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

STATE OF NEW MEXICO, Plaintiff, vs. TINY LAB PRODUCTIONS, et al., Defendants.	No. 1:18-cv-00854-LF-KBM

DEFENDANT GOOGLE'S MOTION TO DISMISS

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(incorrectly named in the Complaint as "Google Inc." and "Admob Inc.")

CONTENTS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Google LLC and defendant AdMob Google Inc. (collectively referred to herein as "Google")[1] respectfully move to dismiss with prejudice all claims asserted against them in the complaint filed on September 11, 2018 [Doc. 1] ("the Complaint") by Attorney General Hector Balderas on behalf of the State of New Mexico ("Plaintiff").

INTRODUCTION

In this action brought under the Children's Online Privacy Protection Act ("COPPA"), Plaintiff alleges that defendant Tiny Lab Productions ("Tiny Lab") developed and marketed mobile device applications ("apps") that were directed to children and that collected and used personal information from child users without the parental notice and consent required by COPPA. But, in addition to bringing suit against Tiny Lab, Plaintiff also seeks to impose liability on Google, in two distinct capacities: first, for its role as the provider of Google Play, a marketplace through which Tiny Lab distributed its apps; and second, as the provider of AdMob, one of the online advertising services that Tiny Lab used to display ads within its apps. The Complaint's claims against Google are all based on the allegation that Google should have known—despite Tiny Lab's express warranties to the contrary—that Tiny Lab's apps were primarily directed to children and not COPPA-compliant.

Plaintiff never contacted Google prior to filing this lawsuit to ask about the Complaint's allegations or to otherwise give Google notice that Plaintiff had concerns about the Tiny Lab apps. Had Plaintiff done so, Google would have explained, as it explains in this motion, how

[1] Google LLC was incorrectly named in the Complaint as "Google Inc.," and AdMob Google Inc. was incorrectly named in the Complaint as "Admob Inc."

Google complies with COPPA and why the claims asserted against Google fail as a matter of law.

COPPA imposes obligations only on the "operators" of services that are "targeted" to children under 13 or that collect and use personal information from a user known by the operator to be under age 13. COPPA requires such operators to obtain parental consent prior to collecting and using that personal information for certain regulated purposes, such as behavioral advertising. Under the statute, the developer of an app, like Tiny Lab, is the "operator" of the app and is responsible for COPPA compliance within the app.

Plaintiff's Complaint seeks to extend Tiny Lab's COPPA obligations to Google. But Plaintiff cannot state a viable COPPA claim against Google, whether for its role in providing Google Play or for its role in providing the AdMob advertising service. Google Play is not alleged to have collected and used any information from children through the Tiny Lab apps. Google Play is merely a platform for the sale or distribution of apps, and the Federal Trade Commission—the agency charged with rulemaking and enforcement under COPPA—has made clear that COPPA does not apply to such platforms. As for the AdMob service, the Complaint recognizes that Tiny Lab represented to Google that Tiny Lab's apps were not primarily child-directed and were COPPA-compliant and that Google relied on Tiny Lab's representations (as COPPA permits) in operating the AdMob service. COPPA imposes no duty on third-party service providers like Google to investigate Tiny Lab's representations or assess Tiny Lab's compliance with COPPA. If Tiny Lab has, in fact, falsely represented the child-directed nature of its apps to Google and thereby failed to comply with COPPA, it alone is responsible under COPPA for that failure.

Plaintiff's state law claims against Google likewise fail. Insofar as those claims are based on the alleged collection of information from children through the Tiny Lab apps, they suffer from the same legal flaws as the COPPA claim, and they are also preempted by COPPA. Insofar as those claims allege that Google misrepresented to consumers that the Tiny Lab apps were COPPA-compliant, they fail because Plaintiff can point to no such misrepresentation by Google. To the contrary, the Complaint acknowledges that it was Tiny Lab—not Google—that made the representations about the apps' COPPA compliance.

For these reasons, the claims against Google should be dismissed, and because the claims rest on a defective theory that cannot be cured by amendment, dismissal should be with prejudice.

STATEMENT OF FACTS AND ALLEGATIONS

A. Google Play and the Designed for Families Program

Google is the provider of Google Play, an online marketplace that, among other functions, allows mobile app developers to offer their apps to users. Compl. ¶ 15. Google does not create the individual apps in Google Play (with the exception of some that Google has itself developed and offered on the platform). The apps are created and operated by third-party developers.

