IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CIVIL ACTION No. 1:16-cv-2360-KBJ

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A BETTER CHOICE LOCK & KEY LLC
dba A Professional Locks
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Chandler, AZ 85224

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Lorton, VA 22079

BERKELEY LOCK AND INSTITUTIONAL SUPPLY, INC.
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dba KEYWAY LOCK & SECURITY INC.
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MARSHALL'S LOCKSMITH SERVICE INC.
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MRS. LOCKSMITH INCORPORATED
dba SANDY SPRINGS LOCKSMITH
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Sandy Springs, GA, 30328

REDFORD LOCK COMPANY, INC.
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for themselves and all others similarly situated,
***Plaintiffs*,**
v.

GOOGLE INC.
1600 Amphitheater Parkway
Mountain View, CA 94043

YAHOO! INC.
701 First Ave
Sunnyvale, CA 94089

MICROSOFT CORPORATION
Microsoft Headquarters
One Microsoft Way
Redmond, WA 98052

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The advent of the Internet has given rise to a new array of deceptive and harmful practices, including identity theft, fake news, and the proliferation of phony tradesmen. Locksmith scams are at or near the head of the list. When a consumer is locked out of his or her automobile or home and is in dire need of help, they use the most available and convenient tool to find that help, usually a handheld device such as a smart phone, to conduct a quick internet search for a nearby locksmith. All too often the consumer's call

results in the arrival of an unlicensed[1] and unqualified person who overcharges and provides inferior service. The scammer will just drill out and destroy a lock, whereas the qualified professional will use specialized tools to gain entry. There have been numerous reported cases of consumers being burglarized with no signs of forced entry shortly after dealing with a scammer locksmith. The locksmith scammer situation has gotten so bad that the Federal Trade Commission, Better Business Bureau, numerous consumer groups, and major news outlets have issued warnings. The problem is real and very costly to consumers.

The locksmith scammer problem would be *de minimis* but for the operation of this Defendant search engines. The search engines provide information allowing consumers to call a locksmith in an emergency. There is no differentiation between licensed and otherwise legitimate locksmiths and scammers. Much of the information is created or developed entirely by the search engine providers, not all by the scammers. The new information created or developed by Defendants significantly enhances the appearance of legitimacy of scam locksmiths to consumers. It is this newly created or developed information that is at the focal point of the First Amended Complaint. The easy acceptance of false and misleading information and creation of additional false information by Defendants increases the demand for search engine services. Defendants actually degrade the benefit to consumers of search results in order to realize greater revenue. Defendants assertion that they would

[1] Sixteen states and several counties require that locksmiths be licensed. See Paragraph

50 of the First Amended Complaint.

not engage in "self sabotage" is disingenuous at best. The increased revenue received by Defendants Using Adwords result in 90% of their 55 billion dollars in revenue, outweighs any concerns for consumers or locksmith.

The problem of scammer locksmiths is ongoing and getting worse each day. This action seeks relief to ameliorate the adverse impact that the search engines are having upon the legitimate locksmith industry and consumers. Defendants have filed a Motion to Dismiss. This Memorandum is submitted in opposition to the Motion.

THE LEGAL STANDARD

This Court has often recited the established standard when considering a motion to dismiss: "[t]he court must view the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations" *Alibalogun v. First Coast Security Solutions,* 67 F. Supp 3d, 213, 215, (D.D.C. 2014) citing *Busby v. Capital One, N.A.,* 932 F. Supp 2d at 134 (D.D.C. 2013). Also *see* Memorandum Opinion in *Badwal v. Board of Trustees of the University of the District of Columbia,* Civil Action No. 12-cv-2073 (KBJ), issued September 28, 2015, contrasting the standards for a Motion to Dismiss with those of a Motion for Summary Judgment.

The First Amended Complaint includes allegations sufficient for Defendants to understand the nature of Plaintiffs' grievances and for them to respond. See *United States v. A T & T, Inc.,* 791 F 3d 112 (D.C. Cir. 2015) applying this standard to the strict pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure.

THE COMMUNICATIONS DECENCY ACT

Defendants' primary argument is that everything that they publish is immune from suit under Section 230(c)(1)of the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) which states: "No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by **ANOTHER** information content provider." (emphasis supplied). The use of the term "another" makes it clear that the interactive service (the search engine) may itself be a content provider and the "immunity" applies only to the information provided by *another* content provider and re-published by the interactive service. There is NO immunity for information created or developed by the search engine itself. Defendants' claim of immunity is much too broad. Defendants just brush off the numerous allegations in the Complaint that Defendants are responsible for the creation or development of their own new content. Such new content is NOT protected by the Communications Decency Act.

