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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DREAMSTIME.COM, LLC, a Florida LLC,

No. C 18-01910 WHA

Plaintiff,

v.

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS**

GOOGLE, LLC, a Delaware LLC; and DOES
1-10,

Defendants.

_____ /

INTRODUCTION

In this antitrust action, plaintiff accuses defendant of using its monopoly power to discriminate against plaintiff. Defendant now moves to dismiss all claims. For the reasons stated below, the motion to dismiss is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

1. THE PARTIES.

Defendant Google, LLC owns and operates the world’s largest internet search engine using a number of proprietary algorithms that Google claims will help consumers find pages with relevant information. When you type a word search into the Google search bar, Google’s product responds by producing lines of results drawn from all over the internet. Google shows approximately ten lines of results per page and provides as many pages as needed to show the hits. As potential hits can run into the thousands, a website’s ranking on Google’s line of results has a direct, measurable impact on the amount of web traffic to that website. In a nearby

1 tab to the Google search bar, Google also operates a search engine for images (“Google
2 Images”). An essential driver of web traffic to Google, Google Images has become the biggest
3 repository of images in the world (Dkt. No. 50 at ¶¶ 2, 4, 18–20, 26).

4 Google has partnered with two photography businesses, Shutterstock as of July 2016
5 and Getty Images as of February 2018, who together represent 70% of the stock photography
6 market. Google’s partnership agreement with Shutterstock in particular provides Google
7 license to integrate Shutterstock’s library of hundreds of millions of online images into its
8 search advertising network. Google then uses those images together with advertisements
9 running through Google’s advertising platforms, further driving web traffic through Google
10 while also providing Shutterstock with free advertising for their images. Nowhere does the
11 amended complaint allege that these agreements *prohibit* Shutterstock and Getty Images from
12 also dealing with Google’s rivals, Yahoo! and/or Bing — stating solely that “Yahoo! and Bing
13 are unable to obtain the same access to licensed stock photos for their competing ad networks.”
14 That inability may simply be due to the absence of any deal (as yet) between Shutterstock and
15 Getty Images on the one hand, and Yahoo! and Bing on the other (*id.* at ¶¶ 32–34, 50, 104).

16 Plaintiff Dreamstime is a heavyweight in image repositories in the stock photography
17 industry. A supplier of high-quality digital images since 2000, Dreamstime has a repository of
18 millions of high-quality stock images. As of March 2018, Dreamstime had 20 million
19 registered members (and counted clients in the Fortune 100 companies), more than 400
20 thousand contributing photographers, and over 75 million photos, illustrations, clip art images,
21 and vectors (*id.* at ¶ 28).

22 2. SPONSORED ADS.

23 Google does not charge its search engine users money. Rather, companies pay Google
24 to have advertisements for their websites prominently displayed in Google’s search results.
25 These are sponsored ads. The complaint estimates that this advertising program (called
26 AdWords by Google) accounts for over 80% of Google’s revenue. Google’s share of the
27 United States online search advertising market is approximately 80%. To use AdWords,
28 advertisers must agree to several adhesive agreements (*id.* at ¶¶ 23, 66–68).

1 The AdWords program uses an auction system to determine which advertisements are
2 shown and how much each advertisement costs. Advertisers bid for relevant search term
3 keywords such as “stock photo” or “digital image” and AdWords then allegedly assigns each
4 advertisement a “quality score” based on multiple factors such as: the quality of the
5 advertiser’s website, the click-through rate (the percentage of users who not only viewed the ad
6 but also clicked on it), and relevance to the search keywords. Each time a Google user enters
7 search terms that include relevant keywords, the AdWords program determines which of the
8 competing advertisements to display (*id.* at ¶¶ 67, 71–73).

9 In 2004, Dreamstime entered into the AdWords Agreement with Google, paying Google
10 to display its advertisements on Google, and engaging in several different marketing campaigns
11 to promote its advertisements with the best combination of quality score, bid amount, and
12 resulting customer acquisitions. Dreamstime paid Google daily to determine which of its
13 advertisements are the most effective and to increase its circulation accordingly. Dreamstime
14 subsequently saw a predictable and steady number of customers resulting from these campaigns
15 (*id.* at ¶¶ 74–77).

16 **3. DREAMSTIME PLUMMETS ON GOOGLE SEARCH.**

17 Dreamstime relies heavily on online search engines and search engine advertising to
18 build its name recognition and generate new customers. Indeed, roughly two-thirds of
19 Dreamstime’s customers come to Dreamstime’s website by way of a search-engine result.
20 Consistent with Dreamstime’s AdWords spending, from approximately 2005 to 2015,
21 Dreamstime consistently ranked in the top three in Google’s line of search results for searches
22 related to stock photography, never appearing lower than the first page. Dreamstime’s website
23 traffic during that time also reflected that many people who searched “online stock
24 photography” on Google used and purchased stock photographs from Dreamstime (*id.* at ¶¶ 29,
25 38–40).