In order to offer apps to users through Google Play, an app developer must agree to certain terms, including that their apps "will comply with all applicable laws" and that the app developer will be "solely responsible" for their apps. *See* Weibell Decl. Ex. 1 ¶¶ 4.1, 4.3, 4.6,

4.8, 4.10, 11.3.[2] In particular, before any app can be added to Google Play, Google requires the app developer to submit an express declaration stating whether or not the app is "primarily directed to children under the age of 13 as defined by COPPA." Weibell Decl. Ex. 2.

Beyond the required certification, Google demands additional assurances from developers who want their apps to appear in the designated "Family" section of Google Play. The Family section, which includes apps that are a part of Google Play's Designed for Families ("DFF") program, is specifically intended to showcase apps designed with "content for the *whole* family." Compl. ¶ 121 (emphasis added). In order to submit an app to the DFF program, an app developer must, among other requirements, warrant that its app is "appropriate for children and compliant with COPPA and other relevant laws." *Id.*

In the context of the Family section of Google Play, which is explicitly directed to "the whole family," the phrase "appropriate for children" means only that an app is relevant to children and suitable for a general family audience. Compl. ¶ 112. The Family section thus includes apps that may be targeted to audiences other than children in addition to being targeted to children. Accordingly, apps in the Family section can be separated into two different categories: (1) apps that specifically have children under 13 as their primary audience ("primarily child-directed"), and (2) apps that have children as only one of their audiences

[2] The Declaration of Anthony J Weibell in Support of Defendant Google's Motion to Dismiss ("Weibell Decl.") attaches as exhibits excerpts from five documents—the Google Play Developer Distribution Agreement (Ex. 1), the Google Play Developer Policy Center (Ex. 2), the Google Play Terms of Service (Ex. 3), the Google Terms of Service (Ex. 4), and the Google Help Center (Ex. 5)—that are referenced in and relied on by the Complaint, and their content is not disputed. *See* Compl. ¶¶ 12, 31, 112, 121, 201, 206, 211, 222, n.14, n.80. As explained in Section I of the Argument below, these documents are thus properly considered with this motion.

("mixed-audience"). *See* Weibell Decl. Ex. 2. The developer of an app that is primarily child-directed is required to declare that its app is primarily child-directed and is then required to participate in the DFF program. *Id.* In contrast, the developer of a mixed-audience app that is relevant both to children and to users in other age groups may choose to opt in to the DFF program but is not required to do so. *Id.*

To ensure that consumers understand that it is app developers rather than Google making determinations regarding the age-appropriateness of apps, consumers seeking to download apps from Google Play must first agree that "Google is not responsible for and does not endorse any Content made available through Google Play that originates from a source other than Google." Weibell Decl. Ex. 3. They must further acknowledge that such third-party content "is the sole responsibility of the entity that makes it available," and that they should not "assume" that Google reviews and approves such content for compliance with its policies. Weibell Decl. Ex. 4.

B. The AdMob Service

In addition to Google Play and other businesses, Google operates an online advertising service called "AdMob," which delivers ads to mobile devices and mobile applications. Compl. ¶ 15. If an app developer wants to display ads from the AdMob network to users of its app, the developer can program its app to request ads from AdMob by incorporating software called "the Google Mobile Ads SDK" into the software for the app. Compl. ¶ 67. The AdMob service is available to any app developer that agrees to comply with the terms of service. However, even though Google sets the terms and policies for the AdMob service, Google does not control the design of the apps that use that service, the content of those apps, the apps' target audience, or the interactions and communications between the apps and their users. It simply sends

advertisements to be displayed within the app based on the information it receives in the ad requests that come from the app.

App developers have complete control over whether their use of the AdMob service complies with the developers' COPPA obligations. App developers are required to declare to Google whether an app is primarily child-directed and, in the case of a mixed-audience app, whether a particular ad request requires "child-directed treatment" (e.g., when a developer knows a particular user is under age 13). Weibell Decl. Ex. 2. In such cases, the AdMob service will automatically operate in a manner that complies with COPPA (i.e., AdMob will disable personalized advertising and remarketing ads that would otherwise be prohibited by COPPA without parental consent). Weibell Decl. Ex. 5. On the other hand, if an app developer breaches its obligations to Google by falsely declaring that its app is not primarily child-directed and/or by failing to communicate to Google that an ad request requires child-directed treatment, the app developer is on its own to obtain any required parental consent to avoid a COPPA violation.

