IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BALDINO'S LOCK & KEY SERVICE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 1:16-cv-2360-KBJ
GOOGLE INC.,	)	
YAHOO! INC., and	)	
MICROSOFT CORPORATION,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

BACKGROUND[1]

The amended complaint alleges that the three most popular internet search engines in the United States are provided by Google Inc., Yahoo! Inc., and Microsoft Corporation (collectively, "the Providers"). *See* Compl. ¶¶ 15, 17, 19, 21, 30–33. These search engines offer access to specific information in response to a query submitted on a consumer's computer or handheld device. *See* Compl. ¶ 16. Organic search results appear as a list of links to websites that are ranked by an algorithm according to relevance. *See* Compl. ¶¶ 30, 108. Map search results are displayed as geographic pinpoints. *See* Compl. ¶¶ 74, 99. Search advertising, which appears alongside the organic and map results for a given search term, is available to businesses that pay one of the Providers for greater visibility. *See* Compl. ¶¶ 36, 83, 101.

Baldino's Lock & Key Service, Inc. ("Baldino") operates a locksmithing business in Maryland and Virginia, where it is licensed to do so, and in the District of Columbia, where it is registered to do business. Compl. ¶ 2. Consumers usually rely on search engines when in need of a locksmith. *See* Compl. ¶¶ 28, 37–38, 49, 54. For this reason, Baldino is concerned about how its website appears in the Providers' search results when an online consumer in the D.C. Metro area submits a query for *locksmith* or related words. *See* Compl. ¶¶ 42–43.

As is clear from its amended complaint, Baldino is particularly troubled by so-called "scam locksmiths" who purportedly defraud consumers across the country. *See* Compl. ¶¶ 56–57, 60–61. Scam locksmiths publish innumerable websites that misrepresent their licensure, location, and qualifications. *See* Compl. ¶¶ 57–58. When a consumer dials a phone number

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[1] For purposes of this motion, factual allegations in the amended complaint (Docket Entry No. 12 ("Compl.")) are taken as true, but legal conclusions couched as factual allegations are not. *See Lattisaw v. District of Columbia*, 118 F. Supp. 3d 142, 150–51 (D.D.C. 2015) (K.B. Jackson, J.). General allegations of the circumstances constituting fraud are also disregarded. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–05 (9th Cir. 2003); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368–69 (5th Cir. 2001). The Court can take judicial notice of the facts and public records of the prior action against Google in the Eastern District of Virginia. *See Alford v. Providence Hosp.*, 60 F. Supp. 3d 118, 123–24 (D.D.C. 2014) (K.B. Jackson, J.).

from one of these websites, an operator at a call center will dispatch a scam locksmith to the consumer's location. *See* Compl. ¶¶ 58–59. Once there, the scam locksmith will do shoddy work and demand an exorbitant cash payment from the vulnerable consumer. *See* Compl. ¶ 60.

The websites and locations of these scam locksmiths can appear among the search results when consumers use the Providers' search engines to find local locksmiths. *See* Compl. ¶¶ 63, 67, 80–82. This poses a problem for Baldino: If scam locksmiths take up the limited space available for displaying organic search results and map search results, then the link to Baldino's website could be bumped to a less visible position. *See* Compl. ¶¶ 65, 104–05. This, in turn, will make it more difficult for Baldino to connect with potential consumers. *See* Compl. ¶ 37. To avoid being buried in this way, Baldino has given money to some of the Providers so that links to Baldino's website can appear in search advertising that consumers are more likely to see. *See* Compl. ¶¶ 119–21, 165; *cf.* Docket Entry No. 1, at ¶ 97.

According to Baldino, the Providers are deliberately flooding their own search results with links to websites from scam locksmiths, even though the Providers know that consumers will be defrauded by these unlicensed or unregistered scammers. *See* Compl. ¶¶ 35, 66, 117, 131. Of course, this kind of self-sabotage decreases the likelihood that consumers will continue to use the Providers' search engines. *See* Compl. ¶ 109. But the Providers are willing to incur that cost, alleges Baldino, because the threat of being submerged by scam-locksmithing websites forces Baldino and others to buy search advertising from the Providers, thereby increasing advertising revenue. *See* Compl. ¶¶ 36, 66, 73–75, 122–23, 132–33, 140, 154.

Baldino has unsuccessfully litigated multiple claims related to scam locksmiths. *See, e.g.*, *SuperMedia LLC v. Baldino's Lock & Key Serv., Inc.*, No. 12-cv-1117, 2013 WL 4176955, at *2 (D. Md. Aug. 13, 2013) (rejecting Baldino's counterclaim accusing a phonebook of

printing phone numbers "in knowing participation in a scam by the 'phony' locksmiths to extort customers"); *Yellowbook Inc. v. Baldino's Lock & Key Serv. Inc.*, No. 358787V, slip op. at 7–8 (Md. Cir. Ct. Nov. 7, 2013) (rejecting Baldino's counterclaim accusing a phonebook of printing other locksmiths' phone numbers in violation of the Lanham Act). In 2014, Baldino sued Google in the U.S. District Court for the Eastern District of Virginia, claiming RICO and other violations based on the inclusion of scam-locksmithing websites among the search results from www.google.com. *See generally Baldino's Lock & Key Serv., Inc. v. Google, Inc.*, No. 1:14-cv-636 (E.D. Va.). The Eastern District of Virginia, Judge Hilton presiding, dismissed under Federal Rule of Civil Procedure 12(b)(6). *See Baldino's Lock & Key Serv., Inc. v. Google, Inc.*, 88 F. Supp. 3d 543 (E.D. Va. 2015). The Fourth Circuit affirmed. *See Baldino's Lock & Key Serv., Inc. v. Google Inc.*, 624 F. App'x 81 (4th Cir. 2015) (per curiam).

