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 18 Google Inc.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 SAN JOSE DIVISION

22 CARL E. PERSON,
 23 Plaintiff,
 24 v.
 25 GOOGLE INC.,
 26 Defendant.

) CASE NO.: C 06-7297 JF (RS)
)
) DEFENDANT GOOGLE INC.'S
) REPLY MEMORANDUM OF POINTS
) AND AUTHORITIES IN SUPPORT
) OF ITS MOTION TO DISMISS THE
) COMPLAINT
)
) Date: March 9, 2007
) Time: 9:00 a.m.
) Dept: 3
) Before: Hon. Jeremy Fogel
)

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1 In his Amended Complaint, plaintiff Carl Person asserts three types of claims. First, he
2 contends that Google violated Section 2 of the Sherman Act through pricing in its AdWords
3 advertising program that Person characterizes as too high and discriminatory. Second, he alleges
4 that Google violated Section 1 of the Sherman Act (and analogous provisions of New York's
5 Donnelly Act and California's Cartwright Act) by entering into agreements with advertisers
6 (such as eBay) that Person views as more favorable than what he receives. Third, he asserts that
7 Google violated sections 349 and 350 of New York's General Business Law ("GBL") through an
8 allegedly deceptive pricing methodology for AdWords.

9 As explained in Google's Motion to Dismiss, each of these claims is untenable as a
10 matter of law. With respect to his antitrust claims, Person's opposition virtually concedes that
11 his Amended Complaint fails to state a claim, and he instead focuses on a newly proposed
12 second amended complaint. But the Court has not granted Person leave to amend, and the
13 proposed new allegations are fatally deficient in any event. As for his GBL claims, Person fails
14 to allege the requisite consumer-oriented conduct or any deception by Google. Indeed, Person's
15 opposition brief, like his current pleading, simply underscores that Google accurately describes
16 the AdWords pricing process.

17 Person's request for leave to file a second amended complaint – a prolix, 99-page
18 document – should be denied. The proposed amendment fails to cure the deficiencies in
19 Person's existing antitrust and GBL claims, and improperly seeks to expand his pleading through
20 the addition of new claims under California law that are facially specious.

21 **I. PERSON'S ANTITRUST ALLEGATIONS FAIL TO STATE A CLAIM**

22 **A. Person's Monopolization Claims Under Sherman Act Section 2**

23 Person's Amended Complaint ("Compl.") asserts claims under Section 2 of the Sherman
24 Act only from the perspective of a customer – Person as a user of Google's AdWords service.
25 The essence of his claims is that Google's revised pricing for AdWords is too high (although still
26 much cheaper for him than advertising on Yahoo!, MSN, and other services) and that, because
27 larger advertisers are able to generate a higher quality score due to their much higher "click-
28 through rates," Person is being discriminated against in favor of eBay and other large advertisers.

1 In moving to dismiss, Google pointed out that nothing in Section 2 of the Sherman Act
2 prohibits anyone, even a monopolist, from charging high prices or discriminatory prices to
3 customers. The Supreme Court’s decision in *Verizon Communications, Inc. v. Law Offices of*
4 *Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004), makes clear as can be that the “charging of
5 monopoly prices[] is not only not unlawful [but] is an important part of the free-market system.”
6 And the courts, including the Ninth Circuit, have been equally clear that discriminatory pricing is
7 not a Sherman Act violation. *E.g., MetroNet Servs. v. Qwest Corp.*, 383 F.3d 1124, 1133-34 (9th
8 Cir. 2004); *Monahan’s Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528-29 (1st Cir. 1989)
9 (Breyer, J.); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 887 (9th Cir. 1982).

10 Person’s opposition has no answer for this central flaw in his claim. He cites no case
11 suggesting that the unilateral charging of high prices is a violation, or that price discrimination
12 qualifies as exclusionary conduct under Section 2. All that he argues is that one of the many
13 cases cited by Google – *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d
14 976 (9th Cir. 1988) – is distinguishable because it involved “open bidding.” Plaintiff’s
15 Opposition to Motion to Dismiss (“Opp.”) at 5. That is a curious distinction since Person’s
16 Amended Complaint shows that AdWords also employs open bidding. More curious still is that
17 that is all Person has to say about the authorities on which Google relies. Person does not even
18 mention, let alone discuss, the many other authorities Google cited which compel dismissal of
19 his claim. *See* Defendant’s Motion to Dismiss (“Motion”) at 5-11.

