

No. 24-5006

IN THE
United States Court of Appeals
for the District of Columbia

BRAD GREENSPAN,

Proposed Intervenor-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Plaintiffs-Appellees,

STATE OF COLORADO, ET AL.,

Plaintiffs-Appellees,

GOOGLE LLC,

Defendant-Appellee.

On Appeal from the
United States District Court for the District of Columbia
Honorable Amit P. Mehta
Nos. 1:20-cv-03010-APM & 1:20-cv-03715-APM

MOTION OF PLAINTIFFS-APPELLEES TO DISMISS APPEAL

INTRODUCTION

Plaintiffs-Appellees (the Government) respectfully request that this Court dismiss this appeal because Appellant Brad Greenspan has not demonstrated Article III standing. Mr. Greenspan sought intervention, purportedly to “help” the Government “fix[]” its case and present “missing data and info.” Pl.’s Mot. to Intervene 5, ECF No. 783. While the United States values, invites, and routinely encourages the participation of third parties impacted or involved in the legal or factual issues presented by a litigated matter through a range of mechanisms, the limited question posed by this appeal is whether this particular third party has standing to intervene pursuant to the requirements of Article III and the Federal Rules of Civil Procedure. Mr. Greenspan’s general interest in this litigation does not confer Article III standing for intervention of right and does not warrant permissive intervention.

STATEMENT

1. The Government alleges that Defendant-Appellee Google LLC has illegally monopolized certain markets for search services and search advertising in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, since at least 2010, Google has maintained monopolies in these markets through exclusionary conduct that deprives rivals of the scale necessary to compete effectively, discourages competition from potential rivals, and forecloses rivals through

exclusive distribution agreements. These agreements include agreements with Apple Inc., with manufacturers of Android mobile devices and wireless carriers, and with third-party developers of web browsers, whereunder Google agrees to share advertising revenue with its counterparty in exchange for placement as the default search engine.

Additionally, the Government plaintiffs in Case No. 1:20-cv-03715¹ allege that Google also harmed competition through its operations of its SEM tool SA360, which is enabled by the impact of the exclusionary distribution contracts and general search engine rivals' resultant and limited ability to attract advertisers. They further allege that as Google's monopoly flows downstream, Google's rivals are weakened in their ability to make arrangements with other industry partners that would increase their ability to attract users and build scale.

Case No. 1:20-cv-3010 was filed on October 20, 2020. Case No. 1:20-cv-03715 was filed on December 17, 2020. The parties conducted discovery for almost two years. The district court granted partial summary judgment to Google on August 4, 2023. The trial commenced on September 12, 2023, and concluded on November 16, 2023, with a total of 42 days of trial. The parties filed post-trial pleadings on

¹ The district court consolidated *United States v. Google LLC*, No. 1:20-cv-3010 (D.D.C. filed Oct. 20, 2020), and *State of Colorado v. Google LLC*, No. 1:20-cv-03715 (D.D.C. filed Dec. 17, 2020), for purposes of trial and discovery. Order, ECF No. 67. The district court denied intervention in both matters, and Mr. Greenspan has sought to appeal both denials. Notice of Appeal, ECF No. 798.

February 9, 2024, with further briefing due on March 22, 2024, and closing argument scheduled to begin on May 1, 2024.

2. On the day the trial concluded, and more than three years into the lawsuit, Mr. Greenspan filed his motion seeking intervention, apparently both as a matter of right, *see* Fed. R. Civ. P. 24(a)(2), and by permission, *see* Fed. R. Civ. P. 24(b)(1)(B). Mr. Greenspan claimed to be able to “contribute[] facts about specific matters beginning in 2005 related to Google and the state of play,” Pl.’s Mot. to Intervene 4, ECF No. 783, without identifying any facts relevant to the Government’s case. He stated that he was “happy to help the DOJ and States with fixing their legal case before too late” by providing “factually missing data and info that would help the case,” *id.* at 5, again without identifying any relevant facts. He also appears to have requested that the district court order the Government to bring additional, unspecified claims against Google. *Id.*

On November 28, 2023, the district court denied Mr. Greenspan’s motion for intervention. The court held that Mr. Greenspan had not demonstrated that he was entitled to intervene either as a matter of right or permissively. It explained that, although Mr. Greenspan argued that “he would contribute additional evidence in support of Plaintiffs’ case,” he had “failed to identify any cognizable claims or injuries he would be able to pursue or remedy, as required to establish Article III standing.” Minute Order, Nov. 28, 2023 (attached as Exhibit A). Moreover, the

court held that Mr. Greenspan’s motion was untimely given the “time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *Id.* (quoting *Amador Cnty., Cal. v. U.S. Dep’t of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014)).

3. On December 27, 2023, Mr. Greenspan filed a motion for reconsideration of the district court’s denial of intervention. Mr. Greenspan stated that he “was about to submit evidence” regarding alleged “illegal no poach agreements which were per se violations of the Sherman Act,”² apparently involving Google, Apple, Comcast, and MySpace, and an alleged “illegal [C]layton Act section 8 violation,” apparently involving Google and Apple.³ Pl.’s Mot. for Recons. 6-7, ECF No. 790.

