IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

e-ventures Worldwide, LLC, Plaintiff, v. GOOGLE, INC., Defendant.	Civil Action No. 2:14-cv-00646-JES-CM

PLAINTIFF'S OPPOSITION TO DEFENDANT GOOGLE'S MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Unlike each of the cases relied upon by Google, this is not a case where Google merely buried the plaintiff's websites on the last pages of its search results with an allegedly unfair "PageRank," refused to run the plaintiff's advertisements due to the ads' content, or censored political information. This is a case where a Google employee admittedly targeted one small business and decided that all of that business's websites and paid advertisements would be completely hidden from all Google users' views, regardless of the websites' or the ads' content. As a result of this action, when the public searched for e-ventures' websites on Google, they could not be found.

Google's purported rationale for this decision was that e-ventures (like many companies) had attempted to cause its websites to be ranked higher in Google's search results and that this "bad behavior" needed to be "deterred." The parties dispute whether and to what extent "search engine manipulation" by e-ventures occurred. Google itself defines what it considers to be "search engine manipulation" or "pure spam," and adopts a definition that is vague, non-exhaustive, and unpredictable. Under Google's definition, any website owner that attempts to cause its website to rank higher, in any manner, could be guilty of "pure spam" and blocked from Google's search results, without explanation or redress. Because Google holds a 70-90% share of the search market, such a decision would be fatal to any small, online publishing business like e-ventures. Google's assurance that there are "plenty of alternatives" to Google is disingenuous; Google has a practical monopoly in the search market and its competitors are pseudo-competitors.

Google admits that its published "Removal Policies" do not acknowledge that Google engages in this conduct; instead, it points to the "Webmaster Guidelines" buried somewhere on its website. There has been no showing that the general public reads the "Webmaster Guidelines" or considers them to be anything other than "guidelines" for "webmasters" and not terms of use

for the general public that override Google's published "Removal Policies." Even assuming that such a showing *could* be made by Google, none of the "Webmaster Guidelines" indicate that Google ever acts against a specific company or individual in a punitive manner as occurred here. Instead, the Guidelines portray Google's removals as strictly *content-based*, not *company-based*. In fact, Google's public relations team goes to great lengths to portray Google's search results as transparent, fair and comprehensive. At the same time, Google's legal team suggests that Google's individual employees wield the power to make any company or individual's websites disappear completely and covertly, for any reason (even, for example, because of a personal vendetta), and that there is no redress in courts of law.

II. FACTS

A. e-ventures and Google have a long-standing, direct, commercial relationship.

1. As alleged in e-ventures' Complaint, Google was "manually excluding e-ventures' websites from appearing ***anywhere*** in Google search results," including both Google's paid and unpaid search listings. Doc. 1, Complaint ("Compl."), ¶ 1 (emphasis added). e-ventures' websites were previously displayed in both Google's paid and unpaid search results. *Id*. at ¶ 46.

2. e-ventures is a "consumer" as alleged in ¶ 51 of the Complaint, because e-ventures has paid Google to advertise e-ventures' websites in Google's search results for years. *See* attached Trika Verification[1], ¶ 3. *See also* Doc. 11, Trika Verif., ¶ 8.

3. e-ventures' monthly payments to Google were and are extremely significant and guaranteed premium placement of e-ventures' websites in Google's "paid" search results. *Id*. at ¶ 4.

[1] The Trika Verification provides additional factual detail relevant to Google's Motion. If the Court believes that e-ventures' Complaint should be amended to add these allegations, e-ventures respectfully requests leave to amend. *See* Fed.R.Civ.P. 15(a)(2) (Leave to amend "shall be freely given" by district courts "when justice so requires"); *Thomason v. West Bank FSB*, No. 13–11987, 2014 WL 7139750, *3 (11th Cir. Dec. 16, 2014) ("Generally, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.")

4. Like other advertisers participating in Google's "AdWords" program, e-ventures pays Google based on the number of times a user clicks on the ad to reach e-ventures' website. *Id*. at ¶ 5.

5. Google's ad is a link to e-ventures' website that asks users to "click" on it. When a user clicks on the link, it triggers a commercial transaction between e-ventures and Google. *Id*.

6. Google's public statements indicate that over 95% of Google's over $50 billion in annual revenues are from advertisements like these. Compl., ¶ 19; Doc. 11, Ex. G to Arena Decl.

B. Google acknowledges that a Google employee (or employees) intentionally removed every website associated with e-ventures from both Google's paid and unpaid search listings shortly after receiving a third party complaint.

7. Plaintiff alleges, and Google does not appear to dispute, that a third party with a personal vendetta against e-ventures reported false information to Google about e-ventures' websites. Compl., ¶ 32. Google admits that its actions were triggered by "an external 'tip'" about e-ventures it received in mid-September. *See* Doc. 31, Google's Declaration of Brandon Falls ("Falls Decl."), ¶ 37. Google did not (and still has not) shared the tipster's message with e-ventures.

