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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 RUMBLE, INC.,
8 Plaintiff,
9 v.
10 GOOGLE LLC,
11 Defendant.

Case No. [21-cv-00229-HSG](#)

**ORDER DENYING MOTION TO
DISMISS AND TO STRIKE**

Re: Dkt. No. 32

12
13 Pending before the Court is Defendant's partial motion to dismiss and motion to strike,
14 briefing for which is complete. *See* Dkt. No. 32 ("Mot."), 44 ("Opp."), 45 ("Reply"). Defendant
15 asks the Court to dismiss Plaintiff's tying and search-dominance theories of liability and strike
16 paragraphs 34, 35, and 75-176 of Plaintiff's First Amended Complaint. *See* Mot. at i. The Court
17 held a hearing on the motion, *see* Dkt. No. 50, and now **DENIES** it.

18 **I. BACKGROUND**

19 "Since 2013, Rumble has operated an online video platform." Dkt. No. 21 ("FAC") ¶ 14.
20 Plaintiff alleges that "Rumble is one of the most respected independent and privately owned
21 companies in the online video platform industry and market, and its business model is premised
22 upon helping the 'little guy/gal' video content creators monetize their videos." *Id.* According to
23 Plaintiff, "Rumble currently has more than 2 million amateur and professional video content-
24 creators that now contribute to more than 100 million streams per month." *Id.* ¶ 22. Plaintiff
25 alleges that "Rumble's success, however, has been far less than it could and should have been as a
26 direct result of Google's unlawful anticompetitive, exclusionary and monopolistic behavior"
27 *Id.* ¶ 23.

28 Rumble alleges that "Google has willfully and unlawfully created and maintained a

1 monopoly in the online video platform market by pursuing at least two anticompetitive and
2 exclusionary strategies”:

3
4 First, by manipulating the algorithms (and/or other means and
5 mechanisms) by which searched-for-video results are listed, Google
6 insures [sic] that the videos on YouTube are listed first, and that those
7 of its competitors, such as Rumble, are listed way down the list on the
8 first page of the search results, or not on the first page at all. Second,
9 by pre-installation of the YouTube app (which deters smart phone
10 manufacturers from pre-installing any competitive video platform
11 apps) as the default online video app on Google smart phones, and by
12 entering into anti-competitive, illegal tying agreements with other
13 smartphone manufacturers to do the same (in addition to requiring
14 them to give the YouTube app a prime location on their phones’
15 opening page and making it not-deletable by the user), Google assures
16 the dominance of YouTube and forecloses competition in the video
17 platform market.

18 *Id.* ¶ 27; *see also id.* ¶ 194 (alleging that Google’s “anticompetitive and exclusionary conduct . . .
19 has included rigging its search engine algorithms such that YouTube videos will always be listed
20 first in search results and requiring pre-installation and prominent placement of Google’s
21 YouTube apps on all Android smartphones in the United States”). Plaintiff further alleges that
22 “manufacturers and carriers are beholden to Google’s Android ecosystem, which Google uses to
23 preserve its monopolies in general search, search advertising, general search text advertising and
24 the online video platform market.” *Id.* ¶ 147. Plaintiff alleges that Defendant’s “chokehold on
25 search is impenetrable, and that chokehold allows it to continue unfairly and unlawfully to self-
26 preference YouTube over its rivals, including Rumble, and to monopolize the online video
27 platform market.” *Id.* ¶ 146.

28 Plaintiff alleges that Defendant uses various agreements with Android-based mobile smart
device manufacturers and distributors to ensure its monopoly of the video platform market. *See*
id. ¶¶ 75–89. According to Plaintiff, Defendant “requires Android device manufacturers that want
to preinstall certain of Google’s proprietary apps to sign an anti-forking agreement.” *Id.* ¶ 84.¹

¹ Plaintiff explains that “in general an anti-forking agreement sets strict limits on the
manufacturers’ ability to make and sell Android-based devices that do not comply with Google’s
technical and design standards.” FAC ¶ 84.

