IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America, *et al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 1:20-cv-03010-APM HON. AMIT P. MEHTA

State of Colorado, *et al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 1:20-cv-03715-APM HON. AMIT P. MEHTA

JOINT STATUS REPORT

The parties in *United States v. Google LLC* and *State of Colorado v. Google LLC* submit the following Joint Status Report summarizing the state of discovery and identifying any issues between the parties, and the parties' respective positions, that will be raised at the status hearing scheduled for January 7, 2022.

I. Case No. 1:20-cv-03010

A. Google's Discovery of Plaintiffs

A summary of Google's First Set of Requests for Production and prior document productions made by Plaintiffs are set forth in the parties' earlier Joint Status Reports, including

their reports dated February 23 (ECF No. 111), March 28 (ECF No. 124), April 23 (ECF No. 131), May 24 (ECF No. 135), June 24 (ECF No. 149), July 27 (ECF No. 165), August 27 (ECF No. 191), September 24 (ECF No. 223), October 26 (ECF No. 248), and November 23 (ECF No. 256).

B. Plaintiffs' Discovery of Google

A summary of Plaintiffs' First through Seventh Sets of Requests for Production and the document productions previously made by Google are set forth in the parties' earlier Joint Status Reports, including their reports dated February 23 (ECF No. 111), March 28 (ECF No. 124), April 23 (ECF No. 131), May 24 (ECF No. 135), June 24 (ECF No. 149), July 27 (ECF No. 165), August 27 (ECF No. 191), September 24 (ECF No. 223), October 26 (ECF No. 248), and November 23 (ECF No. 256). Google produced additional documents on December 6, 8, 10, 17, 20, 22, 23, 27, and 29 and Google produced additional data on December 3, 6, 17, and 22. Plaintiffs served their Eighth Requests for Production to Google on December 9, 2021. The parties continue to negotiate document and data requests, as well as supplementation in connection with refresh requests served by Plaintiffs on September 30 and October 26.

Plaintiffs have completed twenty-three depositions of current or former Google employees. The parties have scheduled eight for the coming weeks, and the parties are in the process of scheduling three more. Plaintiffs have also completed depositions pursuant to two 30(b)(6) notices issued in July.

Following the status conference held on December 6, the parties continued to meet and confer regarding Plaintiffs' November 1 30(b)(6) Notice and reached resolution on a number of issues. On December 22, Google identified a witness and provided a deposition date for Topic 2 and advised Plaintiffs that it would seek relief from the Court with respect to Topic 3. Google provided written responses to Topics 1, 4, 5, and 7 on December 31. The parties' position

statements regarding Topic 3 of Plaintiffs' November 30(b)(6) notice are set forth in Sections III and IV.

C. The Parties' Discovery of Third-Parties

A summary of the third-party discovery requests previously issued by the parties is set forth in the parties' earlier Joint Status Reports, including their reports dated February 23 (ECF No. 111), March 28 (ECF No. 124), April 23 (ECF No. 131), May 24 (ECF No. 135), June 24 (ECF No. 149), July 27 (ECF No. 165), August 27 (ECF No. 191), September 24 (ECF No. 223), October 26 (ECF No. 248), and November 23 (ECF No. 256). The parties have issued document subpoenas to approximately 108 third parties in total. The parties anticipate that they will continue to issue additional document subpoenas as discovery progresses.

The parties have completed two third-party depositions that were noticed by both Plaintiffs and Google. Plaintiffs have noticed four depositions of third-parties for dates in January and February, and Google has issued cross-notices to those four witnesses. In addition, Google has noticed two depositions of other third-parties for dates in January, and Plaintiffs have cross-noticed one of them. The parties anticipate that they will continue to issue additional deposition subpoenas as discovery progresses.