8. Google now claims that it "first noticed" e-ventures' websites and what Google alleges was e-ventures' "bad behavior" in 2005. Falls Decl., ¶ 28. To e-ventures' knowledge, Google never contacted e-ventures or did anything else about this in 2005. Google's conduct in mid-September 2014 came without warning to e-ventures. Compl., ¶ 30-31.

9. Google claims that 366[2] websites were removed on September 18, 2014 based upon the websites' perceived affiliation with e-ventures and "to efficiently use Google's resources." *See* Falls Decl., ¶ 39 ("I manually removed 366 of e-ventures' sites from Google's search results. Given the breadth and scope of violations (and Plaintiff's long history of search engine manipulation), ***we acted upon the entire network of websites to efficiently use Google's resources***…"); Doc. 30,

[2] Interestingly, e-ventures identified 244 websites that Google removed, and Google stated that it removed 366 websites it connected to e-ventures. It is currently unclear who owns the remaining 122 websites that were removed.

Google's Brief, at 6 ("Google decided to treat e-ventures' collection of websites as a single network. ***Such grouping allows Google to use its resources more efficiently***…") (emphasis in quotes added).

10. Google's statements indicate that, for reasons of "efficiency," it did not individually review and analyze the content of each of the 366 websites prior to their removal. *Id*.

11. e-ventures' websites were removed not just from Google's "natural" or "unpaid" search listings, but also from Google's paid search listings. Compl., ¶ 46.

12. In addition, e-ventures' ads were not just removed from www.google.com. Google also delivers millions of ads on third party websites through its display network advertising program. When Google delisted e-ventures, upon information and belief, e-ventures ads were also removed from these third party websites. Trika Verif., ¶ 6.

13. On September 19, *after* e-ventures' websites had been delisted, Google sent e-ventures notifications claiming that the 231 websites associated with e-ventures' Webmaster Tools account had been removed because Google had identified them as "pure spam." Compl., ¶ 33.

14. The delisted websites included "corporate" websites, new websites, and websites that could not have engaged in activities that could possibly be classified as "spam." *Id*. at ¶ 34.

15. Following the removal, when an individual searched for "eventures" on Google's search engine, a confusing display of third party websites for companies using the trademark "eventures" appeared, but e-ventures' actual corporate websites were absent from Google's paid and unpaid search listings. Compl., ¶ 46.

16. On September 23, e-ventures created new, completely inoffensive, "test" websites to see if they would be listed in Google's search results. *See* Doc. 11, e-ventures' Prelim. Inj. Motion, at 3. As before, without any content-based justification, Google also removed those websites. *Id*.

17. e-ventures also created new paid ads for its websites to see if they would also be blocked by Google, but not all of them were blocked. Trika Verif., ¶ 7.

18. Accordingly, during the ban, Google accepted money from e-ventures to run a paid ad for a website that Google continued to block from its "natural" search listings as "spam." *Id*. Google continued to take e-ventures' money to advertise websites that Google claimed had "run afoul of Google's quality standards" and required e-ventures to pay Google to have its websites listed in Google's search results, although Google offers that privilege to most website owners for free. *Id*.

C. Google acknowledges that its decision was punitive and anti-competitive.

19. Google claims that its "mission" is to "organize the world's information." Doc. 36, Google's Motion, at 3. At the same time, Google admits that it covertly punishes parties by excluding their information from "the world's information." Motion, at 4-5.

20. Google admits that it takes "manual action" to punish parties that Google believes engage in bad behavior. *See* Falls Decl., ¶ 6 ("[W]e also may manually adjust or edit our search results (i.e. take 'manual action') when we believe it appropriate to deter bad behavior…").

21. Google defines "bad behavior" vaguely and non-exhaustively. *See* Doc. 26, Google's Brief, at 4 (Its "guidelines give specific examples of the kind of manipulations that may lead Google to take manual action against particular websites…But Google cautions that the specific violations described in the guidelines are not exhaustive."); Google's Motion, at 16, Ex. A at 3 ("Google may respond negatively to other misleading practices not listed here. It's not safe to assume that just because a specific deceptive technique isn't included on this page, Google approves of it.").

22. "Bad behavior" includes anything Google deems a "low quality" website (*see, e.g.*, Doc. 31, ¶ 45), including websites with little or duplicate content or with poor grammar.

23. "Search engine manipulation" includes anything done to a website to make it more visible on Google. Arguably, creating a website "title tag" or headline containing relevant terms, which almost every website owner does, constitutes "search engine manipulation."

