UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CORONAVIRUS REPORTER, et al.,

Plaintiffs,

v.

APPLE INC., et al.,

Defendants.

Case No. 21-cv-05567-EMC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, AND DENYING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION, TO STRIKE, AND TO APPEND CLAIM

Docket Nos. 20, 45, 51, 52, 74

I. INTRODUCTION

Plaintiffs bring this action for antitrust and RICO violations, and breach of contract and fraud against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

Now pending is Apple's motion to dismiss all of Plaintiffs' claims against Apple. Docket No. 45. Additionally, Plaintiffs two motions for preliminary injunction, Docket Nos. 20, 52, motion to strike Apple's motion to dismiss, Docket No. 51, and request to append a claim to its FAC, Docket No. 52, are also pending. Finally, Apple's motion to quash Plaintiffs' subpoena request, Docket No. 74, is pending. For the reasons explained below, the Court **GRANTS** Apple's motion to dismiss all of Plaintiffs' claims against Apple, and **DENIES AS MOOT** each of Plaintiffs' pending motions and Apple's motion to quash.

II. BACKGROUND

A. Summary of Allegations

Plaintiffs bring this antitrust and breach of contract action against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

1. Apple's App Approval Process

Apple launched the iPhone and its proprietary iOS ecosystem in 2007. *See Epic Games, Inc. v. Apple Inc.*, 2021 WL 4128925, at *17 (N.D. Cal. Sept. 10, 2021). Apple introduced the App Store the following year. *Id.* at *19. App developers wishing to distribute apps on the App Store must enter into two agreements with Apple: the Developer Agreement and the Developer Program License Agreement ("DPLA"). Developers must also abide by the App Store Review Guidelines (the "Guidelines").[1] The Developer Agreement governs the relationship between a developer and Apple, *see* Docket No. 42 ("Brass Decl."), Exh. 1 ("Developer Agreement"), while the DPLA governs the distribution of apps created using Apple's proprietary tools and software, *see id.*, Exh. 2 ("DPLA"). By signing the DPLA, developers "understand and agree" that Apple may reject apps in its "sole discretion." *Id.* § 6.9(b). The Guidelines set out the standards Apple applies when exercising that discretion to review and approve apps for distribution on the App Store, a process known as "App Review." *See generally id.*, Exh. 3 ("Guidelines").

2. Plaintiffs' Apps

Plaintiffs allege they are developers of "a diverse group" of apps: Coronavirus Reporter, Bitcoin Lottery, CALID, WebCaller, and Caller-ID. FAC ¶¶ 8, 27–30. Two of these apps, Coronavirus Reporter and Bitcoin Lottery, were never approved for distribution on the App Store. *Id.* ¶¶ 29, 53.

[1] The agreements and Guidelines are "central" to Plaintiffs' claims, FAC ¶ 273, and are incorporated by reference in the FAC. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also* FAC ¶¶ 19, 24, 56, 74, 113–14, 135, 145, 165, 186, 195–206, 245, 254–55, 258–59, 269–

Coronavirus Reporter sought to collect "bioinformatics data" from users about COVID-19 symptoms that it would then share with "other users and [unidentified] epidemiology researchers." FAC ¶¶ 48, 52. The Coronavirus Reporter team allegedly included Dr. Robert Roberts, a former cardiologist for NASA. *Id.* ¶ 47. The Coronavirus Reporter app was developed in February 2020, and, if approved, "this startup COVID app" would allegedly have been "first-to-market." *Id.* The Coronavirus Reporter app was rejected by Apple on March 6, 2020, under Apple's policy requiring that any apps related to COVID-19 be submitted by a recognized health entity such as a government organization or medical institution. *Id.* ¶¶ 54, 56, 69, 94, 96, 98; *see also* Guidelines § 5.1.1(ix) ("Apps that provide services in highly-regulated fields (such as banking and financial services, healthcare, and air travel) or that require sensitive user information should be submitted by a legal entity that provides the services, and not by an individual developer"). Apple allegedly denied Coronavirus Reporter's appeal from rejection on March 26, 2020, which Plaintiffs alleged was concurrent with "Apples internal discussions with its own partners" in order to "further cement Apple's own monopolistic trust and medi[c]al endeavors." FAC ¶ 56.

Similarly, Apple allegedly rejected Plaintiff Primary Productions' Bitcoin Lottery, a "blockchain app" developed by Plaintiff Primary Productions, under its alleged policy "generally block[ing] blockchain apps." FAC ¶¶ 85–86.