About a year after the Fourth Circuit affirmed the dismissal of its case against Google, Baldino brought this latest lawsuit against Google and the other Providers, seeking monetary and injunctive relief under the federal antitrust laws, the Lanham Act, and various state-law theories. *See* Docket Entry No. 1. Baldino and thirteen added locksmiths (collectively, "the Locksmiths") subsequently filed an amended complaint. *See* Compl. ¶¶ 1–14. Only some of the Locksmiths have purchased search advertising from the Providers, though the amended complaint does not identify which ones. *See* Compl. ¶¶ 119, 165. Moreover, one of the Locksmiths does business in Maryland but is not alleged to hold the license required by that State. *See* Compl. ¶¶ 9, 50, 85–86. The Locksmiths intend to seek certification of a Rule 23(b)(3) class. *See* Compl. ¶¶ 122–29.

The Locksmiths cannot offload to the Providers the costs of policing scam locksmiths or of certifying and promoting legitimate locksmithing websites. For the reasons set forth below, the amended complaint should be dismissed pursuant to Rule 12(b)(6).[2]

ARGUMENT AND AUTHORITIES

I. The Providers Enjoy Immunity Under The Communications Decency Act

By enacting the Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133–43 ("CDA"), Congress "effectively immunize[d] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (Friedman, J.). The key provision, Section 230(c)(1), dictates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(2) (preempting inconsistent state law). As construed by the D.C. Circuit, the CDA

> mandates dismissal if (i) [the defendant] is a "provider or user of an interactive computer service," (ii) the information for which [the plaintiff] seeks to hold [the defendant] liable was "information provided by another information content provider," and (iii) the complaint seeks to hold [the defendant] liable as the "publisher or speaker" of that information.

Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (quoting 47 U.S.C. § 230(c)(1)). The CDA bars all of the Locksmiths' claims except for the breach-of-contract claim in Count VI.

A. The Providers Satisfy The Three-Part Test For CDA Immunity

The Providers meet all three of the D.C. Circuit's requirements for immunity. First, each is a "provider . . . of an interactive computer service" within the meaning of Section 230(c)(1)

[2] Defendant Microsoft Corporation joins this motion to dismiss with respect to all but two of the named plaintiffs: Baldino and Joe East Enterprises, Inc., d/b/a A-1 Locksmith ("A-1 Locksmith"). *See* Minute Order Granting Microsoft Corporation's Consent Motion to Stay Arbitrable Claims (Feb. 21, 2017). Microsoft Corporation expressly asserts its right to arbitrate on an individual basis any and all claims brought against it by Baldino, A-1 Locksmith, and any other plaintiff, named or absent, who may be subject to arbitration and who may have waived the ability to take part in a putative class action.

because its search engine enables online consumers to access a server. *See* Compl. ¶¶ 15–16, 30, 54; *cf.* 47 U.S.C. § 230(f)(2) (defining "interactive computer service"). The Eastern District of Virginia so held in the prior action between Baldino and Google, thereby resolving the issue. *See Baldino's Lock & Key Serv., Inc. v. Google, Inc.*, 88 F. Supp. 3d 543, 547 (E.D. Va. 2015). Other courts have reached the same unsurprising conclusion with respect to all three Providers. *See, e.g., O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 354–55 (6th Cir. 2016) (Sutton, J.) (addressing Google's search results); *Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (per curiam) (same); *Stayart v. Google Inc.*, 783 F. Supp. 2d 1055, 1056 (E.D. Wis. 2011) (same); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (same); *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 938–40 (S.D. Cal. 2013) (addressing Yahoo's search results); *Manchanda v. Google*, No. 16-cv-3350, 2016 WL 6806250, at *2 (S.D.N.Y. Nov. 16, 2016) (addressing Google's, Microsoft's, and Yahoo's search results); *Despot v. Balt. Life Ins. Co.*, No. 15-cv-1672, 2016 WL 4148085, at *15 (W.D. Pa. June 28, 2016) (same); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630–31 (D. Del. 2007) (same).