26 In 2015, however, Dreamstime’s search ranking on Google plummeted (this order
27 pauses here to note that Google’s agreement with Shutterstock was announced in July 2016).
28 For example, Dreamstime’s rank on Google for the generic search term “stock photos” in June

1 2017 sank from what had been either the second or third *overall result* down to the fourth *page*.
2 Such a drop in Google search results can be catastrophic for businesses; falling from page one
3 to page two alone reduces website traffic by 95%, according to the amended complaint. In
4 April 2016, Dreamstime’s fall in Google’s search ranking had taken a quantifiable toll, as the
5 number of new Dreamstime customers who signed up and made a purchase within one month
6 fell by 30% from that point the prior year (*id.* at ¶¶ 40–44).

7 **4. DREAMSTIME’S ATTEMPTED SOLUTIONS.**

8 In an effort to steer away from the impending iceberg, Dreamstime followed every
9 guideline and suggestion provided by Google’s documentation to boost Dreamstime’s rankings
10 on Google search. Specifically, Dreamstime switched to https and http2, disavowed links,
11 improved website quality, diversity, and quantity of content, invested in dedicated hardware for
12 a caching system, and dramatically increased the crawl rate and number of pages on the site.
13 When those efforts did not restore Dreamstime’s ranking, Dreamstime also invested numerous
14 development hours to rebuild its entire site to be mobile-friendly, diverted resources from other
15 projects in its business plan and doubled its hosting costs, engaged with and followed the advice
16 of external agencies, hired its own in-house Search Engine Optimization expert, spent millions
17 of dollars on website hosting to increase the content on its website by adding more images, and
18 launched a second website — Megapixl.com — to get more exposure. Dreamstime also spent
19 millions of dollars on new Google AdWords campaigns (increasing its budget by 50%) both for
20 itself and for Megapixl.com. Still, Dreamstime’s Google rank continued to decline through the
21 end of 2017 and Megapixl.com did not gain traction (*id.* at ¶¶ 63–64, 77–78, 105).

22 To date, no one, including “guru” search engine optimization companies, have identified
23 any issues with Dreamstime’s site that would explain how Dreamstime came to be marginalized
24 in Google’s search rankings. To its knowledge, Dreamstime improved every metric critical to
25 search ranking: Dreamstime’s user engagement improved over the relevant period,
26 Dreamstime’s bounce rate (a metric that indicates the percentage of people who land on a web
27 page and then leave without clicking anywhere else on the website) has declined, and the
28

1 average amount of time users spend on Dreamstime’s website has stayed constant. Yet,
2 Dreamstime’s growth has slowed by approximately 50% since its peak (*id.* at ¶¶ 60, 64, 105).

3 This drop in rankings, moreover, continues to be unique to Google’s search engine: a
4 recent search demonstrated Dreamstime’s search ranking for “stock images” was fifth on Bing’s
5 search engine, fourth on Yahoo!’s search engine, and third on Baidu’s search engine. On
6 Google’s search engine, by contrast, Dreamstime found itself ninety-first, behind websites such
7 as an obscure site with only 30,000 free images (compared with Dreamstime’s more than two
8 million free images), yet another site with only 140 images total, and a blog article that had not
9 been updated since 2014 entitled “Stock Photos That Don’t Suck.” Yet, when comparing
10 Dreamstime to Google’s partner Shutterstock by measure of accuracy, Dreamstime returned
11 completely accurate, if not more accurate results than companies like Shutterstock. Dreamstime
12 continues to maintain it has no internal answers for these vast discrepancies in search results (*id.*
13 at ¶¶ 41, 44, 55–58).

14 **5. SUBVERSION BY GOOGLE IN DREAMSTIME’S ADVERTISING CAMPAIGNS.**

15 Dreamstime contends that throughout this time, Dreamstime’s advertising campaigns
16 were actively subverted. Specifically, Google canceled Dreamstime’s most successful
17 advertising campaigns without notice or explanation and willy-nilly suspended Dreamstime’s
18 account based on accusations of policy violations. Google also prevented Dreamstime from
19 running its advertisements altogether (but simultaneously allowed the exact same
20 advertisements to be placed by Dreamstime’s competitors). Most subversively, Google caused
21 Dreamstime’s daily spending limits to be exceeded systemically and on a regular basis by over-
22 delivering on the advertisement campaigns (using more of the allocated advertising budget in a
23 shorter period of time) (*id.* at ¶¶ 8, 79–80, 86, 90–91, 172).

24 Moreover, Google selectively applied its policies to Dreamstime’s detriment. For
25 example, Google removed Dreamstime’s mobile application because it featured lingerie
26 photographs but allowed Google partner Shutterstock’s mobile application to remain active
27 despite featuring explicitly nude photographs. In another example of selective policy
28 enforcement, Google removed Dreamstime’s lowest cost per acquisition advertisements but

1 allowed Dreamstime’s high cost per acquisition display advertisements *of the same type* to
2 remain active (translating to more income for Google) (*id.* at ¶¶ 53, 81, 86, 93).