Under Google's contracts with app developers who distribute their apps through the Google Play DFF program, the app developer bears sole responsibility for ensuring COPPA compliance and for providing Google with accurate information about the app's content and users. Compl. ¶ 112. In addition, when using AdMob with an app in the DFF program, the app developer must warrant that the app will "comply with applicable legal obligations relating to advertising to children." *Id.* As the Complaint recognizes, the app developer must also warrant that the app will comply "with all applicable privacy laws and regulations (including COPPA, specifically), and that any third-party software contained within the apps will comply with all applicable privacy laws and regulations." Compl. ¶ 113.

C. The Tiny Lab Apps

Tiny Lab is an app developer that offered several apps for download in Google Play. Compl. ¶ 109. Tiny Lab specifically requested that most of those apps be included in the Google Play DFF program. *Id.* In so doing, Tiny Lab took upon itself all of the obligations and warranties described above required to have an app accepted into this program. Compl. ¶¶ 112-113. Tiny Lab was also required to provide Google with an express declaration for each app identifying whether the app was "primarily directed to children under the age of 13 as defined by COPPA." Weibell Decl. Ex. 2.

The Complaint alleges that Google was subsequently contacted by a group of privacy researchers claiming that certain apps made by Tiny Lab were "*potentially* incorrectly listed as directed to 'mixed audiences,' and 'not primarily directed to children.'" Compl. ¶ 114 (emphasis added). The implication of these claims was that because Tiny Lab had described its apps as "mixed-audience" instead of "primarily child-directed," Tiny Lab did not have to treat every app user as a child under 13, only those users who self-identified as being under 13. Therefore, Tiny Lab could target more of its app users with ads and generate more advertising revenue than it otherwise could if it treated all of its users as children under 13.

Google corresponded with these researchers about the issue during July 2018 to get further information. In the face of express declarations and explanations by Tiny Lab that its apps were not primarily child-directed, Google continued to investigate the information available to it in order to make a definitive determination about whether the apps were in fact "primarily directed to children." Compl. ¶ 118. Ultimately, prior to the filing of the Complaint in September

2018, Google terminated Tiny Lab's Google Play account and removed Tiny Lab's apps after determining that Tiny Lab was not in compliance with Google Play policies.

D. Plaintiff's Claims Against Google

Plaintiff filed this lawsuit on September 11, 2018, without giving any prior notice to Google of the allegations and claims in the Complaint. The crux of the Complaint is that several of the apps developed by Tiny Lab ("the Tiny Lab Apps") collected information from children under 13 without parental consent for purposes that violated COPPA.[3] Compl. ¶¶ 6-7. With respect to Google, the Complaint alleges that Google should have known that the Tiny Lab Apps were violating COPPA. Compl. ¶ 7. Plaintiff seeks to hold Google liable both in its capacity as the provider of Google Play and as the provider of the AdMob service. More specifically, the Complaint asserts claims against Google for violation of COPPA (Count I), violation of the New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57-12-1 to 26 ("UPA") with respect to AdMob (Count II), violation of the UPA with respect to Google Play (Count III), and common law intrusion upon seclusion (Count IV).

[3] The Complaint incorrectly and without factual support assumes that COPPA was violated for all of the Tiny Lab Apps listed in Exhibit 1 to the Complaint. However, several of the Tiny Lab Apps were declared by Tiny Lab to be primarily child-directed during all or a portion of their existence. As explained in Section B of the Statement of Facts and Allegations, for all apps designated by Tiny Lab to be primarily child-directed, the AdMob service automatically operated in a manner that did not trigger COPPA obligations. Therefore, the only apps at issue with respect to the claims against Google are those for which Tiny Lab made a false declaration that the app was not primarily child-directed.

ARGUMENT

I. LEGAL STANDARD

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Accordingly, while the Court accepts as true all material allegations in the complaint, it need not accept the truth of conclusory allegations or unwarranted inferences, nor should it accept legal conclusions as true merely because they are cast in the form of factual allegations. *Id.* at 678-79.

Nor should the Court accept as true allegations that are contradicted by documents on which a plaintiff's claims are based. As the Tenth Circuit has explained, a district court may consider "documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). This rule prevents plaintiffs from selectively pleading only portions of documents that support their claims, while omitting portions that might undermine their claim. *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) ("[W]e examine the document itself, rather than the complaint's description of it."). Similarly, the Court will not "accept as true the complaint's factual allegations insofar as they contradict ... matters subject to judicial notice." *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013). Information typically subject to judicial notice includes "factual information found on the world

wide web." *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("The court should take judicial notice of [factual information] from [the defendant's] website[.]").