II. Case No. 1:20-cv-03715

A. Google's Discovery of Plaintiff States

A summary of Google's First Set of Requests for Production and the document productions made by Plaintiffs to date are set forth in the parties' earlier Joint Status Reports, including their reports dated March 28 (ECF No. 124), April 23 (ECF No. 131), May 24 (ECF No. 135), June 24 (ECF No. 149), July 27 (ECF No. 165), August 27 (ECF No. 191), September 24 (ECF No. 223), October 26 (ECF No. 248), and November 23 (ECF No. 256).

B. Plaintiff States' Discovery of Google

A summary of Plaintiff States' First and Second Sets of Requests for Production and the document productions previously made by Google are set forth in the parties' earlier Joint Status Reports, including their reports dated March 28 (ECF No. 124), April 23 (ECF No. 131), May 24 (ECF No. 135), June 24 (ECF No. 149), July 27 (ECF No. 165), August 27 (ECF No. 191), September 24 (ECF No. 223), October 26 (ECF No. 248), and November 23 (ECF No. 256). Google has continued to produce to Plaintiff States the documents and data produced to the U.S. Plaintiffs and its co-plaintiffs in Case No. 1:20-cv-03010 in addition to producing documents and data in response to Plaintiff States' First and Second Sets of Requests for Production.

On October 27, Plaintiff States submitted a request for supplementation of documents in response to Plaintiff States' First Request for Production. The parties have reached agreement on Plaintiff States' October 27 supplementation request. Plaintiff States and Google have also reached agreement on Google's response to Plaintiff States' Second RFP, which involves adding certain requested custodians, and the parties will continue to discuss the timing of Google's production of documents retrieved from those custodians.

Plaintiff States served Google with their Third Set of Requests for Production containing Plaintiff States' full-fledged data requests on November 2, and Google served its responses and objections on December 2. The Parties met and conferred on December 6 and December 9 and continue to exchange information. Plaintiff States served Google with their Fourth Set of Requests for Production on December 23. Google's responses and objections are due on January 24.

A summary of the depositions of current and former Google employees and third parties is set forth above in Section I.B. In accordance with the Scheduling and Case Management Order, Plaintiff States and the U.S. Plaintiffs are coordinating in the noticing and scheduling of

all depositions. In addition to depositions of witnesses addressing issues common to both cases, to date, Plaintiff States have taken or noticed depositions of ten Google employees and third parties focused primarily on issues related to the Plaintiff States' case.

Following the status conference held on December 6, the parties continued to meet and confer regarding Plaintiffs' November 1 30(b)(6) Notice and reached resolution on a number of issues. For Topics 8 and 11, Google has identified a witness and the parties are in the process of identifying a mutually agreeable date in January for the deposition. On December 31, Google served supplemental responses and objections that include a written response to Topic 13 and dates by which it will provide written responses to Topics 9, 10, and 12.

C. The Parties' Discovery of Third Parties

The parties have issued document subpoenas to approximately 108 third parties. All third parties that have received a subpoena from Plaintiff States have received a cross-subpoena from Google. Similarly, all third parties that have received a subpoena from Google have received a cross-subpoena from Plaintiff States. Both parties anticipate that they will continue to issue additional document subpoenas as discovery progresses. A summary of the third-party depositions that have been recently scheduled is set forth above in Section I.C. The parties anticipate that they will continue to issue additional deposition subpoenas as discovery progresses.

III. U.S. Plaintiffs' Position Statement

More than two months after Plaintiffs served the November 30(b)(6) Notice to Google, and in contravention of the Court's December 6 Minute Order, Google has refused to provide a witness to address the subject identified as "Topic 3". The examination topic at issue concerns the methodology Google uses to calculate the amount it pays (or is willing to pay) to its search

distribution partners—a central issue to this case, as Google has employed these payments to maintain its monopoly over general search services. Google's refusal to produce a witness on this examination topic based on an overbreadth objection rings hollow given that Plaintiffs' have offered to limit their inquiry to only Google's top distribution partners and Google's proffer to provide a written submission for this topic. Accordingly, the Court should order Google to provide a witness to testify on Topic 3 no later than January 21.