24. Google does not dispute that delisting e-ventures' websites also benefited Google economically and had an anti-competitive impact. Compl., ¶ 18. e-ventures' websites advertise

companies that offer "search engine optimization services," or services aimed at causing companies' websites to be ranked higher in Google's search results. If companies adopt strategies that cause their websites to be ranked higher in Google's unpaid search results, those companies have less of an incentive to buy Google's advertising services. *Id*.

25. Google's removal of e-ventures' websites (and affiliated Google advertisements) was not based upon the content of the websites or advertisements; rather, it was based on the websites' apparent affiliation with e-ventures and Google's stated objective of "punishment" of e-ventures for alleged "bad behavior." *See* Falls Decl., ¶ 6, 39; Doc. 30, Google's Brief, at 6.

26. Google also admits that it does not notify the public about websites manually removed as "spam." *See* Falls Dec., ¶ 25. Google claims that notifying the public of its manual action would "reflect the proprietary signals that Google employs" (*id*.), but it is unclear, and Google makes no attempt to explain, how disclosing a list of the blocked websites would disclose Google's "proprietary signals."

D. Google Intentionally Confuses its "Removal Policies" with its "Webmaster Guidelines."

27. In an apparently-intentional attempt to confuse two unrelated documents, Google has attached the "Webmaster Guidelines" and the "Removal Policies" together as Exhibit A to its Motion. Those two documents are viewed and accessed separately by Internet users at different website addresses and do not even link to one another. The Webmaster Guidelines comprise pages 1-14 and the Removal Policies comprise pages 15-16 of Exhibit A.

28. Only the Removal Policies and Google's other published policies are referenced in Plaintiff's Complaint. The "Webmaster Guidelines" are not referenced in Plaintiff's Complaint.

29. An internet user looking for guidance on when websites are removed by Google is likely to view Google's "Removal Policies," not the "Webmaster Guidelines." Compl., ¶¶ 21-29; *see also* Doc. 11, at 6-8.

30. Google's Removal Policies do not indicate that Google ever removes content as "spam" or "pure spam." *Id*. Rather, they indicate that Google only removes websites containing harmful software, intellectual property violations, privacy violations or unlawful content pursuant to court order.

31. Discovery has yet to be taken as to Google's published Policies, but some of Google's policies contradict its actions towards e-ventures in this case. For example, Google cited the following policy in *Kinderstart v. Google,* No. 5:06cv0257 (N.D.Cal.):

> It is Google's policy not to censor search results. However, in response to local laws, regulations, or policies, we may do so. When we remove search results for 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.

See Exhibit A, Google's Rule 11 Motion in *Kinderstart v. Google*, excerpted. In that Motion, Google vehemently argued that it never removes search results for political or religious reasons, undercutting Google's argument here that its search results should receive robust First Amendment protection.

32. Even the "Webmaster Guidelines" cited by Google do not state that Google ever removes websites because they are affiliated with a particular party. Rather, those Guidelines allege that Google's removals are *content-based* and not *company-based*.

E. Google's conduct caused significant economic damage to e-ventures.

33. Google describes itself as "one of the world's leading Internet companies" (Motion, at 3), but with 70-90% of the search market, Google has a practical monopoly and the power to destroy any small online publishing company (or even large publishing company) it chooses. Compl., ¶ 1.

34. Google's conduct caused significant damage to e-ventures. Third parties that contracted with e-ventures terminated those contracts when e-ventures' websites were delisted. Compl., ¶ 44; Trika Verif., ¶ 9.

35. Third parties immediately noticed and had a clear interpretation of Google's delisting of e-ventures' websites. For example, one blogger concluded in an article that: "Recently

TopSEOs…was de-indexed by Google…for using black hat tactics. Its domain topseos.com was de-indexed last week, and a second domain topseosglobal.com dropped within 24 hours of its creation. As of this writing, their third domain topseos-global.com has also been taken down from Google's index as well. … Google couldn't have killed TopSEOs from its search rankings any better than this." Doc. 11, Ex. D to Arena Decl.

36. Before filing its Complaint, e-ventures contacted Google repeatedly, prepared to make whatever changes to its websites that Google deemed necessary, but despite e-ventures' best efforts, e-ventures could not even identify what changes Google wanted made to the websites. Compl., ¶ 38-41. e-ventures' counsel also contacted Google, simply asking what e-ventures needed to do to get its websites relisted to avoid litigation, and could not get an answer. *Id*.

37. Following the filing of its Complaint, e-ventures continued to receive harassing emails from an anonymous Google email account, insinuating that the email's sender was responsible for the delistings and asking e-ventures if it was "having fun yet." *See* Doc. 11, Ex. 1 to Trika Verif. e-ventures has not yet positively identified the emails' sender and has not yet taken discovery.

