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11 Attorneys for Defendant  
12 GOOGLE LLC

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 JOHN COFFEE, MEI-LING MONTANEZ,  
16 and S.M., a minor by MEI-LING  
17 MONTANEZ, S.M.'s parent and guardian, on  
behalf of themselves and all others similarly  
situated,

18 Plaintiffs,

19 v.

20 GOOGLE LLC,

21 Defendant.

**Case No. 5:20-cv-03901-BLF**

**Date Action Filed: June 12, 2020**

**DEFENDANT GOOGLE LLC'S  
OBJECTION AND MOTION TO  
STRIKE PLAINTIFFS' PROFFER RE:  
MOTION TO DISMISS FIRST  
AMENDED CLASS ACTION  
COMPLAINT [ECF NO. 77]**

**Judge: Hon. Beth Labson Freeman  
Ctm.: 3 - 5th Floor**

**Robert F. Peckham Federal Building &  
United States Courthouse  
280 South 1st Street  
San Jose, CA 95113**

**OBJECTION AND MOTION TO STRIKE**

1  
2 At the hearing on Google’s Motion to Dismiss Plaintiffs’ First Amended Complaint (FAC),  
3 the Court admonished Plaintiffs’ counsel that they cannot “manipulate the facts to bob and weave  
4 around [the Court’s] order,” and the Court would not permit them to “amend to create new facts.”  
5 (See Transcript of Hearing at 36:17-19.) Plaintiffs’ “Proffer” last week—belatedly submitted *months*  
6 after their original complaint, first amended complaint and Opposition to the Motion to Dismiss—  
7 attempts to do exactly what the Court prohibited. The Court should sustain this Objection, decline to  
8 consider the Proffer, and strike it from the docket on this basis alone.

9 But even if the Proffer did not directly contravene the Court’s warning to Plaintiffs’ counsel  
10 during oral argument, it remains procedurally and legally improper and should be disregarded for  
11 several other reasons.

12 First, matters outside the pleadings are improper on a Rule 12(b)(6) motion. *See U.S. v. Ritchie*,  
13 342 F.3d 903, 908 (9th Cir. 2003). Plaintiffs did not—and could not—ask the Court to take judicial  
14 notice of the contents of the Proffer because it is being offered for the truth of the matter asserted, long  
15 after Plaintiffs could properly have requested judicial notice of facts in support of their Opposition to  
16 the Motion. *See Streets v. Space Sys./Loral, LLC*, No. 20-cv-07901-EJD, 2021 U.S. Dist. LEXIS  
17 173535, at \*8 (N.D. Cal. Sep. 13, 2021) (courts will not “credit the truth of any . . . matter asserted”  
18 in a request for judicial notice).

19 Second, the Proffer constitutes inadmissible hearsay. Fed. R. Evid. 801(c), 802. The Proffer  
20 purports to attach “a copy of Plaintiff Coffee’s Google Play Store order history” but lays no supporting  
21 foundation as to the supposed evidence, merely asserting that “Plaintiffs’ counsel confirmed” the  
22 contents of the Proffer when “[f]ollowing up on this factual issue after the hearing.” (See ECF No. 77  
23 at 1:4-8 & Ex. A.) And as they attempted to do in support of Plaintiffs’ Opposition, Plaintiffs’ counsel  
24 again attempts to offer improper “expert” testimony—now in the form of this hearsay “Proffer” instead  
25 of a declaration—when they are not qualified to do so and the argument and purported supporting  
26 evidence lacks any foundation. (See *id.* at 1:22-2:4; see also ECF Nos. 71-1, 71-3.)

27 Third, the hearsay Proffer is legally irrelevant to the Section 230 immunity that supports  
28 dismissal in this case, with prejudice. Even if Plaintiffs *could* amend the complaint again to

1 incorporate the inadmissible contents of their Proffer, any such amendment would be futile as their  
2 claims would still fail as a matter of law because they are barred by Section 230 and further fail to  
3 allege a violation of the California Penal Code. (*See generally* ECF Nos. 66, 74.)

4 Fourth, the Proffer is factually irrelevant to the Court's determination of the Motion. As the  
5 Court previously found and again noted during last month's hearing, the only video games at issue in  
6 this action are Final Fantasy Brave Exvius and Dragon Ball Z Dokkan Battle. (Dismissal Order (ECF  
7 No. 56) at 2:12-16; Transcript at 36:2-8.) Plaintiffs' counsel suggested at last month's oral argument  
8 that they could amend the complaint to allege that Plaintiffs played different games than the two  
9 already at issue in the FAC, which led to the Court's admonishment that Plaintiffs cannot circumvent  
10 the Court's orders with new factual allegations. (*See* Transcript at 36:9-19.) Plaintiffs' Proffer  
11 predictably requests leave to amend to add the exact allegations that the Court already forbade  
12 Plaintiffs from adding, as their newly-submitted hearsay *relates to purchases made in two different*  
13 *games*: Puzzles and Dragons and Clash Royale. (ECF No. 77 at 1.)

14 Fifth and finally, Plaintiffs' Proffer concedes that the alleged purchases were made between  
15 January 2017 and March 2019, more than a year *before* the filing of both the original and the amended  
16 complaints, so even if this irrelevant hearsay lacking in all foundation were admissible, there is no  
17 basis for the Court to consider this evidence now. Simply put, Plaintiffs are too late.

18 For all of the reasons set forth in Google's Motion to Dismiss the First Amended Complaint  
19 and supporting Reply, the FAC should be dismissed with prejudice and Plaintiffs' proffer stricken  
20 from the record.

21  
22 Dated: November 1, 2021

Respectfully submitted,

**BAKER & MCKENZIE LLP**

23  
24  
25 By: /s/ Teresa H. Michaud  
Teresa H. Michaud  
26 Attorneys for Defendant  
GOOGLE LLC  
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