Pursuant to the Court's September 28, 2021 Minute Order, Plaintiffs issued a Rule 30(b)(6) Notice on November 1, 2021, seeking narrowly tailored information related to several discrete subjects. Following several meet-and-confers and written correspondence, the parties have reached an initial agreement on all but one topic.[1] The disputed topic, Topic 3, seeks "the methodology by which Google calculates the amount it is willing to pay search distribution partners in revenue share agreements," including how Google's measures the long-term revenue, incremental revenue, and "defensive value" (i.e., the value of the distribution channel not being available to a rival) associated with these deals.[2]

During the parties' negotiations, Google explained that it enters revenue share agreements with too many partners to discuss in a deposition. Plaintiffs accordingly narrowed Topic 3 to the methodologies used with a narrow set of Google's top distribution partners.[3] Upon

[1] U.S. Plaintiffs negotiated Topics 1 through 7, and the Colorado Plaintiffs negotiated Topics 8 through 13. This position statement only addresses Topics 1 through 7. Google has agreed to testify about Topic 2. U.S. Plaintiffs have agreed (1) to withdraw Topic 6, and, (2) at Google's request, to provisionally accept interrogatory responses for Topics 1, 4, 5, and 7, which Google served on December 31. The parties have agreed that these topics and written responses do not count against Plaintiffs' interrogatory allotment under the CMO. Further, Plaintiffs have reserved the right to seek testimony on Topics 1, 4, 5, and 7 for any deficiencies in Google's written responses.

[2] A copy of Plaintiffs' November 30(b)(6) Notice is attached as Exhibit A.

[3] In particular, of Google's dozens of distribution partners, Plaintiffs narrowed the relevant partners to twelve (12): Apple, Samsung, LG, Motorola, Vivo, Huawei, AT&T, Verizon, T-Mobile, Sprint, Mozilla, and Opera.

this narrowing, Google offered to submit a written substantive response to Topic 3.[4] By making this offer, Google acknowledges that Plaintiffs' Topic 3 describes a deposition subject with sufficient particularity to be answerable. Nevertheless, without addressing this seemingly important concession, Google continues to refuse to produce a witness to testify orally in response to Topic 3.

Google's objection is based on the argument that Topic 3 is overbroad and unduly burdensome because "no single 'methodology' governs financial analysis of revenue share agreements" across the at-issue revenue sharing agreements and amendments. Google's Responses and Objections to Plaintiffs' November 30(b)(6) Notice. Google's objection is misguided and meritless.

Indeed, to evaluate Google's burden objection to Topic 3, Plaintiffs posed several straightforward and pertinent questions related to the narrow set of distribution partners identified: (1) how many different methodologies has Google used to analyze revenue share agreements; (2) how much, if at all, have the methodologies differed from agreement to agreement; and (3) does Google perform a financial analysis for each new agreement or amendment? For instance, Plaintiffs asked Google whether the methodology for calculating the long-term value of a revenue share agreement differs from partner to partner over the relevant period. Plaintiffs posited that if the methodology for calculating the long-term value of a deal is relatively consistent across agreements, for example, then the scope of Topic 3 is far narrower than Google's objection would suggest.

Google refused to answer any of Plaintiffs' questions. Instead, Google repeatedly

[4] Google has not argued (and could not reasonably argue) that, absent Plaintiffs' consent, written responses to Topic 3 could substitute for oral testimony. *See In re Subp. Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003) (collecting cases and observing that "[d]istrict courts have . . . typically treated oral depositions as a means of obtaining discoverable information that is preferable to written interrogatories").

emphasized that even after Plaintiffs narrowed their inquiry to only Google's top distribution partners, Topic 3 still implicates "at least a couple hundred agreements (including extensions and amendments)."[5] Letter from J. Schmidtlein (Dec. 13, 2021). But Topic 3 focuses on methodologies, which would be expected to remain consistent across agreements. Thus, the breadth of Topic 3 corresponds to the number of methodologies used, not the number of agreements, extensions, or amendments assessed with those methodologies. On this critical issue, Google has represented only that "no *single* 'methodology' governs financial analysis of revenue share agreements." Email from G. Safty (Dec. 12, 2021) (emphasis added). This vague representation—which leaves open the possibility that Topic 3 covers as few as two methodologies—fails to justify narrowing Topic 3 any further.