38. Following e-ventures' preliminary injunction motion, Google gradually relisted e-ventures' websites and advertisements. Trika Verif.,¶ 8. Although some of e-ventures' websites have changed to accommodate Google's ambiguous, unpredictable "preferences," not all of the websites changed before they were relisted. Google actually delisted and then relisted some websites without changes ever having been made to those websites, as if *sua sponte*, Google reconsidered its own actions. *Id*. at ¶ 11.

III. ARGUMENT

In considering this motion, the court must accept the allegations in the complaint as true, *Hishon v. King & Spalding,* 467 U.S. 69, 73, (1984), and construe them in plaintiff's favor. *Duke v. Cleland,* 5 F.3d 1399, 1402 (11th Cir. 1993). To survive this motion, the complaint need not contain "detailed

factual allegations," but must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citations omitted).

Dismissal of a complaint is appropriate only "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). As the Eleventh Circuit has noted, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *In re Southeast Banking Corp.,* 69 F.3d 1539, 1551 (11th Cir.1995) (quotations omitted). If dismissal could be avoided through amendment of the complaint, leave to amend the complaint should be freely given. *Thomason v. West Bank FSB*, No. 13–11987, 2014 WL 7139750, *3 (11th Cir. Dec. 16, 2014).

A. The First Amendment Does Not Give Google Unchecked Power.

Ironically, Google's defense to silencing e-ventures by causing all of its websites to "disappear," without those websites even being individually reviewed by Google, is the First Amendment. Google argues that it can punish any party it chooses through its search results, for any reason, and the victim has no legal recourse.

In arguing for blanket First Amendment immunity, Google asserts that it was merely acting like a newspaper publisher "expressing its constitutionally protected opinion about what information would be relevant to its users' queries." Motion, at 10. This does not jibe with Google's other explanation, which was that Google delisted e-ventures' websites' to "deter" e-ventures' perceived "bad behavior." If relevance was truly the concern, then Google obviously could have merely listed e-ventures' websites on the last pages of its search results (where less relevant results are typically found), but Google decided to preclude e-ventures' websites and ads from being displayed even on pages that most users never reach.

Instead of being analogous to a newspaper that declines to run an article because of that article's content, for its readers' benefit, Google's actions are more analogous to a publisher that summarily decides that one of its longstanding advertisers is engaging in "bad behavior," which has been decreasing the publisher's revenues. To deter this "bad behavior," the publisher decides that the advertiser and all of its perceived affiliates are being blacklisted from 70-90% of the town's publications for an undetermined amount of time, until the publisher is sufficiently convinced that the advertiser has reformed, at which point, the blacklist will end and the ads will run again. Meanwhile, the publisher's true motivation is anti-competitive. The publisher only informs the advertiser of the blacklist after the blacklist has already begun, and after the public has already wrongfully concluded that the advertiser was engaged in "bad behavior." Then the advertiser files suit against the publisher, the blacklist ends, and some of the "blacklisted" content begins running again.

Google's actions were not based on editorial judgments. First, if Google's removals were based on editorial judgments, then Google would have actually reviewed e-ventures' websites before taking action, but Google admitted that it did not even do so. *See* Statement of Facts above "SMF," at ¶ 9-10. Second, Google would not have delisted and then relisted some websites without any changes being made to those websites. *Id*. at ¶ 39. Third, Google would not have continued to accept payment to display websites that were purportedly being "blocked" as "spam" or violated Google's quality standards. *Id*. at ¶ 17. Fourth, Google would have addressed relevance by ranking e-ventures' websites lower, not blocking them entirely. Google's proffered explanation for its conduct – that Google was merely concerned about relevance - is false. The content of e-ventures' websites was not the cause of the action taken by Google, and accordingly, Google cannot assert a content-based First Amendment defense.

1. Whether Google's "Delisting" of All of a Party's Ads and Websites is Protected By the First Amendment is an Issue of First Impression.

None of the four cases cited by Google involve a party whose websites were precluded from being displayed in a search engine's paid or unpaid search results, regardless of the websites' content. None of these cases involve a FDUTPA claim, or an unfair trade practices claim based upon similar facts, or a defamation or tortious interference claim based upon similar facts. None of the cases involve Google's definition of "spam." Each case is summarized below:

