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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

DREAMSTIME.COM, LLC, a Florida LLC, Plaintiff, v. GOOGLE LLC, a Delaware LLC; and DOES 1-10, Defendants.	CASE NO.: 3:18-CV-01910-WHA **GOOGLE'S RESPONSE TO COURT'S ORDER OF JANUARY 14, 2019** Before: Hon. William Alsup

Google submits this response to the Court's Order of January 14, 2019 (ECF No. 70), which states as follows:

> Defendant Google has led the Court to believe that under Section 2 of the Sherman Act, binding appellate law holds that a firm enjoying a monopoly position in its market *may destroy a single customer* so long as there is *no harm to competition*. The Court has been unable to find such case law. Defense counsel shall provide the citation and quote the precise language that supposedly so states by 5:00 P.M. on January 15.

ECF No. 70, at 1 (emphasis added).

As discussed in more detail below, controlling precedent establishes that the "destruction" of either a competitor or a customer, if unaccompanied by allegations of harm to competition, does not state a claim. Although Google does not believe any Supreme Court or Ninth Circuit case uses the Court's precise words, the proposition that a customer cannot sue for exploitative conduct by a monopolist supplier, absent harm to competition, is established by a number of cases, and was confirmed specifically in *Trinko*:

> ***The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system***. The opportunity to charge monopoly prices—at least for a short period— is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, ***the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct***.

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis added).

Because this requirement of anticompetitive or exclusionary conduct – harm to competition – has been so clear for so long, there appear to be no binding appellate cases where *customers* claim to have been driven out of business (or "destroyed" as the Court put it) without an accompanying allegation of anticompetitive or exclusionary conduct. *E.g.*, *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988) ("The alleged violation must cause injury to competition beyond the impact on the claimant under section 1, and must destroy competition and cause antitrust injury under section 2.").

Notwithstanding the absence of the specific language mentioned by the Court, the controlling case law establishes two other propositions that confirm that a monopolist "may destroy a single customer so long as there is no harm to competition."

First, absent harm to competition, Sherman Act § 2 does not prohibit driving even *competitors* out of business. *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992) ("Austin was required to show not merely injury to himself as a competitor, but rather injury to competition. Even 'the *elimination* of a single competitor, standing alone, does not prove anticompetitive effect.'" (citation omitted)). "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) (citation omitted); *accord Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber, Co.*, 549 U.S. 312, 314-15 (2007) (plaintiff driven out of business but competition not harmed).

Driving a competitor out of business has the potential to harm competition. Driving a *customer* out of business does not; suppliers remain free to compete for all the other customers in the market, and the loss of a single customer does not affect price, output, quality, or consumer choice in the market as a whole – especially in circumstances like those here, where the number of customer websites is in the many millions. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) ("To demonstrate anticompetitive effects on the two-sided credit-card market *as a whole*, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." (emphasis added)); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) ("LiveUniverse does not explain how MySpace's [removing links to Plaintiff's product] *on its own website* can reduce consumers' choice or diminish the quality of their experience on *other* social networking websites, which is

the [alleged] relevant market."). So cases saying that it is not unlawful to destroy a competitor absent harm to competition establish the Court's point *a fortiori* that it is not unlawful to destroy a customer.

Second, absent harm to competition, a supplier is entirely free to refuse to deal at all with a customer – the strongest form of customer mistreatment – regardless of the effect on the customer. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."); *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016) ("As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals'; there is only a duty not to refrain from dealing where the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition.'" (citations omitted)); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986) ("A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws."), *modified on denial of reh'g*, 810 F.2d 1517 (9th Cir. 1987). This established principle underscores that individual consumer injury is not sufficient for a violation of Section 2. As in every case under Section 2, competition itself must have been harmed.

* * * * *

For these reasons, and for the many reasons already expressed on the record, the Amended Complaint should be dismissed with prejudice.

Dated: January 15, 2019

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By: */s/ Brian M. Willen*
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2019, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

By: */s/ Brian M. Willen*
Brian M. Willen