Plaintiffs have "described with reasonable particularity the matters on which examination is requested," Fed. R. Civ. P. 30(b)(6), if not through the text of Topic 3, then by specifically enumerating the methodologies of interest and narrowing the scope to Google's top partners. Google is now responsible for conducting a reasonable investigation into this topic by, among other things, talking to the employees tasked with performing the analyses for the narrow list of partners and designating one or more individuals to respond. To the extent Google had a valid objection, Google should have stated that objection with particularity and engaged with Plaintiffs to alleviate any undue burden. By refusing to do so during the meet-and-confer process and failing to adhere to the Court's December 6 Minute Order, Google has waived its right to any further relief.

Finally, because it is unclear whether Google maintains an objection to the timeframe and

[5] Google's lumping of extension, amendments and agreements is but a thin-veiled attempt to make the scope of Topic 3 appear more burdensome than it is—most amendments and extension are simple boilerplate time extension with no substantive deal term modifications.

geographic scope of Topic 3, Plaintiffs briefly address the issue here.

Topic 3 seeks information back to 2005 covering the United States, European Union, Russia, and Japan. With regard to timeframe, Plaintiffs allege that (1) Google's anticompetitive conduct dates from at least as early as 2010, and (2) relevant events leading to that conduct occurred as far back as the early 2000s; Plaintiffs are entitled to depositions to support these claims. *See Prasad v. George Washington Univ.*, 325 F.R.D. 1, 3 (D.D.C. 2018) ("The topics on which a litigant must produce and prepare a 30(b)(6) deponent to testify are limited by the familiar relevance standard of Rule 26(b)(1) of the Federal Rules of Civil Procedure, which allows discovery of 'any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.'" (citations omitted)). Indeed, the search distribution contracts at the heart of this case and the focus of Topic 3 date back to at least 2005. Under such circumstances, inquiry back to 2005 is relevant and proportional, as this Court previously found in connection with Plaintiffs' July 30(b)(6) Notice. *See* Court's September 28, 2021 Minute Order.

The geographic scope of Topic 3 is plainly relevant and proportional to the needs of the case. First, most of Google's search distribution contracts with its top partners (including Apple) are worldwide, or multi-jurisdictional, agreements. Second, information pertaining to business operations outside the United States is further relevant because Russia, Japan, and the European Union have government-imposed remedies upon Google and significant search competitors such as Yandex. Thus, agreements covering these other locations may serve as an informative contrast to the United States. Given the scope of the revenue sharing agreements, the already narrowed list of Google's top distribution partners, and Google's failure to state any burden with particularity, no further limitations, including geographic limitations, are warranted.

For the foregoing reasons, the Court should order Google to provide a witness to testify on Topic 3 no later than January 21.

IV. Google's Position Statement

Google Should Not Be Required to Provide Rule 30(b)(6) Testimony in Response to Topic 3 of Plaintiffs' November Notice

Plaintiffs' November Rule 30(b)(6) Notice contains 13 sweeping topics and more than 30 distinct subtopics, all but one of which span more than a decade. *See* Exhibit A. In serving the Notice, Plaintiffs defied Rule 30(b)(6)'s requirement that the Notice "describe with reasonable particularity the matters for examination" as well as this Court's "expectation that there will be precision in these 30(b)(6) notices," which should be limited to "more discrete, identifiable topics as to which a 30(b)(6) witness is actually required." Sept. 28, 2021 Hr'g Tr. 44:23–45:6. Despite the unjustifiable overbreadth of the topics, Google has worked diligently to devise a reasonable approach to provide information responsive to the Notice. Google has designated witnesses to testify regarding three of the topics in January, in addition to providing written responses to five of the topics on December 31 and committing to provide written responses to three more in January.[6]