- ***Zhang v. Baidu.com, Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).** This anti-censorship lawsuit against a comparatively small, Chinese search engine involved the search engine's filtering out of certain political information related to the pro-democracy movement in China. Similar to how employers or parents may filter out certain material that is obscene, or related to topics like gambling or weapons, Baidu.com adopted algorithms that filtered out certain political information, regardless of the website on which it was displayed. The Court held that this conduct was protected by the First Amendment, considering that it was: (1) politically-motivated; (2) content-based; (3) accomplished through search engine algorithms (not manual action); (4) not accomplished by a search engine with a monopoly (the Court specifically noted that Baidu.com was a relatively small search engine that blocked results which were still "widely available" through search engines such as Google, *id*. at *7); and (5) the speech was not commercial. *Id*. at *8. Unlike in *Baidu*, here: (1) Google's removals were not politically-motivated, instead, the removals were for commercial, anti-competitive reasons; (2) Google's removals were not content-based, they were company-based – Google did not even review all of e-ventures' websites before removing them; (3) Google's removals were not accomplished through algorithms, but rather were the result of an employee's manual action; (4) unlike Baidu.com, Google has monopoly power; and (5) if the manual action was "speech," it was "commercial speech" that included the removal of paid ads.

- ***Langdon v. Google*, No. 06cv319, 2007 WL 530156 (D.Del. Feb. 20, 2007**). Langdon's *pro se* complaint was convoluted, but appeared to assert that "Google disproved his ads on the basis of unacceptable content." *Id.* at *2. Google rejected the ads because they contained attacks against an individual or protected group, including attacks against named individuals. *Id*. Langdon's websites were not delisted. Langdon did not submit any written defense to Google's motion to dismiss on First Amendment grounds. *Id*. at *5. The court summarily concluded that Google was able to decline to run Plaintiff's advertisements based upon the ads' objectionable content under the First Amendment. Unlike *Langdon*, this case does not concern Google's rejection of objectionable ad content. In fact, the content of e-ventures' ads remained the same before and after the Google ban. This case concerns a complete removal of 366 websites (as well as the ads) from Google's paid and unpaid search listings, based upon their apparent affiliation with e-ventures.

- ***Kinderstart v. Google*, No. 06cv2057, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007)**. Kinderstart alleged that Google gave its websites an unfairly-low ranking or "PageRank." Unlike in this case, Kinderstart did not allegedly pay Google to run ads that were delisted. Kinderstart's defamation claim against Google was dismissed due to California's common interest privilege. *Id.* at *20. However, in its final opinion, the Court noted that, if the defamation claim had not been barred by the common interest privilege, the defect in the defamation claim "conceivably could be cured by amendment." *Id*. at *19. Unlike in *Kinderstart,* Google did not simply misrank e-ventures' websites. Aside from the court's apparent recognition of the potential viability of a defamation claim under these circumstances, *Kinderstart* is of limited relevance because the claims, the Google conduct, and the Google policies at issue were all different.

- ***Search King v. Google*, No. 02cv1457, 2003 WL 21464568 (W.D. Okla. May 27, 2003)**. Search King also contended that Google was liable for assigning its websites an unfairly low PageRank in Google's unpaid search listings. The case did not involve paid ads or a discussion of commercial speech, and Search King only asserted one claim - intentional interference with contractual relations. The Court concluded that "there is no conceivable way to prove that the relative significance assigned to a given web site [or its PageRank] is false" (*id.* at *4), and dismissed the claim on that basis. Unlike *Search King*, this matter involves a delisting of paid ads and websites. The *Search King* court could not conceive of how to gauge whether the relevance of a website was a false statement, but here, the court is not required to gauge the relevance of e-ventures' websites.

In sum, there is no case where a court has examined similar conduct by Google and concluded that it was speech protected by the First Amendment. Even if we interpret *Search King*, *Baidu*, and *Langdon* to hold that the PageRank Google assigns to its unpaid search listings is "speech," that does not mean that Google's actions in blocking a certain company from being displayed on any Internet property that Google controls (both paid and unpaid) is "speech."

2. Google's Conduct Was Not Speech Because It Was Not Content-Based – It Was Company-Based, Punitive, and Anti-Competitive.

To further its arguments in cases like these, Google previously commissioned a White Paper, which concludes that search engines' immunity is virtually limitless – *see* Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 24 Geo. Mason U. C.R.L.J. 89 (2013). Interestingly, *even in the White Paper Google commissioned*, the authors note that the First Amendment only protects Google to the extent its decisions are motivated by *content*:

> To be sure, it is constitutionally permissible to stop a newspaper from 'forcing advertisers to boycott a competing' media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States,* 342 U.S. 143, 152, 155 (1951). But the newspaper in Lorain Journal Co. was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station.

Volokh & Falk, supra, at 22. *See also Lorain Journal,* 342 U.S. at 155:

> The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.

