UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION

Case No. 20-cv-03556-BLF

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

This is a putative class action antitrust lawsuit brought by Plaintiffs Hanson Law Firm, PC, Surefreight Global LLC d/b/a Prana Pets, and Vitor Lindo (collectively, "Plaintiffs") against Defendants Google LLC and Alphabet Inc. (collectively, "Defendants" or "Google"). First Amended Consolidated Complaint ("FAC"), ECF 52. Before the Court is Google's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) & (6) on the grounds that Plaintiffs fail to plead claims under the Sherman Act and California's Unfair Competition Law and that some of the Plaintiffs are bound to arbitration. Mot. to Dismiss ("Mot.") 1, ECF 66. Plaintiffs oppose. Opp. to Mot. ("Opp."), ECF 93. The Court heard oral argument on this motion on April 8, 2021. For the reasons stated on the record and detailed below, the Court GRANTS Google's motion and DISMISSES WITH LEAVE TO AMEND.

I. BACKGROUND[1]

Digital advertising consists of search advertising and display advertising. FAC ¶ 30. Search advertising is the placement of advertisements above or alongside the results generated by a search engine. *Id.* ¶ 31. A search advertisement appears when a consumer performs a search that has a

[1] Plaintiffs' well-pled factual allegations are accepted as true for purposes of the motion to dismiss.

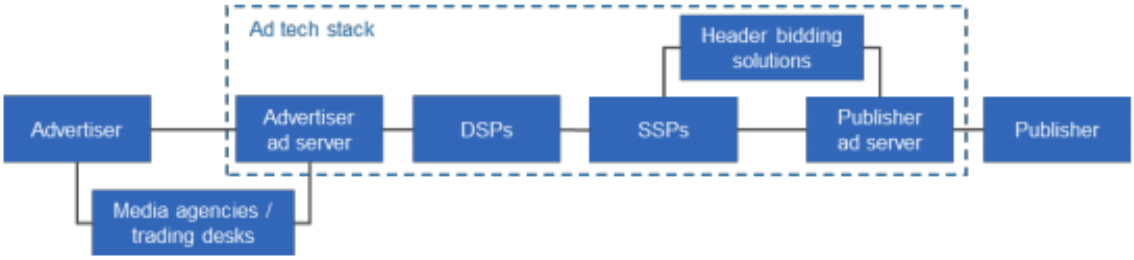
connection to a product or service offered by a company sponsoring the advertisement. *Id*. When a consumer clicks on the advertisement, the advertiser pays based on a cost-per-click rate. *Id*. Display advertising, on the other hand, appears next to website content. *Id*. ¶ 34. Unlike search advertising, which generally appears in a text-only format, display advertising comes in many forms, such as banners, images, and videos. *Id*. Display advertisers place their advertisements on websites likely to be viewed by their target audience. *Id.* ¶ 35. Suppliers of display advertising space are website operators and are referred to as publishers. *Id.* ¶ 36. Publishers rely on third-party tools to find advertisers willing to purchase available ad space. *Id.* In 2019, $69.9 billion was spent on digital display advertising in the United States, which accounted for about half of the digital advertising market. *Id*. ¶¶ 37-38. Many publishers rely on display advertising as a major source of revenue. *Id*. ¶ 38.

Google is a technology company that provides internet services and products, including online advertising technologies and a search engine. FAC ¶ 24. According to Plaintiffs, "Google is the dominant supplier in the search advertising market and has moved rapidly to control all stages of the display advertising market, as well." *Id*. ¶ 40. In 2019, Google earned $135 billion from search and display advertising. *Id*. Because Google owns the dominant internet search engine, it is "by far the largest supplier of digital search advertising in the United States. Over the last ten years, Google's share of the digital search advertising supply has ranged between 89% and 93%." *Id*. ¶ 45. Google makes space on its search results pages available through an auction process that occurs each time a user runs a search. *Id*. ¶ 46. According to Plaintiffs, "Google controls (and frequently raises) the price of its search advertising by setting a high reserve price. Doing so enables Google to directly set the price of its search advertisements because an ad will not sell unless its price meets or exceeds the reserve price." *Id*. ¶ 47.