For these reasons, the Court may properly consider on this motion the exhibits to the Declaration of Anthony J Weibell in Support of Defendant Google's Motion to Dismiss, which include documents—the Google Play Developer Distribution Agreement (Ex. 1), the Google Play Developer Policy Center (Ex. 2), the Google Play Terms of Service (Ex. 3), the Google Terms of Service (Ex. 4), and the Google Help Center (Ex. 5)—that are referenced in and relied on by the Complaint and not disputed. *See* Compl. ¶¶ 12, 31, 112, 121, 201, 206, 211, 222, n.14, n.80.

II. THE COPPA CLAIM (COUNT I) FAILS AS A MATTER OF LAW

COPPA requires that the operator of an online service obtain parental notice and consent before collecting personal information from users who are under age thirteen and using that information for certain regulated purposes, such as behavioral advertising. 15 U.S.C. §§ 6501, 6502. To state a claim for violation of COPPA, the Complaint must satisfy all of the following elements:

(1) The defendant "operates" an online commercial website or service;

(2) Either (a) the website or service is "directed" (meaning "targeted") to children under 13, or (b) the defendant "has actual knowledge that it is collecting personal information from a child [under 13]";

(3) The defendant collects personal information from the child users of that website or service for a purpose that requires parental notice and consent; and

(4) The defendant failed to comply with the parental notice and consent requirements prescribed by the Federal Trade Commission (FTC) for those child users.

15 U.S.C. §§ 6501, 6502.

Here, whether based on Google's role as provider of Google Play or as provider of AdMob, Plaintiff's COPPA claim against Google fails to meet these requirements.[4]

A. Google is Not Liable under COPPA for the Tiny Lab Apps because Tiny Lab, and Not Google, is the "Operator" of Those Apps

COPPA applies only to the "operator" of the website or online service at issue. 15 U.S.C. § 6502(a) ("It is unlawful for an operator [to do the things prohibited by COPPA]."); *see also* Children's Online Privacy Protection Rule, 78 Fed. Reg. 3972, 4014 (Jan. 17, 2013) ("In COPPA Congress defined who is an operator and thereby set the outer boundary for the statute's and the COPPA Rule's reach."). Here, the Complaint targets the Tiny Lab Apps as being allegedly "directed to children" and used to collect information in violation of COPPA. Compl. ¶¶ 12, 209. But Google is not the operator of those apps. Tiny Lab is the operator and therefore responsible for complying with COPPA's requirements. The FTC has made that clear: "For child-directed properties, one entity, at least, must be strictly responsible for providing parents notice and obtaining consent when personal information is collected through that site. The Commission believes that the primary-content site or service is in the best position to know which plug-ins it

[4] This appears to be the first contested lawsuit that has ever been filed under COPPA since the statute was enacted more than 20 years ago. (Previous COPPA cases are uncontested actions filed by the government pursuant to a consent agreement with a defendant.) While the issues raised by Google's motion have not been litigated before, it is clear from the statute's text and the interpretations promulgated by the FTC that Plaintiff's claims against Google fail as a matter of law.

integrates into its site, and is also in the best position to give notice and obtain consent from parents." 78 Fed. Reg. at 3977. Under the plain language of the statute, and the FTC's interpretation, Google is not liable under COPPA for allegedly improper data collection practices by the Tiny Lab Apps because Google is not the "operator" of those apps.

The Complaint tries to get around this fundamental defect by focusing on the role that Google plays in operating two distinct services: Google Play and AdMob. But, as explained below, Plaintiff cannot state a COPPA claim on these bases either.

B. Google is Not Liable under COPPA for the Tiny Lab Apps as the Provider of Google Play

Although Tiny Lab distributed its apps through Google Play (*see* Compl. ¶¶ 15, 30-31), the FTC has expressly foreclosed COPPA liability on this theory. As the FTC has explained, COPPA does not "encompass platforms, such as Google Play or the App Store, when such stores merely offer the public access to someone else's child-directed content." 78 Fed. Reg. at 3977. Instead, COPPA covers "only those entities that designed and controlled the content, i.e., the app developer." *Id.* As a matter of law, the FTC's guidance forecloses COPPA claims against Google based on its role as provider of Google Play and the distribution of the Tiny Lab apps through that platform.

