IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Coronavirus Reporter and Five Unnamed Apps, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. Apple Inc., *Defendant*.	§ § § § § § § § § §	Civil Action No. 1:21-cv-00047-LM

DEFENDANT APPLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

This case is borne of a developer's dissatisfaction with Apple's lawful efforts to ensure the App Store is a place where consumers can find trustworthy and reliable apps, an imperative Apple takes extremely seriously. Apple's motion to dismiss the First Amended Complaint ("FAC") laid bare the fatal defects in Coronavirus Reporter's antitrust and contract claims. Rather than respond on the merits, Coronavirus Reporter filed a Second Amended Complaint ("SAC") that repeats the same allegations and claims from the FAC, and then adds new, copied allegations in an effort to save its case from dismissal. This litigation tactic fails.

The SAC adds allegations about "Five Unnamed Apps" purporting to be plaintiffs, and allegations and claims copied and pasted from at least three other antitrust cases against Apple regarding the App Store pending in the Northern District of California ("Northern District"). But claiming anonymity without the Court's leave plainly violates the Federal Rules, warranting dismissal, and cobbling together allegations from other actions to attempt to state a claim does not save the SAC. This case should be dismissed for multiple reasons, or at the very least, transferred

to the Northern District, where Coronavirus Reporter concedes "redundant" litigation is pending.[1]

First, the Unnamed Apps are not proper parties. Their failure to obtain permission to proceed anonymously before filing the SAC deprives the Court of jurisdiction over them, and warrants their dismissal under Rule 10(a). The SAC pleads that the Unnamed Apps are just that—apps, which are not the real parties in interest and which lack capacity to sue under Rule 17.

Second, the SAC should be dismissed under the first-to-file rule, which exists to prevent the inefficiencies and inconsistencies that result from allowing substantially similar actions to proceed in different federal district courts. This case cries out for application of the rule. Dozens of allegations in the SAC were intentionally copied *verbatim* from at least three antitrust cases pending in the Northern District. At a minimum, this case should be transferred under this rule.

Third, Coronavirus Reporter lacks Article III standing to bring claims arising from alleged injuries it did not suffer. Coronavirus Reporter's alleged injury-in-fact is that its app was not approved for distribution on the App Store. The SAC alleges no facts that Coronavirus Reporter suffered other injuries alleged in the SAC, which were copied from the other cases, including paying a 30% commission to Apple or being subject to "ranking suppression." Claims predicated on injuries Coronavirus Reporter did not suffer must be dismissed.

Fourth, and after consideration of these issues, what remains of the SAC are largely Coronavirus Reporter's original claims dressed up with some new allegations. But these claims are as meritless as they were before, and grounds for dismissal remain the same. First, the Sherman Act claims fail because Coronavirus Reporter does not plead sufficient facts to make its product market definitions plausible. These claims also fail because, as before, Coronavirus Reporter pleads injury only to itself, not to competition. Further, the Section 1 claim fails because it is

[1] Apple reserves all rights as to its motion for transfer, and if the case is transferred, Apple reserves the right to file a renewed motion to dismiss to conform to Ninth Circuit law and practice. ECF No. 19.

predicated on unilateral conduct, not the concerted action that Section 1 requires. Finally, the Section 2 claims fail because Coronavirus Reporter alleges no exclusionary conduct, only a refusal-to-deal theory that runs afoul of well-settled Supreme Court precedent.

Fifth, the copied claims for unlawful tying (§ 1) and denial of essential facilities (§ 2) fail. Coronavirus Reporter lacks Article III standing to bring the tying claim, and the SAC does not sufficiently allege that the two allegedly tied products are distinct. The essential facilities claim fails because Apple is not required to deal with another party on that party's preferred terms.

Sixth, Coronavirus Reporter's contract claims fail because the SAC does not (just as the FAC did not) identify any contract term in which Apple allegedly "promised" that developers like Coronavirus Reporter could publish COVID-19 apps on the App Store. The claim for breach of the implied covenant of good faith and fair dealing derives from the contract claim and also fails.

Based on these significant deficiencies, the SAC should be dismissed with prejudice.

BACKGROUND[2]

I. Developers' Access to the App Store

In 2008, Apple introduced the App Store. SAC ¶ 118. App developers wishing to distribute apps on the App Store must enter into two agreements with Apple, the Apple Developer Agreement and the Apple Developer Program License Agreement ("DPLA"). They must also abide by the App Store Review Guidelines (the "Guidelines"). The SAC incorporates by reference both agreements and the Guidelines. *See* SAC ¶¶ 70, 87, 232, 234, 252, 261 (Developer Agreement); *id.* ¶¶ 158, 219 (DPLA); *id.* ¶¶ 56, 69, 76, 232 (Guidelines).[3]

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[2] Allegations in the SAC are stated herein solely for purposes of this motion to dismiss. Apple does not admit the truth of any of the allegations in the SAC.

[3] Because these documents are incorporated by reference, the Court may consider them on this motion. *See Watterson v. Page*, 987 F.2d 1, 3–4 (1st Cir. 1993) (documents "central" to claims or "sufficiently referred to in the complaint" can be considered on a motion to dismiss); *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33–34 (1st Cir. 2001). The SAC alleges Apple breached the Developer Agreement, SAC ¶ 261; defines a putative class in

Last modified on June 8, 2015, the Developer Agreement governs basic elements of a developer's relationship with Apple, including the developer's use of Apple's confidential information and the terms by which it retains its status as a "registered Apple Developer." Ex. A §§ 5, 10, p. 6. The Developer Agreement also contains an integration clause and requires that any modification be "made in writing and signed by an authorized representative of Apple." *Id.* § 19. The DPLA governs distribution of apps through the App Store. Ex. B. In the DPLA, developers "understand and agree" that Apple may reject their app in its "sole discretion." *Id.* § 6.9(b). The Guidelines set out the standards Apple applies when exercising its contractual right to review and select apps for distribution on the App Store, a process known as "app review." SAC ¶¶ 69, 89. IAP is an in-app purchase functionality to the App Store that allows iOS users to purchase digital goods and services within apps. *See* Ex. C §§ 3.1.1, 3.1.3(e)

II. Apple's Response to the Pandemic

Recognizing the public-health crisis at hand, Apple took important steps to make sure the App Store offered users COVID-19 apps from credible and reputable sources. According to the SAC, in March 2020, Apple "announced that applications dealing with coronavirus would only be allowed from 'recognized institutions such as government, hospital, insurance company, NGO, or a university.'" SAC ¶ 8. Apple allegedly expanded the criteria for developers submitting COVID-19 apps to "any healthcare company with deep-rooted credentials." *Id.* ¶ 54.