3 The amended complaint is silent as to whether or not Dreamstime continued to win its
4 AdWords campaigns for search terms. Dreamstime eventually determined that the spending on
5 AdWords did not help Dreamstime’s search ranking, and so, “Dreamstime recently resolved to
6 significantly lower its advertising spending” (*id.* at ¶ 65 n.26).

7 **6. THIS ACTION.**

8 Dreamstime filed this lawsuit in March 2018 asserting four claims for relief: (1)
9 violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) breach of contract; (3) breach of
10 the implied covenant of good faith and fair dealing; and (4) violations of Section 17200 of the
11 California Business and Professions Code (Dkt. No. 1). Google moved to dismiss all claims
12 (Dkt. No. 25). At oral argument (following full briefing), the undersigned judge provided
13 Dreamstime an opportunity to amend the complaint before issuing an order on Google’s motion
14 to dismiss. Dreamstime elected to amend (Dkt. No. 44).

15 In September 2018, Dreamstime timely filed the amended complaint, asserting the same
16 four claims for relief (Dkt. No. 50). Google again moved to dismiss (Dkt. No. 53), and
17 following full briefing (Dkt. Nos. 60, 61), another hearing was held in December 2018. Orders
18 subsequently issued seeking clarification from both Dreamstime and Google (Dkt. Nos. 66, 70).
19 Having received clarifications from both sides, this order follows (Dkt. Nos. 68, 69, 71).

20 **ANALYSIS**

21 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
22 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556
23 U.S. 662, 678 (2009) (quotations omitted). A claim is facially plausible “when the plaintiff
24 pleads factual content that allows the court to draw the reasonable inference that the defendant
25 is liable for the misconduct alleged.” *Id.* at 678. Plausibility requires pleading facts, as opposed
26 to conclusory allegations or the “formulaic recitation of the elements of a cause of action,” *Bell*
27 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and must rise above the mere conceivability
28 or possibility of unlawful conduct that entitles the pleader to relief. *Iqbal*, 556 U.S. at 678–79.

1 “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops
2 short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at
3 678 (citation and quotation omitted). Nor is it enough that the complaint is “factually neutral”;
4 rather, it must be “factually suggestive.” *Twombly*, 550 U.S. at 557 n.5.

5 **1. MONOPOLY MAINTENANCE UNDER SECTION 2 OF THE SHERMAN ACT.**

6 Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and
7 conspiracies to monopolize. More specifically, Section 2 provides that “[e]very person who
8 shall monopolize, or attempt to monopolize, or combine or conspire with any other person or
9 persons, to monopolize any part of the trade or commerce among the several States, or with
10 foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. § 2.

11 The original complaint appeared to allege an unlawful monopoly leveraging theory
12 based on the market for online stock photography and its dependence on the online search
13 advertising market which Google purportedly monopolized. But both in Dreamstime’s briefing
14 and when directly asked during the first oral argument in September 2018, Dreamstime
15 explicitly disavowed any such leveraging theory stating: “we are not alleging a two-market
16 monopoly leveraging theory.” Instead, Dreamstime insisted “it’s a simple, straightforward
17 monopoly maintenance case in which Google, with a market share of 70 percent plus, has
18 maintained that monopoly power and abused it . . .” (Dkt. No. 49 at 37, 38).

19 But even the maintenance theory had not been adequately alleged. The Court thus gave
20 Dreamstime another chance to revise the unwieldy complaint to set forth its antitrust theory,
21 observing that the best shot for Dreamstime appeared to be a leveraging claim. Dreamstime
22 accepted the opportunity to amend, but the amended complaint made clear: “Dreamstime is
23 advancing a traditional monopoly maintenance antitrust claim” (Dkt. No. 50 at ¶ 111). Later,
24 Dreamstime affirmatively disavowed any leveraging theory: “plaintiff Dreamstime is not
25 asserting a separate Section 2 of the Sherman Act two-market ‘monopoly leveraging’ claim”
26 (Dkt. No. 68 at 1). It is plain that plaintiff foreswears asserting a leveraging theory, attempting
27 instead (for whatever reason) to pigeonhole this claim under the guise of unlawful monopoly
28 maintenance.

