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E-FILED on 11/13/09

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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12 DAVID ALMEIDA, individually and on behalf  
13 of all others similarly situated,

No. C-08-02088 RMW

14 Plaintiff,

15 v.

ORDER DENYING WITHOUT PREJUDICE  
PLAINTIFF'S MOTION FOR LEAVE TO  
FILE A FIRST AMENDED COMPLAINT  
AND TO SET NEW CASE MANAGEMENT  
CONFERENCE16 GOOGLE, INC., a Delaware Corporation; and  
17 DOES 1 through 10, inclusive,

18 Defendants.

[Re Docket No. 27]

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Plaintiff David Almeida brings this suit, individually and on behalf of all others similarly situated, against Google, Inc. ("Google") alleging that certain aspects of the registration process for Google's AdWords advertising program is misleading. Plaintiff moves for leave to amend his complaint to substitute a new named plaintiff. Google opposes the motion on the grounds that plaintiff lacks standing and substitution is thus impermissible under *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018 (9th Cir. 2003). The court heard argument on the motion on October 30, 2009. The court has read the moving and responding papers and considered the arguments of counsel. For the reasons set forth below, the court DENIES without prejudice plaintiff's motion for leave to amend and to set a new case management conference.

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ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT  
AND TO SET NEW CASE MANAGEMENT CONFERENCE—No. C-08-02088 RMW

LJP

1 **I. BACKGROUND**

2 This suit arises out of certain aspects of the registration process for Google's AdWords  
3 advertising program. Plaintiff alleges that Google uses a misleading registration form and then  
4 charges customers for ads they do not want. After some discovery, it appears that Almeida had not  
5 used the allegedly deceptive form when he signed up for AdWords. The parties disagree about the  
6 proper way to proceed in light of this information.

7 **A. Factual Allegations**

8 Google operates an advertising program called AdWords, which allows advertisers to bid on  
9 words or phrases that will trigger advertisers' ads. Compl. ¶ 4. Google charges advertisers each  
10 time an internet user clicks on an ad, and each advertiser chooses a maximum cost per click ("CPC")  
11 bid that it is willing to pay for each click. *Id.* ¶¶ 3-4. Google offers advertisers two types of ads:  
12 search ads, which appear when internet users use Google's search engine to search for a specific  
13 term; and content ads, which are shown on third party websites with content matching the keywords  
14 bid on by the advertiser. *Id.* ¶ 11.

15 During the process of registering for the AdWords program, an advertiser sets its maximum  
16 daily budget and the maximum CPC bid. *Id.* ¶ 12. The advertiser is given two choices, the "Default  
17 CPC bid" and the "CPC content bid." *Id.* Next to the "CPC content bid" input is the word  
18 "optional." *Id.* Neither on this page nor anywhere in the registration process is there an option to  
19 opt out of content ads. *Id.* Thus, plaintiff alleges, advertisers who do not want to pay for ads placed  
20 on third party websites leave the "CPC content bid" input blank, reasonably believing that the word  
21 "optional" means having content ads placed on third party websites is optional. *Id.* ¶ 13. Google  
22 fails to inform advertisers that those who leave the "optional" input blank will still be charged for  
23 content ads. *Id.* ¶ 14. As a result, Google has charged advertisers millions of dollars for allegedly  
24 unwanted ads. *Id.*

25 Almeida enrolled in AdWords in November 2006. *Id.* ¶ 15.

26 **B. Procedural History**

27 This action was filed on April 22, 2008. Plaintiff served his initial discovery requests in  
28 October 2008. Declaration of Michael V. Storti Supp. Pl.'s Mot. ("Storti Decl.") ¶ 5. Google served

1 its Objections and Responses to Plaintiff's First Set of Interrogatories on December 5, 2008. *Id.* ¶ 7  
2 & Ex. D. When asked when it first included a CPC Content Bid Input on the Signup Bidding Page,  
3 Google responded that it had first included such an input in or around October 2007. *Id.*, Ex. D at 4-  
4 5. This is almost a year after Almeida is alleged to have signed up for AdWords. Google sent  
5 plaintiff a verification of the December 5, 2008 interrogatory responses in May 2009. *Id.* ¶ 17 &  
6 Ex. J.