III. The Plaintiffs

The SAC attempts to add to this action new "plaintiffs," in addition to Coronavirus Reporter, which are alleged and listed on the caption as "Five Unnamed Apps." SAC ¶ 5. The SAC claims the Unnamed Apps may proceed anonymously because, "if a party may be subject to

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terms of all U.S. app developers who have signed the DPLA and alleges the DPLA is an "illicit contract[]" that violates Section 1, *id.* ¶¶ 158, 219–20; and alleges Apple effectuates an unlawful tie "[t]hrough" the Guidelines, *id.* ¶ 232.

injury and/or harassment, their name may be withheld." *Id.* ¶ 22. The Unnamed Apps and Coronavirus Reporter were allegedly "excluded from distribution on the App Store, or effectively excluded" due to "ranking suppression and excessive commissions." *Id.* ¶¶ 15 (p. 8), 53, 56.

A. Coronavirus Reporter

In February 2020, a "group of health care and computer science experts" allegedly developed an app named Coronavirus Reporter. *Id.* ¶ 6. The app allegedly would have allowed users to "self-identify" COVID-19 symptoms. *Id.* ¶ 7. Coronavirus Reporter allegedly submitted its app to Apple for app review on March 3, 2020. *Id.* ¶ 6, 8. Apple allegedly rejected the app and denied an appeal on March 26, 2020, because the app was not from a recognized institution, Coronavirus Reporter "lacked 'deeply rooted medical credentials,'" and the app's "user-generated data ha[d] not been vetted for accuracy by a reputable source." *Id.* ¶¶ 8, 10, 56.

Coronavirus Reporter does not allege that users would have had to pay to download its app, requiring it to pay a 30% commission to Apple had it been approved; that it was denied distribution through ranking suppression; or that the app would have offered for sale in-app any digital products or services that would have been subject to a 30% commission collected through IAP.

B. Unnamed App 1 ("App #1")

App #1 allegedly sought to "assist people with the new quarantine situation." *Id.* ¶ 16 (p. 9). The SAC alleges Apple "disallowed" App #1 "because it sought to be ranked using keywords related to Coronavirus." *Id.* The SAC does not allege that users would have had to pay for App #1; that it was denied distribution through ranking suppression; or that it would have offered for sale in-app any digital products or services that would have been subject to a 30% commission collected through IAP.

C. Unnamed App 2 ("App #2")

This app is "an edutainment financial technology application which required absolutely no

money or risk from the users." *Id.* ¶ 94. The SAC alleges Apple rejected the app in 2017[4] "for creating too much financial risk to users, and other plainly vague, false pretenses." *Id.* The SAC alleges that "apps with similar functions were allowed" on the App Store, *id.* ¶ 17 (p. 9), but does not plead facts about App #2's functions or those of other allegedly similar apps. The SAC does not allege that App #2 was denied distribution through ranking suppression, or that it would have offered for sale in-app any digital products or services that would have been subject to a 30% commission collected through IAP.

D. Unnamed App 3 ("App #3")

This app "is an information search utility." *Id.* ¶¶ 18 (p. 9), 95. The SAC alleges that Apple "disallowed and de-ranked" App #3 because of "privacy concerns" and that Apple "replaced" App #3 with an "Israeli app" that "functioned nearly identically," a decision App #3's team "felt" was due to "cronyism and favoritism." *Id.* ¶ 18. The SAC does not allege that users would have had to pay for App #3, or that it would have offered for sale in-app any digital products or services that would have been subject to a 30% commission collected through IAP.

E. Unnamed App 4 ("App #4")

This app is allegedly "a marketplace platform focused on telemedicine" that "was denied distribution in 2017 because it did not use" IAP. SAC ¶¶ 19 (p. 9), 96. The SAC does not allege that users would have had to pay to download App #4; that it was denied distribution through ranking suppression; or that App #4 ever paid Apple a 30% commission. *Id.* ¶ 96.

F. Unnamed App 5 ("App #5")

This app is also allegedly a "platform marketplace[] for telemedicine." *Id.* App #5 was

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[4] The SAC alleges that Apps #2 and #4 were denied "in 2017." *See* SAC ¶¶ 17, 19 (p. 9). Sherman Act claims are subject to a four-year statute of limitations. 15 U.S.C. § 15b. Although the Unnamed Apps are not proper parties to this action, *see infra* § I, Apple reserves its rights to move to dismiss any Unnamed Apps' claims on statute-of-limitations grounds if it learns those claims accrued outside the limitations period.

"required to use Apple In-App Payments" and allegedly had a "non-viable business model as a result of Apple's excessive commissions." *Id.* ¶ 20 (p. 10). The SAC does not allege whether App #5 ever paid commissions. The SAC alleges that App #5's team "*believes* it was subject to ranking suppression because it used non-Apple development tools." *Id.* (emphasis added).

IV. The SAC

On April 26, 2021, in lieu of responding to Apple's Motion to Dismiss the FAC (ECF No. 26), Plaintiffs filed the SAC. In addition to adding the Unnamed Apps, the SAC is styled as a putative class action on behalf of three proposed classes, and adds approximately 150 paragraphs of new allegations and claims. Plaintiffs allege several new antitrust markets, SAC ¶¶ 116, 126, 127, 149, and add new antitrust claims: Section 2 claims for monopsonization and attempted monopsonization (Counts I and II), a Section 2 essential facilities claim (Count III), and a Section 1 tying claim (Count VI). The SAC also pleads the same claims alleged in the FAC (Counts IV, V, VII, and VIII), which Apple previously moved to dismiss. ECF No. 26.

