwise, without any evidentiary support.
2 Accordingly, the imposition of sanctions under Rule 11 is appropriate. *See, e.g., Pickern v. Pier*
3 *1 Imports (U.S.), Inc.*, 339 F. Supp. 2d 1081, 1091 (E.D. Cal. 2004) (finding a violation of Rule
4 11 where “plaintiff’s counsel signed a complaint containing allegations without factual
5 support.”).

6 **2. Allegations Concerning Notice of Removal of a Listing from Search**
7 **Results** Case 5:06-cv-02057-JF Document 60 Filed 10/20/2006 Page 5 of 8

8 Paragraphs 60(c), 89, 136, 147, 238, 243, and 266(f) of the SAC include allegations in
9 various forms that Google has stated that it will display a notice when it removes a website from
10 its search results for any reason. Paragraphs 60(c), 89, and 147 attribute the following quote to
11 Google: “When we remove search results, . . . we display a notice on our search results.” The
12 actual policy, as currently posted on Google.com, reads in full as follows:

13 It is Google’s policy not to censor search results. However, in response to local
14 laws, regulations, or policies, we may do so. When we remove search results *for*
15 *these reasons*, we display a notice on our search results pages. Please note: For
some older removals (before March 2005), we may not show a notice at this time.

16 Cutts Decl. ¶ 3 (emphasis added). When reproduced in part, Google’s policy appears to
17 represent that it *always* displays a notice on its search results pages when it removes an entry.
18 KinderStart relies on that apparent (but distorted) representation to support its Sherman Act,
19 Lanham Act and false advertising claims against Google. *See* SAC ¶¶ 232, 238, 243-45, 266(f).
20 Yet the policy in fact states that Google displays a notice that it has removed search results only
21 under certain circumstances (in response to local laws, regulations, or policies). The use of
22 ellipses by KinderStart’s counsel to omit information, and to present facts in a manner that
23 contradicts the true record, merits sanctions under Rule 11. *See Moser v. Bret Harte Union High*
24 *School District*, 366 F. Supp. 2d 944, 957-69 (E.D. Cal. 2005) (imposing sanctions for, among
25 other things, party’s misrepresentations regarding the factual record). KinderStart’s repetition of
26 the distorted quotation in the SAC and its reliance on this distortion to support its claims for
27 relief lead to the conclusion that KinderStart’s omission of the critical language was purposeful
28 and not merely an oversight.

1 In addition, to support an alleged “violation” of a removal representation that Google
2 never made in the first instance, KinderStart alleges “[o]n information and belief, not once has
3 the Engine ever produced Search Results viewed within the [United States] that disclose or
4 notify users that Speech Content, URLs or Websites have been removed from the results.”² SAC
5 ¶ 89. That too is false. One easily-discovered example of a situation in which Google posts such
6 a notice is the removal of search results following a complaint under the Digital Millennium
7 Copyright Act. Cutts Decl. ¶ 4. Today, a Google user who performs a search for the term
8 “xenu” will be presented with a notice at the bottom of the first page of search results that reads:
9 “In response to a complaint that we received under the US Digital Millennium Copyright Act, we
10 have removed 1 result(s) from this page. If you wish, you may read the DMCA complaint that
11 caused the removal(s) at Chilling Effects.org.” *Id.* The website ChillingEffects.org provides a
12 list of DMCA complaints sent to Google. *Id.* Again, because KinderStart and its counsel have
13 made factual representations in a complaint for which there is no evidentiary support, the
14 imposition of sanctions under Rule 11 is justified. *See Truesdell v. So. Calif. Permanente*
15 *Medical Group*, 209 F.R.D. 169, 176-77 (C.D. Cal. 2002) (imposing sanctions).

16 **3. Allegations that Google Blocks Results and Deflates PageRanks for**
17 **Political and Religious Reasons**

18 Throughout the SAC, Kinderstart claims that Google removes search entries and deflates
19 PageRanks for political and religious. *See, e.g.*, SAC ¶¶ 99, 166, 167 and 257. Again, these
20 allegations are reckless and false. Cutts Decl. ¶¶ 5. Google has never done anything of the sort.
21 *Id.* As before, the baseless nature of these allegations is revealed by the absence of any details to
22 support them. And again, sanctions are merited based on the total lack of evidentiary support for
23 the allegations.³

24 _____
25 ² KinderStart’s pleading on “information and belief” does not immunize it from Rule 11
26 sanctions. *See Truesdell*, 293 F.3d at 1153 (imposing sanctions where “complaint stated
allegations ‘upon information and belief’ that Plaintiff’s counsel must have known were false.”).

27 ³ By identifying several categories of allegations from the SAC as false, Google does not
28 mean to credit KinderStart’s other dubious allegations. To the contrary, much of the SAC
appears to be a work of fiction. Google has simply set out the most glaring of KinderStart’s
inflammatory and unsupportable charges.

1 **B. KinderStart's and Mr. Yu's Rule 11 Violations Justify Both Monetary and**
2 **Non-Monetary Sanctions**

3 Because KinderStart and its counsel, Mr. Yu, have violated Rule 11, the Court may enter
4 both monetary and non-monetary sanctions. *See* Fed. R. Civ. P. 11(c)(2); *Truesdell*, 209 F.R.D.
5 at 175; *Integrated Circuit Systems, Inc. v. Realtek Semiconductor Co., Ltd.*, No. C00-4035
6 MMC, 2002 WL 532122, at *3 (N.D. Cal. Apr. 5, 2002). The Court may impose sufficient
7 sanctions in order to deter repetition of such conduct or comparable conduct by others similarly
8 situated." Fed. R. Civ. P. 11(c)(2). Here, deterrence is particularly appropriate and important
9 because the Court's express caution at the June 30, 2006 hearing was not enough to compel
10 KinderStart and its counsel to comply with Rule 11. June 30, 2006 Hearing Tr. at 12:3-8.

11 Rule 11 provides for the imposition of non-monetary sanctions -- such as striking
12 frivolous allegations -- and allows a court to make "an order directing payment to the movant of
13 some or all reasonable attorneys' fees and other expenses incurred as a direct result of the
14 violation." Fed. R. Civ. P. 11(c)(2). Striking alleged facts and references in a complaint which
15 are contrary to known facts is a permissible non-monetary sanction, including where a monetary
16 sanction is also assessed against plaintiff's counsel. *See Ivanova v. Columbia Pictures*
17 *Industries, Inc.*, 217 F.R.D. 501, 512-514 (C.D. Cal. 2003) (imposing such sanctions on plaintiff
18 and plaintiff's counsel).

19 In light of the conduct at issue, Google requests that the Court:

- 20 1. Strike the frivolous allegations from the SAC; and
21 2. Order KinderStart and Mr. Yu to reimburse Google for all of its reasonable
22 attorneys' fees attributable to the instant motion for sanctions, and a portion of the fees
23 attributable to Google's motions to dismiss and strike the SAC.

24 **II. CONCLUSION**

25 For the reasons set forth herein, Google respectfully asks the Court to strike the
26 allegations of the following paragraphs from the SAC: 60(c), 89, 99, 130, 131, 135, 136, 147,
27 166, 167, 238, 243, 257 and 266(f). Google also respectfully asks this Court to direct
28 KinderStart and Mr. Yu to reimburse it for reasonable attorneys' fees attributable to the instant

1 motion for sanctions, and a portion of the fees attributable to Google's motions to dismiss and
2 strike the SAC.

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Dated: September 28, 2006

WILSON SONSINI GOODRICH & ROSATI
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By: /s/ David H. Kramer

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