It is well established that an interactive service may be both a service provider that publishes content provided by another AND the original publisher of content that it creates or develops. This distinction is made clear in *Fair Housing Counsel of San Fernando Valley v. Roommates.com, LLC.,* 521 F 3d 1157, 1162-1163 (9th Circuit *en banc*, 2007) which held that the grant of immunity applies "only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development' of the offending content."

"A website operator can be both a service **provider** and a content **provider:** If it passively displays content that is created entirely by third parties, then it is only a service **provider** with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." *Id* at 1162-1162.

In *Federal Trade Commission v. Accusearch, Inc.,* 570 F. 2d 1187 (10th Cir., 2009) the Court followed *Fair Housing Council of San Fernando Valley* and rejected a claim of immunity under the Communications Decency Act when it found that the Defendant "was responsible in whole or in part for the… …development of the offending content." 570 F. 2d at 1198, broadly interpreting the meaning of "responsible" and "development."

The above cited cases holdings' that a service provider may also be an information content provider is consistent with the language of Communications Decency Act Section 230(f)(3) which defines an "information Content Provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." If the Complaint fairly alleges that Defendants are responsible in whole or in part for the creation or development of information that they publish about scam locksmiths, the immunity does not obtain, and the Motion to Dismiss should be denied.

The First Amended Complaint includes numerous allegations that the Defendants are responsible for the creation or development of some of the information that they publish relating to scam locksmiths. Such information enhances the apparent credibility

of the scam locksmiths and the increases harm caused to consumers, Plaintiffs, and other legitimate locksmiths. And have no links, web sites, references and credits to other internet content providers

Paragraphs 76 through 79 (inclusive) of the First Amended Complaint allege the publication of original content (created or developed by Defendants) that is harmful to Plaintiffs. Paragraph 94 makes specific reference to fictitious addresses, photos, map locations and map pinpoints for scam locksmiths as well as driving directions to and from the fictitious locations. For example, it appears that if a scam locksmith states that it is located in Falls Church, Virginia, but gives no location information, the search engine will create a map and arbitrarily place a pinpoint someplace in Falls Church. The map and pinpoints are created entirely by the search engine provider, not by "another." The maps and pinpoints only enhance the status of the scam operator, to the detriment of consumers and Plaintiffs. Defendants claim of copyright protection for this information is tantamount to an admission that it was "created or developed" by Defendants. (See Paragraph 95 of the First Amended Complaint.)

Paragraph 96 of the First Amended Complain alleges that "The Defendants' original content does not appear anywhere on the internet except on Defendants' own websites and on websites contractually authorized by Defendants to republish the Defendants content via RSS feed. Paragraph 97 alleges that this newly created content is published on Defendants' search engine websites separately and independently from content culled from scam locksmiths websites.

The Complaint (Paragraph 98) goes on to allege that the content created or developed by Defendants "deceives consumers beyond the original deception purveyed

by the scam locksmiths." Paragraphs 99 and 100 allege that "Defendants independently determine the location of a requesting consumer and then create and publish non-interactive maps which purport to show the locksmith's location in relation to the consumer's location" and that such content is not interactive and cannot be altered or edited by anyone but the Defendants. Paragraphs 106 and 107 further allege harm to consumers and Plaintiffs from the content created or developed by Defendants. Being that much of the information is false in nature such as the name location and address. The allegations of content created or developed by Defendants are again set forth in Paragraphs 173-178 (inclusive). The material identified in the above referenced paragraphs is not within the ambit of Section 230 of the Communications Decency Act.

As noted above, this Court should construe the language of the Complaint in the light most favorable to Plaintiffs and assume that the allegations of the Complaint are true for purposes of deciding the Motion to Dismiss. The allegations of the First Amended Complaint separately and together are plausible and state claims for conduct outside of whatever immunity is afforded by Section 230. Defendants rely on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) for the argument that Plaintiff's claims are not "plausible." Two years after *Twombly* the Supreme Court made it clear that the plausibility standard in Twombly does not require "detailed factual allegations, but it demanded more than an unadorned, the defendant-unlawfully-harmed me accusation…..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, 677-78 (2009). The First Amended Complaint meets this standard.