The lone remaining dispute stemming from the objectionable Notice relates to Topic 3, which asks Google to prepare a witness to testify regarding various financial analyses (to the extent they were performed and/or are available) relating to negotiated terms in agreements with at least a dozen third parties around the world dating back to 2005 across various types of devices:

> From 2005 to the present, the methodology by which Google calculates the amount it is willing to pay search distribution partners in revenue share agreements, including:

[6] Plaintiffs withdrew one of the topics in light of information and testimony provided in response to Plaintiffs' July Rule 30(b)(6) notice.

a. how Google measures the "defensive value" of the deal (*see, e.g.*, GOOG-DOJ-13127914);

b. how Google calculates the lifetime value or long-term revenue of various features that either act as search access points or drive search traffic including the source of any inputs and basis for any assumptions used in the calculations; and

c. how Google estimates the incremental revenue created by a search distribution deal including (i) any methods of estimating the expected proportion [of] users or revenue from a given search access point that Google would retain if it were to lose default status (e.g., "winback" rate or "clawback" rate) and (ii) the results of any analyses utilizing these methods.

As Google has explained to Plaintiffs, there is no single methodology for any such analysis, and no single set of inputs or outputs that a witness could be prepared to convey by deposition. *See, e.g.*, Dec. 1, 2021 Resp. & Obj. to Nov. 30(b)(6) Notice; Dec. 13, 2021 Ltr. from J. Schmidtlein. The only respect in which Plaintiffs have been willing to pare back the topic is to "limit" it to 12 different counterparties. *See* Dec. 8, 2021 Ltr. from A. Cohen. In light of the topic's timespan, however, it still potentially puts hundreds of different agreements, amendments, and extensions at issue. Plaintiffs have inexplicably refused Google's invitation to identify a reasonable number of specific agreements about which they seek further information, and they have likewise refused to accept a high-level written response to the topic in lieu of live testimony. Researching the existence of numerous potential analyses of terms of these myriad agreements, negotiated by different Google employees at different points in time, is overbroad, unduly burdensome and practically not feasible for testimony by a single Rule 30(b)(6) deponent. Plaintiffs well understand this, for they have been asking Rule 30(b)(1) witnesses about such analyses, and about documents that Plaintiffs believe pertain to Topic 3. Plaintiffs' insistence that a witness now be educated on any document touching upon the scores of agreements covered Topic 3 is without foundation, and their request for Rule 30(b)(6) testimony on the topic should be denied.

A. Topic 3 Is Overbroad and Imposes an Undue Burden

"An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). For that reason, "[t]he initial burden under this rule falls on the plaintiffs," who are required to "'describe[] with reasonable particularity the matters on which examination is requested.'" *Alexander v. FBI*, 186 F.R.D. 137, 139 (D.D.C. 1998). With respect to Topic 3, Plaintiffs have entirely failed to do so.

Topic 3 requests testimony regarding "the methodology by which Google calculates the amount it is willing to pay search distribution partners in revenue share agreements" for a 17-year period. Even limited to the 12 counterparties that Plaintiffs have identified during the meet-and-confer process, the scope is still remarkably broad, as it encompasses at least a couple hundred agreements, amendments, and extensions with those counterparties since 2005. *See Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 18 (D.D.C. 2004) (explaining that a Rule 30(b)(6) notice "certainly does not describe with 'reasonable particularity the matters on which examination is requested'" when "each of the topics reads like an interrogatory or a section of a request for production of documents"). The topic is impermissibly broad in large part because there is no single methodology that governs financial analysis of revenue share agreements, many of which are individually negotiated against the backdrop of a long-standing relationship between Google and the partner as well as prior agreements with that partner. Many of the agreements also provide a range of different terms of value to Google and the counterparty that are determined by bilateral negotiation. At any given point in time, the agreements with the 12 counterparties identified by Plaintiffs are not uniform, and neither are the ways in which Google calculates "the amount it is willing to pay" in a particular agreement.