Second, the Locksmiths are suing the Providers over "information provided by another information content provider" within the meaning of Section 230(c)(1). *Cf.* 47 U.S.C. § 230(f)(3) (defining "information content provider"). Specifically, Baldino alleges that the Providers published the websites and locations of scam locksmiths, which appear in the search results near those of the Locksmiths. *See, e.g.*, Compl. ¶¶ 63, 65. The Locksmiths do not adequately allege that the Providers "provided, created, or developed" the challenged information about scam locksmiths. *Klayman*, 753 F.3d at 1358. The amended complaint only offers conclusory assertions about "fictitious addresses" that the Providers "created out of whole cloth" in order to "deliberately deceive[ ] consumers." *E.g.*, Compl. ¶¶ 62, 64, 94, 98. These

general allegations of the circumstances constituting fraud must be disregarded, because they lack the particularity that Rule 9(b) demands and are implausible in any event. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–05 (9th Cir. 2003); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368–69 (5th Cir. 2001). The Locksmiths do not provide a single example of a fictitious address created by one of the Providers.[3] *See, e.g.*, *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (noting that Rule 9(b) demands "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud" (internal quotation marks omitted)). Nor do the Locksmiths offer a plausible explanation as to why the Providers would go out of their way to make their own search results less useful to consumers.

Third, most of the Locksmiths' theories seek to hold the Providers liable as a "publisher or speaker" of the challenged information within the meaning of Section 230(c)(1). Count I of the amended complaint claims that the Providers violated 15 U.S.C. § 2 by "*listing* large numbers of artificial listings in their organic results, burying the authentic listings." Compl. ¶ 132 (emphasis added). Count II claims that the Providers ran afoul of 15 U.S.C. § 1 by "*publishing* fake listings." Compl. ¶ 140 (emphasis added). Count III claims that the Providers have fraudulently "*us[ed]* fake organic listings to create demand for the paid advertising spots." Compl. ¶ 159 (emphasis added). Count IV claims that the Providers committed a state-law tort by "*display[ing]* unlicensed, unregistered, inaccurate, or otherwise unlawful listings that block customers from seeing [the Locksmiths'] listing[s]." Compl. ¶ 157 (emphasis added). Count V claims that, in an act of unfair competition, the Providers "artificially dilut[ed] their organic

[3] It would be futile for the Locksmiths to file yet another amended complaint attaching a screenshot of a scam-locksmithing website. Such an assertion would not constitute a well-pleaded fact demonstrating that the Providers, rather than the scam locksmiths, created the allegedly false information accessed through the Providers' interactive computer services. *See Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (per curiam) ("A district court may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss.").

search results" by listing scam locksmiths. Compl. ¶ 164. Count VII claims that the Providers violated 15 U.S.C. § 1125(a)(1)(B) by "*publishing* maps indicating locksmith businesses at locations [that] are misrepresentations." Compl. ¶ 172 (emphasis added). And Count VIII claims that the Providers engaged in some sort of conspiracy based on the "listings they *display[ed]*." Compl. ¶¶ 184–86 (emphasis added). CDA immunity protects the Providers against all of these claims.

B. The Statutory Exceptions To CDA Immunity Do Not Apply Here

The CDA sets forth three exceptions to the immunity conferred by Section 230(c)(1). They do not apply to the Providers in this case.

The first exception provides that "[n]othing in [Section 230] shall be construed to impair the *enforcement* of . . . any . . . Federal criminal statute." 47 U.S.C. § 230(e)(1) (emphasis added). The Locksmiths attempt to fit into this exception by alleging federal crimes in violation of the antitrust laws. *See* Compl. ¶¶ 44–45. But the Locksmiths have commenced a civil action, not a criminal prosecution enforcing a federal statute. *See* FED. R. CIV. P. 3. As a consequence, they cannot invoke the first exception, which "is limited to criminal prosecutions" and "excludes civil suits." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016) (Selya, J.); *accord Obado v. Magedson*, No. 13-cv-2382, 2014 WL 3778261, at *8 (D.N.J. July 31, 2014); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1054–55 (E.D. Mo. 2011); *Doe v. Bates*, No. 5:05-cv-91, 2006 WL 3813758, at *21–*22 (E.D. Tex. Dec. 27, 2006).

The second exception provides that "[n]othing in [Section 230] shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). This exception does not apply. In its prior lawsuit against Google, Baldino argued that "[t]he Lanham Act protects intellectual property, and Section 230 could not have been intended to immunize violators of the Lanham Act." Opp'n, CM/ECF Doc. 106, at 10, *Baldino's Lock & Key Serv.*,

Inc. v. Google, Inc., No. 1:14-cv-636 (E.D. Va. Nov. 21, 2014). This argument does not help the Locksmiths, because they do not allege ownership of anything protected by the intellectual-property laws, much less that the Providers have infringed any intellectual-property rights. That is because the Locksmiths' theory of liability concerns the Lanham Act's false-advertising provision, codified at 15 U.S.C. § 1125(a)(1)(B). *See* Compl. ¶ 171. And their Lanham Act count does not pertain to intellectual property: "While much of the Lanham Act addresses the registration, use, and infringement of trademarks and related marks, [the false-advertising provision] is one of the few provisions that goes beyond trademark protection." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28–29 (2003) (Scalia, J.). Accordingly, the second exception to Section 230(c)(1) does not apply.

The third exception provides that "[n]othing in [Section 230] shall be construed to limit the application of the Electronic Communications Privacy Act of 1986." 47 U.S.C. § 230(e)(4). The Electronic Communications Privacy Act deals with government access to private electronic communications. This exception does not apply, and nothing in the amended complaint suggests that the Locksmiths seek to invoke it.