This case is analogous to *Anthony v. Yahoo, Inc.,* 421 F. Supp. 2d 1257 (N.D. Calif., 2006), where a District Court denied a Motion to Dismiss based on the Communication Decency Act when the Complaint (like the Complaint here) alleged the publication of fictitious information created by a provider. The Court held that by publishing information that it had created, the defendant became an "information content provider" and was not shielded from liability by the Communications Decency Act. 421 F. Supp at 1262-1263. Just like the court in *Anthony v. Yahoo,* supra., gave the Plaintiff an opportunity to go forward, Plaintiffs here are entitled to an opportunity to prove the allegations of the Complaint.

Defendants' claim of total immunity under the Communications Decency Act should be rejected.

ANTITRUST CLAIMS

ABUSE OF MONOPOLY POWER

Defendants assert that Plaintiffs' antitrust claim rests on a theory of "shared monopoly" and that a "shared monopoly" cannot support a claim under Section 2 of the Sherman Act. That is a distorted reading of the First Amended Complaint and ignores the requirement that for purposes of a Motion to Dismiss, the Complaint should be read in the light most favorable to Plaintiffs.

Plaintiffs do not allege that the Defendants "share" a monopoly. The terms "share" or "shared monopoly" does not appear in the Complaint. Rather, the Complaint focuses on the market power held by the largest of the three search engines (Google). See, e.g., Paragraphs 46 and 47. Paragraph 30 specifically alleges that Google has a market share

of approximately 70%. This allegation alone is sufficient to allege a prima facie case of monopoly power against Google. See, e.g., *Spirit Airlines v. Northwest Airlines*, 431 F 3d 917, 935-936 (6th Cir. 2005) holding that a reasonable finder of fact could find monopoly power based on market shares from 70% to 89%, and *In re Educ. Testing Service*, 429 F. Supp752, 756 (E.D. La., 2005) the court reviewed applicable case law and determined that a market share of 70% is generally sufficient to support an inference of market power. Surely, an allegation of 70% market share is sufficient to withstand a Motion to Dismiss. The fact that the Complaint also alleges that the non-monopolist Defendants take advantage of Google's abuse of monopoly power does not convert the claim into one for "shared monopoly." The Complaint adequately alleges monopoly power by Google.

Although neither of the other Defendants (Yahoo and Microsoft) acting alone appears to have market power in the market for search engine services, they enhance Google's market power by following the same course of action, i.e., manipulating the market with a flood of phony listings in order to exact additional revenue from Plaintiffs and other legitimate locksmiths. Instead of acting as a check on Google's market power, they amplify it. Defendants Yahoo and Microsoft make no attempt to vigorously compete with Google. Instead, they mimic Google's approach to also maximize their revenue at the expense of consumers and legitimate locksmith businesses. As a practical matter, consumers and Plaintiffs are faced with a monolith.

The Complaint adequately pleads monopoly power with respect to Defendant Google. It is significant that the Defendants do NOT contest that the alleged market

distortion and flooding of listings with phony businesses in order to obtain additional revenue is an abuse of market power. The money paid by scam locksmiths and other paid advertisement to Defendants ultimately comes out of the pockets of unsuspecting consumers and advertiser competition which is created by their bid system. If they can rig the bids to be higher they win. Accordingly, the Motion to Dismiss Count I of the Complaint (at least with respect to Google) should be denied.

THE CONSPIRACIES

The Defendants assert that Plaintiffs have not alleged agreements with sufficient specificity to satisfy the requirements of Section 1 of the Sherman Act. This argument is without merit.

The Supreme Court long ago defined "agreement" (under Section 1) as "a unity of purpose or a common design and understanding, or meeting of the minds in an unlawful agreement." *American Tobacco Company v. United States,* 328 U.S. 781 (1946). Subsequent decisions clearly establish that such understandings may be tacit or implied and can arise without specific verbal or written communication between the conspirators. See, e.g., *Apex Oil Co. v. DiMauro,* 822 F.2d 246, 253 (2d Cir., 1987). In *Monsanto v. Spray-Rite Service Corp.,* 456 U.S. 752, 768 the Supreme Court held "…there must be direct or circumstantial evidence that reasonably tends to prove that (the parties) had a conscious commitment to a common scheme designed to achieve an unlawful objective.."