C. Google is Not Liable for the Tiny Lab Apps as the Provider of AdMob

Plaintiff's effort to hold Google liable in its capacity as the provider of AdMob also fails. Plaintiff's theory seems to be that because Tiny Lab chose to use AdMob to serve mobile ads to its apps, Google is responsible for Tiny Lab's alleged failure to comply with COPPA by collecting personal information from children and using it for targeted advertising without proper

notice and consent. Compl. ¶¶ 209-210. Even assuming that providing advertising services to an app developer could be a basis for COPPA liability,[5] such a theory would require Plaintiff, at a minimum, to establish that (1) Google had *actual knowledge* that a Tiny Lab app being served by AdMob was primarily directed to children, *and* (2) Google *knew* that Tiny Lab was in breach of its contract with Google to comply with COPPA's parental notice and consent requirements for the use of the information being collected. The Complaint does not allege facts showing either of these things, and Plaintiff's claim against Google thus fails as a matter of law.

1. The Complaint Fails to Show that Google Had Actual Knowledge that the Tiny Lab Apps Were Primarily Child-Directed

COPPA obligations are triggered only where an operator's service is "targeted" to children or the operator "has actual knowledge that it is collecting personal information from a child [under 13]" who is using the service. 15 U.S.C. §§ 6501(10)(a)(ii), 6502(a). Where an app developer (Tiny Lab) has incorporated into its app a third-party advertising network software development kit (such as the Google Mobile Ads SDK), the FTC has determined that the operator of the third-party advertising service (Google) has no obligations under COPPA except "where it has actual knowledge that it is collecting personal information directly from users of a child-directed site or service." 78 Fed. Reg. at 3978. This standard generally requires that either (i) the app developer "directly communicates the child-directed nature of its content" to the third-

[5] As discussed below, the FTC has interpreted COPPA to apply to third-party advertising services under certain limited circumstances where the third-party service is collecting information from an app with "actual knowledge" that the app is child-directed. *See* 78 Fed. Reg. at 3978. While this expansive interpretation of the statute has not been judicially reviewed, Google complies with the FTC's interpretation of COPPA and also assumes for purposes of this motion that the FTC's interpretation applies.

party advertising service or (ii) the third-party advertising service "recognizes the child-directed nature of the content" in the app. *Id.*

Under the FTC's standard, unless Google had specific actual knowledge while operating the AdMob service that the content of the Tiny Lab Apps was child-directed, Google had no obligations under COPPA in regard to its collection or use of data through those apps. Moreover, the FTC has made clear, a third party in Google's position has "no duty to investigate"—Google is not required to review the app's content or to determine the ages of the app's users. *See* FTC FAQ No. D.11 ("You would have no duty to investigate.");[6] *see also* Children's Online Privacy Protection Rule, 64 Fed. Reg. 59888, 59892 (Nov. 3, 1999) ("COPPA does not require operators of general audience sites to investigate the ages of their site's visitors"). That is true even if Google had received complaints from researchers or others accusing the app of being primarily child-directed. *See* FTC FAQ No. D.11 ("[Q:] I operate an ad network. I receive a list of websites from a parents' organization, advocacy group or someone else, which says that the websites are child-directed. Does this give me actual knowledge of the child-directed nature of these sites? [A:] It's unlikely the receipt of a list of purportedly child-directed websites alone would constitute actual knowledge.").

In this way, the FTC has confirmed that it is the app developer—and not the third-party advertising service—that bears "strict liability" for COPPA compliance. 78 Fed. Reg. at 3975; *see also* Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your

[6] Citations to "FTC FAQ" refer to the Federal Trade Commission's publication titled "Complying with COPPA: Frequently Asked Questions," available online at https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

Business, Federal Trade Commission (advising *app developers* that "[i]f another company [like Google] collects personal information through your child-directed site or service—through an ad network or plug-in, for example—you're responsible for complying with COPPA").[7] This approach makes sense. Unlike the developer of an app, the operator of a third-party advertising service like AdMob is not privy to most of the information required to make a determination of whether an app is "directed to children," which includes the following:

- User age-related information obtained by an app developer during app installation and usage;
- Information about the actual "audience composition";
- Information about "the intended audience" for the app;
- Whether and how the app makes use of "animated characters";
- Whether and how the app includes "child-oriented activities and incentives";
- Whether and how the app includes child-targeted "music or other audio content";
- Whether and how the app uses child "models" or "child celebrities or celebrities who appeal to children"; and
- Whether and how the app uses "language or other characteristics" targeted to children.

16 C.F.R. § 312.2 (listing factors for consideration in determining COPPA obligations).

That is even more true because, under the FTC's rules, an "online service that is directed to children under the criteria set forth [in the bulleted list above], but that does not target children as its *primary* audience [i.e., mixed-audience services], *shall not be deemed directed to children* if it: (i) Does not collect personal information from any visitor prior to collecting age

[7] Available online at https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance.

information; and (ii) Prevents the collection, use, or disclosure of personal information from visitors who identify themselves as under age 13 without first complying with the notice and parental consent provisions." *Id.* (emphasis added). In other words, COPPA allows the developer of an app directed to mixed audiences to ask its users if they are under age 13 and to collect and use personal information from them without parental consent if they are not under age 13.