II. The Locksmiths Do Not Plead A Plausible Antitrust Violation

A. Count I Fails To State A Claim Under Section 2 Of The Sherman Act

Under Section 2 of the Sherman Act, 26 Stat. 209 (1890), it is illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. In Count I of the amended complaint, the Locksmiths claim that the Providers violated Section 2 "by abusing their monopoly power over organic and map internet search." Compl. ¶ 130. It is further alleged that the Providers "together control approximately 90% of organic

and map internet search originating in the United States," giving them some sort of shared "dominat[ion]" of the market. Compl. ¶¶ 15, 33.[4]

This shared-monopoly theory misapprehends the key word: *monopoly*. "A monopoly arises when *a single firm* controls all or the bulk of a product's output, and no other firm can enter the market, or expand output, at comparable costs. The very phrase 'shared monopoly' is paradoxical; when a small number of large sellers dominates a market, this typically is described as an oligopoly." *Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 926 F. Supp. 2d 36, 46 (D.D.C. 2013) (Friedman, J.) (emphasis added) (citations and internal quotation marks omitted). Nothing in the amended complaint fits the single-firm definition.

The Locksmiths allege that Google, Microsoft, and Yahoo *all* have market power, respectively handling approximately 70%, 20%, and 12% of all organic internet search queries conducted in the United States. *See* Compl. ¶¶ 30–32, 34. Taken as true, that allegation establishes as a matter of law that there is no monopoly. *See Oxbow*, 926 F. Supp. 2d at 46 ("To the extent that plaintiffs have alleged a market structure in which [defendants] each possess and seek to protect market power within the same markets, their monopoly claims based on an alleged agreement to monopolize must fail."). Without alleging any single-firm monopoly, either actual or threatened, the Locksmiths cannot state a claim under Section 2. *See id.* at 45–46 (agreeing with "the vast majority of other courts" that a shared monopoly cannot support a Section 2 claim); *see also Midwest Gas Servs., Inc. v. Ind. Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003); *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988); *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 42 (D.D.C. 2007)

[4] The alleged product market is ill-defined in the amended complaint, which offers several inconsistent alternatives. *See, e.g.*, Compl. ¶¶ 29, 34 (suggesting a market for "Consumer Internet Search" comprised of "domestic search engines"); Compl. ¶¶ 30, 130 (suggesting a market for "organic internet search"); Compl. ¶¶ 41, 130 (suggesting a market for "map internet search"); Compl. ¶¶ 41, 132 (suggesting a market for "paid advertised search").

(Roberts, J.); *Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005); *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 391–92 (D. Md. 1990). Accordingly, the Court should dismiss the Section 2 claim.

B. Count II Fails To State A Claim Under Section 1 Of The Sherman Act

In Count II, the Locksmiths claim that the Providers violated Section 1 of the Sherman Act "by cooperating with scam locksmiths in restraint of trade." Compl. ¶ 143. That statute forbids any "contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Among other elements, Section 1 liability requires some sort of agreement that gives rise to anticompetitive conduct. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007); *Oxbow*, 926 F. Supp. 2d at 42.

As the Supreme Court famously held in another Section 1 case, "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Moreover, to state a claim against each Provider, the Locksmiths must "alleg[e] that each individual defendant joined the conspiracy and played some role in it." *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 164 (D.D.C. 2004) (Friedman, J.). "When a complaint relies either on wholly conclusory statements of concerted action, or, at best, on mere parallel conduct, and when plaintiffs sprinkle the words 'conspired,' 'concerted,' and 'concertedly' throughout the complaint, that complaint is insufficient to state a § 1 claim." *Hinds County v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) (alteration and internal quotation marks omitted).

The Locksmiths flunk the plausibility standard of *Twombly* and *Iqbal* for their Section 1 claim. When stripped of legal conclusions, the amended complaint "lacks factual allegations about how the alleged agreement came about [or] the basic terms of the agreement itself." *Oxbow*, 926 F. Supp. 2d at 47 (dismissing a conspiracy-to-monopolize claim under Section 2 for this reason). Here, as in *Twombly* itself, the amended complaint "mention[s] no specific time, place, or person involved in the alleged conspiracies," and "furnishes no clue as to which of the [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." *Twombly*, 550 U.S. at 565 n.10.

In the relevant portion of the amended complaint, the Locksmiths vaguely allude to an unspecified number of agreements. *See* Compl. ¶¶ 141–45. The amended complaint fails to identify the contracting parties to these purported agreements, beyond a cryptic reference to "agreements between Defendants and scam locksmiths." Compl. ¶ 141. And then there is the supposed agreement among the Providers "to flood listings with phony locksmith [sic] with the understanding that it will increase profits for all Defendants." Compl. ¶ 142. When, exactly, did the Providers enter into this so-called "cooperative agreement to permit locksmith listings they know are fraudulent"? Compl. ¶ 144. Which employees did each of the Providers send to this scam-locksmithing summit? Where did they meet? What were the terms on which they agreed?

The Court will search the amended complaint in vain for answers to these fundamental questions. Dismissal is the only appropriate response to such a threadbare pleading. "Without basic factual information about the alleged conspiratorial agreement, plaintiffs' allegations are not 'enough to raise a right to relief above the speculative level.'" *Oxbow*, 926 F. Supp. 2d at 47 (quoting *Twombly*, 550 U.S. at 555).