1 The amended complaint alleges a relevant product market of online search advertising
2 (Dkt. No. 50 at ¶ 119). Dreamstime’s monopoly maintenance theory centers on an intertwined
3 relationship between stock photographs and the online search advertising market. That is, stock
4 photographs “are a critical component of search-based display ads (ads that include pictures
5 related to keyword searches). The use of stock photos in search-based display ads allows online
6 search advertisers to create high-quality, engaging display ads that pop up when users enter
7 certain keywords” (*id.* at ¶ 2b). Google purportedly therefore maintains its monopoly in the
8 online search advertising market by taking “control over online stock photo supply . . . to sell in
9 its advertising network, giving it a crucial competitive advantage over its competitors, such as
10 Yahoo! and Bing” (*id.* at ¶ 4). Moreover, “[n]ow that Google has access to all of Shutterstock
11 and Getty Images’ stock photos, it has instantly become one of the largest distributors of stock
12 photos to customers looking to use those photos in online ads” which “provide it with a key
13 advantage over its online search advertising competitors, by allowing it to integrate hundreds of
14 millions of licensed images into its search advertising network” (*id.* at ¶¶ 32, 34). Critically,
15 Google then targets Dreamstime and other stock photography companies “by removing an
16 important supplier of stock photos for search advertisers” (*id.* at ¶ 7).

17 As Google’s rivals in the online search advertising market have their own image
18 services that have failed to gain traction, Google’s monopoly in online search advertising is
19 further secured:

20 Competition in online search advertising is harmed by
21 Google’s promotion of Google Images over Dreamstime
22 and others. Google’s competitors, such as Bing and
23 Yahoo!, offer competing search and image services.
24 However, they have been unable to achieve the volume of
25 traffic and associated historical data capable of allowing
26 their image-based services to compete with Google Images.
27 Google’s elimination of Dreamstime and other stock
28 photography websites enhances and entrenches Google
Images’ dominance and secures its competitive advantages
over Bing and Yahoo!.

(*id.* at ¶ 102). As alleged in the amended complaint, therefore, Google’s mechanism for
restricting competition in the online search advertising market is to exclude Dreamstime and

1 other stock photography companies from engaging in both Google’s search function and
2 sponsored ads:

3 Google intends to restrict competition among itself, Yahoo!
4 and Bing, and to extend its dominance over chief rivals. Its
5 vehicle for doing so is the exclusion of Dreamstime and
6 several other non-partner stock photography websites . . .
7 As these tactics injure competition in Google’s market,
8 they simultaneously cause material injuries to Dreamstime
9 and other stock photo suppliers in the form of decreased or
10 eliminated visibility in Google’s search and ad results,
11 overcharges for AdWords, lost revenue, lost customers,
12 potential search engine optimization (“SEO”) penalties,
13 and loss of goodwill.

14 (*id.* at ¶ 10). In other words, the importance of stock photographs to Google means
15 vanquishing smaller rivals in the stock photography industry:

16 Google has undertaken its . . . exclusionary conduct with
17 the . . . purpose of maintaining and abusing its monopoly in
18 the online search advertising market (by increasing Google
19 Images’ dominance and increasing its own stock photo
20 offerings within its ad network) and to vanquish . . . smaller
21 rivals in the online stock photography industry . . .
22 Google’s conduct discourages, prevents and/or precludes
23 consumers from finding, accessing and/or buying services
24 from Dreamstime and other online stock photo repositories
25 directly, which in the long-run would erode Google’s
26 standing as the first place to go via its Google Images
27 feature to search for . . . stock photos on the Internet.

28 (*id.* at ¶¶ 125, 126). In sum, Dreamstime has most recently clarified the theory as follows:

[P]laintiff Dreamstime *is* alleging that defendant Google is
a monopolist and has engaged in an overall scheme
consisting of various predatory and exclusionary acts to
maintain its monopoly position in the online search
advertising relevant market. This conduct is directed at
harming Dreamstime as a consumer/participant of services
in the online search advertising market. This conduct
simultaneously harms competition and consumers, and
enhances Google’s monopoly in the online search
advertising market . . . As Dreamstime has alleged, its
exclusion harms competition and consumers and enhances
Google’s monopoly in the online search advertising market
notwithstanding that Dreamstime does not directly compete
with Google in that market. While not a direct competitor
in the online search advertising market, Dreamstime does
compete for the same web traffic and offers similar
functions to Google (in particular, Google Images) with
respect to image-related searches, and its exclusion is a
means by which Google increases its image-related search
dominance and therefore its foothold in the online search
advertising market.

1 (Dkt. No. 68 at 1–2).

2 Dreamstime’s theory, however, fails because it does not plausibly allege harm to
3 competition in the relevant market. As the Supreme Court has made clear: “the possession of
4 monopoly power will not be found unlawful unless it is accompanied by an element of
5 *anticompetitive conduct.*” *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,*
6 *LLP*, 540 U.S. 398, 407 (2004) (emphasis added). Our court of appeals defines anticompetitive
7 conduct as “behavior that tends to impair the opportunities of rivals and either does not further
8 competition on the merits or does so in an unnecessarily restrictive way.” *Cascade Health*
9 *Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (citing *Aspen Skiing Co. v. Aspen*
10 *Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985)).