With respect to online display advertising, 86% of ad space in the United States is bought and sold in real time on electronic trading venues, referred to as advertising exchanges or programmatic real-time bidding. FAC ¶ 50. On the supply side of exchanges, publishers employ publisher ad servers (PAS) to accept, store, and manage ads, choose where and when ads appear, and track the effectiveness of ad campaigns. *Id*. ¶ 55. Publishers rely on supply-side platforms

(SSPs) to run auctions, interface directly with their demand-side equivalents (i.e., advertisers), and optimize available inventory. *Id.* The demand side of exchanges are comprised of advertisers and media agencies. Advertisers and media agencies rely on advertiser ad servers (AAS) to store ads, deliver them to publishers, and record transactions. *Id.* ¶ 56. Advertisers and media agencies employ demand-side platforms (DSPs) to purchase digital advertising space by bidding in auctions and to manage their bids. *Id.* The DSP connects to an exchange, which combines inventory from ad networks and SSPs with third-party data from a data management platform or data broker. When an ad space on a publisher's site becomes available, the ad exchange holds an auction in which the DSP bids on the impression submitted by the ad network or SSP. According to Plaintiffs, Google owns and operates the dominant ad exchanges. *Id.* ¶¶ 48-50.

The PAS, SSPs, AAS, and DSPs—the set of intermediary exchanges and platforms that advertisers and publishers use to buy, sell, and place display ads—make up the ad tech stack:



FAC ¶ 48, 58. Google "captures well over 50% of the market across the ad tech stack." *Id.* ¶ 48. In the past, different entities provided the various functions across the stack, and intermediaries in the stack did not own publishers or advertisers. *Id.* ¶ 59. This is no longer the case because, after a series of acquisitions, "Google now dominates and controls the ad stack as a whole." *Id.* ¶ 59.

According to Plaintiffs, Google's acquisitions in the ad tech stack over the past fifteen years have "[given] it access to and made it a major player at every level of the display advertising service industry, and have enabled Google to exclude competition through a variety of anticompetitive policies and activities." FAC ¶ 60; *see, e.g., id.* ¶¶ 61-76 (detailing acquisitions). Plaintiffs further contend that Google has leveraged its dominance in search and search advertising and its control of user data to gain a monopoly in the brokerage of display advertising. *Id.* ¶¶ 77-99. Google also allegedly harms purchasers and sellers within the online advertisement ecosystem by tying its

display advertising services to its search advertising services. *Id*. ¶¶ 100-133. Finally, Google purportedly exploits user data and forecloses technological compatibility. *Id*. ¶¶ 134-136. Google's conduct allegedly restrains competition in the market for online display advertising services, which encompasses the overall system that connects display advertisers and publishers. *Id*. ¶ 183; *see also id*. ¶¶ 183-206 (describing "Relevant Market").

Based on the above allegations, Plaintiffs filed their class action complaint on May 27, 2020. ECF 1. The operative complaint asserts two causes of action for (1) monopolization in violation of Section 2 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 2, for acquiring and maintaining a monopoly in the relevant market of programmatic display advertising services; and (2) violations of California' Unfair Competition Law ("UCL"), Cal. Bus. Prof. Code § 17200 *et seq*. FAC. ¶¶ 236-251. Plaintiffs further request injunctive relief "to restore competition in the relevant market and its constituent submarkets." *Id*. at § XI.

II. LEGAL STANDARD

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9thCir. 2011) (quoting *Navarro v. Block*, 250 F.3d729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc*., 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig*., 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially

noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983).

In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis*, 371U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc*., 316 F.3d 1048 (9th Cir. 2009). A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1)undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital*, 316 F.3d at 1052. "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Id*. However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id*.

III. ANALYSIS

A. Failure to State a Claim: Sherman Act

Defendants first argue that Plaintiffs have failed to adequately plead a Sherman Act claim because they have not alleged a plausible relevant market, Mot. at 4-9, or actionable anticompetitive conduct, *id*. at 9-18. They also contend that Plaintiffs have failed to plead antitrust standing. *Id*. at 19-20. The Court addresses each concern in turn.

1. Relevant Market

To state an antitrust claim under the Sherman Act, "plaintiffs must plead a relevant market." *Hicks v. PGA Tour, Inc*., 897 F.3d 1109, 1120 (9th Cir. 2018). "While plaintiffs need not plead a relevant market with specificity, 'there are some legal principles that govern the definition of an antitrust "relevant market," and a complaint may be dismissed under Rule 12(b)(6) if the complaint's "relevant market" definition is facially unsustainable.'" *Id*. (brackets and alterations omitted) (quoting *Newcal Indus., Inc. v. Ikon Office Sol*., 513 F.3d 1038, 1045 (9th Cir. 2008)). The relevant market must include a product market, and the product market "must encompass the product at issue as well as all economic substitutes for the product." *Id*. (internal quotation marks omitted). "Economic substitutes have a reasonable interchangeability of use or sufficient cross-elasticity of demand with the relevant product." *Id*. (internal quotation marks omitted).

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