Crucially, the amended complaint fails to set forth a plausible motivation to enter into the supposed agreement—because none exists. No well-pleaded facts establish any incentive for the Providers to decrease the usefulness of their search results. To the contrary, as the Locksmiths themselves allege, the Providers have an incentive "to gain users by optimizing [their] search results so that more customers use their services more of the time." *See* Compl. ¶ 109. It is implausible to suggest that the Providers would deliberately sabotage their own search results through some unified tweaking of their respective algorithms that will have the effect of driving consumers away. These accusations do not justify subjecting the Providers to the costly discovery that is inherent in antitrust litigation. *See Twombly*, 550 U.S. at 557–59. "Because [the Locksmiths] have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

C. The Locksmiths Lack Antitrust Standing

The claims under Section 1 and Section 2 should be dismissed for the additional reason that none of the Locksmiths is "a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31, 538–45 (1983) (discussing "antitrust standing" under 15 U.S.C. § 15); *cf.* Compl. ¶ 25 (invoking 15 U.S.C. § 15). "[A] plaintiff must demonstrate antitrust standing in order to pursue an antitrust claim." *Klein v. Am. Land Title Ass'n*, 560, F. App'x 1, 1 (D.C. Cir. 2014) (per curiam); *see also Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001) (outlining factors to be considered in assessing antitrust standing). Here, too, the Locksmiths fall short.

For starters, there has been no demonstration of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Locksmiths seem to be complaining about having paid unspecified sums of money

to the Providers in exchange for search advertising. *See* Compl. ¶¶ 130–46. Yet the Locksmiths do not explain how that putative injury stems from any anticompetitive conduct. The Locksmiths do not establish antitrust injury merely by alleging that they are in a worse position than they would have been had the alleged conduct not occurred. *See Brunswick*, 429 U.S. at 486–87. Rather, the Locksmiths must show that their "loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Here, however, the Locksmiths claim that the Providers did not exclude scam locksmiths from search results. *See, e.g.*, Compl. ¶¶ 65–66, 69–75. In other words, the Locksmiths complain that they faced *more competition* for search advertising about locksmithing than they desired. They do not, and cannot, allege competition-*reducing* behavior.

Even if the Locksmiths were to allege antitrust injury, the remaining factors still foreclose a finding of antitrust standing. *See Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 26–27 (D.C. Cir. 1987). "Additional factors to be considered in determining whether the plaintiff has 'antitrust standing' include: the directness of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Andrx*, 256 F.3d at 806. The putative damages are speculative here, insofar as the Locksmiths seek to recover on the basis of business lost to scam locksmiths. *See, e.g.*, Compl. ¶ 43 ("Plaintiffs have lost approximately 25% of their gross revenue since 2009 as a direct result of Defendants' conspiracy and abuse of monopoly control over the internet search industry."). And apportioning damages in this case would be a highly complex endeavor, with the Court forced to work out which of the Locksmiths lost business to scam locksmiths, in what amounts, and what proportion of the damages is more appropriately directed to victimized consumers. The Supreme Court, however, does not "allow suit by *every*

party affected by an [alleged] antitrust violator's [supposed] 'ripples of harm.'" *Andrx*, 256 F.3d at 806 (quoting *Blue Shield v. McCready*, 457 U.S. 465, 476–77 (1982)).

D. The Antitrust Claims Are In Part Time-Barred

The Locksmiths' claims under Section 1 and Section 2 are in part untimely under the four-year statute of limitations that governs them. *See* 15 U.S.C. § 15b. Recognizing as much, the Locksmiths assert that the limitations period "should be tolled and extended significantly because [they] were not aware of or understand [sic] Defendants' abuse of monopoly power until recently." Compl. ¶ 139. The Court should reject that excuse.

A plaintiff's lack of awareness or understanding, without more, does not toll the statute of limitations. *See Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278–79 (D.C. Cir. 2003) (discussing availability of tolling where a plaintiff, "despite all due diligence[,] is unable to obtain vital information bearing on the existence of his claim," or where a defendant engages in inequitable conduct). The Locksmiths allege that an "abuse of monopoly power has been well established in an August 8, 2012 report," which was more than four years prior to their filing of this lawsuit. Compl. ¶ 46. Yet they have alleged no facts to suggest that they exercised due diligence, but somehow justifiably overlooked this supposed abuse. Nor could they, given that the search results challenged by the Locksmiths are publicly available and accessible to anyone "quickly via computer or hand-held device." Compl. ¶ 16.

Nor have the Locksmiths pleaded fraudulent concealment with particularity. The amended complaint lacks any allegations suggesting "wrongful concealment by the party raising the statute of limitations defense." *Gen. Aircraft Corp. v. Air Am., Inc.*, 482 F. Supp. 3, 8 (D.D.C. 1979) (Green, J.). Accordingly, the Providers cannot be blamed for the Locksmiths' tardiness in bringing the claims under Section 1 and Section 2. Those claims, therefore, should be dismissed insofar as they extend beyond the four-year statute of limitations.