20 Neither does Person support his bald argument that Google’s pricing practices qualify as
21 exclusionary conduct under Section 2. As Google explained, Motion at 10, pricing practices are
22 not exclusionary absent proof that the pricing is *below cost*. *See, e.g., Brooke Group Ltd. v.*
23 *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993); *Atl. Richfield Co. v. USA*
24 *Petroleum Co.*, 495 U.S. 328, 340 (1990). Person cites no authority suggesting otherwise.
25 Indeed, the Supreme Court reconfirmed this basic principle just last week. *Weyerhaeuser Co. v.*
26 *Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1076-77 (2007).

1 **B. Person's Sherman Act Conspiracy Claims**

2 Person also asserts conspiracy claims under Sections 1 and 2 of the Sherman Act. Each
3 is based on allegations that Google has conspired with its larger advertisers to provide them with
4 lower prices that are not available to smaller advertisers. Compl. ¶¶ 35-40, 110-24. As stated in
5 Google's opening brief, these allegations fail to state a claim under Section 1 based on two
6 principles: (1) it is not unlawful for Google to agree with its customers on the price Google will
7 charge and the customer will pay, *see* ABA Section of Antitrust Law, *Antitrust Law*
8 *Developments* 130 n.738 (5th ed. 2002) ("An agreement between a buyer and a seller regarding
9 the price for the transaction between them is not illegal because the agreement deals with the sale
10 price, not the resale price"); and (2) the existence of vertical agreements between Google and
11 each of its customers does not amount to a Section 1 claim without an alleged *horizontal*
12 agreement between and among direct competitors. Motion at 11-12; *see also 49er Chevrolet,*
13 *Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986) (granting summary judgment
14 against price-fixing claim where there was "no agreement among competitors to set prices")
15 (citation omitted); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (stating that
16 a claim of horizontal conspiracy requires "an agreement between or among direct competitors");
17 *Spectators' Comm'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 224 (5th Cir. 2001)
18 (stating that "hub and spoke sort of proof does not establish a horizontal combination").
19 Person's conspiracy claim is deficient, therefore, because he does not and cannot allege any
20 conspiracy among Google's customers. All he alleges is a series of (entirely lawful) vertical
21 agreements between Google and each customer.

22 In his opposition, Person cites no case to the contrary and points to no allegation in his
23 Amended Complaint that suggests an agreement among competitors. Instead, Person recasts his
24 allegations in a futile attempt to cure the Amended Complaint's deficiencies. Person argues that,
25 by requiring a minimum bid from AdWords participants for certain keywords, Google excludes
26 Person and other small advertisers from the auction system, which thereby lowers the price that
27 larger advertisers who remain in the auction ultimately have to pay. Opp. at 13. According to
28 Person, the auction results themselves, therefore, constitute "an agreement among competitors to

1 set the price of keyword advertising” and the advertisers’ participation in the auction process
2 amounts to a “horizontal agreement among competitors to be bound by the terms of the auction.”

3 *Id.*

4 The suggestion that every advertiser that succeeds in placing an advertisement on
5 AdWords is a participant in a scheme to fix prices is frivolous. To claim an antitrust conspiracy,
6 Person must allege more than a passive agreement based on mere participation in Google’s
7 auction; he must allege facts that would support a finding of “a conscious commitment to a
8 common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv.*
9 *Corp.*, 465 U.S. 752, 768 (1984); *see also 49er Chevrolet*, 803 F.2d at 1467 (“Ordinary sales
10 contracts do not unlawfully restrain trade; indeed, trade would be impossible without them.”).
11 He has done nothing of the kind. Person does not come close to alleging a conscious
12 commitment among competitors to fix prices or achieve some other unlawful objective. For
13 these reasons and the reasons stated in Google’s opening brief, Person’s conspiracy claim under
14 Section 1 of the Sherman Act should be dismissed.

15 Person’s claim of conspiracy to monopolize under Section 2 of the Sherman Act also
16 fails. As explained in Google’s moving papers, a failure to plead conspiracy under Section 1 of
17 the Sherman Act necessarily dooms any conspiracy claim under Section 2 as well. Because
18 Person fails to state a claim for conspiracy to restrain trade under Section 1 of the Sherman Act,
19 his claims for conspiracy to monopolize under Section 2 necessarily fail as well. Motion at 12;
20 *see* 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 809 (2d ed. 2002). Person does
21 not even attempt to respond to this basic point.

