

David C. Kiernan (State Bar No. 215335)
dkiernan@jonesday.com
Craig E. Stewart (State Bar No. 129530)
cestewart@jonesday.com
Lin W. Kahn (State Bar No. 261387)
lkahn@jonesday.com
JONES DAY
555 California Street, 26th Floor
San Francisco, California 94104
Telephone: +1.415.626.3939
Facsimile: +1.415.875.5700

Catherine T. Zeng (State Bar No. 251231)
czeng@jonesday.com
JONES DAY
1755 Embarcadero Road
Palo Alto, California 94303
Telephone: +1.650.739.3939
Facsimile: +1.650.739.3900

Attorneys for Defendants
ALPHABET INC. and GOOGLE LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DREAM BIG MEDIA, INC., GETIFY
SOLUTIONS, INC., and SPRINT
SUPPLIER LLC, Individually and on Behalf
of all Others Similarly Situated,

Plaintiff,

v.

ALPHABET INC. and GOOGLE LLC,
Defendants.

Case No. 4:22-cv-02314-JSW

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO STRIKE
CLASS ACTION ALLEGATIONS**

Date: September 30, 2022
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. THE COURT HAS AUTHORITY TO STRIKE CLASS ALLEGATIONS	1
II. PLAINTIFFS FAIL TO ESTABLISH THAT THE CLASS IS DEFINED IN SUCH A WAY THAT THOSE WITHIN IT WOULD HAVE STANDING	2
A. “Developers” or “Users” Who Were Not Purchasers Cannot Be in the Class.....	2
B. Users Who Have Merely Had Free Credits Depleted “More Rapidly” Cannot Be in the Class	3
III. PLAINTIFFS’ CLASS DEFINITION IS IMPERMISSIBLY “FAIL SAFE.”	5
CONCLUSION	6

TABLE OF AUTHORITIES**Page****CASES**

<i>Brazil v. Dell Inc.</i> , 585 F. Supp. 2d 1158 (N.D. Cal. 2008)	6
<i>Brown v. Google LLC</i> , No. 20-CV-03664-LHK, 2021 WL 6064009 (N.D. Cal. Dec. 22, 2021)	4
<i>Bruton v. Gerber Prods. Co.</i> , No. 12-CV-02412 LHK, 2018 WL 4181903 (N.D. Cal. Aug. 31, 2018)	2
<i>Calhoun v. Google LLC</i> , 526 F. Supp. 3d 605 (N.D. Cal. 2021)	4
<i>In re Anthem, Inc. Data Breach Litig.</i> , No. 15-MD-02617-LHK, 2016 WL 3029783 (N.D. Cal. May 27, 2016).....	4
<i>In re Yahoo! Inc. Customer Data Sec. Breach Litig.</i> , No. 16-MD-02752-LHK, 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017)	5
<i>Khrapunov v. Prosyankin</i> , 931 F.3d 922 (9th Cir. 2019).....	5
<i>Klein v. Facebook, Inc.</i> , 580 F. Supp. 3d 743 (N.D. Cal. 2022)	4
<i>Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC</i> , 31 F.4th 651 (9th Cir. 2022) (<i>en banc</i>)	5
<i>Sanchez v. L.A. Dep't of Transp.</i> , 39 F.4th 548 (9th Cir. 2022)	5
<i>Tietzworth v. Sears, Roebuck & Co.</i> , 720 F. Supp. 2d 1123 (N.D. Cal. 2010)	1
<i>Uschold v. Carriage Servs., Inc.</i> , No. 17-CV-04424-JSW, 2020 WL 1466172 (N.D. Cal. Mar. 6, 2020).....	6

INTRODUCTION

Google’s motion explained the two independent bases for striking plaintiffs’ class allegations. First, the alleged class includes persons who could not have suffered a cognizable injury because they purchased nothing from Google at all, such as “developers” and “users” who merely used Google’s mapping API services as well as plaintiffs who used their free usage credits “more rapidly.” Second, the class is impermissibly fail-safe because the only way to identify certain putative class members—those who were injured “because of the anticompetitive allegations” and others “who continue to experience anticompetitive harm as a result of the allegations herein”—is to resolve the merits of their claim.

Plaintiffs have no valid answer to either point. They assert that the class is limited to purchasers because the complaint excludes indirect purchasers who paid less than 100% of the purchase price. But that assertion ignores the proposed definition’s express inclusion of users who did not purchase API services at all. Plaintiffs argue that class members who used their free usage credits “more rapidly” suffered a cognizable injury by citing inapposite cases involving a loss of property, while failing to recognize that the free usage credits are neither property nor property belonging to plaintiffs. Finally, plaintiffs misrepresent Ninth Circuit caselaw as permitting fail-safe classes and argue that their class definition is not fail-safe, even though the only way to determine certain membership in the class is to evaluate the merits of plaintiffs’ claims.

ARGUMENT

I. THE COURT HAS AUTHORITY TO STRIKE CLASS ALLEGATIONS.

Plaintiffs do not dispute that the Court “has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained.” *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010). They argue only that striking class allegations is “rare” at the pleading stage and is generally “more” appropriate later in the litigation after discovery. Opp. 9. But the invalidity of plaintiffs’ overbroad and improper fail-safe class definition does not turn on any factual issues for which any discovery is needed—and plaintiffs identify none. It can be read on the face of the complaint. If the Court does not

1 dismiss the action entirely, addressing this legal issue now will “streamline the ultimate resolution
2 of the action” and “avoid the expenditure of time and money” that would arise with litigating a
3 class definition that cannot be sufficient. *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412 LHK,
4 2018 WL 4181903, at *6 (N.D. Cal. Aug. 31, 2018) (cleaned up). Resolving this issue now will
5 also provide clarity to putative class members, who are entitled to a clear class definition so that
6 they can determine whether this lawsuit affects their rights.

7 **II. PLAINTIFFS FAIL TO ESTABLISH THAT THE CLASS IS DEFINED IN SUCH**
8 **A WAY THAT THOSE WITHIN IT WOULD HAVE STANDING.**

9 Plaintiffs do not dispute that a class definition must be limited to persons with standing.
10 See Mot. 3 (citing cases). They argue only that their definition complies with this requirement.
11 But plaintiffs’ arguments fail to respond to Google’s arguments and only exacerbate the
12 confusion surrounding their class definition.

13 **A. “Developers” or “Users” Who Were Not Purchasers Cannot Be in the Class.**

14 As Google’s motion details, plaintiffs’ class definition includes “app or website
15 developers” or “other types of users” as distinct from “direct purchasers.” This definition
16 necessarily includes “developers” and “users” who were not injured and thus cannot be class
17 members because they have never purchased anything (or even had their free credits depleted)—
18 they merely used the API services. For example, the class definition encompasses a third-party
19 developer who “used” a Google mapping API service in designing a web site but who never paid
20 for any API service calls. The class definition is also broad enough to include a person who
21 merely visits a website that uses Google’s API services. Such an imprecise class definition must
22 be struck.

23 Plaintiffs insist that their class definition “specifically exclude[s] the indirect victims,”
24 including those highlighted in Google’s motion, because the complaint excludes indirect
25 purchasers who *bought* from a direct purchaser that did not pass on 100% of the purchase price.
26 Opp. 3, 10 (citing ECF 1, ¶ 48). But those indirect purchasers actually made purchases.
27 Excluding this subset of purchasers says nothing about “developers” or “users” who paid nothing
28 at all. If plaintiffs insist that the class is actually limited to direct purchasers of Maps, Routes, and

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.