Many of the SAC's new allegations are copied nearly verbatim from other antitrust litigations currently pending against Apple in the Northern District, as noted: [5]

Epic Games v. Apple Inc. (Ex. D)	allegations; essential facilities, tying claims (Counts III, VI)
Cameron v. Apple Inc. (Ex. E)	allegations, including class-related; Section 2 monopolization/monopsonization claims (Counts I and II)
SaurikIT v. Apple Inc. (Ex. F)	allegations

The SAC alleges three classes: (1) "All U.S. developers of any Apple iOS application that was excluded through disallowance and/or ranking suppression on Apple's iOS App Store"; (2) "All U.S. developers of any Apple iOS application or in-app product subject to a 30% sales commission Apple's iOS App Store"; and (3) "U.S.-based iOS developers who were required to

[5] This Court may consider the complaints in each of these cases, which the SAC expressly cites, relies on, and copies from. *See Zucker* v. *Rodriguez*, 919 F.3d 649, 652 n.5 (1st Cir. 2019).

sign the DPLA and pay Apple $99 simply to access the 60% of the population that uses smartphone enhanced services (i.e. iOS) over the national internet backbone." SAC ¶¶ 154, 156, 158.

STANDARDS OF REVIEW

Lack of Jurisdiction: The party "invoking federal jurisdiction bears the burden of establishing standing" to sue. *Blum v. Holder*, 744 F.3d 790, 795 (1st Cir. 2014). "[A] plaintiff must demonstrate standing for each claim he seeks to press." *Peterson v. United States*, 774 F. Supp. 2d 418, 423 (D.N.H. 2011) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). A court "accept[s] as true all material allegations." *Blum*, 744 F.3d at 795. A court also lacks jurisdiction over unnamed parties who fail to "request permission from the district court before proceeding anonymously." *United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1250 (10th Cir. 2017) (quoting *W.N.J. v. Yocom*, 257 F.3d 1171, 1172–73 (10th Cir. 2001)).

Failure to State a Claim: Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court takes as true only well-pleaded factual allegations, and must disregard legal conclusions couched as factual allegations. *See Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 33 (1st Cir. 2011).

ARGUMENT

I. The Unnamed Apps Cannot Proceed Anonymously and Must Be Dismissed.

There is a "constitutionally-embedded presumption of openness in judicial proceedings." *Doe v. Univ. of R.I.*, 1993 WL 667341, at *3 (D.R.I. Dec. 28, 1993) (quoting *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)). The Federal Rules of Civil Procedure ("Rules") thus "require that federal cases proceed in the names of the parties." *Doe v. Trustees of Dartmouth College*, 2018 DNH 217, 1. The Rules "do not provide a means for proceeding anonymously or through a pseudonym." *Id.* Rather, Rule 10(a) requires the complaint to "name all the parties," and Rule

17(a)(1) requires that an action "be prosecuted in the name of the real party in interest."

The SAC alleges that the Unnamed Apps can proceed anonymously, with their names withheld from Apple, the Court, and the public, because of "significant risk of harm." SAC ¶ 22. This is incorrect. Parties must seek the Court's permission before proceeding anonymously, and courts grant that permission only "in exceptional cases." *Verogna v. Twitter, Inc.*, 2020 WL 5077094, at *1 (D.N.H. Aug. 27, 2020).[6]

A. The Unnamed Apps must be dismissed for lack of jurisdiction.

The "federal courts lack jurisdiction over the unnamed" plaintiffs. *Triumph Gear*, 870 F.3d at 1249–50. When plaintiffs do not seek permission to proceed anonymously, courts "lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them." *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 637 (6th Cir. 2005); *see also W.N.J. v. Yocom*, 257 F.3d 1171, 1172–73 (10th Cir. 2001) (holding district court never had jurisdiction over unnamed plaintiffs); *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1245 n.3 (10th Cir. 1989) (failure to name plaintiffs is "jurisdictional"). Courts dismiss cases for lack of jurisdiction when anonymous plaintiffs fail to obtain permission to proceed anonymously. *Doe v. Kansas State Univ*., 2021 WL 84170, at *2 (D. Kan. Jan. 11, 2021). On this basis, the Unnamed Apps should be dismissed.

B. The Unnamed Apps must be dismissed because the SAC violates Rule 10.

A plaintiff who proceeds anonymously without leave of court violates Rule 10(a)'s requirement that the complaint "name all the parties," and warrants dismissal. *Doe v. Spears*, 393 F. Supp. 3d 123, 127 n.1 (D. Mass. 2019); *see also Univ. of R.I.*, 1993 WL 667341, at *3

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[6] "Generalized fears of retaliation . . . or economic injury"—which is all that the SAC alleges here, *see* SAC ¶ 23—do not make for an "exceptional case" that would justify withholding these apps' identities. *Verogna*, 2020 WL 5077094, at *2 (quoting Fed. R. Civ. P. 10, commentary). Apple will oppose any motion to proceed anonymously.

(dismissing unnamed plaintiff); *Doe v. Bell Atl. Bus. Sys. Servs., Inc.*, 162 F.R.D. 418, 422 (D. Mass. 1995) (same); *Doe v. W. New England Univ.*, 2019 WL 10890195, at *1–2 (D. Mass. Dec. 16, 2019); *Doe v. U.S. Dep't of Just.*, 93 F.R.D. 483, 484 (D. Colo. 1982). Not having not sought permission to be anonymous, the Unnamed Apps and their claims must be dismissed.

C. The Unnamed Apps must be dismissed because the SAC violates Rule 17.

The SAC violates Rule 17(a)'s requirement that an action be "prosecuted in the name of the real party in interest." *Cont'l W. Ins. Co. v. Superior Fire Prot., Inc*., 432 F. Supp. 3d 1, 3 (D.N.H. 2019); Fed. R. Civ. P. 17(b) (describing who has "capacity to sue"); 15 U.S.C. § 15 (authorizing only "person[s]" to sue for antitrust violations); *Morcelo-Martinez v. Welfare Fund ILA-PRSSA*, 972 F.2d 337 (1st Cir. 1992).

The SAC pleads facts showing that the Unnamed Apps are just apps, not entities with the capacity to sue, and not the real parties in interest. App #1 is "owned" by a "Florida corporation," SAC ¶ 16 (p. 9); App #2 "has a parent LLC in New Jersey," *id.* ¶ 17 (p. 9); App #3 "is held by a US corporation," *id.* ¶ 18 (p. 9); App #4's "owners . . . were chiefly in Rhode Island," *id.* ¶ 19 (p. 10); and App #5 is "an East Coast based developer," *id.* ¶ 20 (p. 10). *See* 4 Moore's Fed. Prac. – Civ. § 17.10 (2021) ("A party not possessing a substantive legal right is not the real party in interest."). Because the Unnamed Apps do not have the capacity to sue, their claims must be dismissed. *Cf. Citizens to End Animal Suffering & Exploitation, Inc*. *v. N.E. Aquarium*, 836 F. Supp. 45, 49–50 (D. Mass. 1993) (Rule 17 "addresses the capacity of corporations, partnerships, and other business entities to litigate"; holding dolphin lacked capacity to sue); *Leatherback Sea Turtle v. Nat'l Marine Fisheries Serv*., 1999 WL 33594329, at *19 (D. Haw. Oct. 18, 1999) ("plain language" of Rule 17 does "not authorize the turtles to sue"); *Hawaiian Crow ('Alala) v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991) (similar).