As in *Lorain Journal Co.*, Google did not block e-ventures' websites and advertisements because of their content. In fact, Google assures the public that it never removes websites for political, religious, or similar content-based reasons. Ex. A. Google blacklisted e-ventures for punitive, anti-competitive reasons, and removed e-ventures' websites and ads as part of that effort. Google did not even review all of the websites before removing them, Google continued to run paid ads for some of the same (allegedly harmful) content, and some content remained the same before and after the websites and ads were delisted. SMF, ¶ 9, 18, 39. In defining "spam" as - whatever Google wants to define "spam" as, Google is attempting to write itself a blank check that allows Google to punitively damage *any* party it chooses, for whatever reason. *Id*. at ¶ 21-23. But having taken action against the company, not the content, Google cannot credibly argue that it was just looking out for "relevance" for the benefit of its users.

3. <u>If Google's Conduct Was Speech, Then It Was Commercial Speech Entitled to Lesser First Amendment Protection.</u>

Certain categories of speech receive a lesser degree of constitutional protection under the First Amendment. *See Snyder v. Phelps,* -- U.S. --, 131 S.Ct. 1207 (2001)*; Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515 (7th Cir. 2014) (analyzing First Amendment defense to unfair trade practices claim in dispute between private parties). "Commercial speech was initially viewed as being outside

the ambit of the First Amendment altogether," but now receives some lesser level of protection. *Jordan,*743 F.3d at 515. The "hallmark of commercial speech" is that it "pertains to commercial transactions." *Id*. at 516-17. However, "the commercial-speech category is not limited to speech that directly or indirectly proposes a commercial transaction." *Id*. Courts have also considered whether "(1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech." *Id*. If the speech is commercial, the First Amendment does not provide a complete defense and Plaintiff's claims should not be dismissed. *Id.* at 522.

In the *Baidu* decision relied upon by Google, the court concluded that the definition of commercial speech "would presumably apply to advertisements displayed by a search engine, and might even apply to 'search results shown to purposefully advance an internal commercial interest of the search provider.'" *Baidu*, 2014 WL 1283730, at *8.

The e-ventures ads that Google delisted clearly meet this definition. The ads consisted of sponsored links that invited the consumer to click on them, and with each click, Google received compensation. Google cannot deny that these ads proposed a commercial transaction, and accordingly, if the ads were to constitute "speech," that speech would be "commercial" and entitled to lesser First Amendment protection. Under these circumstances, as in *Jordan v. Jewel Food Stores*, dismissal is not justified.

B. The Communications Decency Act does not protect Google because Google did not act in "good faith" and did not even look at the websites' content, much less make a "good faith" determination that the content was sufficiently objectionable.

As acknowledged by Google, the Communications Decency Act, 47 U.S.C. 230 (“CDA”), protects internet service providers from liability only where they acted in "good faith." 47 U.S.C. § 230(c)(2). Google further admits that, at this preliminary stage, the issue is whether Plaintiff has pled an absence of good faith. Motion, at 12. *See also Smith v. Trusted Universal Standards,* No.

09cv4567, 2010 WL 1799456, *7 (D.N.J. May 4, 2010) (court could not conclude that internet service providers exercised "good faith" at dismissal stage).

Plaintiff has pled an absence of good faith, alleging that Google's conduct was commercial, punitive, anti-competitive, and went well beyond a "traditional publisher's function." Specifically, Plaintiff takes issue with the fact that Google did not act in accordance with its own published Removal Policies (SMF, ¶ 27-32), that Google provided e-ventures with no notice before summarily delisting the websites (*id*. at ¶ 7-8), that Google did not provide e-ventures with reasonable redress (even after e-ventures contacted Google through counsel and initiated this lawsuit) (*id*. at ¶ 36), and that Google's actions appear to have been precipitated by an anonymous tipster (*id*. at ¶ 7). Without the benefit of discovery, e-ventures does not actually know the identity of the tipster or his relationship with Google. Even if the individual is unknown to Google, it does suggest bad faith that Google would take such destructive, arbitrary action based upon the ranting of an anonymous tipster, without even providing e-ventures with an opportunity to rebut the tipster's accusations.

Google either ignores Plaintiff's allegations of bad faith or argues that they are not "plausible." Google's Motion, at 13. As the Court is undoubtedly aware, the Court is required to accept Plaintiff's factual allegations and all reasonable inferences from them as true for the purposes of this Motion. Moreover, most of the allegations cited above have either been admitted or ignored by Google. *See Smith,* 2010 WL 1799456*,* at *7 ("One would expect that if an interactive computer service had acted in good faith, it could and would have come forward with the legitimate basis for its actions when questioned"). Google's arguments amount to an admission that e-ventures' claims are not ripe for dismissal under the CDA.

