PETITION FOR REVIEW

California Supreme Court

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S. LOUIS MARTIN V GOOGLE, INC

San Francisco Superior Court Number: CGC-14-539972

Court of Appeals Case Number:

A145657

First Appellate District, Division 2

Judges: Ernest Goldsmith and Joseph Quinn

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SUMMARY OF SIGNIFICANT FACTS

Petition Summary: This Petition for Review is asking for review of an issue that has been edging its way toward the spotlight for some time and now finds itself fully in it. With a shift in the search-engine market away from search-results integrity and towards maximizing profits via advertising, the issue is this: Can search engines such as Google present unmarked advertising as protected speech per the First Amendment, or does this fall under the prohibitions of Section 5 of the Federal Trade Commission Act? In Plaintiff Martin's view, such search results clearly constitute a form of deception and "information pollution" and should not be considered as protected speech. The harm both to the consumer and completion is discussed below under ***Use of 425.16 Anti-SLAPP with Deceptive Search Results****, which relates the particular case of Martin v Google, Inc. A secondary issue discussed under* ***Dismissal and Common Sense*** *is the manner in which this case has been dismissed in the lower court of appeal. Does a first defective judgment that has been updated after a considerable passage of time still rule, or does the second judgment? Common sense, life experience, and practically dictate that the second judgment is* ***the*** *judgment. Finally, though the Plaintiff is not asking the court to look into the matter, the background of a too-cozy relationship of the lower courts with a politically powerful litigant is discussed under* ***Justice Shoved Aside****.*

MEMORANDUM OF POINTS AND AUTHORITIES

1. Use of 425.16 Anti-SLAPP with Deceptive Search Results

Summary: This is a critical issue. Can search engines present results that are deceptive per Section 5 of the Federal Trade Commission Act and claim that they are protected by the First Amendment? Such results constitute "information pollution" and harm both the consumer and competition. This is explained below. The issue goes well beyond the case of Martin v Google, affecting millions of users or more, and probably tens of thousands of competitors. The issue begs for resolution.

On 13 November 2014, the Superior Court in San Francisco granted Defendant Google's 425.16-based special motion to strike in S. Louis Martin v Google, Inc. This was wrong for a number of reasons as discussed below:

First, the motion was untimely: It was filed 72 days after the complaint was filed.

But most important of all: The motion should not have been granted in the first place. Plaintiff Martin both opposed the ruling in testimony in court on 13 November 2014, and Martin also filed an opposition that was ignored by the court. In fact, Judge Goldsmith said it did not exist. Martin also filed other documents that supported continuing the case, but they were all suppressed (not made viewable and ignored by the court). One of those documents, "Shifting Search Scenarios, Extreme Bias," was critical to the case. It is discussed below.

Google claimed the right to strike per ccp 425.16, the California Anti-SLAPP law. But the problem with its application is this:

Google makes the claim that its search results are protected speech per the First Amendment. But this is a false claim. ***Google's search results are not protected speech because they are in violation of Section 5 of the Federal Trade Commission Act.*** Being unmarked ads bid on for placement ranking on the Google's *AdWords* program, they constitute a deceptive business practice. And they not only harm the consumer but competition as well. For consumers, the number harmed is probably in the millions or more; for competitors, the number disappeared is probably in the tens of thousands. Google has skimmed the advertising dollars of nearly every business on the planet and reduced the quality and quantity of objective news reporting.

Note: Not all Google search results are unmarked ads, but if a search involves anything that can make money and be advertised -- and just about everything can be -- Google's search results are now mostly unmarked ads.

When it comes to the consumer, the harm is pretty obvious. Imagine someone searching for a cancer or Alzheimer's medication and Google does not return the best or even appropriate medication; it returns an ad paid for by a pharmaceutical company that bid the highest. The consumer could be badly misled into taking some ineffective medicine, while one that would help them would not be presented at all in the search results. And perhaps the most effective medication, because the pharmaceutical company that makes it refused to "pay the Google", would be disappeared.

Information Pollution

This is a clear case of *information pollution*. It is information that is tainted by deceptive business practices. It is akin to the pollution of air, water, and food; but perhaps it is even worse, as deceptive information could tell you that your air, water, or food was safe when it was not. Deception of this type -- ***paid advertising that is, however, not marked as such*** --

should not be allowed because it is clearly harmful to the consumer. And in fact it is not allowed per the Federal Trade Commission. But Google simply chooses to ignore the rules.