11 Dreamstime alleges the following eight predatory acts committed by Google, which,
12 taken as a whole, purportedly combine to impose anticompetitive conduct: (1) rigging the
13 AdWords auction bidding process to control the purchase of Google’s AdWords advertising
14 services; (2) downgrading and distorting Dreamstime’s online search ranking (raising
15 Dreamstime’s costs of competing and threatening to drive it out of business); (3) favoring
16 contractual partners (Shutterstock and Getty Images) with opportunities not available to other
17 smaller stock photography suppliers; (4) selectively enforcing its rules and terms governing its
18 online AdWords advertising program to disadvantage Dreamstime, thereby further undermining
19 its ability to supply stock photos to its customers and Google’s rivals; (5) elevating
20 inconsequential websites ahead of Dreamstime and other online stock photography repositories;
21 (6) suspending Dreamstime’s mobile application purportedly for policy violations (that the
22 application did not violate), and later de-indexing Dreamstime’s mobile application for the most
23 common searches for stock photos within the Google Play Store; (7) allowing users to bypass
24 Dreamstime’s licensed images and obtain them directly on Google Images without paying for
25 them; and (8) engaging in unlawful activity to capture and use privacy protected data of its
26 consumers and advertisers (Dkt. No. 50 at ¶ 133).

27 But the pattern of conduct that appears to be predatory here, is not in and of itself
28 injurious to competition in the relevant market. The theory advanced by plaintiff is that

1 Dreamstime is a victim of a series of predatory acts — but the only harm to competition alleged
 2 is that it hurt Dreamstime and Dreamstime’s ability to act as a consumer in that market. In the
 3 auction process, it would be to the advantage of Google to have more bidders. Facially, it does
 4 not make sense that Google would want to benefit from losing a customer.

5 What would make sense, is that Dreamstime is a potential competitor to Google in the
 6 online search advertising market with respect to images. Dreamstime could have its own search
 7 engine for images and sell sponsored ads and thus compete with Google as a rival. But
 8 Dreamstime has expressly disavowed that theory (Dkt. No. 68 at 1).*

9 Taking the synergistic effect of the alleged predatory acts together as an overall scheme,
 10 this maintenance theory still does not succeed as a Section 2 monopolization claim as “there can
 11 be no synergistic result” if none of the acts alleged is an antitrust violation. *Cal. Computer*
 12 *Prods. v. Int’l Bus. Machs., Corp.*, 613 F.2d 727, 746 (9th Cir. 1979). Although “a finding of
 13 some slight wrongdoing in certain areas need not by itself add up to a violation,” Dreamstime
 14 still needs to meet every element of the antitrust claim. *City of Anaheim v. S. Cal. Edison Co.*,
 15 955 F.2d 1373, 1376 (9th Cir. 1992). A showing of anticompetitive conduct is missing.

16 Much of the amended complaint focuses on the mistreatment of Dreamstime as a
 17 customer of Google in the online search advertising market. But such mistreatment, even by a
 18 monopolist, does not necessarily reduce competition in the relevant market. It is true that
 19 “reduction of competition does not invoke the Sherman Act until it harms consumer welfare.”
 20 *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (citations
 21 omitted). But showing harm to one customer does not on its own demonstrate anticompetitive
 22 conduct. As one leading treatise states: “[t]he real intent of a consumer welfare test is to
 23 identify practices that both exclude rivals from the market and harm consumers.” The treatise
 24 further illustrates:

25
 26 * This theory is suggested by language in the amended complaint (*see, e.g.*, Dkt. No. 50 at ¶¶ 36, 126).
 27 At oral argument in December 2018, the district judge asked Dreamstime whether or not this was its theory.
 28 Dreamstime dodged the question at the time (Dkt. No. 65 at 4) (“Well, we think we should have been a stronger
 competitor in the image market, not taking Google head on in the search market”), but later affirmatively
 disavowed the theory: “plaintiff Dreamstime is not alleging it is a future potential or actual direct competitor to
 defendant Google (or Yahoo! or Bing) in the online search advertising market” (Dkt. No. 68 at 1).

1 Suppose that Microsoft, which has a monopoly in its
 2 Windows operating system, should develop a new version
 3 that was particularly buggy and prone to crashes. Clearly,
 4 consumers as a group would be harmed because they have
 5 a few good alternatives to Windows. But developing a bad
 6 version of Windows is not a monopolistic practice *because*
 7 *no one is excluded*. Microsoft’s mistake . . . might simply
 8 impose harm on consumers until Microsoft fixed the
 9 problems and restored the status quo, *but the one thing that*
 10 *the practice would clearly not do is exclude rivals from the*
 11 *market. As a result, the practice is not ‘monopolistic,’ even*
 12 *though it causes consumer harm.*

13 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651 (4th ed. 2015) (emphasis added).
 14 Although this example differs from the predatory acts alleged in the amended complaint in that
 15 Google is purportedly acting nefariously here, the fatal flaw in both theories remains the same:
 16 by destroying Dreamstime, no rival and no competition has been excluded from the online
 17 search advertising market, and therefore, no anticompetitive conduct has been adequately
 18 alleged.

