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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DREAM BIG MEDIA, INC., GETIFY SOLUTIONS, INC., and SPRINTER 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

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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

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

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

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

A. "Developers" or "Users" Who Were Not Purchasers Cannot Be in the Class.

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

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

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