Now consider harm to competition. In order to free up the top search position in the search results listings, the highest quality search results must be virtually disappeared. Such is the case with CoastNews.com, which once occupied the top search spots in the key restaurant areas in San Francisco. It routinely came in #1, 2, or 3, in areas such as North Beach, Chinatown, Downtown, Fishermen's Wharf ... By agreement with Google, CoastNews.com once hosted Google ads on it site. (Note: CoastNews.com contains “San Francisco Restaurant & Dining Guide”.) But with the new search scenario employed by Google (see "Shifting Search Scenarios, Extreme Bias" in the Appellant’s Appendix), Google can make approximately 1,250 times as much money by running unmarked ads in its place. But of course this depends on Google *successfully misleading the consumer into thinking that he or she is viewing a bone fide (honest) search result based on quality*, not how much money the restaurant paid in a bidding war.

Killing publishers

S. LOUIS MARTIN, in one of his court-suppressed document, "Shifting Search Scenarios, Extreme Bias," (see page 115 of the Appellant's Appendix) tells the same story as Harvard University law professor Michael Luca and Columbia University law professor Tim Wu, who recently studied Google's search results and declared that they were biased and harmed both consumers and competition. Martin shows in detail why Google is doing it. While the good law professors are on the right track, Martin does not think they comprehend the full economic implications of what Google is doing. The money from returning unmarked advertisers is hugely more lucrative than returning honest search results. When you do the math, it is almost staggering. Martin explains in detail why Google is disappearing publishers in its search results and instead returning unmarked advertisers.

Let's do the math, based on the research analysis of "Shifting Search Scenarios, Extreme Bias."

In the case that Google returns an actual publisher (honest search result based on ranking, sometimes called "organic" or "natural" search result) with an ad on the page, for 1,000 clicks on that publisher's URL, Google would make about 32 percent of 2.5 clicks * 6 USD. That comes out to be 4.80 USD, the price of a cheap bottle of wine at Trader Joe's.

Notes:

- 2.5 clicks is used because only 2 to 3 out of 1000 users would click on an ad if they knew it were an ad;
- 6 USD is the average cost to the advertiser for the click;
- Google keeps 32 percent of the 6 USD.

In the case that Google returns an unmarked advertiser, Google would make 100 percent of 1,000 * 6 USD. That comes out to be 6,000 USD, the cost of some pretty pampered weekend fun for a Google-glassed executive in a self-driving car.

In short, Google makes 1,250 times as much returning an unmarked ad than it does a real publisher!

But note that it is very important that Google does not label an ad as an ad, because if it did the click rate would go down to 2 to 3 in 1000. The practice is of course very deceptive, as the assumption by the consumer is that if the ad is not marked as an ad, then it is a bone fide search result. And, ironically, the presence of a few labeled ads enhances that perception. It says, "Those are the ads; here are the real

search results." While this strategy is clever, it is also extremely devious.

Thus the motivation is clear and obvious for disappearing real publishers and, by the deception of the unmarked ad, returning an ad instead. Real publishers get in the way of ad delivery on the Google ad network, so they must go. (See "Introduction to What Is Google?" on page 108 of the Appellant's Appendix and "What Is Google?" on page 111), two other suppressed and ignored documents.) ***And, ironically, the higher the quality of real publishers, the greater is the urgency to get rid of them!***

The harm is clear: Google puts CoastNews.com out of business and sends consumers to restaurants not based on restaurant quality but on the amount the restaurant paid. Google in fact may send the consumer to the worst restaurant in town, not the best. This constitutes deception. While you do not die from this experience, in the case of pharmaceuticals, you well could.

In the areas of air, water, and food, such deception is not tolerated. The EPA and Food Quality Protection Act protect the consumer. Nor should it be in the area of information. One could argue that "clean" information is even more important these days than pure air, water, and food, as such

information is used unwittingly by consumers to determine health and safety consideration in many areas of their lives.

As just one more example, consider the consumer buying tires on the basis of "polluted" information about tire safety. A tire company with defective or low-quality tires could simply outbid its competitors, inducing consumers to purchase unsafe tires for their cars. Death could easily result.