The First Amended Complaint alleges two separate conspiracies: First, each of the Defendants participates in a scheme with scam locksmiths to make them appear legitimate in the eyes of consumers and to divert money from legitimate locksmiths to the

scammers and indirectly to Defendants. The conspiracies are made explicit when scam

locksmiths submit paid advertising to Defendants with the clear mutual understanding that the payments will move the scammer listings ahead of non-paying legitimate locksmiths in directory listings. It is understood that higher listings get a greater consumer response. The *quid pro quo* of more money to Defendants in exchange for legitimizing scammers and others is palpable. (See Complaint Paragraphs 111-117). The Defendants act in concert with the scammers.

This conspiracy also includes the mutual understanding that information (including information that both the scammers and Defendants know to be misleading) provided by the scam locksmiths will be published in Defendants' on-line directories as well as the mutual understanding that Defendants will create and develop new information that will also be published in conjunction with on-line directories and have the direct effect of enhancing the scammers' legitimacy. The scammers love the maps and driving directions created entirely by Defendants because they suggest to consumers that the scammer is a nearby business (even if it is really a call center hundreds of miles distant.) The more that consumers are directed to scammers, the more money the scammers pay to Defendants. Defendants have an economic motive to see that as many consumers as possible are driven to scammer listings, and their newly created content does just that.

The second conspiracy alleged by the First Amended Complaint is between and among the three Defendants. Defendants search engines mimic one another in organization and presentation, apparently without concern for one another's copyrights. Defendants knowingly allow each other to scrape their content for inclusion in their own

search engines, further enhancing the uniformity that lessens competition and deprives consumers of truly accurate information. (See Complaint Paragraph 46 quoting FTC Staff Report.) There is that "knowing wink." *Esco Corp. v. United* States, 340 F. 2d 1000, 1007 (9th Cir. 1965) Instead of competing on the accuracy and utility of their listings and providing real value to consumers, Defendants, have chosen identical business methods with the intent of maximizing revenue at the expense of consumers. (See First Amended Complaint Paragraphs 144 and 145.)

ANTI-TRUST INJURY

Each of the two conspiracies distorts and reduces competition in (1) the market for legitimate locksmith services (between consumers and locksmiths) and (2) the market for search engine services (between locksmiths and the search engines). Paragraph 42 of the First Amended Complaint alleges *inter alia* that "A large number of formerly viable locksmiths have been put out of business entirely as a direct result of Defendants' actions." In other words, Defendants' actions have resulted in a market with fewer participants.[2] That's direct injury to competition, and it is harmful to consumers. Defendants' suggestion that the inclusion of scam locksmiths in their listings actually increases competition is specious. The inclusion of criminal "loan sharks" does not increase competition between and among legitimate licensed lenders. It distorts the market and injures competition.

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[2] Plaintiffs will present evidence of numerous legitimate locksmiths that have been put out of business or who have restricted their operations as a direct result of scammer activity that would not exist but for Defendants' actions.

Likewise, the assertion that Defendants have increased competition among search engines is also specious. Defendants have artificially created greater demand for their services to the economic benefit of all Defendants. They have artificially created a scarcity within the prime listing space. But, they have not created additional competition for search engine services. While the demand in the market for search engine services has escalated due to Defendants' deliberate inclusion of scammers, competition in the market for legitimate locksmith services has diminished due to the reduction in participants and an illusory increase in the supply of locksmiths.

By flooding their listings with scammers, Defendants artificially increase the apparent[3] supply of locksmiths which has the effect of crowding out the demand for the services of Plaintiffs and other legitimate locksmiths. Legitimate locksmiths get fewer calls and less revenue. That's a direct result of Defendants' anticompetitive conduct and constitutes antitrust injury.

The First Amended Complaint alleges (Paragraphs 42 and 43) that Defendants' activities have resulted in a measurable loss of business and revenue to Plaintiffs. Not only have Defendants' activities diverted consumer revenue away from Plaintiffs, Defendants have artificially imposed additional advertising and promotional costs on Plaintiffs which adversely affects prices in the market for legitimate locksmith services.

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[3] Consumers initially believe that the scammer listings are genuine. They learn that they have been scammed only after they have been overcharged for the service and subsequently realize that the work and parts provided by the scammer are substandard, and the apparent locksmith is not licensed (in jurisdictions requiring licenses) and they have no recourse because scammers rarely provide proper identification. The legitimate locksmith has been deprived of a business opportunity. The "increase" in supply of locksmiths resulting from the inclusion of scammers is illusory.

The Complaint alleges antitrust injury to competition in the market for legitimate locksmith services as well as to numerous individual firms and participants in such market.