III. The Locksmiths Fail To State A Claim Under The Lanham Act

Count VII of the amended complaint asserts a false-advertising claim against the Providers under Section 43(a)(1)(B) of the Lanham Act, 60 Stat. 441 (1946). *See* 15 U.S.C. § 1125(a)(1)(B). The Locksmiths must show "that the defendant's ads were false or misleading, actually or likely deceptive, material in their effects on buying decisions, connected with interstate commerce, and actually or likely injurious to the plaintiff." *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990) (Thomas, J.) (footnote omitted). According to the Locksmiths, the Providers made actionable misstatements by "publishing maps indicating locksmith businesses at locations [they] are well aware are misrepresentations." Compl. ¶ 172.

This false-advertising claim has been dismissed once before, with the Fourth Circuit affirming that Baldino has no claim against Google based on misstatements made by scam locksmiths. *See Baldino's Lock & Key Serv., Inc. v. Google Inc.*, 624 F. App'x 81, 82 (4th Cir. 2015) (per curiam). The claim should meet the same fate here. The amended complaint alleges that "[s]cam locksmiths publish hundreds or thousands of unique websites," which are said to convey numerous misrepresentations and "display either a fictitious or no address." Compl. ¶¶ 57–58. That counsels a Lanham Act claim against scam locksmiths, perhaps, but not against the Providers.

Fatally absent from the amended complaint are examples of false advertisements that were made by the Providers, rather than by scam locksmiths.[5] It is insufficient for the Locksmiths to allege that false maps "can be found somewhere on the internet," for "the internet is vast and contains multitudes." *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, No.

[5] Once again, it would not suffice for the Locksmiths to provide an example without a well-pleaded fact regarding the false advertisement's origin. *See supra* n.3.

14-cv-3954, 2014 WL 6892141, at *2 (C.D. Cal. Nov. 5, 2014) (dismissing a false-advertising claim based on allegations that a blender manufacturer posted negative online reviews of a competing blender). Because "[the Locksmiths] have not alleged in their complaint any particular false statement or misrepresentation on the part of [the Providers]," dismissal is warranted for the false-advertising claim. *Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 872 (3d Cir. 1992); *see also Brown v. Armstrong*, 957 F. Supp. 1293, 1302 (D. Mass. 1997) ("It is axiomatic that, to establish false advertising, Plaintiffs must identify an advertisement or promotion containing false information.").

IV. The Locksmiths Do Not Sufficiently Plead A State-Law Violation[6]

A. Count III Fails To State A Claim For Common-Law Fraud

Count III of the amended complaint claims that the Providers committed fraud by misrepresenting the accuracy, legitimacy, lawfulness, and value of their search results. *See* Compl. ¶¶ 147–48. This fraud claim has not been pleaded with particularity and should be dismissed. *See* FED. R. CIV. P. 9(b). Ignoring the command of Rule 9(b), the Locksmiths have impermissibly omitted "the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (Easterbrook, J.).

The Providers are said to "have represented that their organic and map results are accurate, legitimate, and lawful," and to "have represented that the paid advertisement spots they display alongside their organic and map results are a scarce and valuable commodity." Compl. ¶¶ 147–48. But the amended complaint does not specify when and where these supposed

[6] The Locksmiths do not allege which state law applies to their common-law claims. While the Providers would apply a D.C. choice-of-law analysis to the state-law claims contained in the fourteen named plaintiffs' putative class action, a single jurisdiction's law may not apply to all named or absent class members' state-law claims. For purposes of this motion, the Providers apply D.C. law to the Locksmiths' state-law claims. The Locksmiths will bear the burden of demonstrating the lack of variation among state laws at an appropriate point in the litigation. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) ("[T]o establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." (internal quotation marks omitted)).

misrepresentations were made, who heard them, or how many times they were repeated. Rule 9(b) therefore dictates dismissal, given the Locksmiths' failure to "state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (internal quotation marks omitted).

B. Count VI Fails To State A Claim For Breach Of Contract

Count VI asserts a breach-of-contract claim against the Providers. The Locksmiths contend that displaying links to scam-locksmithing websites among search results somehow breaches a duty of good faith and fair dealing that is implicit in a contract for search advertising. *See* Compl. ¶ 169. The amended complaint fails to state a claim here because it "does not contain sufficient facts to put [the Providers] on notice of the basis for [the Locksmiths'] contract claim." *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009).

In a crucial omission, the amended complaint does not allege the existence of any particular contract between an identified Locksmith and an identified Provider. In fact, it impliedly concedes that some of the Locksmiths have not contracted for search advertising with any of the Providers. *See* Compl. ¶ 119 ("*Many Plaintiffs* [read: not all of them] have paid Defendants for a link to their website to appear in Defendants' paid search results." (emphasis added)). Instead of identifying who made which contracts, the amended complaint offers only this cryptic allegation:

> Plaintiff has contracted some of listed defendants for paid advertising services, typically paid for through a bidding system where business web sites bid on the amount they are willing to pay per potential customer's "click through" on their advertisement on to the business website.

Compl. ¶ 165. It is unclear whether the singular form of the word "Plaintiff" indicates that Baldino alone entered into one or more contracts for search advertising. Given that only "some

of listed defendants [sic]" sold search advertising to the mystery "Plaintiff," it is also unclear which of the Providers did not do so.