The Complaint makes no allegation that Google knowingly collected information through the AdMob service from users who were specifically identified as under 13 for mixed-audience apps. Accordingly, under the FTC's rules, the only possible basis for liability in connection with the AdMob service would be an allegation that Google had "actual knowledge" that the Tiny Lab Apps were "primarily" directed to children, rather than directed to a mixed audience of children, teens, and/or adults. But the Complaint alleges no such facts. Specifically, there is no allegation that Google collected or used information in violation of COPPA from apps that were declared by Tiny Lab to be primarily child-directed or that Google determined should be treated as primarily child-directed.[8] To the contrary, the Complaint acknowledges that Tiny Lab "expressly warrant[ed]" to Google that its apps were "compliant with COPPA" (Compl. ¶ 112) and that Google had not reached a conclusion that the Tiny Lab Apps were "designed primarily for children" rather than "for families in general." Compl. ¶ 118. In fact, Google's policies required Tiny Lab to make an express declaration to Google if its apps were "primarily directed to

[8] For clarification, as mentioned in footnote 3 above, Tiny Lab declared some of its apps to be primarily child-directed. These apps should not be at issue in this action because AdMob automatically operated in a manner that complied with COPPA for all such apps, and there is no allegation that apps declared by Tiny Lab to be primarily child-directed or labeled by Google for child-directed treatment were not treated as such by Google for COPPA purposes.

children under the age of 13 as defined by COPPA." Weibell Decl. Ex. 2. But Tiny Lab allegedly did not do so for some of its apps. Compl. ¶ 114.

Lacking any basis for alleging that Google had actual knowledge, Plaintiff improperly seeks to hold Google liable based on the assertion that it *would have been* "obvious and indisputable from a cursory review" of the Tiny Lab Apps that they "were directed to children." Compl. ¶ 212. But such an argument is both legally irrelevant and factually incorrect for several reasons: *First*, as explained above, the standard requires actual knowledge that the apps were "*primarily*" directed to children—not just directed to children as one of multiple audiences, and that typically requires information about the actual audience for the apps and other information not readily available to a third-party. 16 C.F.R. § 312.2. *Second*, as discussed, the FTC has made clear that Google had "no duty to investigate" or otherwise conduct a review of the apps to determine whether they were primarily child-directed, and that is so even if it received letters from third-parties accusing the apps of being child-directed, as the Complaint alleges. FTC FAQ No. D.11 (quoted above). *Third*, the letter that the privacy researchers sent to Google did not even conclude that the apps were primarily child-directed—only that these apps were "*potentially* incorrectly listed as directed to 'mixed audiences,' and 'not primarily directed to children.'" Compl. ¶ 114 (emphasis added). That is not enough. *See* FTC FAQ No. D.11. *Fourth*, it is clear that most of the information needed to determine whether the apps were primarily child-directed was only available to Tiny Lab; that includes the actual audience demographics, the intended audience, the intent in the design, and content not readily accessible within the app, such as content that can only be accessed over time by playing the games in the apps.

Finally, Google went out of its way to require and enable app developers to be COPPA-compliant by requiring them to declare whether their apps were primarily child-directed or mixed-audience and requiring developers using AdMob to inform Google if any user required child-directed treatment. Weibell Decl. Exs. 2, 5. Google then went above and beyond what was required by COPPA in such situations by having AdMob automatically disable data processing that required parental consent under COPPA, regardless of whether any app developer had obtained parental consent. Weibell Decl. Ex. 5. That reality provides further reason to reject Plaintiff's baseless effort to hold Google liable based on something far less than actual knowledge.

2. Google Was Entitled to Rely on Tiny Lab's Obligation to Ensure COPPA Compliance

Even if Google had obtained actual knowledge that the Tiny Lab Apps were primarily directed to children, Google would still not have been in violation of COPPA because Google was entitled, as a matter of law, to rely on Tiny Lab's contractual promises to obtain parental notice and consent when required by COPPA.