Returning deceptive search results is clearly a serious matter. Search results form the basis from which many important decisions are made these days. They form the basis for public opinion on important matters and are used for research and homework in schools. Dirtying the mind with misleading or false information should not be ignored. Clean information is the heart and soul of the democratic process; lies and half-truths are the basis of totalitarian forms of government.

Now consider what Google and the Superior Court claim as the legal basis for granting the motion to strike. Although they don't explicitly say so, it is really ccp 425.16 (c) (4) that they are invoking. It says:

(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of

free speech in connection with a public issue or an issue of public interest.

Google's search engine is taken to be the "conduct" of the company which presumably S. Louis Martin is bullying with its lawsuit. But the argument simply does not hold up for this reason: **Deceptive search results are not protected by the First Amendment; and in fact they are prohibited by Section 5 of the Federal Trade Commission Act.** They are no more protected than shouting "Fire!" in a crowded theatre or inciting a riot in front of the courthouse and yelling "burn it down". And the argument that Google makes that its search engine is a free service and the consumer does not have to use it does not hold up either. The consumer relies on Google and expects honest information, not pollution in the form of deceptive information. If someone sells tomatoes, grapes, or peanuts in a market, it is expected that they are safe to eat, not that they might kill you. That you have other options at the market down the street does not matter. Selling tainted food is illegal.

Consider the case of Flatley v Mauro, decided by the California Supreme Court. ***The court denied Mauro's 425.16-based motion to strike on the grounds that extortion, as employed by Mauro, was not protected speech.*** The court held that the defendant cannot use the Anti-SLAPP law if "either the defendant concedes, or the evidence conclusively

establishes, that the assertedly protected speech or petition activity was illegal as a matter of law."

While Google is not directly extorting money from clients -- though some would argue that its *AdWords* program for bidding on keywords amounts to the same thing -- it is engaging in deceptive business practices regarding unmarked advertising. And thus Google should never have been granted the 425.16-based motion to strike. The free-speech rights of its search algorithm, if they exist at all, do not apply when it is telling lies to consumers or deceiving them!

On the subject of Google's late filing of its 425.16 based special motion to strike, consider this:

Per 415.16 (f) it is due within 60 days; Google filed it in 73 days without a Motion for Leave to delay, with the clerk not catching or flagging the error, and with this violation going unnoticed or unnoted by the judge. Why it was not filed before or with the Demurrer (also filed late) is anyone's guess, though filing it late did cause surprise and some confusion.

In *Olsen v Harbison* the, the appeals court ruled against a late filing of a 425.16-based motion to strike, stating that the anti-SLAPP motion "is denied on the ground that it is dilatory,

without good cause for failing to bring the motion earlier….” Likewise, in the case of S. LOUIS MARTIN V GOOGLE, INC. the filing by Google was “dilatory” and no good cause -- or any cause at all! -- was ever stated, formally or informally. It therefore should not have been allowed. And it is another instance of Google’s privileged attitude of entitlement.

In *PLATYPUS WEAR, INC. v. Martin GOLDBERG,* an appeals court overturned the decision of the Superior Court to grant a late filing of a 425.16-based motion to strike, stating,: “[T]he grounds given by the court for finding the anti-SLAPP motion [timely] are inconsistent with the substantive law of section 425.16, …”

Of course, in the case of S. LOUIS MARTIN v GOOGLE, INC., no application for late filing of the Anti-SLAPP was even filed! The late filing was simply tacitly accepted by the clerk of the court and the judge, again indicating a privileged status for Defendant GOOGLE, INC.

But in over a year in court, such issues about deception and the use of 425.16 never came up. Google and the court engaged in nothing other than **procedural war** against Plaintiff Martin to ensure they did not. In fact, none of the issues raised in the complaint were ever discussed. Procedure triumphed over substance. It is interesting to note that the

very first sentence of the Complaint raises the issue: “First, Google returns biased search results that favor its own paid advertisers and Google-owned companies.”

It the court wants to bar all lawsuits involving Google search, then it should get the state legislature to pass a law that says Google cannot be sued over its search results. That, however, would conflict with Federal law.

(For more on the use of 425.16 to derail this case, see the Opening Brief filed with the Appeals Court: http://coastnews.com/google/opening-brief-6-PDF.pdf and the Appellant’s Appendix: http://coastnews.com/google/record-1.pdf.)