None of this is news to Plaintiffs, who have received the agreements together with financial analyses (to the extent they were performed) and testimony from multiple Google employees about

these issues. For example, when a Google Finance Director was asked during her deposition last month "what kind of … analyses [she and her] team run on specific RSA [*i.e.*, revenue share agreement] deals," she explained that "to an extent, it varies deal by deal, because … each partner that has an agreement with us may have a different set of terms that are part of the contract." Dec. 15, 2021 Dep. Tr. 74:13–25. And when a different Finance Director who supports a different Google business unit was asked at deposition how he "perform[s] a financial evaluation of a distribution deal or a proposed distribution deal," he likewise explained "[t]hat is hard to answer, because it often depends case by case, depending on the partner and the situation and the specifics." Oct. 8, 2021 Dep. Tr. 28:6–14.[7]

The nonexhaustive list of terminology included in the three subparts of Topic 3 does not narrow its scope in any respect. Searches for the terms referenced in the subparts—"defensive value," "lifetime value," "long-term revenue," "incremental revenue," "winback rate," and "clawback rate"—collectively yield tens of thousands of documents among those that Google has produced. These documents do not neatly derive from a single "methodology" that can be taught to a Rule 30(b)(6) witness; rather, the "inputs" and "assumptions" are circumstance-specific. As a Google Finance Director recently testified in deposition, the term "incremental revenue" does not have "a well-known universal definition," and the definition of the term "winback rate" "depends on the context in which the terms are brought up." Dec. 15, 2021 Dep. Tr. 105:16–22, 172:17–21. Moreover, the only specific document that Plaintiffs have identified in connection with this topic (GOOG-DOJ-13127914), was (on its face) not even created in connection with the

[7] As discussed below, those witnesses and others have answered Plaintiffs' questions about particular agreements or analyses that they are familiar with, and Plaintiffs have noticed depositions of other witnesses who are familiar with different sets of agreements that are encompassed by Topic 3.

negotiation of a particular revenue share agreement. If anything, the subparts of the topic exacerbate its unnecessary breadth and ambiguity instead of providing the necessary precision.

Under these circumstances, it would be unduly burdensome to require a Google employee to try to learn and recount the details of even the currently operative agreements with the 12 counterparties identified by Plaintiffs. The request is even more unjustified, however, in reaching back to every revenue share agreement with those counterparties since 2005, and thereby sweeping in contracts that were negotiated and analyzed by employees who left Google years ago, some of whom Plaintiffs have already deposed pursuant to Rule 30(b)(1). The overbreadth is compounded by the fact that the request applies to varied counterparties that have offered an array of products and services over that period, from web browsers to smartphones, and desktop computers to smart home devices. Plaintiffs have not even established the relevance of all of these agreements and any associated analyses spanning a 17-year period, let alone that the probative value of another deposition on the subject outweighs the substantial burden of educating a witness on such a wide-ranging topic. *See, e.g.*, *Prasad v. Geo. Wash. Univ.*, 323 F.R.D. 88, 99 (D.D.C. 2017) (rejecting Plaintiff's request for a Rule 30(b)(6) deposition on "sweeping topics [that] would intensify the already time-consuming and inefficient nature of such depositions, so that the burden on Defendant of designating and preparing a witness would almost certainly outweigh the benefit to Plaintiff" (internal citation omitted)); *Lockheed Martin Corp. v. United States*, 2013 WL 1968372, at *5 (D.D.C. May 13, 2013) (concluding that a Rule 30(b)(6) topic "is vague and overly broad and it would be burdensome for the Government to produce witnesses to explain the history of" a particular government policy over the course of two decades, "particularly where the Plaintiff has been unable to clearly demonstrate its need for such information within the context of this case").