II. The First-to-File Rule Mandates Dismissal, or Transfer, of This Action.

Under the first-to-file rule, this court can dismiss a later-filed action that involves similar parties and issues as a previously filed action in another federal district court. *Thakkar v. United States*, 389 F. Supp. 3d 160, 170 (D. Mass. 2019). Coronavirus Reporter and the Unnamed Apps essentially concede this standard is met.

The first-to-file rule addresses "obvious concerns" when similar cases are pending in different federal courts: "wasted resources because of piecemeal litigation, the possibility of conflicting judgments," and courts' potential "undu[e] interfere[nce] with each other's affairs." *Ridenti v. Google LLC*, 2021 WL 1195801, at *3 (D. Mass. Mar. 30, 2021) (quoting *TPM Holdings, Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996)). Under this rule, courts "examine the similarity of the parties involved and the similarity of the issues." *Thakkar*, 389 F. Supp. 3d at 170–71. The rule does not require "strict identity" of parties or issues. *Id.* at 172–74. In the class action context, courts assess party similarity by "the classes," not the plaintiffs. *Id.* at 172. Courts test issue similarity by asking "whether the plaintiff's case and the class action turn on similar determinations of fact and seek to resolve similar legal issues." *Id.* at 173–74.

Coronavirus Reporter and the Unnamed Apps concede there is substantial overlap between the SAC and cases pending in the Northern District against Apple. As they stated in their most recent filing, the SAC "pleads identical claims, redundantly to those that are currently pending in District Courts around the country." ECF No. 31, at 2.

Cameron is a prime example. The parties and issues here and in *Cameron* are similar. Coronavirus Reporter is allegedly an app developer, like the named plaintiffs in *Cameron*, and the putative classes alleged in the SAC overlap with the putative class in *Cameron*. The SAC pleads a class of "All U.S. developers of any Apple iOS application or in-app product subject to a 30% sales commission Apple's iOS App Store." SAC ¶ 156. This is essentially the same as the putative

class in *Cameron*, defined as: "All U.S. developers of any Apple iOS application or in-app product (including subscriptions) sold for a non-zero price via Apple's iOS App Store." Ex. E ¶ 113. That is because the only apps or in-app products "subject to a 30% sales commission," SAC ¶ 156, are those "sold for a non-zero price via Apple's iOS App Store," Ex. E ¶ 113. The SAC's other proposed class—"U.S.-based iOS developers who were required to sign the DPLA and pay Apple $99" (SAC ¶ 158)—subsumes the *Cameron* putative class of iOS developers; the SAC alleges that any developer wishing to put an app on the App Store must pay a $99 fee. *Id.* ¶ 38. *See Cruz-Acevedo v. Unilever U.S., Inc.*, 2016 WL 9460633, at *5 (D.P.R. Sept. 26, 2016).

In addition, the eight factual and legal issues that the SAC claims are common between plaintiffs and proposed class members are adopted nearly verbatim from the *Cameron* complaint. *Compare* SAC ¶ 161, *with* Ex. E ¶ 116; *see Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 351 (D. Mass. 2019) (finding issue-similarity when statements in later-filed complaint "track, virtually verbatim, statements" from first-filed action). Counts I and II of the SAC are lifted from the *Cameron* complaint. *Compare* SAC ¶¶ 167–177, *with* Ex. E ¶¶ 124–134; *compare* SAC ¶¶ 178–189, *with* Ex. E ¶¶ 135–146.

The SAC also copies from two other cases. Counts III and VI in the SAC are lifted from *Epic*, a case where a developer was removed from the App Store for violating the Guidelines. *Compare* SAC ¶¶ 190–203, *with* Ex. D ¶¶ 193–206; *compare* SAC ¶¶ 230–241, *with* Ex. D ¶¶ 233–244. And the market-definition allegations are copied from the complaint in the *SaurikIT* matter. *Compare* SAC ¶¶ 116–124, *with* Ex. F ¶¶ 35–41, 43–44, 47.[7]

[7] That the SAC includes two contract claims not alleged in the other App Store cases does not undermine the SAC's substantial similarity to those cases, which the SAC relies on. *See Thakkar*, 389 F. Supp. 3d at 174 (similarity established even when the second action alleged "various additional claims"); *cf. Wiley v. Gerber Prod. Co.*, 667 F. Supp. 2d 171, 172 (D. Mass. 2009) (finding causes of action in two cases "very similar" even when later action added claims and invoked the laws of a different state than first-filed action).

Because this action is substantially similar to *Cameron*, *Epic*, and *SaurikIT*, all pending in the Northern District, this Court should dismiss this action. *See U.S. Fire Ins. Co. v. Med. Coaches, Inc.*, 2010 WL 2772207, at *2 (D.P.R. July 6, 2010) (dismissing complaint under first-to-file rule); *Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 959 (N.D. Cal. 2008); *Preci-Dip, SA v. Tri-Star Elecs. Int'l, Inc.*, 2008 WL 5142401, at *2 (N.D. Ill. Dec. 4, 2008); *Stewart v. Lashbrook*, 2019 WL 4735906, at *4 (S.D. Ill. Sept. 27, 2019). Alternatively, at a minimum, this Court should transfer this case to the Northern District. *See Waithaka*, 404 F. Supp. 3d at 351 (transferring later action to district in which similar earlier action had been filed); *Jimenez v. Kohl's Dep't Stores, Inc.*, 480 F. Supp. 3d 305, 307 (D. Mass. 2020).

III. Coronavirus Reporter Lacks Article III Standing to Bring Most Claims in the SAC.

The grounds outlined above are sufficient to dismiss the SAC. Even still, the SAC establishes that Coronavirus Reporter—the only plaintiff remaining—was not injured even in the minimal constitutional sense by much of the conduct alleged in the SAC, and, as a result, lacks Article III standing to challenge that conduct.