7 In June 2009, plaintiff sought Google's agreement to stipulate to an amended complaint,  
8 substituting Largo Cargo Co. as the class representative. *Id.* ¶ 13. The proposed first amended  
9 complaint alleges that the new plaintiff enrolled in AdWords in January 2008. *Id.*, Ex. A ¶ 16. The  
10 proposed amendments do not include new causes of action. *Id.* Google declined to stipulate to an  
11 amendment and stated that *Lierboe* required dismissal of the action. Declaration of David J. Silbert  
12 ("Silbert Decl.") ¶ 4; Storti Decl. ¶ 14. The parties subsequently attempted to stipulate to a dismissal  
13 but were unable to come to an agreement. Silbert Decl. ¶ 6 & Ex. D; Storti Decl. ¶ 18 & Ex. K-L.  
14 Plaintiff also unsuccessfully tried once more to get Google to stipulate to an amended complaint.  
15 Storti Decl., Ex. M.

## 16 II. ANALYSIS

17 Plaintiff moves pursuant to Fed. R. Civ. P. 15(a) for leave to file a first amended complaint.  
18 Rule 15(a)(2) states that "[t]he court should freely give leave [to amend] when justice so requires."  
19 The propriety of a motion to amend is determined by ascertaining the presence of any of four  
20 factors: bad faith, undue delay, prejudice to the opposing party, and/or futility. *Griggs v. Pace Am.*  
21 *Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). "Generally, this determination should be performed  
22 with all inferences in favor of granting the motion." *Id.*

23 Google does not argue that any of the four factors are present in this case. Rather, it argues  
24 that dismissal is compelled by the Ninth Circuit's holding in *Lierboe*. In *Lierboe*, the court vacated  
25 certification of a class after the sole named plaintiff was found to lack standing to bring the claims.  
26 350 F.3d at 1022-23. The court then addressed the question "whether the suit must be dismissed  
27 without more, or if other proceedings may follow under which it may be possible that the suit can  
28 proceed as a class action with another representative." *Id.* at 1023. While recognizing the judicial

1 economy considerations in favor of allowing the case to continue, the court found persuasive the  
2 approach in *Foster v. Center Township of LaPorte County*, 798 F.2d 327, 244-45 (7th Cir. 1986),  
3 which dismissed a case where the sole named plaintiff never had standing and was never a member  
4 of the class she purported to represent. *Lierboe*, 350 F.3d at 1023. The court concluded that,  
5 "because this is not a mootness case, in which substitution or intervention might have been possible,  
6 we remand this case to the district court with instructions to dismiss." *Id.* Thus, *Lierboe* stands for  
7 the proposition that where the original named plaintiff lacks standing, a new plaintiff with standing  
8 cannot step in to save the lawsuit from dismissal.<sup>1</sup>

9 No court has applied *Lierboe* in the context of a motion to amend, but *Lierboe* would seem to  
10 apply with equal force whether intervention of a new plaintiff is achieved by Rule 15 amendment or  
11 Rule 24. See *Lidie v. State of California*, 478 F.2d 552, 555 (9th Cir. 1973) (finding plaintiff's  
12 motion to amend was actually a motion to intervene by additional plaintiffs and denying the  
13 intervention as improper); *Zapien v. Wash. Mut., Inc.*, 2008 U.S. Dist. LEXIS 67137 (S.D. Cal. June  
14 17, 2008); cf. *Palmer v. Stassinis*, 236 F.R.D. 460, 465 (N.D. Cal. 2006) (finding the tolling rule for  
15 intervenors applied to new plaintiffs who sought to intervene "by way of [existing plaintiffs]  
16 amending their complaint"). In *Zapien*, the court found the named plaintiff lacked standing but  
17 granted leave to amend consistent with her representation that she would add additional factual  
18 allegations and add or substitute an additional class plaintiff. 2008 U.S. Dist. LEXIS 67137 at \*5-6.  
19 The court deferred ruling on the propriety of the suggested substitution until the defendant moved to  
20 dismiss the amended complaint. *Id.* at \*6. When the defendant brought its motion, the court  
21 dismissed the original plaintiff for failing once more to demonstrate standing. *Id.* at \*8. The court  
22 then held that *Lierboe* barred the new named plaintiff from continuing the action. *Id.* at \*10. Thus,  
23 even if plaintiff here satisfies the traditional standards for amending his complaint, Largo Cargo Co.  
24 could not continue this action if Almeida does not have standing.