Plaintiff locksmiths are also consumers of search engine services. The artificial increase in demand for such services without any concomitant increase in supply results in legitimate locksmiths paying a higher price for search engine services than they would if the demand were based only on legitimate businesses. That higher price is also antitrust injury.

Defendants assert that Plaintiffs have not precisely quantified the alleged damages. But that's no reason to dismiss the Complaint. Having alleged antitrust injury, Plaintiffs are entitled to an opportunity to prove the amount of damages at trial. Plaintiff's have antitrust standing because they are being directly injured by Defendants' anticompetitive conduct. In any event, the case should go forward even if Plaintiffs were not seeking money damages. The harmful conduct is ongoing. The First Amended Complaint also seeks injunctive relief.

THE ACTION IS TIMELY

Defendants are *right now* engaging in conduct that is *currently* harming the Plaintiffs' livelihoods. A key part of the relief sought by this action is an injunction to curtail Defendants' behavior. Defendants' assertion that the Statute of Limitations somehow protects them from ongoing and current wrongdoing has no merit. A statute of limitations does not shield a wrongdoer from liability merely because it has gotten away

with the wrongdoing in the past. "Under the continuing conspiracy theory, 'each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . the statute of limitations runs from the commission of the act.' Zenith, 401 U.S. at 338; see also Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982); Poster Exch. v. Nat'l Screen Serv. Corp., 517 F.2d 117, 125 (5th Cir. 1975)." Quoting from *Rx.com v. Medco Health Solutions, Inc.,* No. 08-40388 (5th. Cir. 4/22/2009) (5th. Cir., 2009).

Plaintiffs are not suing over scam locksmith listings published by Defendants years ago. New scammer listings (and newly created content) are being published every day, and every new publication gives rise to a new cause of action. Defendants have been emboldened by their belief that the Communications Decency Act gives them complete protection even with respect to content of their own creation. Even if Plaintiffs could have brought this action sooner, a new cause of action may arise from later overt acts in furtherance of a challenged conspiracy or from each injury resulting from a continuing violation. *See,* e.g.,*Zenith Radio Corp. v. Hazeltine Researech,* 401 U.S. 321 at 338-339 (1971); *Hanover Shoe, Inc.v. United Shoe Mach. Corp.,* 392 U.S. 481, 502 n.15 (1968); *W. Penn Allegheny Health Sys. V. UPMC*, 627 F.3d 85, 106-108 (3rd. Cir. ,2010) (conspiracy claim was not time-barred because complaint alleged defendant performed acts in furtherance of conspiracy within limitations period); *Toledo Mack Sales & Serv. V. Mack Trucks*T, 530 F.3d 204, 217-18 (3d Cir., 2008) (plaintiff not limited to evidence within limitations period but must present sufficient evidence that defendants committed acts in furtherance of conspiracy during limitations period, even if conspiracy began

before that period); *Champaign Metals v. Ken-Mac Metals*, 458 F.3d 1073, 1088-91 (10th Cir., 2006).

Plaintiffs allege throughout the Complaint that injury resulting from Defendant's wrongful conduct has been both continuous and accruing. There is no basis for dismissal under the Statue of Limitations.

THE LANHAM ACT

Defendants repeat their specious assertion that the Complaint strictly alleges third-party content and should therefore be dismissed with respect to their alleged violations of the Lanham Act. Paragraphs 35, 36, 62, 64, 76, and 77 squarely allege that the Defendants — not third-parties — are the original creators and first-party publishers of Content that falsely and misleadingly indicates the geographic origin of scam locksmith services. Paragraphs 94-100, (inclusive), and paragraphs 171-174 and 176-182, (both inclusive) are devoted to very specific factual allegations, which, if proven true, would make the Defendants, not any third-party, liable under 15 U.S.C. § 1125(a)(1)(B). See Page 3, et seq. above, concerning the Communications Decency Act.

Defendants' Motion to Dismiss essentially avoids the Complaint's allegations addressing the Defendant's original content. Instead, they attempt to muddy the standard of what is necessary to survive a 12(b)(6) motion to dismiss, suggesting that [the complaint fails for lack of] "*examples* of false advertisements that were made by the Providers, rather than by scam locksmiths." (emphasis added). Plaintiffs have provided "a short and plain statement" that adequately describes the new material. The viability of

a Complaint rests on the sufficiency of its allegations of fact, not evidentiary proof supporting those allegations (i.e. the "examples" that Defendants prematurely demand here). Just like "representative samples" were not required to satisfy F.R.C.P. Rule 9(b) in *United States v. A T & T, Inc.*, supra, 791 F 3d at 125, examples of the false information are not required here. Defendants are on notice of Plaintiffs' claims regarding new material, and Plaintiff will present evidence in support of the allegations at trial as suggested in *A T & T, Inc*.