In addition, even assuming that Google could meet the "good faith" standard, which it cannot, Google still cannot show it believed the information was "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *See* §230(c)(2). First, there is no case cited by Google indicating that "search engine manipulation" is "otherwise objectionable" under the

statute. The statute was designed to "empower parents to restrict their children's access to objectionable or inappropriate online material." *See Smith,* 2010 WL 179945, at *6. The cases Google cites involving harassing, offensive email spam (which could be sent to email accounts viewed by children or other members of the public) are clearly inapposite. e-ventures' websites were not objectionable and harmed no member of the public. Second, Google forgets that it did not even review all of e-ventures' websites and ads before summarily removing them, and then relisted some of the same content that had earlier been delisted. Clearly, the content of the websites and ads were not the issue. Google is not entitled to Section 230 immunity for content Google did not even review.

Finally, Section 230 immunity does not exist for a FDUTPA claim, given that Section 230 states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). *See also Almedia v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (discussing limits to Section 230 immunity).

C. Plaintiff states a FDUTPA claim.

e-ventures is surprised to see that Google is asserting that "Plaintiff was not a consumer of Google's services" (Motion, at 15) as Google has received significant monthly payments from e-ventures to advertise e-ventures' websites (the same websites that were delisted) for years. SMF, ¶ 2-3. Plaintiff's Complaint asserts that its websites were removed from Google's "paid" search listings, which they only inhabit by virtue of payment to Google. Compl., ¶ 1, 46; Trika Verif. Plaintiff was and is a consumer of Google's services. *Id*.

Google also confuses the standards between a FDUTPA claim surviving a motion to dismiss and succeeding at trial in arguing that the "plaintiff must make 'a showing of probable, not possible, deception.'" Doc. 36, Motion, at 16. At this stage, Plaintiff is not required to make an evidentiary showing; Plaintiff's factual allegations are accepted as true and are more than sufficient to state a FDUTPA claim.

In addition, although Google accuses e-ventures of having a "lack of candor" because e-ventures did not reference and attach Google's "Webmaster Guidelines" in the Complaint, Google improperly attaches completely separate documents (Google's Webmaster Guidelines and Removal Policies) as one Exhibit to its Motion, apparently in an attempt to confuse the Court into considering the documents together. SMF, ¶ 27-32. These documents are accessed by e-ventures and the public at separate website addresses. *Id*. The documents do not even link to one another. *Id*. Google also refers to the "Webmaster Guidelines" as part of Google's "Policies" although the Guidelines are never identified as "Policies" and are not listed with Google's published Policies. *Id*. e-ventures submits that the Webmaster Guidelines, which were not even referenced in Plaintiff's Complaint, should not be considered by the Court on a motion to dismiss.

Nevertheless, even if the Webmaster Guidelines are considered, they do not mean that Google's conduct was not "unfair" or "deceptive." First, the Guidelines never indicate that Google will punish a person or company by removing all of their websites, without individual review, to "deter" "bad behavior," but that is what Google alleges occurred here. Google's actions were inconsistent with even the Guidelines. If Google's conduct *had* comported with its statements to the public, Policies, and Guidelines, then e-ventures' websites and ads would not have been delisted.

Second, it is not enough for Google to point to statements that exist in obscure locations on the web and argue that, as a result, its policies are transparent. Rather, Google must show that the public actually reads the Guidelines and understands them to be terms of use, even where they contradict Google's other published policies. Moreover, there is nothing transparent about Guidelines that provide vague, non-exhaustive definitions of terms like "pure spam," which are terms coined by and defined by Google.

Third, Google's actions were "unfair" within the meaning of the statute because they were anti-competitive. Google's criticism of e-ventures was that e-ventures tried to be ranked higher in Google's search results. Hypocritically, Google accepts monthly payments from e-ventures to

achieve the same result. e-ventures' pays Google significant sums each month to be listed first in Google's paid link advertisements. Google's true criticism of e-ventures was that e-ventures was decreasing Google's revenues from the paid links.

Fourth, despite Google's assertions that its statements are not deceptive, they are contrary to Google's conduct here. For example:

- *Google's "mission is 'to organize the world's information.'"* Motion, at 3. Google excluded e-ventures' information from the world's information.
- *"Google's index merely reflects that the page exists on the wider web"* Compl., ¶ 22. e-ventures' pages existed on the web, but they were not reflected in Google's index.
- "*Google search results are a reflection of the content publicly available on the web." Id.* ¶ 23. e-ventures' websites were publicly available but did not appear in Google search results.
- *"See our Removal Policies to learn more about what information Google will remove." Id.* ¶ 24. The Removal Policies say nothing about the removal of "spam" or blacklisting companies.
- "*This page explains our policies for different types of content that Google will remove from web, image or video results*." *Id*. at ¶ 25. Again, spam and blacklisting is not mentioned.
- "*Google is committed to leading the industry in transparency"* and publishes data that "*sheds light on how laws and policies affect Internet users and the flow of information online*." *Id*. at ¶ 27. Google does not publish any data shedding light on these removals.
- "*Chilling Effects posts and analyzes copyright removal requests (among other types of content removal requests) from a number of participating companies on its website. We link in our search results to the requests published by Chilling Effects in place of removed content when we are able to do so legally*." *Id*. at 28. Google could have linked to Chilling Effects legally, but did not do so, to let the public know that e-ventures' websites had been removed.
- "*It is Google's policy not to censor search results. However, in response to local laws, regulations, or policies, we may do so. When we remove search results for 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.*" SMF, ¶ 31. Google censored e-ventures' websites without any notice to the public.