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27 <sup>1</sup> *Foster* did not address substitution or intervention of new plaintiffs. In *Foster*, the only issue was  
28 whether the named plaintiff could maintain her class claim while lacking standing personally. 798  
F.2d at 244.

1 Plaintiff attempts to distinguish *Lierboe* on the grounds that it involved a judicial  
2 determination that the named plaintiff lacked standing. Here, plaintiff argues, Google has not  
3 challenged Almeida's standing except in its opposition to this motion for leave to amend, and the  
4 court has not made any findings regarding Almeida's standing. However, this attempt to amend  
5 appears designed specifically to avoid any such judicial determination. Indeed, plaintiff basically  
6 admits that "he was compelled to file the present motion" and unable to reach an agreement with  
7 Google because he did not want to stipulate that he lacked standing. Reply at 1-2.

8 Even with all inferences in favor of allowing amendment, the court cannot find on the current  
9 facts that plaintiff has standing and *Lierboe* does not apply. Notably, plaintiff has not reaffirmed  
10 that he has standing since Google served its interrogatory response. Rather, plaintiff suggests that  
11 further discovery is needed to verify the October 2007 date, Motion at 3:16-17, and challenges the  
12 evidentiary value of the interrogatory response, Reply at 3:25 to 4:3. Plaintiff also admits that he  
13 "can no longer satisfy the typicality requirement of FRCP 23(a)," Motion at 1:16, which seems to be  
14 a veiled admission that he lacks standing.

15 Plaintiff argues that he is not required to prove his standing at every turn during litigation,  
16 and Google cannot turn its opposition into a motion for summary judgment of standing. It makes no  
17 sense to force the parties to prepare and respond to a summary judgment motion on the standing of  
18 an individual who would no longer be a part of the action regardless of in whose favor the motion  
19 was decided. Thus, the court will require plaintiff to submit evidence sufficient to create an  
20 inference that he has standing, consistent with the standard for a motion to amend. *See Lujan v.*  
21 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that elements of standing must be  
22 supported "with the manner and degree of evidence required at the successive stages of the  
23 litigation"). If plaintiff does so, he can renew his motion to amend to substitute Largo Cargo Co. as  
24 named plaintiff.<sup>2</sup>

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26 <sup>2</sup> Some courts have suggested that, prior to class certification, substitution of named plaintiffs is  
27 improper. *See, e.g., Gonzalez v. Procter & Gamble Co.*, No. 06-869 (S.D. Cal. Aug. 31, 2006)  
28 (Docket No. 27) (denying leave to amend to substitute plaintiffs because it would amount to a new  
lawsuit); *Velazquez v. GMAC Mortgage Corp.*, 2009 U.S. Dist. LEXIS 88574 at \*8-10 (C.D. Cal.  
Sept. 10, 2009) (distinguishing cases allowing substitution after class certification because a

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**III. ORDER**

For the foregoing reasons, the court DENIES without prejudice plaintiff's motion for leave to file a first amended complaint and to set a new case management conference.

DATED: 11/13/09



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RONALD M. WHYTE  
United States District Judge

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certified class acquires a legal status separate from that of the named plaintiffs); *Miller v. Mercedes-Benz USA LLC*, 2009 WL 1393488 at \*1 (C.D. Cal. May 15, 2009) (same). However, the cases denying leave to amend also found that amendment would prejudice the defendants. *Gonzalez*, slip op. at 5:5-12; *Velazquez*, 2009 U.S. Dist. LEXIS 88574 at \*10-11. Here, there is no evidence that Google would be prejudiced by allowing a substitution of plaintiffs as opposed to requiring Largo Cargo Co. to file a new suit alleging no additional claims and requiring the same discovery with respect to Google's practices. *See Hackner v. Guar. Trust Co. of New York*, 117 F.2d 95, 98 (2d Cir. 1941) ("[W]e think this action can continue with respect to [the new plaintiff] without the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are.").