Nothing in COPPA prohibits a third-party advertising service from contracting with an app developer to have the app developer fulfill any notice and consent obligations associated with the app. In fact, FTC guidance expressly endorses this practice, explaining that the app developer is "in the *best* position to give notice and obtain consent from parents." 78 Fed. Reg. at 3977; *see also* FTC FAQ No. D.6. (the app developer "may arrange with the third party collecting the personal information to provide adequate COPPA protections"); FTC FAQ No. D.7 (the app developer is "liable for the collection of information that occurs on or through [its app], even if you yourself do not engage in such collection"). Indeed, it would be infeasible for a

third-party advertising service like AdMob to itself communicate with end users to provide notice and obtain consent for every app that uses its service because AdMob (i) controls neither the design of the app nor the disclosures made to users of the app, (ii) does not know what other additional information may be collected through the app (including by other third-party ad networks), and (iii) does not control how information collected through the app by the app developer or other third parties is used.

Here, in the absence of actual knowledge by Google that Tiny Lab was violating its obligations under COPPA (and under the parties' agreement)—and no such knowledge is alleged—Google was legally permitted to rely on Tiny Lab's express contractual promise to take care of all COPPA-related requirements for its apps.[9] Compl. ¶¶ 112-113, 201.

D. The COPPA Claim Fails for the Additional Reasons Explained in the Joint SDK Defendants' Motion to Dismiss

The COPPA claim against Google also fails for the additional reasons explained in the Joint SDK Defendants' Motion to Dismiss [Doc. 47] filed contemporaneously with this motion. Pursuant to the stipulated Order on Motion to Dismiss Briefing Consolidation and Related Page Limits [Doc. 37], Google joins in and incorporates that motion by reference and will not repeat those arguments in this motion.

[9] As explained above, prior to the filing of the Complaint, Google was engaged in an ongoing investigation of Tiny Lab and did in fact terminate Tiny Lab's Google Play account prior to the filing of the Complaint. Thus, even if Google hypothetically had been required by COPPA to investigate the allegations relating to Tiny Lab and take action following that investigation, Google would have satisfied this hypothetical obligation.

III. THE STATE LAW CLAIMS BASED ON VIOLATIONS OF COPPA (COUNTS II AND IV) FAIL AS A MATTER OF LAW

The Complaint asserts two state law claims (Count II for violation of the UPA and Count IV for intrusion upon seclusion) that are based entirely on the alleged collection of information from children under 13 in violation of COPPA. Compl. ¶¶ 218-220 (asserting UPA claim based on the novel legal theory that "a violation of COPPA constitutes an unfair or deceptive act or practice" that is allegedly actionable under the UPA); Compl. ¶¶ 246-247 (asserting intrusion claim based on the allegation that the collection of information was "highly offensive to a reasonable person," as "evidenced by, inter alia, the legislation enacted by Congress including COPPA"). Accordingly, because these claims are predicated on the alleged COPPA violation discussed above, they fail for the same reasons the COPPA claim fails. But in any event, these state law claims should be dismissed because they are preempted by federal law (15 U.S.C. § 6502(d)).

The Joint SDK Defendants' Motion to Dismiss [Doc. 47] filed contemporaneously with this motion explains these points in detail, and, pursuant to the stipulated Order on Motion to Dismiss Briefing Consolidation and Related Page Limits [Doc. 37], Google joins in and incorporates that motion by reference and will not repeat those arguments in this motion.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE UPA RELATING TO GOOGLE PLAY (COUNT III)

Count III, which advances a UPA claim based on Google's operation of Google Play, gestures in the direction of a misrepresentation claim, but Plaintiff fails to state a viable claim based on a misrepresentation theory. To make such a claim, Plaintiff would have to allege (among other facts) that Google made a "representation that was either false or misleading" and

that it was "knowingly made." *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100 (1991). Here, the most the Complaint can muster is the conclusory (and false) allegation that "Google has represented that 86 of Tiny Lab's Gaming Apps are compliant with its Designed for Families ("DFF") program and, by extension, that these Gaming Apps are suitable and safe for children, complying with all applicable privacy laws, including COPPA." Compl. ¶ 232. This allegation cannot be credited in light of the other information before the Court on this motion, which makes clear that Google made no such representations.