Defendants's citation of *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, No. 14-cv-3954, 2014 WL 6892141, at (C.D. Cal. Nov. 5, 2014) is simply strange. Defendants characterize the Complaint as alleging "That false maps 'can be found somewhere on the internet,". Neither this not other similarly vague language appears anywhere in the Complaint. The Complaint repeats again and again that the Defendants' own, original, first-party information is displayed on each Defendant's own website. How can content on which Defendants' display their own copyright notice somehow be "third-party"?

Plaintiffs have adequately set forth a claim for violation of the Lanham Act.

THE COMMON LAW COUNTS

FRAUD

Defendants argue that Count III (Common Law Fraud) is not pleaded with sufficient particularity under Rule 9(b) of the Federal Rules of Civil Procedure. They approach the argument as if we were dealing with a single transaction between two parties. But Plaintiffs do no assert fraud with respect to a single transaction. Rather, the

First Amended Complaint alleges an ongoing scheme including false addresses, false map locations, false driving directions, etc. which deceive consumers and injure Plaintiffs. See e.g. Complaint Paragraphs 73, 94, 99, 147-149 (inclusive), 173-176 (inclusive).

Defendants simply ignore the guidelines recently set forth by the District of Columbia Circuit for determining "particularity" under Rule 9(b). In *United States v. A T & T, Inc.,* 791 F 3d 112, 123-128 (D.C.Cir.) 2015, the Court rejected a claim that a complaint must be dismissed for failure to include "representative samples of the claims that specify the time, place, and content of the bills," holding that "…Rule 9(b) does not inflexibly dictate adherence to a predetermined checklist of 'must have' allegations." The point of Rule 9(b) is to ensure that there is sufficient substance to the allegations to both afford the defendants the opportunity to prepare a response "and to warrant further judicial process." 791 F 3d at 125. The Court went on to note that it would be unreasonable to require a plaintiff, before any discovery, to plead more detail than would be required to establish the claim at trial. Defendants know exactly what Plaintiffs claim with respect to their allegations of false locations, created maps, and driving directions. They are fully able to respond.

Accordingly, this Court should deny the Motion to Dismiss with respect to F.R.C.P. Rule 9(b).

TORTIOUS INTERFERENCE WITH ECONOMIC ADVANTAGE

The standard for a claim of Tortious Interference with an Economic

Advantage was explained in detail in *Nat'l R.R. Passenger Corp.. v. Veolia Transp. Serv. Inc.,* 791 F.Supp.2d 33 (D.D.C., 2011) (Walton, J.): "As this Court noted in Amtrak I, the requisite elements to a successful claim of tortious interference with a prospective advantage are "(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*.'"* 592 F.Supp.2d at 98 (quoting *Browning v. Clinton*, 292 F.3d 235, 242 (D.C.Cir.2002)).

Nat'l R.R. Passenger Corp. supra., includes a protracted discussion regarding the element of intent, explaining *Genetic Sys. Corp. v. Abbott Labs*., 691 F. Supp. 407, 422–23 (D.D.C.1988) (Green, J.). The Court defined the issue of intent as a question of fact and rejected the Defendant's Motion for Summary Judgment, explaining *"Furthermore, 'when there is room for different views, the determination of whether [an] interference was improper or not is ordinarily left to the jury.'* Restatement (Second) of Torts § 767 cmt. 1 (1979)."

The Complaint here itemizes each of the requisite elements of its claim for Tortious Interference with an Economic Advantage in paragraphs 156-161 (inclusive) of the First Amended Complaint. Each and every defendant directory and search engine is on actual notice (i.e. has 'knowledge') that a) their conduct is interfering with Plaintiff's ability to reach potential customers because, b) they are listing and receiving money for paid advertisements from unlicensed or otherwise unlawful locksmiths, c) they are actively publishing their own original content that is explicitly designed to cause

customers to reach these illegitimate actors instead of the lawful locksmith Plaintiffs. Plaintiffs have sufficiently alleged the element of 'intent'. Proving "*Intent"* is a question of fact that must be heard and decided by a jury. *Ibid*.