Plaintiffs' other apps (CALID, Caller-ID, and WebCaller) allegedly were approved for distribution on Apple's App Store. FAC ¶¶ 97, 103. CALID, "a cross-platform scheduling platform with an initial focus on telehealth," *id.* ¶ 94, was approved after the developer addressed several violations of Apple's Guidelines, including Apple's requirement that developers use Apple's payment system for in-app purchases. *Id.* ¶¶ 95, 97. Although Plaintiffs state that they later "abandoned" the app, *id.* ¶ 97, they allege "CALID was subject to ranking suppression," *id.* ¶ 28. Through "ranking suppression," Plaintiff allege that Apple rendered the app "invisible on App Store searches" by end users. *Id.* Plaintiffs similarly allege that Apple "suppressed" Caller-ID and WebCaller because it competed with Apple's own Facetime app and because Apple retaliated against Plaintiff Isaacs after he "informed Apple he held a patent on web caller ID, and that [Apple's] agents Whitepages [] violated his patent." *Id.* ¶¶ 104, 97, 205. Plaintiffs concede

however, that Isaac's patent was invalidated. *Id.* ¶ 305.

3. Plaintiffs' Antitrust Claim Theory

The core of Plaintiffs antitrust claims are challenges to Apple's alleged exercise of market power in reviewing proposed apps and to Apple's unilateral authority to approve or deny which apps are allowed on the App Store. Plaintiffs challenge Apple's unilateral control over the ability of developers to access and provide apps to iOS users, including Apple's alleged practice of suppressing the visibility of apps which compete with Apple's own apps or apps of Apple's "cronies." FAC ¶ 21-23, 127, 199.

Plaintiffs' FAC articulates at least fifteen different relevant markets to its antitrust claims against Apple:

> (1) a "Smartphone Enhanced National Internet Access Devices" market;
>
> (2) a "smartphone market";
>
> (3) a "single-product iOS Smartphone Enhanced Internet Access Device" market;
>
> (4) "[t]he iOS market";
>
> (5) the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone";
>
> (6) the "institutional app market";
>
> (7) the "iOS institutional app market";
>
> (8) the "iOS notary stamps" market;
>
> (9) the "iOS onboarding software" market;
>
> (10) the market for access rights to the iOS userbase;
>
> (11) the "national smartphone app distribution market";
>
> (12) the "iOS App market";
>
> (13) the "US iOS Device App market";
>
> (14) the "market of COVID startups"; and
>
> (15) "the App Market."

FAC ¶¶ 8 n.1, 11, 13, 17, 18, 81, 121, 125, 27, 142, 165, 66, 168, 223, 235. Plaintiffs' Opposition

brief attempts to clarify that certain of the alleged markets are synonyms for other alleged markets, and that, to simplify for purposes of the instant motion, Plaintiffs are focused on "two relevant foremarkets" (apparently the "US smartphone market" and the "US iOS smartphone market" which "is an alternative single-produce market to the US smartphone market") and "five downstream markets":

(1) the institutional app market (i.e. wholesale app competition);

(2) the iOS institutional app market (iPhone app single-product wholesale marketplace);

(3) iOS notary stamps market (permission tokens to launch iOS apps);

(4) iOS onboarding software ('Mac Finder' capability disabled on all nonenterprise iOS devices); and

(5) access rights to the iOS userbase").

Docket No. 55 ("Opp.") at 7 (citing FAC ¶¶ 8 n.1, 16, 18). Plaintiffs allege that its market definitions cover and "equally apply to free apps – a major component of the ecosystem" of iOS app purchases. FAC ¶ 16.

Plaintiffs' antitrust theory allegedly "flow[s] logically" from the key fact that "the only marketplace, the only seller of apps to end-users, is Apple itself" and thus Apple monopolizes an "institutional smartphone application software marketplace" in which Apple "purchase[s]" apps from developers—by approving or rejecting them through the App Review process—and then resells them to consumers on its own terms. *Id.* ¶¶ 9–11, 19.

Plaintiffs allege that "Apple's App Store retails approximately 80% of the apps in the US consumer-facing market for smartphone apps," but that the relevant market for its antitrust claims is the "national institutional app market" where Apple "is a monopsony buyer of developers' apps." *Id.* ¶ 121. Plaintiffs allege that "Apple has complete control of pricing and contractual terms in [the national institutional app market]" and, accordingly, "they can reject apps simply because the app competes with Apple's own competitor app, or its cronies." *Id.* ¶ 127. Plaintiffs allege that Apple monopolizes three additional downstream markets, (a) iOS notary stamps market (permission tokens to launch iOS apps), (b) iOS onboarding software, and (c) access rights to the iOS userbase, through Apple's unilateral control of access to these markets. FAC ¶¶ 135–41

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