Having failed to allege the existence of a definitive contract with an identified Provider, the Locksmiths cannot proceed with a breach-of-contract claim. After all, "[w]ithout a contractual duty, there can be no breach of contract." *See Edmond v. Am. Educ. Servs.*, No. 10-cv-578, 2010 WL 4269129, at *2 (D.D.C. Oct. 28, 2010) (Bates, J.) (quoting *Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 48 (D.D.C. 2010) (Huvelle, J.)). "Allowing this case to proceed absent factual allegations that match the bare-bones recitation of the claims' elements would sanction a fishing expedition costing both parties, and the court, valuable time and resources." *Bissessur*, 581 F.3d at 604. The Court should dismiss the claim instead.

C. The Remaining State-Law Counts Fail To State A Claim

As explained in Part I, *supra*, CDA immunity forecloses the tortious-interference claim asserted in Count IV, the unfair-competition claim asserted in Count V, and the conspiracy claim asserted in Count VIII. There are additional reasons to dismiss these claims under Rule 12(b)(6).

Count IV, concerning tortious interference with an economic advantage, asserts that the Providers "are both inducing and causing an actual breach in the Plaintiffs' expectant customers from contacting him [sic] for locksmith and related security business" because links to the Locksmiths' websites are buried in links to scam-locksmithing websites. *See* Compl. ¶¶ 156–61. "To establish a claim for tortious interference with prospective economic advantage, a plaintiff ordinarily must plead (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage." *Genetic Sys. Corp. v. Abbott Labs.*, 691 F. Supp. 407, 422–23 (D.D.C. 1988) (Green, J.). "[A] general intent to interfere or knowledge that the conduct will injure the

plaintiff's business dealings is insufficient to impose liability." *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1995) (quoting *Genetic Sys.*, 691 F. Supp. at 423). The Locksmiths must make a "strong showing of intent" to "disrupt ongoing business relationships," and the conduct alleged must be "egregious, for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement." *Genetic Sys.*, 691 F. Supp. at 423. The Locksmiths fail to allege a single fact to support the notion that any one of the Providers—let alone all of them—had the requisite knowledge or intent to disrupt any business expectancy.

Count V fails because the Locksmiths have not alleged acts that would constitute unfair competition. Under District of Columbia law, "[u]nfair competition is not defined in terms of specific elements, but instead by the description of various acts that would constitute the tort if they resulted in damage." *Bus. Equip. Ctr., Ltd. v. DeJur-Amsco Corp.*, 465 F. Supp. 775, 788 (D.D.C. 1978) (Gasch, J.). D.C. courts have recognized the following acts as unfair competition: "defamation, disparagement of a competitor's goods or business methods, intimidation of customers or employees, interference with access to the business, threats of groundless suits, commercial bribery, inducing employees to sabotage, false advertising or deceptive packaging likely to mislead customers into believing goods are those of a competitor." *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 881 n.3 (D.C. 1982). The allegations under Count V merely rehash the allegations of common-law fraud under Count III. Common-law fraud is not among the acts that constitute unfair competition in the District of Columbia, and the Locksmiths have not alleged fraud with particularity in any event, so Count V should be dismissed.[7]

[7] Even if the Court were to construe Count V as asserting a claim under the Consumer Protection Procedures Act ("CPPA"), D.C. CODE § 28-3901 *et seq.*, Count V still fails because the CPPA "does not protect businesses engaged in commercial activity." *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1043–44 (D.C. Cir. 2010) (holding that an entity could not state a claim under the CPPA when it engaged in "transactions intended primarily to promote business . . . interests"). The Locksmiths' allegations supporting Count V all relate to commercial activity between the Locksmiths and the Providers. *See* Compl. ¶¶ 163–64.

Count VIII does not state a conspiracy claim, as "there is no recognized independent tort action for civil conspiracy in the District of Columbia." *Waldon v. Covington*, 415 A.2d 1070, 1074 n.14 (D.C. 1980). Count VIII should be dismissed for that reason alone. Even if the Court were to read Count VIII to address any of the Locksmiths' tort allegations, the conspiracy claim would still fail for the same reason as the claim under Section 1 of the Sherman Act: As explained in Part II.B, *supra*, the Locksmiths fail to allege "basic factual information about the alleged conspiratorial agreement." *Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 926 F. Supp. 2d 36, 47 (D.D.C. 2013) (Friedman, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The amended complaint simply states that there were "agreements between Defendants and scam locksmiths," Compl. ¶ 141, but does not allege any details of when or where the purported agreements were entered into, who entered into them, and what terms the agreements set out.

V. Claim Preclusion Bars Baldino's Claims Against Google

Baldino's accusations in this Court inspire déjà vu because they have already been leveled against Google in the Eastern District of Virginia. Claim preclusion forbids this second bite at the apple. The Court should dismiss Baldino's claims against Google because the judgment of the Eastern District of Virginia has claim-preclusive effect in this case. *See, e.g.*, *Alford v. Providence Hosp.*, 60 F. Supp. 3d 118, 120 (D.D.C. 2014) (K.B. Jackson, J.).