22 **II. PERSON STATES NO CLAIM UNDER THE NEW YORK DONNELLEY ACT OR**
23 **CALIFORNIA CARTWRIGHT ACT**

24 As Google explained in its opening brief, Person’s antitrust claims fail under New York’s
25 Donnelly Act and California’s Cartwright Act for the same reasons that Person’s antitrust claims
26 fail under federal law. Motion at 12-13. In his opposition, Person simply states, with no
27 additional explanation, that his claims “are actionable under the Donnelly Act and California
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1 Cartwright Act.” Opp. at 14. This bare assertion is insufficient to salvage Plaintiffs’ claims
2 under the Donnelly and Cartwright Acts, and those claims should be dismissed.

3 **III. PERSON STATES NO SARBANES-OXLEY CLAIM**

4 Person’s single-paragraph opposition regarding his Sarbanes-Oxley allegations does
5 nothing to save them from dismissal. Opp. at 14. As explained above, Person states no claim for
6 relief, including injunctive relief, under the Sherman Act. Adding Sarbanes-Oxley allegations
7 does not rescue the Sherman Act claim, and Person does not explain why it would. Opp. at 14.
8 To the extent he seeks relief under the Sarbanes-Oxley Act itself, Person fails to identify which
9 sections of Sarbanes-Oxley were allegedly violated. He also fails to demonstrate that he has
10 standing to pursue relief under the provisions of the Act. Accordingly, the claim should be
11 dismissed.

12 **IV. PERSON STATES NO CLAIM UNDER GBL SECTIONS 349 AND 350**

13 **A. Person Fails to Allege Consumer Oriented Conduct**

14 As explained in Google’s motion, Person’s GBL claims fail because he does not allege
15 consumer oriented conduct. Motion at 15-16. Person’s initial response is that the statutes do not
16 require it. Opp. at 16. Yet cases interpreting the statutes – including the two cases cited by
17 Person – uniformly require *consumer*-oriented conduct. See Motion at 15-16; Opp. at 16-17.
18 Indeed, protection of consumers is the whole point of the statutory scheme entitled “Consumer
19 Protection from Deceptive Acts and Practices.”

20 Person also contends that AdWords affects consumers at large because “virtually
21 everything can and will be offered through this type of advertising” – in other words, that some
22 AdWords advertisers will, in turn, offer goods to consumers. Opp. at 17. This asserted
23 connection to consumer-oriented conduct is too attenuated. Indeed, the same was true in *Cruz v.*
24 *NYNEX Information Resources*, 703 N.Y.S.2d 103 (App. Div. 1st Dep’t 2000), which addressed
25 small business advertising in the Yellow Pages. Although consumers purchase services or
26 products through the Yellow Pages, the *Cruz* court concluded that small business advertisers
27 simply do not qualify as “consumers” protected by sections 349 and 350. Person does not
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1 address *Cruz* at all. Nor do the two cases on which Person relies address even remotely similar
2 conduct. In fact, both found consumer-oriented conduct absent and dismissed the claims.

3 Person also claims that “[s]mall business persons are consumers,” as they are “consumers
4 . . . trying to make ends meet through part-time small business activities.” *Opp.* at 17. This
5 turns the distinction between business persons and consumers on its head: small business
6 persons are in business to sell to consumers; they themselves are not the consumers or members
7 of the public at large. Again, *Cruz* disposes of this claim, as small business owners who
8 purchase advertising – whether via the Yellow Pages or Google – do not “purchase[] goods,
9 services or property primarily for ‘personal, family or household purposes.’” 703 N.Y.S.2d at
10 106. By itself, Person’s failure to allege consumer-oriented conduct warrants dismissal of his
11 claims.

12 **B. Person Fails to Allege a Misleading Act or Practice by Google**

13 Google’s motion also explained that Person’s GBL claims fail for a second and more
14 basic reason: his failure to allege any misleading act or practice. *Motion* at 16-18; *see also*
15 *Declaration of David Kramer, executed Jan. 25, 2007, Ex. F* at 67-68 (statement of Judge
16 Patterson at oral argument) (“As for the deceptive practices, it does seem to me in looking at the
17 web site pages that are included in the motion to dismiss that those don’t appear to be
18 deceptive.”). According to Person’s opposition, Google’s website falsely describes its auction
19 and pricing processes. *Opp.* at 18 (stating that allegedly false statements are alleged in
20 paragraphs 13 and 13A of Complaint); *see also id.* at 14-16. Specifically, Person argues that
21 Google “secretly” bases its pricing on the rate of click-throughs achieved by an ad. *Id.* at 15
22 (“Google secretly changed this advertised ‘per-click’ payment system into a price based on the
23 rate of clickthroughs experienced by its most profitable advertisers”); *see also id.* at 14-16,
24 18-19. This process purportedly results in larger advertisers – who supposedly have higher
25 click-through rates – being able to secure lower per-click prices because they are ultimately more
26 profitable to Google. *Id.* This theory, nowhere alleged in Person’s GBL counts (*see Compl.*
27 ¶¶ 136-58), fails because there is nothing that is “secret” or in the slightest way deceptive about
28 Google’s auction and pricing processes.