Finally, Google cannot succeed in arguing that its actions were aimed at preventing injury to the consuming public, while also arguing that Google's goal was "deterring" "bad behavior." The public was not Google's concern, because: (a) Google continued to profit from e-ventures' websites (which Google alleged were engaging in "bad behavior") during the Google ban (*id*. at ¶ 18); (b) Google delisted websites that were not engaged in "deceptive manipulations" (*id*. at ¶ 14, 16); (c) Google

eventually restored Plaintiff's websites and ads, sometimes with no changes having been made (*id*. at ¶ 39); and (d) Google delisted the websites instead of just impacting their "relevancy."

D. Plaintiff states a defamation claim.

Google's arguments are contradictory. On the one hand, Google argues that it cannot be liable under FDUTPA or in tort because its search results are published "speech" protected by the First Amendment, and websites are manually removed by Google only if they meet Google's narrow criteria for removal. On the other hand, Google argues that in manually removing e-ventures' websites, because they *did* meet Google's narrow criteria for removal, Google did not make any false statements about the websites. Google cannot have it both ways.

To understand the false message Google gave to the public about e-ventures, the Court need only look to commentators' statements about Google's action, such as "[e]ventures…was de-indexed by Google…for using black hat tactics." Doc. 11, Arena Decl., Ex. D. Google's conduct informed the public, falsely, that the delisted websites engaged in "black hat tactics." Whether or not e-ventures' websites *did* employ certain tactics or contain certain content, in violation of Google's published policies, is a question of fact. Contrary to Google's suggestion, no court has held that Google's delisting of a company's websites is an expression of an "opinion." In *Search King*, 2003 WL 21464568, at *10-12, the court said that Google's "PageRank," or the relevance assigned to a particular search result, was "opinion-like." That comment has no bearing on the question whether indicating to the public that e-ventures' websites were removed for "black hat tactics" is a false statement. *See also Jews for Jesus v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008) ("Defamation by implication arises, not from what is stated, but from what is implied when a defendant 'juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication…'") (*quoting Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (2007)). The public could only interpret the disappearance of e-ventures from Google one way, and that

implication was defamatory. Moreover, Google's actions were at least negligent, as it acted without even reviewing all of the websites in question, for reasons of "efficiency." SMF, ¶ 9-10.

Finally, Google quotes Plaintiff's Complaint in a misleading manner. The Complaint states: "Google's removal of over 230 websites of e-ventures falsely indicates to the public that e-ventures websites are not worthy of being listed on Google's search engine, *because the websites somehow meet Google's narrow criteria for removal*." Compl., ¶ 63 (emphasis added). Google argues that the first portion of the quote is an expression of opinion. As discussed above, the second portion of the quote, which Google fails to address, is a question of fact.

E. Plaintiff states a tortious interference claim.

Google argues that the tortious interference claim should be dismissed under Florida's "single publication/single action rule." This theory would require the Court to disregard that there are multiple publications at issue in this case – Google acted to delist e-ventures' websites not just on September 18, but also later when e-ventures' created new websites. Google's actions were varied and continuing between September 18 and December 11 (when e-ventures' websites were relisted and its preliminary injunction motion withdrawn). Google's theory would also require the Court to conclude that all of e-ventures' damages arose out of a single publication instead of multiple acts of delisting. The single-action rule cannot bar e-ventures' claim.

Google's argument that it acted with no knowledge of e-ventures' contractual relationships and did not cause them to be breached ignores reality. e-ventures' counsel sent Google's attorneys a letter detailing the damage, which was ignored, and e-ventures submitted multiple notices directly to Google, which were ignored, prior to filing its Complaint. Compl., ¶ 38-41.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Google's motion to dismiss. If the Court deems amendment of the Complaint necessary, Plaintiff respectfully requests leave to amend.

Respectfully submitted,

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Dated: January 12, 2015

EXHIBIT A

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

2. Allegations Concerning Notice of Removal of a Listing from Search Results

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

> It is Google's policy not to censor search results. However, in response to local laws, regulations, or policies, we may do so. When we remove search results ***for 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.

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

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

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

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

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[2] KinderStart's pleading on "information and belief" does not immunize it from Rule 11 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.").

[3] By identifying several categories of allegations from the SAC as false, Google does not 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.