19 To circumvent this problem, Dreamstime engages in some sleight of hand. Dreamstime
 20 asserts itself in the amended complaint not only as a customer whose welfare has been harmed,
 21 but also as a competitor to Google for web traffic and stock photographs. The relevant market
 22 alleged, however, is sponsored ads, not stock photographs. Dreamstime has repeatedly made
 23 clear, it is not, nor does it intend to be, a rival to Google in the relevant market: the online
 24 search advertising market (*see* Dkt. No. 68). Although Google may have reduced competition
 25 on the merits in the online stock photography market or “the online search advertising market
 26 for photography for images” (as the district judge asked Dreamstime at the December 2018
 27 hearing), Dreamstime disavowed any such relevant market, insisting that the relevant market is
 28 “online search advertising, and we are in that market as a participant because we are a
 contractual customer of Google” (Dkt. No. 65 at 23).

 Scrutinizing the predatory actions alleged that are broader than mere harm to
 Dreamstime results in the same conclusion and do not “exclude[] some potential,” or “limit[]
 some actual, competition.” *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295,
 343 (D. Mass. 1953) (Judge Charles Wyzanski), *aff’d per curiam*, 347 U.S. 521 (1954). In fact,
 some alleged conduct are more likely to have the opposite impact. The rigging of the AdWords

1 bidding process and the general selective enforcement of Google’s rules, for example, are more
2 likely to steer customers towards existing rivals or to foster competition by encouraging others
3 to enter the market.

4 Turning to the sole remaining alleged predatory act, Google’s capturing of data,
5 Dreamstime has not demonstrated that this data is captured through a means other than
6 Google’s “ability, economies of scale, research, natural advantages, and adaptation to inevitable
7 economic laws.” *Ibid.* Although the data collection likely gives Google an advantage in the
8 online search advertising market over its rivals, a monopolist utilizing its competitive advantage
9 does not equate to anticompetitive conduct. *Trinko*, 540 U.S. at 415–16. Other than couching
10 the data collection practice as “unlawful,” Dreamstime has not specified how or in what way
11 Google’s data collection practice is anticompetitive.

12 Despite not listed as part of the eight predatory acts alleged in the amended complaint,
13 this order pauses to explore the following possibility grounded in the facts alleged in the
14 amended complaint: if, as Dreamstime states, it is true that the pipeline of stock photographs is
15 the mechanism by which Google maintains its monopoly in the online search advertising
16 market, then agreements between Google and stock photography companies streamlining that
17 pipeline further allow Google to maintain its strength in the relevant market. This strength is
18 further aided by Google’s vast trove of data, including data shared between Shutterstock/Getty
19 Images and Google as part of their agreements (Dkt. No. 50 at 103–104). This conduct,
20 moreover, causes antitrust injury by increasing spending in the AdWords bidding campaigns for
21 stock photography sites such as Dreamstime.

22 Even this conduct, however, would not be anticompetitive. Returning to the Supreme
23 Court’s opinion in *Trinko*: “Firms may acquire monopoly power by establishing an
24 infrastructure that renders them uniquely suited to serve their customers.” *Trinko*, 540 U.S. at
25 407. A company providing a platform for businesses to sell advertisements must be expected to
26 *efficiently* produce the best possible product to its customers. Thus, if in the online search
27 advertising market, this means making stock photographs readily available to businesses
28 seeking to advertise, a company will likely attempt to enter into agreements to make those stock

1 photographs as available as possible. The use of data and the securing of these agreements here
2 are efficient business transactions that do not “attempt[] to exclude rivals *on some basis other*
3 *than efficiency.*” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)
4 (citations omitted) (emphasis added). The Sherman Act, moreover, “does not restrict the long
5 recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to
6 exercise his own independent discretion as to parties with whom he will deal.” *United States v.*
7 *Colgate & Co.*, 250 U.S. 300, 307 (1919).

8 Of course, Google could not enter into an agreement that violates Section 1 of the
9 Sherman Act (agreements in unreasonable restraint of trade). But a Section 1 violation is not
10 alleged here. Under Section 2, nothing Dreamstime has alleged demonstrates that Google has
11 maintained its monopoly by engaging in conduct to “chill[] vigorous competition” *in the*
12 *relevant market.* *American Needle, Inc. v. National Football League*, 560 U.S. 183, 190 (2010).
13 Google may position itself to leap ahead of its rivals in the relevant market on the merits. It is
14 telling that not a single fact in this 76-page first amended complaint (with 19 exhibits attached)
15 specifies how Google’s rivals or potential rivals are denied online search advertising market
16 share due to the agreements between Google and Shutterstock/Getty Images. Dreamstime has
17 not met its burden to show that the reason Google’s rivals are unable to obtain the same access
18 to licensed photos as Google is because of Google’s anticompetitive action. Again, for all the
19 amended complaint alleges, Shutterstock and Getty Images are perfectly free to enter into
20 licensing arrangements with Yahoo! and Bing.