A plaintiff bears the burden of establishing Article III standing for its claims. *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 330 (1st Cir. 2020). A plaintiff must allege (1) injury in fact, (2) that is fairly traceable to defendant's conduct and (3) redressable. *Id.* To show "injury in fact," a plaintiff must show that it suffered an injury that is "concrete and particularized." *Id.* That a suit may be a class action "adds nothing" because "plaintiffs who represent a class must allege and show a past or threatened injury to *them*, and not just to other, unidentified members of the class to which they belong and which they purport to represent." *Id.* at 331 (citation & internal quotation marks omitted); *Jalbert v. U.S. Sec. & Exch. Comm'n*, 945 F.3d 587, 594 (1st Cir. 2019); *Black Fac. Ass'n of Mesa Coll. v. San Diego Cmty. Coll. Dist.*, 664 F.2d 1153, 1156 (9th Cir. 1981).

First, Coronavirus Reporter lacks standing to bring any claims related to IAP or the alleged

30% commission on sales of paid apps and in-app digital products or services. The SAC is devoid of any allegations that Apple denied the Coronavirus Reporter app because it did not use IAP. Also absent are any allegations that Coronavirus Reporter paid Apple 30% commissions. Rather, the SAC alleges that Coronavirus Reporter planned to offer its app for free. SAC ¶¶ 48, 73, 137, 229. Coronavirus Reporter's alleged injury is that it was rejected from the App Store because it did not meet Apple's policies for pandemic-related apps—a basis that has nothing to do with IAP or 30% commissions. *Id.* ¶¶ 8, 10. Second, Coronavirus Reporter lacks standing to assert claims arising from alleged "ranking unfairness." *Id.* ¶ 40. Coronavirus Reporter's app was never approved for distribution on the App Store, *see id*. ¶ 56, so it was never subject to alleged ranking suppression. *Cf. id.* ¶¶ 18 (p. 9), 40 (describing ranking-suppression theory).

Because the SAC does not allege Coronavirus Reporter suffered any injury-in-fact due to Apple's IAP requirement, 30% commissions, or "ranking suppression," claims predicated on this alleged conduct must be dismissed.[8] *See Gilliam v. Fid. Mgmt. & Rsch. Co.*, 2006 WL 8458180, at *18 (D. Mass. Sept. 18, 2006) (dismissing claims for lack of injury in fact where plaintiffs could not "trace their injuries to a defendant's misconduct" involving a mutual fund that plaintiffs did not own); *Granfield v. NVIDIA Corp.*, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012) (claims "relating to products not purchased must be dismissed for lack of standing") (citing cases); *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1272 (11th Cir. 2015) (no Article III standing absent "any plausible connection" between plaintiff's alleged injury and the challenged conduct).

[8] These claims are: (1) Count VI, which alleges that Apple "tied its in-app payment processor, In-App Purchase, to the use of its App Store" (SAC ¶ 232); and (2) Counts I, II, and IV to the extent they are based on alleged injuries related to Apple's alleged 30% commission (*id.* ¶¶ 3, 96, 137–38, 141, 174, 186, 208), and to the antitrust markets of: "in-app-product distribution services" (SAC ¶¶ 132–33, 141, 146, 150, 161, 181, 183), "IAP distribution services" (*id.* ¶¶ 128, 169–70, 173–74, 176, 180–81, 184, 186, 188), "IAP digital products" (*id.* ¶¶ 180–81), and "in-app-product retailing services" (*id.* ¶ 146). The putative class, "All U.S. developers of any Apple iOS application or in-app product subject to a 30% sales commission Apple's iOS App Store" also must be struck. *Id.* ¶ 156; *see Edwards v. Oportun, Inc.*, 193 F. Supp. 3d 1096, 1100 (N.D. Cal. 2016) (striking proposed class under Rule 12(f) when plaintiff was not a member of the putative class).

IV. Coronavirus Reporter's Antitrust Claims Must Be Dismissed.

A. Coronavirus Reporter's Section 1 and 2 claims must be dismissed for failure to allege a plausible relevant market.

In order to state a claim under either Section 1 or Section 2, a plaintiff must plead a relevant market. *See Yagoozon, Inc. v. Kids Fly Safe*, 2014 WL 3109797, at *10 (D.R.I. July 8, 2014) (§ 1); *Gilbuilt Homes, Inc. v. Cont'l Homes of New England*, 667 F.2d 209, 211 (1st Cir. 1981) (§ 2). A relevant antitrust market includes a geographic and a product market. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 442 (3d Cir. 1997); *R & J Tool, Inc. v. The Manchester Tool Co.*, 2001 DNH 009, 4–5, 11. Defining the "relevant market" is the "threshold" for stating Sections 1 and 2 claims. *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)). The First Circuit has affirmed the dismissal of these claims for failure to sufficiently allege a relevant market. *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 7 (1st Cir. 2004) (§ 1); *Gilbuilt Homes*, 667 F.2d at 211 (§ 2).

The SAC contains a hodgepodge of product-market allegations and purports to reserve the right to apply "market definitions interchangeably." SAC ¶ 127. Such scattershot pleading—which "puts the onus on the court to 'cull through the allegations, identify the claims, and, as to each claim identified, select the allegations that appear to be germane to that claim'"—is reason alone to dismiss all of the antitrust claims. *Currier v. Town of Gilmanton*, 2019 DNH 129, 9 (McCafferty, C.J.) (quoting *Ledford v. Peoples*, 657 F.3d 1222, 1239 (11th Cir. 2011)); *Med. Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp. 2d 1316, 1331–32 (D. Kan. 2006) (dismissing antitrust complaint for failure to satisfy Rule 8).

The SAC alleges an "iOS app distribution" market, a "market/aftermarket for iOS app payment processing," SAC ¶ 116, and a market for "the entire interstate, smartphone enhanced

commerce and information flow transacted via the national internet backbone," *id.* ¶ 126. None of these alleged markets, supported by factual allegations from *other* cases, *see id.* ¶¶ 116–124, is plausible here. The SAC also conclusorily alleges relevant markets for "iOS app and IAP distribution services," *id.* ¶¶ 169, 180; "retailing of iOS apps and related digital products," *id.* ¶ 169; "IAP processing," *id.* at p. 61; the "iOS App Store," *id.* ¶ 206; and "the iOS Games Payment Processing Market," *id.* ¶ 240.[9]

A plaintiff "cannot arbitrarily choose the product market relevant to its claims; instead, the plaintiff must justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017); *see also Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 854 (1st Cir. 2016); *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (product market must be defined so that it "encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business"). Coronavirus Reporter alleges product markets arbitrarily copied from other cases in a grasping attempt to survive a motion to dismiss. But nowhere in the SAC does Coronavirus Reporter attempt to meet this critical pleading threshold for any of its proposed relevant markets.