A. The Complaint Cannot Plausibly Allege that Google Knowingly Misrepresented that the Tiny Lab Apps Were COPPA-Compliant

The Complaint fails to identify any actual representation made by Google that the Tiny Lab Apps were compliant with COPPA. To the contrary, all of the relevant Google statements quoted or referenced in the Complaint make clear that any representations about the apps' suitability for the Designed for Families program and COPPA compliance were made by the app developers—not by Google:

- "Google Play ratings … are based on the app developer's responses to questionnaires provided by Google—i.e. the ratings reflect the developer's representations about the appropriate audience for the app." Compl. ¶ 31.
- "You [Tiny Lab] represent that apps submitted to Designed for Families are compliant with COPPA." Compl. ¶ 112.
- "Families and COPPA – Google Play offers a rich platform for developers to showcase trusted, high-quality and age appropriate content for the whole family. Before submitting an app to the Designed for Families program, *ensure your* [referring to Tiny Lab] *app is appropriate for children and compliant with COPPA* and other relevant laws." Compl. ¶ 121 (emphasis added).
- "If your [referring to Tiny Lab] Designed for Families app displays ads, you confirm that … You comply with applicable legal obligations relating to advertising to children." Compl. ¶ 201.

- "You [Tiny Lab] represent that apps submitted to Designed for Families are compliant with COPPA ...." Compl. ¶ 201.
- "Google is not responsible for and does not endorse any Content made available through Google Play that originates from a source other than Google." Weibell Decl. Ex. 3.
- "Our Services display some content that is not Google's. This content is the sole responsibility of the entity that makes it available. We may review content to determine whether it is illegal or violates our policies, and we may remove or refuse to display content that we reasonably believe violates our policies or the law. But that does not necessarily mean that we review content, so please don't assume that we do." Weibell Decl. Ex. 4.
- "WE DON'T MAKE ANY COMMITMENTS ABOUT THE CONTENT WITHIN THE SERVICES, THE SPECIFIC FUNCTIONS OF THE SERVICES, OR THEIR RELIABILITY, AVAILABILITY, OR ABILITY TO MEET YOUR NEEDS. WE PROVIDE THE SERVICES 'AS IS'." *Id.*

In light of these express disclaimers—and Plaintiff's inability to point to any specific representation by Google to Google Play users that it had separately verified that the Tiny Lab Apps were COPPA-compliant—there is simply no plausible allegation that Google knowingly misrepresented to consumers that the Tiny Lab Apps were COPPA-compliant. Without that, any fraud-based claim against Google under the UPA fails and should be dismissed.

B. Google is Immune from Liability for Tiny Lab's Representations

Plaintiff's Complaint acknowledges that it was Tiny Lab—not Google—that made the warranties about the Tiny Lab Apps being COPPA-compliant: "In order for any of the Gaming Apps to have been included in the Family section of Google Play (and therefore for Tiny Lab to have enrolled in the Designed for Families program), Tiny Lab had to expressly warrant, inter alia, that the Gaming Apps met specific criteria related to privacy laws (set by Google)." Compl. ¶ 201; *see also id.* ¶ 113 ("Tiny Lab warranted that the Designed for Families (or DFF, as defined infra) Gaming Apps are child-friendly, that they (and Tiny Lab, generally) act in

accordance with all applicable privacy laws and regulations (including COPPA, specifically), and that any third-party software contained within the apps will comply with all applicable privacy laws and regulations."); Compl. ¶ 204 ("Tiny Lab has deceived the public as to the data exfiltration functionality of the DFF Gaming Apps."); Compl. ¶ 192 ("Tiny Lab … makes affirmative misrepresentations regarding the collection of children's Personal Data.").

Any effort to treat Google as the "speaker" of these representations on the basis that Google provided an online platform through which the Tiny Lab Apps were made available to users is barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c), which immunizes Google from liability arising from any misrepresentations made by the developers of apps distributed through Google Play. *Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 983 (N.D. Cal. 2015) (holding Apple and Google immune under Section 230 from claims based on their distribution through their respective app stores of apps created by third parties); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000) ("47 U.S.C. § 230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party.").

CONCLUSION

For these reasons, the Complaint does not and cannot state a claim against Google. Google therefore respectfully requests that the claims against Google (named in the Complaint as "Google Inc." and "AdMob Inc.") be dismissed with prejudice. *See Knight v. Mooring Capital Fund, LLC*, 749 F.3d 1180, 1190-91 (10th Cir. 2014) (affirming dismissal of claims with prejudice when further amendment would be futile).

Respectfully submitted,

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(incorrectly named in the Complaint as "Google Inc." and "Admob Inc.")

CERTIFICATE OF SERVICE

I certify that on this day, I filed the foregoing electronically through the CM/ECF system, which caused all parties who have lawfully appeared in this action either as an individual *pro se* or as an individual or entity represented by an admitted attorney to be served by electronic means, as reflected in the Notice of Electronic Filing.

/s/ Anthony J Weibell
Anthony J Weibell

January 11, 2019