Given the number and diversity of agreements implicated by Topic 3, Google repeatedly urged Plaintiffs to identify a handful of specific agreements about which they seek additional information. *See* Dec. 13, 2021 Ltr. from J. Schmidtlein. Plaintiffs refused to do so. Alternatively, Google offered to provide a written response to the topic based on a reasonable inquiry. *See* Dec. 17, 2021 Email from G. Safty. Again, Plaintiffs refused, in favor of insisting on subjecting a designee to an impermissible "memory contest" about a wide array of agreements, analyses, and other documents. *Alexander*, 186 F.R.D. at 143.

B. Rule 30(b)(6) Testimony Regarding Topic 3 Is Unnecessary and Unwarranted

In addition to being overbroad, Topic 3 also seeks testimony concerning subject matters that Plaintiffs have addressed and can continue to address through the Rule 30(b)(1) depositions that they have been taking for months—or years, if taking into account the depositions conducted during the pre-Complaint investigation. "Rule 30(b)(6) is intended to streamline the discovery process" by, among other things, "curb[ing] the bandying by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of the facts that are clearly known to the organization." *Prasad*, 323 F.R.D. at 99. "It is not appropriate, however, to use a 30(b)(6) deposition as a catch-all technique to reexamine at the end of discovery the universe of information an adversary has produced during the discovery period." *Id.* That is particularly true here, where Plaintiffs have requested and received millions of documents from well over 100 custodians who occupied a wide variety of roles over the last two decades, and have also requested and received the opportunity to conduct dozens of Rule 30(b)(1) depositions of Google employees.

The problem here is not that Plaintiffs are unclear about who to ask the multitude of potential questions encompassed by Topic 3, as they already have deposed or noticed depositions

of numerous individuals knowledgeable about the agreements covered by Topic 3. And to the extent Plaintiffs had any doubts about the right witnesses to inquire of on these points, Google offered them the opportunity weeks ago to identify specific agreements that purportedly warranted Rule 30(b)(6) testimony. *See, e.g.*, Dec. 13, 2021 Ltr. from J. Schmidtlein. Contrary to this Court's guidance, Topic 3 would not conserve resources by eliminating the need for a multitude of fact witness depositions. Instead, it is being used here to cause unnecessary duplication of effort through yet another deposition of the same individuals who have already been or will be deposed in their individual capacities about the same subject matter described in the topic.

For example, during its pre-Complaint investigation, the DOJ asked a Finance Director within Google's Platforms & Ecosystems group and a Partner Development Manager within that group all manner of questions regarding financial analysis of revenue share agreements with Android partners. *See, e.g.*, Sept. 11, 2020 Dep. Tr. 49:9–55:7 (discussing a revenue share analyses and monthly reports describing revenue share payments); *id.* 70:25–76:15 (discussing how Google establishes expected revenue); *see also* July 18, 2020 Dep. Tr. 262:23–265:4. Such testimony has continued in fact discovery during this litigation. Plaintiffs recently deposed another Finance Director within Google's Platforms & Ecosystems group, whose role includes analyzing "the size of the deal or what the payment would look like" in revenue share agreements with certain Android partners. Dec. 15, 2021 Dep. Tr. at 74:5–12. Although the witness explained that the financial analyses "var[y] deal by deal," she also described the types of analyses her team periodically conducts to the extent that Plaintiffs asked about them. *E.g.*, *id.* at 74:17–76:21. Similarly, Plaintiffs have deposed another Finance Director at Google who is familiar with financial analyses of certain agreements with third-party browser providers with whom Google has negotiated revenue sharing agreements. *See, e.g.*, Oct. 8, 2021 Dep. Tr. 27:8–15 (testifying

about usage of the term "incremental revenue"); 185:24–186:8 (testifying about usage of the term "lifetime value"); 191:5–193:23 (testifying about "winback" and "clawback" rate analyses). The same witness also testified that he had made recommendations in the past about "a maximum revenue share that Google should offer to [a] proposed distribution partner," *id*. at 29:25–30:10, and although he explained that his team's analysis varies deal-by-deal, he described the sorts of analyses they typically conduct in response to Plaintiffs' questions, *e.g.*, *id*. at 30:22–32:13.