Consider the alleged "market for smartphone enhanced commerce and information flow transacted via the national internet backbone." SAC ¶ 192. That alleged market, on its face, includes players like Google, Samsung, and myriad others, who also make smartphones that people use to engage in "enhanced commerce and information flow." *Id.* The SAC contains no allegations as to the universe of products within this proposed market that are reasonably interchangeable, thus warranting dismissal. *Queen City Pizza*, 124 F.3d at 436; *E. & G. Gabriel*

[9] Neither Coronavirus Reporter nor any of the Unnamed Apps is alleged to provide any gaming app. And to the extent any of the SAC's claims are predicated on any of these conclusorily-pleaded markets, those claims must be dismissed.

v. Gabriel Bros., 1994 WL 369147, at *3 (S.D.N.Y. July 13, 1994) ("failure to define" market by "the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal"); *Yagoozon*, 2014 WL 3109797, at *11.

The SAC also fails to sufficiently plead that the "iOS app distribution" market is plausible. SAC ¶¶ 116, 206. It is alleged in terms of a single brand's (Apple's) product, a two-sided transaction platform. Generally, a seller's "own products do not themselves comprise a relevant product market." *Apple Inc*. *v. Psystar Corp*., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008). The SAC does not sufficiently allege why this alleged product market is so unique as to have no competitors; this requires dismissal. *Id*. at 1203 (dismissing antitrust claims where single-brand product market alleged); *Tanaka*, 252 F.3d at 1065 (affirming dismissal; rejecting effort to "restrict the relevant market to a single athletic program"). The alleged markets for "IAP distribution services," and others defined around IAP, fail for the same reasons, even setting aside that Coronavirus Reporter did not participate in any alleged market pertaining to IAP. *Supra* § III.

B. Coronavirus Reporter's Section 1 and 2 claims must be dismissed for failure to allege plausible anticompetitive harm.

Anticompetitive harm is a pleading requirement for Section 1 and Section 2 claims. *TechReserves Inc. v. Delta Controls Inc*., 2014 WL 1325914, at *3 (S.D.N.Y. Mar. 31, 2014). Plausible allegations of anticompetitive harm are critical at the pleading stage because antitrust law protects competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990).

Coronavirus Reporter has only pleaded a harm to its business—"an injury to itself, not an anticompetitive injury to the market." *Chicago Studio Rental, Inc*. *v. Ill. Dep't of Com*., 940 F.3d 971, 978 (7th Cir. 2019); *see* SAC ¶¶ 8, 11, 53, 56. This defect is fundamental, and warrants dismissal of all Section 1 and 2 claims. *See Yagoozon*, 2014 WL 3109797, at *9–10 (plaintiff's

"loss of sales" did not plead "actual or potential injury to competition"); *N.E. Carpenters Health Benefits Fund v. McKesson Corp*., 573 F. Supp. 2d 431, 435 (D. Mass. 2008).

While the SAC copies a variety of allegations from another complaint in an attempt to allege harm to competition, those allegations have no connection to Coronavirus Reporter's theory of harm in this case (rejection from the App Store), so do not rescue Coronavirus Reporter's claims. *See* SAC ¶¶ 132, 135 (alleging Apple restricts output by not letting competing app stores onto the App Store); *id.* ¶ 133 (alleging Apple's charges are so high as to "keep developers out of the App Store"); *id.* ¶ 138 (alleging 30% commissions are evidence of supracompetitive prices).

C. Coronavirus Reporter's Section 2 claims must be dismissed for failure to plead exclusionary conduct.

To state a Section 2 claim, a plaintiff must plead willful acquisition or maintenance of monopoly power in a relevant market. *Diaz Aviation Corp. v. Airport Aviation Servs., Inc*., 716 F.3d 256, 265 (1st Cir. 2013). Monopoly power alone is not unlawful unless accompanied by "exclusionary conduct." *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990); *see also Pro Music Rts., LLC v. Apple, Inc.*, 2020 WL 7406062, at *8 (D. Conn. Dec. 16, 2020). Exclusionary conduct is "the willful acquisition or maintenance of" monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP (Trinko)*, 540 U.S. 398, 407 (2004).

Coronavirus Reporter alleges Apple engaged in exclusionary conduct by rejecting its app for distribution on the App Store. *See* SAC ¶¶ 10, 53, 61, 66.[10] But that alleged conduct is entirely lawful, does not support any of the Section 2 claims under any theory (attempt, monopoly,

[10] The Unnamed Apps, to the extent they were denied or restricted access to the App Store, likewise allege only lawful conduct as the basis for their Section 2 claims. *See* SAC ¶¶ 16-20 (pp. 9–10).

monopsony), and runs headlong into well-settled Supreme Court precedent. Absent a duty to deal with competitors (even assuming—although Coronavirus Reporter does not adequately allege it—that Apple and Coronavirus Reporter compete), a defendant "has no obligation to deal under terms and conditions favorable to its competitors." *Pac. Bell Tel. Co. v. linkLine Comm'cns, Inc.*, 555 U.S. 438, 450–51 (2009); *see also Homefinders of Am., Inc. v. Providence J. Co.*, 621 F.2d 441, 443 (1st Cir. 1980) (no antitrust claim in newspaper's refusal to deal with advertiser who violated newspaper's advertising policy).