1 Google's website – cited in Person's own complaint – expressly states that an advertiser's
 2 bid price depends on its Quality Score. Compl. ¶ 31 ("Quality Score" is "the basis for measuring
 3 the quality of your keyword and determining your minimum bid"). Google's website also
 4 expressly describes that an advertiser's Quality Score depends on a keyword's click-through rate;
 5 the higher the rate, the lower the required bid price:

6 How is the Quality Score calculated?

7 . . . Each keyword is given a Quality Score based on data specific to your keyword
 8 performance on Google, including your keyword's clickthrough rate (CTR),
 9 relevance of ad text, historical keyword performance, the quality of your ad's
 10 landing page, and other relevancy factors.

11 . . . Your keyword's Quality Score and maximum CPC (at the keyword or Ad
 12 Group level as seen on Google) determine your ad's rank on Google and the search
 13 network. . . . Remember that improving the relevance of your ad text and keywords
 14 will increase your keyword's Quality Score and reduce the price you pay when
 15 someone clicks on your ad.

16 Declaration of David DiNucci, executed Aug. 28, 2006, Ex. C (attaching document found at
 17 <https://adwords.google.com/support/bin/answer.py?answer=10215&topic=114>);¹ *see also*
 18 Compl. ¶ 31 ("Quality Score is determined by your keyword's clickthrough rate [T]he
 19 Quality Score may decrease and in turn increase the minimum bid required for the keyword to
 20 run."). Thus, Google makes it perfectly clear that bid price depends on an advertiser's click-
 21 through rate. While it may be that larger advertisers typically enjoy higher click-through rates,
 22 the salient point is that the pricing process is accurately described in Google's website. The fact
 23 that in some cases an advertiser may have a lower click-through rate than another who is better
 24 known is not at all surprising, not at all deceptive and not at all relevant.

25 Relatedly, Person complains that he is entitled to purchase advertising at the price of \$.01
 26 per click, so long as no other advertiser is bidding for the same keywords. Opp. at 14, 15
 27 ("Google is not letting me participate in its auction program at the minimum price."), 19. But
 28 Person does not, and cannot, allege that Google ever guarantees that it will always offer an

¹ As explained in Google's moving brief, the Court can consider this document on a motion to
 dismiss. *See* Motion at 3 n.1. Person cites this same website and document in his Complaint.
See Compl. ¶ 31 (citing <https://adwords.google.com/support/bin>).

1 advertiser the ability to display its ads for \$.01 per click. Likewise, Google never guarantees that
2 an advertiser's bid for a particular price will be accepted. Rather, as described above, Google
3 makes clear that any bid is subject to Quality Score analysis.

4 In addition, Person complains that Google is providing "cost-per-click" advertising that is
5 really "cost-per-impression" pricing. Opp. at 19-20. Again, not so. As Person acknowledges,
6 Google expressly defines "cost-per-impression" pricing as charging the advertiser "for each time
7 your ad is displayed." Opp. at 19 (quoting Google Learning Center). Person does not, and
8 cannot, allege that the AdWords cost-per-click program is priced in this fashion. Rather, the
9 program charges "only when users click on your ad." *Id.* Of course, an advertiser's bid price for
10 submitting an ad depends on its Quality Score and anticipated click-through rate. But that is
11 entirely different than charging an advertiser each time that its ad is displayed. The AdWords'
12 cost-per-click program does no such thing.

13 Person further complains that Google misrepresents that pricing is conducted through an
14 "auction" process, when the process includes Google's evaluation of each participant. Opp. at
15 16. Again, there is nothing misleading here. Google expressly advises how its pricing process
16 works, including Google's use of a Quality Score to set minimum bids. *See* Compl. ¶ 31.