Let us now consider the manner in which this case was dismissed by the Appeals Court after two and a half months of survival there.

2. Dismissal and Common Sense

Summary: This is a common-sense issue that needs a common-sense solution. If two judgments are filed by a court, logic, common sense, and practicality dictate that the second

one is the final one and is therefore the one appealed from. At things now stand, a litigant might claim that the first judgment is the one that counts and assert that an appeal is untimely, even though it is clearly not, as in the case of Martin v Google, Inc. This issue needs to be clarified to avoid procedural mishaps and abuse, especially regarding the 425.16-based special motion to strike.

On 19 August 2015, about one month after the Civil Case Information Statement was filed for the appeal, Google filed a Motion to Dismiss. This was strongly opposed by Plaintiff Martin on 26 August 2015. (See http://coastnews.com/google/opposition.pdf .)

The basis for Google's motion was this:

In the Superior Court, **two entries of judgment were entered**. One was filed on 19 November 2014 and another on 23 April 2015, about five months later. But first it should be noted that the special motion to strike was filed late by Google, 73 days after the complaint was filed, ***although this untimeliness was ignored by the court***. But then, when Google was granted its special motion to strike, it failed to file the "proposed order". On 8 April 2915 this was noted by Presiding Judge John K. Stewart and Google was ordered to "show cause" under penalty of sanctions. Google complied

by filing the proposed order, no sanctions were ever imposed, and a new entry of judgment was entered on 23 April 2015.

Plaintiff Martin assumed the new entry of judgment was ***the*** entry of judgment and timed his appeal accordingly. He made the reasonable assumption that a second decree in any situation always takes precedent over an earlier one. He in fact knew of no other situation in public or private life where things worked otherwise. It is even so at the zoo. If the boa constrictors are not to be fed rats on Wednesday, even though they were previously fed rats on Wednesday, going forward they are not to be fed rates on Wednesday! (See Petition for Rehearing here: http://coastnews.com/google/petition-for-rehearing-1.pdf .)

Google claimed, however, that despite the fact that it made procedural errors both in filing the untimely motion to strike and in failing to file the "proposed order" and being ordered to show cause, Plaintiff Martin was somehow the one at fault and should take the hit for Google's various failures. Common sense does not buy the argument that when something goes wrong it is always someone else's fault. Google owns its mistakes, not Plaintiff Martin.

Moreover, per ccp 904.1, appeal can be made from any judgment, and Plaintiff Martin picked the official, corrected final judgment filed, thinking he was doing the right thing

and was as timely as timely can be. And apparently the clerk of the court thought so too or the appeal would not have been accepted by the court. This kind of information is checked carefully by the court. Nevertheless, Plaintiff Martin is left holding the bag for the procedural defects cause by Google's negligence; and, after more than a year in court, has not had his complaint heard. This is injustice by any other name.

The court, however, agreed with Google on its motion for dismissal, but only in the lamest fashion, simply quoting a few words from Google's motion to dismiss as though rewriting a company press release for publication in a trade journal. Note also that much had taken place in the five-month period between the two entries of judgment. A motion to vacate the strike order was filed by Plaintiff Martin and denied by the court; a request for continuance was filed by Plaintiff Martin and denied (it was based on "good cause": an investigation for perjury of judges Goldsmith and hacking attacks by Google); the leaks in the FTC investigation of Google to the Wall Street Journal occurred, showing that the real FTC investigators had found Google guilty of harming the completion and the consumer; new US Senate investigations commenced along with the European Union lawsuit; the head of Google in Europe, Matt Brittin, admitted that Google "didn't always get it right" … The second judgment was entered in this new environment of revelations about Google that the court chose to ignore but that Plaintiff Martin had duly noted in filings and/or court hearings.

As to the filing of the Appeal by S. LOUIS MARTIN, it was timely per CRC 8.104, which extends time for filing in the case that a Motion to Vacate a Judgment has been filed. 29 July 2015 was the "sooner of" applicable dates here, and S. LOUIS MARTIN filed his appeal on 8 July 2015 (it appears in the Register of Actions on 9 July 2015); thus Plaintiff Martin easily met the Appeal deadline, whereas Defendant Google did not even meet the deadline for filing its 425.16-based special motion to strike and failed to file a Motion for Leave. Question: Who is more timely than whom here?