Legitimate business expectancies are those "not grounded on present contractual relationships but those which are commercially reasonable to anticipate, [and] are considered to be property and therefore protected from unjustified interference." *Carr v. Brown*, 395 A.2d 79, 84 (D.C.1978). "A legally recognizable business expectancy may include 'the opportunity of obtaining customers,' " *Amtrak I*, 592 F.Supp.2d at 98 (quoting Carr, 395 A.2d at 84). *Ibid*., 791 F.Supp.2d 33 (D.D.C., 2011).

Defendants' reliance on *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (C.A.D.C., 1995) is misplaced to the extent that they suggest the language cited refers to the requisite pleading standard. The Court in *Bennett Enterprises, Inc.* was explicitly addressing the evidentiary standard to establish liability at trial. The full citation reads: *"Plaintiff cannot establish liability without a 'strong showing of intent' to disrupt ongoing business relationships. Id. Bennett's evidence in this case does not meet that standard." Ibid.* The First Amended Complaint alleges that Defendants' actions are both inducing and causing an actual breach in the Plaintiffs' expectant customers from contacting them for locksmith and related security business. Plaintiffs will introduce evidence at trial sufficient to establish Defendants' "intent" to divert business to scammers. Plaintiffs have suffered a loss in business and business revenue as a direct result of Defendants' action.

UNFAIR COMPETITION

The Defendants represent their search products to consumers public as authentic, true information regarding legitimate businesses. But instead, the Complaint has alleged that Defendants' listings of scam locksmiths, created by themselves in whole or part, knowingly and intentionally directs business to unlicensed or otherwise illegitimate locksmiths presenting false information — and by definition away from legitimate locksmiths, to their direct economic detriment. The complaint has alleged with particularity that the Defendants have created and published false information regarding the legitimacy, location, and proximity in terms of precise driving directions and times to a potential consumer.

Chapter 2 § 2, of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION defines 'Deceptive Marketing' as: "*One who, in connection with the marketing of goods or services, makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another under the rule stated in § 3 is subject to liability to the other for the relief appropriate under the rules stated in §§ 35-37.*"

Chapter 2 § 3 *id*. continues to define an act as '[To The] Commercial Detriment Of Another' where: *"A representation is to the likely commercial detriment of another if: (a) the representation is material, in that it is likely to affect the conduct of prospective purchasers; and (b) there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will."* Plaintiffs have alleged facts with particularity, which if proven

true, correspond to the Restatement's definition Deceptive Marketing (a form of Unfair Competition).

In citing *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 881 n.3 (D.C. 1982), Defendants fail to mention that the cited list is from a footnote merely quoting *some examples* of unfair competition listed in a hornbook. The same citation appears in a 2013 D.C. District Court case explaining unfair competition as essentially identical in its cause of action as that of a claim for tortuous interference with business relations:

> *"Under D.C. law, the common-law tort of unfair competition "is not defined in terms of specific elements, but by the description of various acts that would constitute the tort if they resulted in damage."* Furash & Co., Inc. v. McClave, *130 F.Supp.2d 48, 57 (D.D.C.2001). These acts may include "defamation, disparagement of a competitor's goods or business methods," and "interference with access to the business."* B & W Mgmt., Inc. v. Tasea Inv. Co., 451 A.2d 879, 881 n. 3 (D.C.1982). *A party may state a plausible claim for unfair competition by alleging defamation and tortious interference with advantageous business relations.* Hanley–Wood LLC v. Hanley Wood LLC, 783 F.Supp.2d 147, 153 (D.D.C.2011) (noting that allegations of interference with the plaintiff's business satisfied the pleading requirements for the "fluid requirements of the tort for unfair competition"); Bus. Equip. Ctr. v. DeJur–Amsco, Corp., 465 F.Supp. 775, 788 (D.D.C.1978) (concluding that the cause of action for tortious interference with business relations is "virtually the same as that for unfair competition"). *Intelsat USA Sales Corp. v. Juch-Tech, Inc.,* 935 F. Supp. 2d 101 (D.D.C., 2013).

The same case explains the requirements for a viable claim for tortious interference with Business Relations (defined above as identical to those claims necessary for a viable claim for Unfair Competition), argued above in the previous section of this Reply: "To establish a claim for tortious interference with prospective advantageous business transaction under D.C. law, a plaintiff must show: (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. See Bennett Enters. v. Domino's Pizza, Inc., 45 F.3d 493, 498 (D.C.Cir.1995)." *Intelsat USA Sales Corp. v. Juch-Tech, Inc.*, 935 F. Supp. 2d 101 (D.D.C., 2013).