1 Plaintiff alleges that once an Android device manufacturer signs an anti-forking agreement,
2 Google will only provide access to its vital proprietary apps and application program interfaces if
3 the manufacturer agrees: “(1) to take (that is, pre-install) a bundle of other Google apps (such as its
4 YouTube app); (2) to make certain apps undeletable (including its YouTube app); and (3) to give
5 Google the most valuable and important location on the device’s default home screen (including
6 for its YouTube app).” *Id.* ¶ 85. As another example, Plaintiff asserts that “Google provides a
7 share of its search advertising revenue to Android device manufacturers, mobile phone carriers,
8 competing browsers, and Apple; in exchange, Google becomes the preset default general search
9 engine for the most important search access points on a computer or mobile device.” *Id.* ¶ 86.
10 “And, by becoming the default general search engine, Google is able to continue its manipulation
11 of video search results using its search engine to self-preference its YouTube platform, making
12 sure that links to videos on the YouTube platform are listed above the fold on the search results
13 page.” *Id.*; *see also id.* ¶¶ 161–72 (alleging that Google’s revenue sharing agreements allow it to
14 maintain a monopoly in the general search market and online video platform market).

15 Plaintiff alleges that Defendant uses these agreements “to ensure that its entire suite of
16 search-related products (including YouTube) is given premium placement on Android GMS
17 devices.” *Id.* ¶ 149. Rumble alleges that the agreements “effectuate a tie” that “reinforces
18 Google’s monopolies.” *Id.* ¶ 151. Specifically, Plaintiff alleges that Defendant provides “Android
19 device manufacturers an all-or-nothing choice: if a manufacturer wants Google Play or GPS, then
20 the manufacturer must also preinstall, and in some cases give premium placement to, an entire
21 suite of Google apps, including Google’s search products and Google’s YouTube app.” *Id.*
22 Plaintiff alleges that “[t]he forced preinstallation of Google’s apps (including the YouTube app)
23 deters manufacturers from preinstalling those of competitors, including Rumble’s app. . . . [and]
24 forecloses distribution opportunities to rival general search engines and video platforms,
25 protecting Google’s monopolies.” *Id.* Moreover, Plaintiff alleges that “[i]n many cases” the
26 agreements expressly prohibit the preinstallation of rival online video platforms, like Rumble. *See*
27 *id.* ¶ 87.

28 According to Plaintiff, Defendant’s “monopolist’s stranglehold on search, obtained and

1 maintained through anticompetitive conduct, including tying agreements in violation of antitrust
2 laws, has allowed Google to unfairly and wrongfully direct massive video search traffic to its
3 wholly-owned YouTube platform” and therefore secure monopoly profits from YouTube-
4 generated ad revenue. *Id.* ¶ 176. Plaintiff alleges that because “a very large chunk of that video
5 search traffic . . . should have rightfully been directly to Rumble’s platform,” Plaintiff and content
6 creators who have exclusively licensed their videos to Rumble “have lost a massive amount of ad
7 revenue they would otherwise have received but for Google’s unfair, unlawful, exclusionary and
8 anticompetitive conduct.” *Id.*

9 Accordingly, Plaintiff alleges that Defendant’s conduct violates Section 2 of the Sherman
10 Act, which makes it unlawful for any person to “monopolize, or attempt to monopolize . . . any
11 part of the trade or commerce among the several States, or with foreign nations. . . .” 15 U.S.C. §
12 2; *see id.* ¶¶ 55, 191–200.

13 **II. LEGAL STANDARD**

14 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain
15 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
16 defendant may move to dismiss a complaint for failing to state a claim upon which relief can be
17 granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the
18 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
19 *Mendonado v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule
20 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible
21 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
22 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that
23 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

24 In reviewing the plausibility of a complaint, courts “accept factual allegations in the
25 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
26 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless,
27 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of
28 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.

1 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

2 **III. DISCUSSION**

3 **A. Motion to Dismiss**

4 Plaintiff pleads a single cause of action alleging Defendant violated Section 2 of the
5 Sherman Act. “The offense of monopoly under [Section 2] has two elements: (1) the possession
6 of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that
7 power as distinguished from growth or development as a consequence of a superior product,
8 business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71
9 (1966). Plaintiff defines the relevant market as the “online video platform market,” where
10 platforms “allow content creators and other consumers to upload, view, share and download video
11 content.” FAC ¶ 55.