21 Nor do the antitrust laws require Google to enter into those same agreements with every
22 stock photography company in the world. Or, as the Supreme Court stated: “The Sherman Act
23 is indeed the Magna Carta of free enterprise, but it does not give judges *carte blanche* to insist
24 that a monopolist alter its way of doing business whenever some other approach might yield
25 greater competition.” *Trinko*, 540 U.S. at 415–16 (emphasis in original) (quotations and
26 citations omitted). Dreamstime’s amended complaint misses a critical element in failing to
27 allege a plausible monopoly maintenance claim — namely, injury to competition in the online
28 search advertising market. The antitrust claim is dismissed without leave to amend.

1 **2. BREACH OF CONTRACT.**

2 To allege a breach of written contract, a plaintiff must plead: (1) the existence of a
3 contract; (2) plaintiff’s performance or excuse of performance; (3) defendant’s breach; and (4)
4 damages. *See Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Dreamstime
5 alleges Google breached two contracts: (1) the AdWords Agreement and (2) the Google Play
6 Agreement.

7 Under the AdWords Agreement, Dreamstime alleges that Google breached its contract
8 by providing Dreamstime advertising campaigns that did not work and did not meet
9 Dreamstime’s expectations, applied its policies and procedures unevenly towards Dreamstime,
10 cancelled some of Dreamstime’s ad campaigns for violating stated policies that the ad
11 campaigns did not violate, and overcharged and overdelivered the ad campaigns (Dkt. No. 50 at
12 ¶ 169). As to the Google Play Agreement, Dreamstime alleges that Google breached the
13 agreement both by removing Dreamstime’s mobile Buyer App from the Google Play app store
14 unfairly and by de-indexing Dreamstime’s Buyer App for common search terms (*id.* at ¶ 171).

15 Dreamstime’s requirement at this stage is solely to identify with specificity the
16 contractual obligations allegedly breached by Google sufficient to put Google on notice of the
17 claims and plausibly allege a right to relief. *See Kaar v. Wells Fargo Bank, N.A.*, 2016 WL
18 3068396 (N.D. Cal. 2016) (Judge William Alsup). Dreamstime does so. In the amended
19 complaint, Dreamstime alleges that the AdWords Agreement incorporated by reference the
20 AdWords program policies, various FAQ answers, and support pages describing Google’s
21 policies. Taking the amended complaint as true, these policies provide in part that overdelivery
22 is a breach of contract, that Google “intended the policies and descriptions of the services
23 Google was to provide to apply equally to all who executed it,” and that the policies include a
24 specific list of prohibited conduct that would subject an advertisement to rejection or removal
25 (such as “ads that mislead or trick the user into interacting with them[,]” and that “an account
26 may be suspended if you have several violations or a serious violation”) (Dkt. No. 50 at ¶¶
27 164–167). As to the policies incorporated by reference into the Google Play Agreement, the
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1 amended complaint provides the specific policy section (Section 8.3) that Dreamstime is
2 alleging Google breached.

3 Thus, the listings made by Dreamstime in the amended complaint are “enough to raise a
4 right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
5 (2007). The amended complaint accordingly puts Google on notice as to what provisions of the
6 AdWords and Google Play Agreements have been breached.

7 Google contends provisions in the agreements undercut Dreamstime’s theories for
8 recovery, rendering the theories implausible. It is true that both the AdWords Agreement and
9 Google Play Agreement contain “catch-all” provisions that may undercut the viability of the
10 alleged claims (Dkt. No. 50 at Exh. F Section 1, 8, 12; Exh. O). But Google cites no authority
11 requiring resolution at this stage. At this juncture, Google has been adequately notified of the
12 provisions and facts at issue. The breach of contract claim may move forward.

13 **3. BREACH OF IMPLIED GOOD FAITH AND FAIR DEALING.**

14 “[I]n every contract there is an implied covenant that neither party shall do anything
15 which will have the effect of destroying or injuring the right of the other party to receive the
16 fruits of the contract.” *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 363 (1997) (citations
17 and quotations omitted). The undersigned has previously held that “absent those limited cases
18 where a breach of a consensual contract term is not claimed or alleged, the only justification for
19 asserting a separate cause of action for breach of the implied covenant is to obtain a tort
20 recovery.” *See, e.g., Total Recall Techs. v. Luckey*, 2016 WL 199796, at *6 (N.D. Cal. Jan. 16,
21 2016) (citations omitted).