17 Finally, Person argues that Google secretly "manipulates" the number of ads presented
18 alongside search results to enable Google to avoid giving the lowest price of \$.01 per click to
19 certain advertisers. Opp. at 16. Again, there is nothing deceptive here. Google never guarantees
20 that any particular number of ads will be placed alongside search results. Likewise, Google
21 never guarantees that a \$.01 per click price will be available regardless of an advertiser's Quality
22 Score.

23 If Person is unhappy that he cannot advertise on Google at the price he wishes to pay, he
24 is free to utilize countless other advertising vehicles. He cannot, however, fabricate claims
25 charging that Google's AdWords pricing is somehow deceptive when it plainly is not. For this
26 reason as well, his consumer practices claims must be dismissed.

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1 **V. PERSON’S REQUEST FOR LEAVE TO AMEND AGAIN SHOULD BE DENIED**

2 This Court should exercise its discretion and deny Person leave to amend his complaint a
3 second time. Person already amended his 39-page Complaint once, in the face of Google’s prior,
4 nearly identical motion to dismiss. Person’s proposed second amended complaint is now a
5 remarkable 99 pages long. In it, Person seeks to add an enormous number of new factual
6 assertions and at least eight new claims for relief under California law.

7 Person largely ignores this Court’s directive that he be “prepared to argue why leave to
8 amend should be granted” in his opposition. Order Denying in Part and Granting in Part Motion
9 for Administrative Relief at 2. Specifically, Person provides no explanation as to how his
10 proposed amended GBL claims and eight new claims under California law state a claim for
11 relief. Rather, he baldly asserts that the facts he wishes to allege “support other claims based on
12 other California statutes.” Opp. at 4; *see also id.* at 20.² More importantly, Person provides no
13 excuse for having waited until now to include claims under California law. The parties’ forum
14 selection clause – which Judge Patterson found enforceable in his order transferring this case to
15 this Court – required any claims to be brought under California law in the first instance.
16 AdWords Agreement Section 9 (“This Agreement must be . . . governed by California law . . .
17 .”). Person’s prior decision to ignore California law until now does not justify leave to amend.

18 More fundamentally, leave to amend a second time should be denied because Person’s
19 proposed amendment would itself be subject to dismissal and amendment is thus futile. *See, e.g.,*
20 *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1049-50 (9th Cir. 2006) (leave to
21 amend complaint properly denied as futile); *see generally Simon v. Value Behavioral Health,*
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24 ² In the scant argument that he does provide, Person maintains that the proposed amendments
25 add only (i) new facts arising after the filing of his original complaint, and (ii) new claims
26 based on California statutes or not available under New York or Second Circuit law. Opp. at
27 20. But Person’s characterization is not accurate. The proposed second amended complaint
28 is replete with assertions – which Google submits are frivolous – that, according to Person,
are based on facts existing well before the filing of the original complaint. *See, e.g., Prop.*
Am. and Supp. Compl. ¶¶ 12D, 35A2-A6, 55A-C, 157-61A, 172-84, 191-96, 222-24, 232-38,
242-46, 259-60, 265A.

1 *Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000) (district court’s discretion to deny leave to amend is
2 particularly broad where plaintiff previously amended his complaint).

3 *First*, Person’s rambling 99-page proposed pleading appears designed to make it
4 impossible for Google to respond to its confusing and repetitious allegations and would be
5 subject to dismissal under Federal Rule of Civil Procedure 8, which requires not only “a short
6 and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P.
7 8(a)(2), but also that “[e]ach averment of a pleading shall be simple, concise, and direct.” Fed.
8 R. Civ. P. 8(e)(1). Person’s tangled web of press clippings and repetitious narrative is
9 “argumentative, prolix, replete with redundancy, and largely irrelevant,” and therefore fails
10 under Rule 8. *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996). Neither this Court nor
11 Google should have to waste its time trying to “fish a gold coin from a bucket of mud,” yet that
12 is precisely what would happen if leave to amend were granted. *See U.S. ex rel. Garst v.*
13 *Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003) (affirming dismissal).