12 Without real dispute, Plaintiff has adequately alleged a Section 2 claim. First, it alleges
13 that Defendant obtained and maintains monopoly power in the online video platform market,
14 asserting that YouTube controls 73% of global online video activity. *Id.* ¶ 37, 63, 193. And
15 second, Plaintiff alleges among other things that Defendant, with no valid business purpose or
16 benefit to users, designs its search engine algorithms to show users YouTube links instead of links
17 to its competitors’ sites. *Id.* ¶ 71; *see also* ¶¶ 68-74. According to Plaintiff, “Rumble and
18 consumers (*e.g.* content creators) are disadvantaged, and competition is harmed, in the defined
19 market because Google provides self-preferencing search advantages to its wholly-owned
20 YouTube platform as a part of its scheme to maintain its monopoly power, and to reap a
21 monopolist’s financial rewards.” *Id.* ¶ 74.

22 Instead, Defendant’s motion is based on the somewhat counterintuitive premise that
23 Plaintiff has pled *too* much. Defendant argues that Plaintiff’s amended complaint should be
24 broken into distinct theories of liability based on (1) self-preferencing, (2) tying of the YouTube
25 app to other Google apps, and (3) unlawfully dominating the search market with agreements
26 involving distribution of Defendant’s search product. Mot. at 1. Defendant does not dispute that
27 Plaintiff has adequately pled a Section 2 claim based on the first theory of liability, self-
28 preferencing, but argues that the second and third theories, tying and unlawful domination of the

1 search market, should be dismissed. *Id.* at 1-2.

2 The only authority Defendant cites for the premise that a court can disaggregate a single
 3 Section 2 cause of action into subtheories, then scrutinize and potentially dismiss some
 4 subtheories without dismissing the entire cause of action, comes from two unpublished district
 5 court cases, one from the Northern District of California and another from the District of
 6 Delaware. *See* Mot. at 3; *Staley v. Gilead Scis., Inc.*, No. 19-cv-02573, 2020 WL 5507555, at *11
 7 (N.D. Cal. July 29, 2020); *see also In re Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust*
 8 *Litig.*, No. 19-CV-01461, 2020 WL 7022364, at *3-4 (D. Del. Nov. 30, 2020).² Defendant does
 9 not cite, and the Court has been unable to find, any Supreme Court or Ninth Circuit authority
 10 ratifying this approach. And the sort of parsing urged by Defendants is at least arguably in tension
 11 with the Supreme Court’s direction that Sherman Act plaintiffs “should be given the full benefit of
 12 their proof without compartmentalizing the various factual components and wiping the slate clean
 13 after scrutiny of each.” *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690,
 14 699 (1962); *see also LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). This is especially true
 15 given the Ninth Circuit’s holding that “even though [a] restraint effected may be reasonable under
 16 section 1, it may constitute an attempt to monopolize forbidden by section 2 if a specific intent to
 17 monopolize may be shown.” *California Comput. Prods., Inc. v. Int’l Bus. Machs. Corp.*, 613 F.2d
 18 727, 737 (9th Cir. 1979) (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532
 19 (1948)). Ultimately, in the absence of controlling authority supporting Defendant’s proposed
 20 approach, the Court declines to reach the viability of each of the purported subtheories, given that
 21 Plaintiff undisputedly has adequately pled a Section 2 claim based on self-preferencing.
 22 Defendant’s motion to dismiss is accordingly **DENIED**.³

24 ² In its Reply, Defendant cites two additional authorities referencing the expense of antitrust
 25 discovery, but these cases are also not controlling, and do not support (or even discuss) the
 26 premise that a court can dismiss select subtheories within a single cause of action. *See* Reply at 4,
 27 *Kelsey K. v. NFL Enters., LLC*, 757 F. App’x 524, 527 (9th Cir. 2018) (affirming denial of
 28 discovery where “no plausible claim for relief has been pled”); *Feitelson v. Google Inc.*, 80 F.
 Supp. 3d 1019, 1025 (N.D. Cal. 2015).