Blix Inc. v. Apple Inc., is on point. 2020 WL 7027494, at *8 (D. Del. Nov. 30, 2020). There, Apple removed Blix's email app, BlueMail, from distribution for violating Apple's guidelines, which Blix alleged violated Section 2. *Id.* at *1. In dismissing the antitrust claims, the court concluded that Blix's "'abuse' of distribution channels" theory would create a new form of antitrust liability "never before recognized" by the Supreme Court. *Id.* at *8. Other analogous cases support dismissal. *See Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 623 (S.D.N.Y. 2013) (dismissing antitrust claims when plaintiffs complained that Amazon engaged in anticompetitive conduct by not allowing "them to sell e-books on Amazon's devices and apps"); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007). The same principles dispose of Coronavirus Reporter's theory that it enjoys a purported "right" to have its app distributed on the App Store, or to do so on the terms it prefers. SAC ¶¶ 73, 137. And to the extent Coronavirus Reporter's theory of exclusionary conduct rests on allegations that it had to "sign the DPLA and pay Apple $99," *Id.* ¶¶ 38, 158, that theory fails because, as explained above, Apple has no obligation to charge a lower price and deal with Coronavirus Reporter on its preferred terms. *See Pac. Bell Tel. Co.*, 555 U.S. at 450. All Section 2 claims fail for Coronavirus Reporter's failure to plead exclusionary conduct.

D. Coronavirus Reporter's essential facilities claim fails due to failure to plead necessary elements.

An essential facilities claim is a type of Section 2 monopolization and refusal to deal claim. *See Aerotech Int'l v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016). Copying some allegations as to this claim, the SAC adds that Apple monopolizes the alleged market for "smartphone enhanced commerce and information flow transacted via the national internet backbone"[11] through its alleged "unlawful denial" of Coronavirus Reporter to "an essential facility—access to iOS userbase." SAC ¶¶ 193–94.

The essential-facilities doctrine has never been recognized by the Supreme Court. *Trinko*, 540 U.S. at 411. Regardless, an "indispensable requirement" of this claim is "the unavailability of access" to the facility; "where access exists, the doctrine serves no purpose." *Id.* The essential-facilities doctrine does not guarantee access to a facility "in a way that is conducive to [a competitor's] existing business model." *Aerotec*, 836 F.3d at 1185.

The SAC alleges only that Coronavirus Reporter's app was denied access to the App Store on its preferred terms. Apple allegedly denied access to the App Store because the app did not meet Apple's stated policies for pandemic-related apps. SAC ¶¶ 8, 10. The SAC also concedes that the iOS user base can be reached through "web browser apps," which establishes that the App Store is not "essential." *Id.* ¶ 83; *see also Aerotec*, 836 F.3d at 1185 ("[A] facility is only 'essential' where it is otherwise unavailable"); *Blix, Inc.*, 2020 WL 7027494, at *7 (MacOS App Store is not an essential facility); *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 277–78, 284 (4th Cir. 2012) (affirming dismissal where plaintiff retained access to defendant's network, though in a

[11] This claim also fails for the simple reason that the only relevant market pleaded as to this claim is not a proper relevant market. *See supra* § IV.A; *hiQ Labs, Inc. v. LinkedIn Corp.*, 2020 WL 5408210, at *10 (N.D. Cal. Sept. 9, 2020).

more "cumbersome, inefficient, and expensive" manner).[12] For these reasons, the essential-facilities claim, to the extent even cognizable, must be dismissed.

E. Coronavirus Reporter's Section 1 claim must be dismissed because it is predicated entirely on unilateral conduct.

Section 1 prohibits restraints of trade achieved through concerted activity between a defendant and its competitors. *Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 249 (1st Cir. 2012); *Qualcomm*, 969 F.3d at 989. "Unilateral conduct by a single firm, even if it 'appears to "restrain trade" unreasonably,' is not unlawful under Section 1." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988) (affirming dismissal; "unilateral action is not prohibited by § 1").

Courts routinely dismiss Section 1 claims that are premised on one party's creation and announcement of terms—here, rules governing pandemic-related apps[13]—to which another party is required to adhere. *See Relevent Sports, LLC v. U.S. Soccer Fed'n, Inc.*, 2020 WL 4194962, at *6 (S.D.N.Y. July 20, 2020); *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1076–77 (S.D. Cal. 2012); *Baar v. Jaguar Land Rover N. Am., LLC*, 295 F. Supp. 3d 460, 465 (D.N.J. 2018). This means that a defendant "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Dennis v. Husqvarna Forest & Garden Co.*, 1994 WL 759187, at *3 (D.N.H. Dec. 27, 1994) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

Coronavirus Reporter challenges unilateral conduct: Apple's rejection of its app under the terms of a pandemic-related app policy it announced. SAC ¶¶ 10, 20 (p. 7). But Section 1 does not bar the mere "announcement of policy and simple refusal to deal." *Homefinder's of Am., Inc.*

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[12] For these same reasons, any Unnamed App's essential facilities claim also must be dismissed.

[13] The same reasoning applies to rules regarding IAP, or the fee that one charges for a service it provides. The Unnamed Apps' Section 1 claims fail for the same reasons stated herein.

v. Providence J. Co., 471 F. Supp. 416, 421 (D.R.I. 1979), *aff'd*, 621 F.2d 441 (1st Cir. 1980).

To the extent the Section 1 claim is predicated on the agreements that developers enter into with Apple, or the Guidelines, they do not support a Section 1 claim because they reflect unilateral conduct—the terms on which Apple will do business with developers, as the SAC concedes. SAC ¶¶ 70, 87, 158, 219. Courts regularly dismiss Section 1 claims based on analogous theories. *Relevent Sports* LLC, 2020 WL 4194962, at *6–7 (U.S. Soccer's adherence to certain FIFA policies was "unilateral compliance with FIFA's directive"); *Sambreel Holdings*, 906 F. Supp. 2d at 1076–77 (required agreements for app developers were "unilateral action" on Facebook's part").

F. Coronavirus Reporter's Section 1 tying claim must be dismissed for failure to plead distinct products.

Tying involves the linking of two separate products from two separate markets; its essential characteristic "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product" that the buyer did not want or would have preferred to purchase elsewhere. *Jefferson Parish Hosp. Dist. No. 2. v. Hyde*, 466 U.S. 2, 12, 21 (1984). To state a tying claim, a complaint must allege facts showing at least that: (1) the tying and tied products are actually two distinct products; (2) there is an agreement or condition, that establishes a tie; and (3) the defendant has sufficient power in the market for the tying product to restrain trade in the market for the tied product. *George Lussier Enters., Inc. v. Subaru of N.E., Inc.*, 1999 WL 1327396, at *2 (D.N.H. Dec. 13, 1999); *Aerotec Int'l*, 836 F.3d at 1178.