14 *Second*, the new claims Person seeks to add under California law are patently specious.
15 For example:

- 16 • Person seeks reformation of the parties’ AdWords Agreement to delete what he
17 characterizes as an “illegal venue provision” despite the fact that Judge Patterson has
18 already *enforced* the provision, collaterally estopping Person from making such a claim.
Prop. Am. and Supp. Compl. ¶¶ 200-19.
- 19 • Person also proposes to pursue a number of claims as the representative of a class while
20 also acting as counsel for that class, which practice is long prohibited. *Id.* ¶¶ 241-50; *In*
re Cal. Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996).
- 21 • Person also seeks to add a claim under California’s Consumer Legal Remedies Act
22 (which covers services only for non-commercial and non-business use, *see* California
Civil Code Section 1761(b)), when Person has failed to allege consumer oriented
conduct.
- 23 • Person also seeks damages under California’s Unfair Competition Law, which makes no
24 provision for the award of damages. *Id.* ¶ 231.
- 25 • A number of Person’s assertions – including, but not limited to, his allegations of elder
26 abuse and concealment of an “illegal venue provision,” Prop. Am. and Supp. Compl. ¶¶
201, 202, 203, 211, 268-69 – would likely lead to additional motion practice under
Federal Rule of Civil Procedure 11.

27 *Third*, Person’s proposed amendments to his existing antitrust and GBL claims would
28 exacerbate, rather than cure, the fatal deficiencies in them. One example is his effort to recast his

1 antitrust claims as claims brought by a *competitor*, rather than a customer, of Google's. The idea
 2 that Person, a lawyer practicing business law in New York City, is a competitor of Google's is of
 3 course preposterous. To make that leap, Person finds it necessary to come up with an entirely
 4 new product market definition – "Website Traffic Monetizing," Prop. Am. and Supp. Compl.
 5 ¶¶ 12, 12A – by which he means "making money from the Internet." One could equally define a
 6 market of "all goods and services" in which everyone in the world is a competitor. *See Alpha*
 7 *Shoe Serv. v. Fleming Cos.*, 849 F.2d 352, 354 (8th Cir. 1988) ("[I]f this court were to accept the
 8 plaintiffs' market definition [the 'attraction of consumers'], we would expand the scope of the
 9 private antitrust action far beyond its intended bounds.").³

10 The proposed amendments to Person's GBL claims would fare no better. For example,
 11 while Person seeks to add certain allegations concerning his "consumer" status, those allegations
 12 merely emphasize that Person purchases Google advertising for business or political purposes –
 13 and not for his own consumer purposes. Proposed Am. and Supp. Compl. ¶¶ 5, 253, 265A.
 14 None indicates that Google, through its AdWords advertising program, offers *consumer* goods or
 15 *consumer* services to the public at large. In addition, while Person repeats and expands his
 16 assertions about the impropriety of using click-through rates, Quality Score, and subjective
 17 analysis, *id.* ¶¶ 11A-E, 252, 259, 260A-B, 260E-F, Google again makes its pricing practices
 18 perfectly clear, and no amount of vigorous assertion by Person can demonstrate otherwise.

19 In sum, leave to amend should be denied. If leave is granted, however, its scope should
 20 be limited to curing the deficiencies in Person's original complaint, and only so long as Person
 21 can do so consistent with the dictates of Federal Rule of Civil Procedure 11. *See, e.g., In re*
 22 *Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1127 (N.D. Cal. 2005) (granting leave to
 23 amend counterclaims solely to address deficiencies identified by prior court order).

24
 25 ³ Apparently in support of the proposed amendments to his antitrust claims, Person improperly
 26 submitted a lengthy declaration that is replete with extraneous factual assertions. Because
 27 Google's motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal
 28 sufficiency of the allegations in Person's complaint, such extraneous factual matters cannot
 be considered. *See Arc Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1096 (9th Cir.
 2005).

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CONCLUSION

For the reasons stated above, the Complaint should be dismissed and Person's request for leave to file an amended and supplemental complaint should be denied.

Dated: February 27, 2007

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____/s/
David H. Kramer

Attorneys for Defendant
Google Inc.

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CERTIFICATE OF SERVICE VIA FACSIMILE AND U.S. MAIL

I, Deborah Grubbs, declare:

I am employed in Santa Clara County. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of documents for facsimile transmittal and correspondence for mailing with the United States Postal Service. In the ordinary course of business, documents would be transmitted via facsimile, and correspondence would be deposited with the United States Postal Service on this date.

On this date, I served **DEFENDANT GOOGLE INC.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT** on each person listed below, by consigning the document(s) to a facsimile operator for transmittal and by placing the document(s) described above in an envelope addressed as indicated below, which I sealed. I placed the envelope(s) for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

Carl E. Person
325 West 45th Street
Suite 201
New York, New York 10036
Facsimile: (212) 307-0247

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on February 27, 2007.

/s/
Deborah Grubbs