In Google's Motion to Dismiss, filed 19 August 2015 in the Appeals Court, Google states:

Appellant's motion to vacate the April 21, 2015 judgment was not valid and therefore would not extend his time to appeal…. California Code of Civil Procedure Section 663 recognizes two valid grounds, allowing parties to challenge judgments as "not consistent with or not supported by the special verdict" or entered on an "[i]ncorrect or erroneous legal basis . . . , not consistent with or not supported by the facts.

This statement is blatantly false. Plaintiff Martin based his entire argument for vacating the judgment on ccp 663. He showed both the erroneous use of ccp 425.16 to protect deceptive search results per Section 5 of the Federal Trade

Communication Act and the Judge Goldsmith's failure to comply with the rules of 425.16 that say the pleadings must be considered. Instead Judge Goldsmith read none of the pleadings and suppressed others. And Plaintiff Martin showed the ruling was completely inconsistent with the facts, especially in the light of the Federal Trade Commission leaks to the Wall Street Journal. Despite all this, Judge Quinn signed an order written by Google that said Plaintiff Martin failed to address CRC 663. Martin's entire discussion in the 29 June 2015 hearing on the motion to vacate the judgment was based on CRC 663! Transcripts are available if there are any doubts about this. And it has been reported that Judge Joseph "Pinocchio" Quinn's nose has returned to its normal length.

In short, Plaintiff Martin is asking for the court to clarify this issue that reason and common sense would see one way but that the court, at least in the case of Martin v Google, does not. Plaintiff Martin feels that justice was not applied uniformly in this matter. And note this: Google was even uneasy about whether its motion to dismiss would be honored by the court! It filed for an Application for Extension for its responding brief after the Plaintiff filed both his Opening Brief and Appellant's Appendix a week early and was ready for further action on the case.

Please also note that the granting of the Application for extension violated the letter and the spirit of CRC 8.63;

Google showed no "good cause" for the extension. It had three able attorneys on the case, one the president of the American Bar Association Antitrust group, and none was known to be ill. If anyone should have been granted an extension, it should have been the *Pro Se* Plaintiff Martin. Nevertheless, the application was granted the day it was filed, and the Plaintiff's harp opposition to it likely cause the early dismissal of the case. Considering the dismissal's proximity to the opposition filed by Plaintiff, it appeared to be punitive in nature. (See Opposition to Google's Application for Extension here: http://coastnews.com/google/opposition-3.pdf.)

3. Justice Shoved Aside

Summary: Collusion, either tacit or explicit, between the court and politically-powerful litigants goes against the grain of justice, yet it is a daily reality of the justice system. While it is impossible to completely weed it out, when it is observed it needs to be reported. This is clearly an issue here, but the Plaintiff is not asking the court to look into it. Nevertheless, it is part of the background and environment of this case, so its presence is being reported.

Although Plaintiff Martin is not asking the court to look at this, it is clear that both Superior Court judges perjured

themselves in signing orders and judgments written by Google that were blatantly false. This is thoroughly discussed in the Opening Brief filed with the Appeals Court and is easily seen in the Register of Actions in the Superior Court. In short, Judge Goldsmith signed a document that said Plaintiff Martin failed to file an opposition to the strike order while he, the judge, suppressed critical documents and failed to do what is required by ccp 425.16 to determine if a Plaintiff has a chance to prevail in the case: namely, consider the pleadings, which Judge Goldsmith did not do. He also stated that Google had "met its burden" of showing that the complaint arose from constitutionally protected activity of Defendant Google. Google has not met this burden. Judge Quinn, in the second of the two judgments mentioned above, said Martin failed to address ccp 663 in his motion to vacate the judgment. That is also a false statement; Martin's whole discussion in the hearing of 29 June 2015 was based on ccp 663 (1) and (2). The transcripts of the hearing clearly show this.

To put it mildly, it appeared that the Superior Court was working in an overly cooperative way with Google to ensure that no discussion of the complaint ever occurred. And in the Appeals Court, Judge Kline's immediate granting of the Application for Extension seemed but another example of an overly Google-friendly court. The extension clearly violated the rules of CRC 8.63. Procedural war appears to have been launched from day one to make certain that all substantive

issues were suppressed. Calling this justice could hardly be called a fair statement.

Dr. S. Louis Martin

/s/ Dr. S. Louis Martin

13 November 2015