As this Court has explained, "the doctrine of claim preclusion bars a successive action when a plaintiff files a new suit arising out [of] the same facts as an earlier unsuccessful cause of action." *Brewer v. District of Columbia*, 105 F. Supp. 3d 74, 85 (D.D.C. 2015) (K.B. Jackson, J.). "Claim preclusion . . . embodies the principle that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so . . . ." *Alford*, 60 F. Supp. 3d at 124–25 (internal quotation marks omitted). "Under the doctrine

of . . . claim preclusion, a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). The Court can entertain a claim-preclusion defense in ruling on this Rule 12(b)(6) motion, taking judicial notice of the proceedings in the Eastern District of Virginia to confirm that the D.C. Circuit's four-part test is satisfied. *See, e.g.*, *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 76–77 (D.C. Cir. 1997); *Brewer*, 105 F. Supp. 3d at 86; *Alford*, 60 F. Supp. 3d at 123–24.

Only the first element is at issue here, as "[t]hree of the elements of the D.C. Circuit's test for claim preclusion are easily satisfied." *Alford*, 60 F. Supp. 3d at 126. Baldino and Google are parties to both this action and the prior action, while the addition or subtraction of other defendants is immaterial. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992); *Dreyfus v. First Nat'l Bank*, 424 F.2d 1171, 1175 (7th Cir. 1970); RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982). The Eastern District of Virginia rendered a final, valid judgment in the prior action, and its Rule 12(b)(6) dismissal was on the merits. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 & n.3 (1981); *Sardo v. McGrath*, 196 F.2d 20, 24 (D.C. Cir. 1952); *Riddle v. Nat'l R.R. Passenger Corp.*, 869 F. Supp. 40, 41–42 (D.D.C. 1994) (Friedman, J.); RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d (1982). As for the Eastern District of Virginia itself, "the federal district court is one of competent jurisdiction." *Alford*, 60 F. Supp. 3d at 126.

That leaves only the question whether the same claim is involved in both this action and the prior action. For this first element, the D.C. Circuit has "embraced the *Restatement (Second) of Judgments*' pragmatic, transactional approach to determining what constitutes a cause of

action." *U.S. Indus., Inc. v. Blake Constr. Co.*, 765 F.2d 195, 205 (D.C. Cir. 1985); *see generally* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). "To determine whether the facts of each lawsuit are similar enough to qualify as the same 'cause of action,' the D.C. Circuit instructs courts to use a 'transactional test' that looks at whether the claims arise from the same 'nucleus of facts.'" *Alford*, 60 F. Supp. 3d at 125. If the two actions share a common nucleus of operative facts, then they involve the same claim for claim-preclusion purposes. *See Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490–91 (D.C. Cir. 2009); RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982).

Under the transactional test, this action involves the same claim as the prior action in the Eastern District of Virginia. *Cf. Alford*, 60 F. Supp. 3d at 126 ("In fact, in the instant complaint Plaintiff repeats—sometimes verbatim—many of the factual allegations in the [prior] complaint."). The common nucleus of operative facts, as alleged in both actions, is that Baldino is unhappy with the visibility of its licensed locksmithing business in Google's search results. When an online consumer looks for *locksmith*, the story goes, Google's search engine buries Baldino's result with a flood of results for scam locksmiths who are unlicensed or unregistered. As a result, Baldino is supposedly forced to pay Google for advertising services in order to get through to consumers.

Given this common nucleus of operative facts, it would be no answer for Baldino to point to minor differences between the two actions. "To bring claim preclusion into play, a cause of action need not be a clone of the earlier cause of action." *Mass. Sch. of Law at Andover, Inc. v. ABA*, 142 F.3d 26, 38 (1st Cir. 1998) (Selya, J.); *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982). Thus, it makes no difference that Baldino's legal theories have shifted somewhat. In the words of this Court, Baldino "cannot recycle the same set of facts . . . and present them

clothed in a different legal theory." *Alford*, 60 F. Supp. 3d at 127; *accord Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984); RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. d (1982). Nor are there any new allegations of operative fact that Baldino could not have raised in the Eastern District of Virginia. "[I]f the plaintiff could have included, but did not include, certain facts in his initial lawsuit, he may not bring a second action stemming from those facts." *Alford*, 60 F. Supp. 3d at 125; *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. b (1982).

Baldino could have and should have raised its antitrust and other theories alongside its RICO theory when it sued Google in the Eastern District of Virginia. Its failure to do so has claim-preclusive effect in this case. *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 590–91 (7th Cir. 1986) (barring a plaintiff who failed to press both RICO and antitrust theories in a prior action). All of Baldino's claims against Google must therefore be dismissed on claim-preclusion grounds. As this Court has held, "the defendant . . . has a right of protection from repetitious litigation involving the same causes of action." *Alford*, 60 F. Supp. 3d at 130 (internal quotation marks omitted).[8]

[8] Dismissal on this basis will foreclose Baldino's attempt to represent a putative class. *See* Compl. ¶ 123. Baldino cannot satisfy Rule 23's requirements of typicality and adequacy when it is subject to a unique claim-preclusion defense that is not generally applicable to the putative class. *See* FED. R. CIV. P. 23(a)(3)–(4).

CONCLUSION

The Court should dismiss the Locksmiths' amended complaint, in its entirety and with prejudice, for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 24, 2017, I electronically filed the foregoing memorandum with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have consented to electronic notification. I further certify that I mailed the foregoing motion and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

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