Moreover, Plaintiffs have taken several depositions of employees involved in the negotiations of revenue share agreements, and they had the opportunity to ask them about what Google seeks in those negotiations, and how it determines the financial terms it is willing to offer in connection with each deal. For example, Plaintiffs deposed a Vice President of Partnerships regarding negotiations with wireless carriers, as well as a Vice President of Android Platform Partnerships, who had already been deposed during Plaintiffs' pre-Complaint investigation regarding agreements with smartphone manufacturers. Plaintiffs have not offered any reasonable justification for requiring Google to educate a witness to testify about an overbroad topic shortly after conducting numerous Rule 30(b)(1) depositions where they had the opportunity to inquire about the subject matter encompassed by the topic. *See, e.g.*, *ChriMar Sys., Inc. v. Cisco Sys., Inc.*, 312 F.R.D. 560, 563–64 (N.D. Cal. 2016) (concluding that a Rule 30(b)(6) topic would unjustifiably burden the defendant "by requiring it to make one of its witnesses available for a second day of deposition," and adding that "[t]his is especially true in light of the recently revised Federal Rule of Civil Procedure 26(b)(1), which balances the proportional needs of the case"); *Banks*, 222 F.R.D. at 19 (precluding plaintiff's attempt to use a Rule 30(b)(6) deposition to "ask questions that duplicate questions previously asked of other witness[es] or seek information that he already has by virtue of responses to other discovery devices"); *see also* Sept. 28, 2021 Hr'g

Tr. 46:1–22 (observing that although "Rule 30(b)(6) witnesses perform … a function and create admissions that a fact witness does not," this "is an unusual case" in that Plaintiffs have "up to 80 fact depositions").

Nor are Plaintiffs by any stretch done with taking Rule 30(b)(1) testimony on these subjects. In February, for example, Plaintiffs will take the deposition of Google's Chief Financial Officer; in conferral over the need for a deposition of such a senior executive, Plaintiffs represented that they needed such a deposition to inquire about "how she evaluated proposed deals, the relative importance of deal terms, details material to her consideration, and any deal models she approved." Nov. 29, 2021 Email from A. Cohen. Similarly, Plaintiffs have noticed a two-day deposition of Google's Chief Business Officer, predicated in part on their assertion that he "personally negotiated, approved negotiation strategy, and/or was the signatory on several relevant Google [revenue share] agreements." Dec. 20, 2021 Email from A. Cohen.

In allowing Plaintiffs to serve four Rule 30(b)(6) notices over the course of the discovery period, the Court specifically cautioned Plaintiffs to avoid a "kitchen-sink-type 30(b)(6) notice" and focus on "topics as to which a 30(b)(6) witness *is actually required*." Sept. 28, 2021 Hr'g Tr. 44:23–45:6 (emphasis added). Topic 3 runs afoul of that guidance, as Plaintiffs had, and will continue to have, ample opportunity to obtain testimony on the subject matter covered by Topic 3. Plaintiffs cannot now obtain testimony through a Rule 30(b)(6) deposition simply because they chose not to pose questions that would elicit that testimony in individual fact depositions or want to generate unnecessary burden by posing the same questions again. Asking Google to prepare a witness to testify with respect to the wide swath of information that falls within the purview of Topic 3 is wholly impracticable, and Plaintiffs' request for Rule 30(b)(6) testimony on the topic should be denied.

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Respectfully submitted,

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