BREACH OF CONTRACT

The First Amended Complaint alleges that some of the Plaintiffs[4] have paid Defendants for advertising. Thus a contractual relationship has arisen between those Plaintiffs and Defendants. The District of Columbia Court of Appeals in *Allworth v. Howard University*, 890 A. 2d 194, 201 (D.C. 2006) Contracts, § 205 (1981) reminds us that "all contracts contain an implied duty of good faith and fair dealing which means that 'neither party shall do anything which will have the effect of destroying the right of the other party to receive the full fruits of the contract." *Paul v. Howard University*, 754 A. 2d at 310 (quoting *Hais v. Smith*, 547 A. 2d 986, 987 (D.C. 1988). If the party to the contract evades the spirit of the Contract, willfully renders imperfect performance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing." *Id*. (citing *Hais,* spra, 547 A. 2d at 987-88) See also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance

[4] Defendants' assertion that Plaintiffs have not sufficiently identified the contracts is inconsistent with Microsoft's claim that at least two of the Plaintiffs have entered into contracts that preclude participation in a class action and require arbitration. Those issues will be addressed in a subsequent pleading, but clearly Microsoft knows exactly which contracts are involved.

and enforcement."; Willens & Niederman v. 2720 Wisconsin Ave. Coop. Ass'n, 844 A2d1126, 1135 (D.C. 2004)."

While it is expected that advertising media will accept advertising from legitimate competing firms, here, Defendants knowingly obscure Plaintiffs' advertising in a flood of postings (including their own newly created material) directing consumers to phony locksmiths, they have unfairly diluted the effectiveness and value of Plaintiffs' paid advertising. Defendants are not acting in good faith when the Plaintiffs pay for advertising with the reasonable expectation that that it will effectively reach consumers without impediment and then Defendants flood the listings with information about unlicensed (in those jurisdictions requiring licensing) scammers. Defendants' knowingly including scammer listings in the paid advertisements artificially drives up the cost of those advertisements (which are sold based on a bid-for-position system) far beyond the cost those same ad slots would have but for the inclusion of known scam listings. Moreover, including Plaintiffs paid advertising in a sea of listings for scammers dilutes the reputation and legitimacy of Plaintiffs. The First Amended Complaint alleges that Defendants are deliberately diluting the effectiveness and value of Plaintiffs paid advertising in contravention of the covenant of good faith and fair dealing. It will be for a jury to decide whether the implied covenant was breached.

BALDINO'S CLAIMS AGAINST GOOGLE

Defendants assert that Baldino's Lock & Key ("Baldino") claims against Google must be dismissed because of its prior litigation with Google.[5] That assertion ignores the fact that the instant Complaint covers ongoing conduct by Google, including all of the new scammer postings and newly created postings since the prior litigation. Baldino is seeking relief for what's happening now. It is settled law that the doctrine of claim preclusion does not apply to a course of activity that continues after the first suit. Thus, in *Lawlor v. National Screen Service Corporation,* 349 U.S. 322, 327-328 (1955), the Supreme Court held that a prior judgment did not bar a subsequent suit for when the same course of conduct continued after the judgment. A new cause of action had arisen. In *Crowe v. Leeke,* 550 F2d 184, 187 (4th Cir., 1977) the Court summarized the law: "We glean from the cases that *res judicata* (claim preclusion) has very little applicability to a fact situation involving a continuing series of acts, for generally each act gives rise to a new cause of action." Also see Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4409, (2d Ed. 2002): "A substantially single course of activity may continue through the life of the first suit and beyond. The basic claim-preclusion result is clear: a new claim or cause of action is created as the conduct continues."

The facts giving rise to the two suits are not the same. Obviously, facts arising subsequent to the prior case could not have been raised or considered. Moreover, the

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[5] *Baldino's Lock & Key Service, Inc.* , No. 15-1202, (4th Cir., Decided December 4, 2015). This is an unpublished opinion and it states on its face that "unpublished opinions are not binding precedent in this circuit." *A fortiori,* this case should not be considered "precedent" in the District of Columbia.

earlier suit rested on the publication of information that Google had received from others, i.e., the scammers. This action, on the other hand, focuses on new information, created or developed by Google (and the other Defendants.) Issues pertaining to the new content created or developed by Google as well as the antitrust claims were not before the Court in the prior action. This is not the same case. Accordingly, Baldino's claims against Google should not be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully Submitted,

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