Coronavirus Reporter lacks standing to bring this claim (copied from *Epic*) because the SAC does not allege Coronavirus Reporter's participation in any "IAP" market, *i.e.*, the alleged tied market. *See supra* § III. Beyond this, the claim must be dismissed because the SAC conclusorily asserts that the two purportedly tied products—"Apple's App Store" and "Apple's In-App Purchase"—are distinct, but does not allege any facts in support. SAC ¶ 235. *See Rick-*

Mik Enters. v. Equilon Enters., LLC, 532 F.3d 963, 974 (9th Cir. 2008) (affirming dismissal of tying claim where allegedly tied market was not "separate and distinct" from the tying product).

V. Coronavirus Reporter's Contract Claims Must Be Dismissed.

A. Coronavirus Reporter's breach of contract claim must be dismissed for failure to plead breach.

Coronavirus Reporter alleges that "Apple's Developer Agreement as amended in March 2020 promised that entities with 'deeply rooted medical credentials' were permitted to publish COVID apps on the App Store." SAC ¶ 252. It alleges that Apple breached when it "refused to allow an entity with deep-rooted medical expertise to publish on the App Store." *Id.* ¶ 261.

To state this claim, a plaintiff must plead: (1) a contract; (2) plaintiff's performance or excuse for nonperformance; (3) breach; and (4) damages. *Hamilton v. Greenwich Invs. XXVI, LLC*, 126 Cal. Rptr. 3d 174, 183 (Cal. Ct. App. 2011).[14] A plaintiff "must identify the specific provision of the contract allegedly breached." *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (citing *Progressive W. Ins. Co. v. Yolo Cnty. Super. Ct.*, 37 Cal. Rptr. 3d 434, 449 (Cal. Ct. App. 2005)).[15] Coronavirus Reporter fails to plead a contract term promising that apps with deeply-rooted medical credentials would be allowed on the App Store—and thus fails to allege breach—instead conclusorily alleging that "Apple breached their own Developer Agreement." SAC ¶ 261. Nowhere in the Developer Agreement or elsewhere does Apple make any promise about any kind of app that it will allow in the App Store.[16]

Coronavirus Reporter attempts to maneuver around this problem by alleging that the Developer Agreement was "amended" when Apple announced its policies for pandemic apps.

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[14] The SAC does not allege Coronavirus Reporter's own performance or excuse for nonperformance, another basis for dismissal. *See Hamilton*, 126 Cal. Rptr. 3d at 183.

[15] Coronavirus Reporter concedes that California law governs its contract claims. ECF No. 23 ¶ 17.

[16] The DPLA governs apps' entry into the App Store, a contract Coronavirus Reporter does not allege was breached. *See* Ex. B, at 1. Nor could it, as the DPLA is clear that Apple has no contractual duty whatsoever to admit any app onto the App Store; rather, that decision is placed in Apple's "sole discretion." *Id.* §§ 3.2(g), 6.9.

SAC ¶ 252. This is wrong. First, the SAC alleges that, on March 3, 2020, Apple "announced" an initial set of entities that would be permitted to submit pandemic-related apps *for review*, and then "added" deeply credentialed healthcare companies to that "list." *Id.* ¶ 8. These allegations do not identify any promise by Apple to allow certain apps onto the App Store. *See Donohue*, 871 F. Supp. 2d at 931 (rejecting argument that a user guide contained contractual promises because it "includes no 'promises' which plaintiff could have 'accepted'"). Second, the SAC pleads no facts showing how the Developer Agreement was allegedly amended by Apple's policy announcement, given the process for amendment under the Developer Agreement, Ex. A § 19, instead persisting in reliance on conclusory allegations. *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011) (dismissal when complaint offered no "specificity as to what contractual provisions Facebook allegedly violated"); *Garibaldi v. Bank of Am. Corp.*, 2014 WL 172284, at *3 (N.D. Cal. Jan. 15, 2014); *Roberts v. UBS AG*, 2013 WL 1499341, at *20 (E.D. Cal. Apr. 11, 2013). And the Developer Agreement indicates, on its face, that it was last modified in June 2015, precluding any assertion that it was later modified in any way that was binding on Apple. Ex. A at p. 6; *see Griffin v. Green Tree Servicing, LLC*, 2016 WL 6782764, at *5 (C.D. Cal. Apr. 11, 2016) (express contract terms barred plaintiff's claims alleging additional contractual promises).

B. Coronavirus Reporter's implied covenant of good faith and fair dealing claim must be dismissed.

First, this claim must be dismissed because it rehashes the breach-of-contract claim. *Compare* SAC ¶¶ 261, 263, *with id.* ¶¶ 266, 269. Where allegations "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action . . . no additional claim is actually stated." *Soundgarden v. UMG Recordings, Inc.*, 2020 WL 1815855, at *17 (C.D. Cal. Apr. 6, 2020) (quoting *Careau*, 272 Cal. Rptr. at 400); *Vigdor v. Super Lucky Casino, Inc.*,

2017 WL 2720218, at *4 (N.D. Cal. June 23, 2017).

Second, Coronavirus Reporter does not allege any express term that was frustrated. The "implied covenant is 'limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract.'" *Donohue*, 871 F. Supp. 2d at 932 (quoting *Pasadena Live, LLC v. City of Pasadena*, 8 Cal. Rptr. 3d 233, 237 (Cal. Ct. App. 2004)); *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d 1179, 1191–92 (N.D. Cal. 2012). Apple never "promised" in the Developer Agreement (or anywhere else) that entities with "deeply rooted medical credentials" would be "permitted to publish COVID apps on the App Store." SAC ¶ 252; *see also supra* § V.A. The SAC points to no other contract term in which to imply any duty.

Third, Coronavirus Reporter cannot rely on an implied covenant untethered to any contract. The SAC alleges that "Apple breached the covenant" when "they disregarded established medical hierarchies and blocked Dr Roberts from using the internet to help people disseminate epidemiological data." SAC ¶¶ 266, 268. These allegations are divorced from any contract term, and fail to show any term that was frustrated. *Soundgarden*, 2020 WL 1815855, at *17.

CONCLUSION

Apple respectfully requests that the Court dismiss the SAC with prejudice.

Respectfully submitted, this 10th day of May, 2021,

APPLE INC.

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CERTIFICATE OF SERVICE

I hereby certify that this pleading was filed through the ECF/CM system and will be sent to all parties of record through ECF/CM.

Date: May 10, 2021 By: /s/ Kevin M. O'Shea