The district court denied the motion on January 9, 2024. The court concluded that Mr. Greenspan had “identified no intervening change in law, new evidence, or other reason for this court to reconsider its prior decision.” Minute Order, Jan. 9, 2024 (attached as Exhibit B). The court further concluded that “nothing presented

² Generally, a no-poach agreement is an agreement to refuse to solicit or hire another company’s employees. Such agreements can be per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See generally* Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidance for Human Resources Professionals* 3 (2016), <https://www.justice.gov/atr/file/903511/dl?inline>.

³ Section 8 of the Clayton Act prohibits a person from serving as an officer or director in two corporations that are competitors, among other requirements. 15 U.S.C. § 19.

in his motion alters the court's conclusions that he lacks Article III standing to intervene and that his application is untimely." *Id.*

On January 10, 2024, Mr. Greenspan filed a notice of appeal from the district court's order denying his motion for reconsideration.⁴ Notice of Appeal, ECF No. 798.

4. Mr. Greenspan filed additional motions, including motions to recuse the district court judge, to recuse a separate district court judge not assigned to these matters, and to join multiple parties, including counsel for Google and for third parties, ECF Nos. 801-806, which the district court denied on January 25, 2024, Minute Orders, Jan. 25, 2024. The court also ordered that, "[i]n light of the court's denials of intervention by [Mr.] Greenspan and his history of frivolous, repetitive filings, the Clerk of Court is hereby directed to accept no further filings from Mr. Greenspan in this matter, absent leave of court." *Id.*

ARGUMENT

Mr. Greenspan has failed to establish Article III standing, as required for intervention of right. And this Court has declined to exercise jurisdiction over appeals of the denial of permissive intervention where the movant lacks Article III standing. Accordingly, this Court should dismiss Mr. Greenspan's appeal.

⁴ On January 8, 2024, Mr. Greenspan filed a petition for writ of mandamus in this Court. *In re Greenspan*, No. 24-5007 (D.C. Cir. 2024).

1. “This Court has jurisdiction over the appeal of denial of intervention as of right.” *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013). “A party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution.” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003).

“[T]he irreducible constitutional minimum of standing contains three elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a party must show “(i) they have suffered a concrete and particularized injury in fact, (ii) that was caused by or is fairly traceable to the actions of the defendant, and (iii) is capable of resolution and likely to be redressed by judicial decision.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2016) (citation and internal quotation omitted); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015) (the standing inquiry is the same for an intervenor as for a plaintiff).

“The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 561; *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (“the plaintiff must clearly allege facts demonstrating each element” (cleaned up)). This Court reviews a district court’s decision on standing *de novo*. *In re Endangered Species Act*, 704 F.3d at 976.

2. As the district court correctly concluded, Mr. Greenspan lacks Article III standing. His desire to help litigate this case and provide the district court with more information does not establish an injury in fact. An injury in fact is one that “affect[s] the [party] in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. “An interest shared generally with the public at large in the proper application of the Constitution and laws will not do.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *see also Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (injuries that are “shared *and* generalized—such as the right to have the government act in accordance with the law—are not sufficient to support standing”). Mr. Greenspan’s “mere interest” in the Government’s prosecution of this lawsuit does not give him “direct enough stake in the outcome . . . to establish [his] standing.” *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973)).

Nor did Mr. Greenspan’s oblique references to vague injuries, seemingly unrelated to the Government’s lawsuit, establish standing. *See* Notice of Errata Attach. 1, at 3, ECF 791-1 (“Defendant’s conduct injured Plaintiff by lowering the value of MySpace upon its acquisition by News Corp and reducing competition in the general search service marketplace since 2005 through the present.”); Pl.’s Mot. to Intervene 4, ECF 783 (“Petitioner’s lawsuit shares common issues of fact with

this instant action in that both are victims of the same corporate shell scheme effected by same defendants.”). He has failed to specify any “concrete” injury that is “fairly traceable” to Google’s conduct challenged by the Government or that would be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61 (cleaned up); *see also, e.g., Renal Physicians Ass’n v. U.S. Dep’t of Health & Human Servs.*, 489 F.3d 1267, 1277 (D.C. Cir. 2007) (“vaguely” addressing causation was insufficient to establish standing). Because Mr. Greenspan has failed “clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s power,” *New World Radio*, 294 F.3d at 170 (internal quotation omitted), he does not have standing to intervene of right in this matter.