22 As alleged in the amended complaint, however, this action plausibly may be one of the
23 aforementioned limited cases. Enough has been shown to support the notion that Google took
24 affirmative steps to frustrate the purpose of the agreements. *See Cobb v. Ironwood Country*
25 *Club*, 233 Cal. App. 4th 960, 966 (2015). For example, Google pretended to work to resolve
26 purported “policy issues” with Dreamstime’s ads while actually subverting and frustrating the
27 ability of Dreamstime to realize the benefits of its contract. Google also is alleged to apply a
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1 double standard to Dreamstime’s low cost and high cost advertising campaigns and a double
2 standard in Google’s treatment of Dreamstime compared to Dreamstime’s competitors.

3 Further, the alleged conduct may go beyond the reach of a breach of contract claim.
4 After all, a possibility exists that in scrutinizing the AdWords and Google Play Agreements, the
5 “catch-all” provisions included therein would undercut any potential claim for breach of
6 contract (Dkt. No. 50 at Exh. F Section 1, 8, 12; Exh. O). Dreamstime’s cause of action of the
7 breach of implied good faith and fair dealing therefore may move forward.

8 **4. VIOLATION OF SECTION 17200.**

9 Section 17200 of the California Business and Professions Code provides a remedy for
10 unlawful, unfair, and fraudulent activity. The amended complaint alleges claims under all three
11 prongs. The claim under the unlawful prong is derivative of the breach of contract and breach
12 of the implied covenant of good faith and fair dealing and therefore may move forward.

13 Turning to the unfairness prong, California courts have applied unfairness under two
14 different tests: *Cel-Tech* and *South Bay*. Our court of appeals has applied both tests. *See, e.g.,*
15 *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865–67 (9th Cir. 2018). *Cel-Tech* held that to be unfair
16 under the unfairness prong, the alleged conduct must be “tethered to some legislatively declared
17 policy” or have some effect on competition. *Cel-Tech Communications, Inc. v. Los Angeles*
18 *Cellular Telephone Co.*, 20 Cal.4th 163, 186–87 (1999). Under *South Bay*, a challenged
19 business practice qualifies as unfair when the practice is “immoral, unethical, oppressive,
20 unscrupulous or substantially injurious to consumers.” *South Bay Chevrolet v. General Motors*
21 *Acceptance Corporation*, 72 Cal. App. 4th 861, 886–87 (1999) (citation omitted).

22 Here, applying both tests, the unfairness prong is satisfied. Dreamstime plausibly
23 alleges that Google, for example, pretended to work in good faith to resolve purported “policy
24 issues” with Dreamstime’s ads while actually intending at all times to remove them arbitrarily.
25 Such action, taken as true, both plausibly breaches the contract through the breach of the
26 implied covenant of good faith and fair dealing thereby tethering the alleged conduct to a
27 legislatively declared policy and is a sufficiently alleged unscrupulous behavior substantially
28 injurious to Dreamstime. Allegations under the unfairness prong may therefore move forward.

1 Turning to the fraud prong, Dreamstime alleges that Google misled Dreamstime with
2 various false assertions as to its ad campaigns. Indeed, the complaint documents numerous
3 times Google falsely told Dreamstime the ad campaigns were working as they were supposed to
4 (Dkt. No. 50 at ¶¶ 78, 90).

5 To determine if the elements of fraud have been pleaded to state a cause of action, the
6 court looks to state law. In California, the elements of a cause of action for fraud are: “(a)
7 misrepresentation (false representation, concealment, or *nondisclosure*); (b) knowledge of
8 falsity (or ‘scierter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and
9 (e) resulting damage.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (citing
10 *Engalla v. Permanente Med. Group*, 15 Cal.4th 951, 974 (1997)) (emphasis in original). Rule
11 9(b)’s heightened pleading standards apply here. *See Kearns*, 567 F.3d at 1125. Under Rule
12 9(b), a pleading is sufficient if it identifies the circumstances constituting fraud so that a
13 defendant can prepare an adequate answer from the allegations. *Moore v. Kayport Package*
14 *Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). The false statements alleged in the amended
15 complaint that Dreamstime relied on to pour more money into its AdWords campaign, at the
16 very least, sufficiently put Google on notice of the circumstances constituting fraud. The claim
17 for fraud has therefore been pled with sufficient particularity and may move forward.

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CONCLUSION

For the above-stated reasons, Google’s motion to dismiss is **GRANTED IN PART AND DENIED IN PART**. The motion to dismiss is granted as to the antitrust claim without leave to amend. The motion to dismiss is denied as to the breach of contract claim, the breach of the implied covenant of good faith and fair dealing claim, and the Section 17200 claims.

The answer is due within 10 calendar days. Both sides should be taking discovery and preparing themselves for summary judgment and/or trial. Reasonable discovery relevant to the allowed claims shall be permitted even if it is also relevant to the Section 2 claim. Further leave to amend will be allowed only if further investigation or discovery reveals facts not previously known that would change the analysis.

IT IS SO ORDERED.

Dated: January 28, 2019.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California