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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 OPPOSITION TO
 DEFENDANT'S ADMINISTRATIVE
 MOTION TO RELATE CASE WITH
 PERSON V. GOOGLE INC., C 06-7297
 JCS**

Before: Hon. Jeremy Fogel

18 Plaintiff KinderStart.com LLC ("KinderStart") files this opposition to Defendant Google
 19 Inc. ("Google")'s administrative motion under Civil Local Rule ("L.R.") 3-12 (the "3-12
 20 Motion") to relate *Person v. Google, Inc.*, C 06-7297 JCS (the "*Person* Action") to the instant
 21 case. KinderStart's Second Amended Class Action Complaint ("SAC") alleges, *inter alia*, that
 22 Google violated the Sherman Act, 15 U.S.C. § 2 for monopolization and attempted
 23 monopolization of the market for advertising linked with search engine results. The *Person*
 24 Action alleges that Google violated both Sections 1 and 2 of the Sherman Act.

25 Google's motion to dismiss KinderStart's SAC under Federal Rule of Civil Procedure
 26 ("Fed.R.Civ.P.") 12(b)(6) (the "12(b)(6) Motion") is now under submission. On November 27,
 27 2006, the *Person* Action was transferred into this district following the venue transfer order of
 28 October 11, 2006 from the Hon. Robert P. Patterson, Jr. of the Southern District of New York.

1 **LEGAL STANDARD FOR RELATING CASES IN THE NORTHERN DISTRICT**

2 Under L.R. 3-12(a), two cases are related when (1) the actions concern “substantially the
3 same parties, property, transaction or event” and (2) there is a likelihood of “unduly burdensome
4 duplication of labor and expense or conflicting results” if the cases are before different judges.
5 This standard contemplates judicial efficiency and consistency, and not whether prejudice would
6 lie against one of more of the litigants. A party that learns of a potentially related case must file
7 an administrative motion with the court and serve the parties to the original case. L.R. 7-11, 3-
8 12(b).

9 **DISCUSSION**

10 **A. The Two Actions Do Not “Substantially the Same Transaction or Event”.**

11 Google expresses a preference for relating the *Person* Action to this case. However, the
12 KinderStart class alleges *seven* different species of anticompetitive conduct to destroy
13 competition in the relevant market. SAC ¶¶ 58-64. Just one of those relates to monopoly pricing
14 using Google’s so-called Landing Page Quality measurement. SAC ¶ 64. Therefore, a
15 substantial commonality on the facts is rather limited. Aside from the question of whether
16 plaintiff in the *Person* Action would be a putative class member, the harm exacted upon this
17 plaintiff is to be evaluated under his status as a competitor, distributor, purchaser or consumer of
18 such online advertising and information.¹

19 There is one potential factual issue could be shared between KinderStart’s allegations of
20 Blockage and Page Rank Deflation (as defined in the SAC) and plaintiff’s allegations in the
21 *Person* Action. When KinderStart’s website was blocked and received a PageRank of ‘0’ over
22 two ongoing periods, this could have adversely affected its Landing Page Quality. Indeed, these
23 acts could impinge the condition of any AdWords participant depending on Google’s motives.
24 If Google chose to harm competition and the consumer (which includes both KinderStart and
25

26 ¹ KinderStart may ultimately have a co-class representative who was victimized by the Landing
27 Page Quality pricing spike launched against certain AdWords clients by Google, as alleged in
28 SAC ¶ 64. On the October 26, 2006 (the day before the hearing on the 12(b)(6) Motion),
Plaintiffs filed a Declaration of Daniel D. Savage in Support of Plaintiffs’ Opposition to the
12(b)(6) Motion, regarding the TradeComet LLC’s identity and the possibility of its joining the
class action as a co-representative of KinderStart. *Court Document 66-1 and 66* on file herein.
PLAINTIFFS’ OPPOSITION TO GOOGLE’S
MOTION UNDER L.R. 7-11 ON RELATING CASES -2-

1 Person), willful tactics to force or skew Landing Page Quality downward further demonstrates
2 composite anticompetitive conduct by Google. Whether this is substantially the same
3 transaction or effect is perhaps unclear cannot be evaluated at this time without substantive
4 declarations and/or formal discovery.

5 **B. There is Little Likelihood of Duplication of Labor or Conflicting Results.**

6 The effort and expense of litigating an action under the Sherman Act is admittedly
7 substantial and extensive. The facts alleged in the SAC behind the first and second counts are
8 layered and complex. If KinderStart's Sherman Act claim goes beyond the 12(b)(6) Motion,
9 extensive expert testimony from economists and technologists is required. As Google correctly
10 confirms, the instant case and the *Person* Action involve allegations of monopolization in "a
11 defined market for search-related advertising online." *3-12 Motion* at 1. However, in opposition
12 to the 12(b)(6) Motion, KinderStart argued the composite effect of Google's anticompetitive
13 conduct toward the class of plaintiffs and competition as a whole. The Sherman Section 2 claim
14 requires expert testimony on the ultimate harm to consumers -- not merely from escalated
15 AdWords pricing but also from the execution of manifold practices perfected by Google against
16 competition and prospective market entrants.

17 Conflicting results are not necessarily going to arise. While Google may retain the
18 same experts for both the *Person* Action and the instant case, this is not necessarily the case for
19 the plaintiff in each case. At trial, the jury could and should hear expert testimony on key
20 questions of the relevant market, the harm to competition, and the purported benefits and/or
21 alleged harm to consumers from the conduct of Google as the alleged monopolist.

22 **C. There is an Absence of Consent or a Stipulation on Google's Motion.**

23 KinderStart never consented to or stipulated to this 3-12 Motion. Google filed a
24 Declaration stating that KinderStart's counsel consented to this motion. Google's counsel failed
25 to secure a written stipulation as required by L.R. 7-11(a) for filing with the Court. Furthermore,
26 Google's counsel incorrectly declares that KinderStart or its counsel actually consented to the
27 merits of this motion. *Declaration of Gregory J. Yu*, concurrently filed herewith, as Exhibit 1
28 hereto. While the absence of KinderStart's consent does not necessarily govern the outcome of

1 this motion, KinderStart objects to the use of Mr. Kramer's Declaration to avoid the purpose and
2 function of the Local Rule.

3 Dated: December 6, 2006

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By: /s/ Gregory J. Yu

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Gregory J. Yu, Esq.

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Attorney for Plaintiff KinderStart.com LLC and
for the proposed Class and Subclasses

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