³ Plaintiff also contends that Defendant’s motion to dismiss is procedurally improper under
 Federal Rule of Civil Procedure 12(g)(2). *Opp.* at 19-20. However, the Court finds that the
 allegations in the original complaint were insufficient to place Defendant on notice of the
 additional theories described in the new allegations it seeks to dismiss. The Court’s finding is

B. Motion to Strike

1 Defendant also moves to strike paragraphs 34, 35, and 75 through 176 of the amended
2 complaint. *See* Mot. at 2. These paragraphs generally concern Plaintiff’s allegations that Google
3 has unlawfully achieved and continues to maintain a monopoly in the online video platform
4 market by conditioning access to its mobile operating system and Defendant’s other popular
5 services on preinstallation of the YouTube app and in some cases “expressly prohibiting the
6 preinstallation of any rival . . . apps (which would include the Rumble app)[.]” *See* FAC ¶¶ 34,
7 87. Plaintiff argues that the allegations Defendant seeks to strike relate to forms of exclusionary
8 conduct that are properly considered in adjudicating a monopolization claim, and further argues
9 that “antitrust claims are to be adjudicated as a whole, . . . not parsed into discrete pieces.” *Opp.* at
10 20.

11 Rule 12(f) of the Federal Rules of Civil Procedure states that a district court “may strike
12 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
13 matter.” Motions to strike are “regarded with disfavor” because they are often used as delaying
14 tactics and because of the limited importance of pleadings in federal practice. *Z.A. ex rel. K.A. v.*
15 *St. Helena Unified Sch. Dist.*, No. 09-CV-03557-JSW, 2010 WL 370333, at *2 (N.D. Cal. Jan. 25,
16 2010). Where there is any doubt about the relevance of the challenged allegations, courts in this
17 Circuit err on the side of permitting the allegations to stand. *See id.* (citing *Fantasy, Inc. v.*
18 *Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds, Fogerty v. Fantasy, Inc.*,
19 510 U.S. 517, 534, 114 S. Ct. 1023 (1994)); *accord Pilgram v. Lafave*, No. 12-CV-5304 GAF-EX,
20 2013 WL 12124126, at *5 (C.D. Cal. Feb. 7, 2013); *Art Attacks Ink, LLC v. MGA Ent., Inc.*, No.
21 04-CV-1035-BLM, 2006 WL 8439887, at *4 (S.D. Cal. June 21, 2006). This is particularly true
22 when the moving party shows no prejudice and when striking the allegations will not streamline
23

24 consistent with the purpose of the federal rules, as described by the Ninth Circuit. *See In re Apple*
25 *iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) (reading “12(g)(2) in light of the general
26 policy of the Federal Rules of Civil Procedure, expressed in Rule 1”). And to the extent
27 Defendant could have raised its arguments in a prior motion, the Court nonetheless exercises its
28 discretion to consider those arguments in the interest of judicial economy. *See id.* (quoting *Banko*
v. Apple, Inc., No. 13–02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) (“Although
Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could
have been made in a prior motion . . . courts faced with a successive motion often exercise their
discretion to consider the new arguments in the interests of judicial economy.”).

1 the ultimate resolution of the action. *St. Helena Unified Sch. Dist.*, 2010 WL 370333 at *2.

2 For the same reasons underlying the Court’s denial of the motion to dismiss, Defendant has
3 not shown that the allegations are so redundant, immaterial, impertinent, or scandalous as to
4 justify striking them. As noted above, substantial authority suggests that, depending on the factual
5 record as it actually develops, all of the interrelated conduct alleged in the complaint could be
6 relevant to the Section 2 claim that is not being challenged in this motion. That fact alone weighs
7 dispositively against striking the allegations targeted by Defendant. Obviously, whether those
8 allegations end up being backed by sufficient evidence to survive a summary judgment motion, or
9 to warrant presentation to the jury at trial under the Federal Rules of Evidence, is a matter for a
10 later stage of the case. Accordingly, Defendant’s motion to strike is **DENIED**.

11 **IV. CONCLUSION**

12 Defendant’s motion to dismiss and to strike is **DENIED**. The court **SETS** a telephonic
13 case management conference on August 30, 2022 at 2:00 p.m. The parties shall submit an updated
14 joint case management statement by August 23, 2022. All counsel shall use the following dial-in
15 information to access the call:


16 Dial-In: 888-808-6929;

17 Passcode: 6064255

18 For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where
19 at all possible, parties shall use landlines.

20 **IT IS SO ORDERED.**

21 Dated: 7/29/2022

22 
23 HAYWOOD S. GILLIAM, JR.
24 United States District Judge
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