3. There is no reason for this Court to review the district court’s denial of permissive intervention. “The denial of a Rule 24(b) motion [for permissive intervention] is not usually appealable in itself, although the court may exercise its pendent appellate jurisdiction to reach questions that are inexplicably intertwined with ones of which [this Court has] direct jurisdiction.” *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (citation omitted). Although this Court has observed that it is “an open question in this circuit whether Article III standing is required for permissive intervention,”⁵ it has “declined to review the

⁵ *But cf. Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018) (“all would-be intervenors must demonstrate Article III standing”); *Deutsche Bank*

denial of a Rule 24(b) motion once [it] determined the potential intervenor lacked standing.” *Id.* Additionally, because “[f]or all relief sought, there must be a litigant with standing,” an intervenor “must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.” *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017).

Because Mr. Greenspan has not established Article III standing, the Court should follow its practice and “decline to reach the Rule 24(b) issue.” *Perciasepe*, 714 F.3d at 1327; *see also Yocha Dehe v. U.S. Dep’t of Interior*, 3 F.4th 427, 431-32 (D.C. Cir. 2021) (declining to address whether the district court erred in denying permissive intervention because movant lacked Article III standing); *In re Endangered Species Act*, 704 F.3d at 980 (“In view of this unresolved standing issue [], we think it inappropriate to exercise our pendant jurisdiction.” (quoting *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 32 (D.C. Cir. 2000))).

CONCLUSION

Plaintiffs-Appellees respectfully request that the Court dismiss Mr. Greenspan’s appeal.

Respectfully submitted.

Dated: February 26, 2024

/s/ Patrick M. Kuhlmann

Nat’l Trust Co. v. FDIC, 717 F.3d 189, 195-96 (D.C. Cir. 2013) (Silberman, J., concurring) (identifying a rule “requiring all intervenors to demonstrate Article III standing”).

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2), Fed. R. App. P., the undersigned hereby certifies that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 2,155 words, excluding the portions exempted by Fed. R. App. P. 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 14.

/s/ Patrick M. Kuhlmann
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, I served the foregoing motion on Brad Greenspan by sending copies of the foregoing motion via Federal Express for delivery within three (3) days to the following address: 244 – 5th Street, Suite G290, New York, NY 10001. I hereby certify that on February 26, 2023, I electronically filed the foregoing motion with the Clerk of the Court of the United States Court of Appeals for the District of Columbia using the CM/ECF system; that other participants in this appeal are registered CM/ECF users; and that service on these other participants will be accomplished by the CM/ECF system.

/s/ Patrick M. Kuhlmann
Attorney

Exhibit A

Docket Text:

MINUTE ORDER denying Brad Greenspan's [783] Motion to Intervene and [784] Motion for a CM/ECF Password. First, the movant has neither demonstrated that he is entitled to intervene as a matter of right, Fed. R. Civ. P. 24(a), nor that the court should permit him to intervene, Fed. R. Civ. P. 24(b). Movant appears to argue that as an intervenor, he would contribute additional evidence in support of the Plaintiffs' case. ECF No. 783, at 4-7. However, movant has failed to identify any cognizable claims or injuries he would be able to pursue or remedy, as required to establish Article III standing and under Fed. R. Civ. P. 24. Second, the motion is not timely, as required by Fed. R. Civ. P. 24, considered in light of the "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." Amador Cnty., Cal. v. U.S. Dep't of the Interior, 772 F.3d 901, 903 (D.C. Cir. 2014). Having denied the Motion to Intervene, the court denies the Motion for a CM/ECF Password as moot. Signed by Judge Amit P. Mehta on 11/28/23. (lcapm2)

Exhibit B

Docket Text:

MINUTE ORDER denying Brad Greenspan's [790] Motion for Reconsideration and granting his [794] Motion to take Judicial Notice. This court's prior Minute Order denied Mr. Greenspan's motion to intervene, ECF No. 783, concluding that he did not have standing to intervene in this matter and, even if he had standing, his intervention would not be timely under Federal Rules of Civil Procedure 24. Mr. Greenspan seeks reconsideration of that decision and has submitted several unrelated filings and dockets from cases in other jurisdictions, requesting that this court take judicial notice of those filings in connection with the reconsideration motion. See ECF No. 794-1. First, the court takes judicial notice of the offered exhibits, though they are not ultimately relevant to the court's decision. Second, the court declines to reconsider its prior order. "Motions for reconsideration are 'disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances.'" *Wright v. F.B.I.*, 598 F. Supp. 2d 76, 77 (D.D.C. 2009) (quoting *Andreen v. Lanier*, 582 F. Supp. 2d 48, 4950 (D.D.C. 2008)). This is because "motions for reconsideration cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Klayman v. Jud. Watch, Inc.*, 296 F. Supp. 3d 208, 21314 (D.D.C. 2018) (quoting *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 10 & n.4 (D.D.C. 2011)) (internal quotation marks and alterations omitted). Here, Mr. Greenspan has identified no intervening change in law, new evidence, or other reason for this court to reconsider its prior decision. And, in any event, nothing presented in his motion alters the court's conclusions that he lacks Article III standing to intervene and that his application is untimely. Signed by Judge Amit P. Mehta on 1/9/24. (lcapm2)