IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

The State of Texas, *et. al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 4:20-CV-957-SDJ Hon. Sean D. Jordan

PLAINTIFFS' RESPONSE IN OPPOSITION TO GOOGLE LLC'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

TABLE OF CONTENTS

TABLE OF AUTHORTIES

CASES **Page(s)**

CASES (cont.) **Page(s)**

OTHER AUTHORITIES

The State of Texas filed this lawsuit in the Eastern District of Texas to vindicate the rights of Texas citizens who have been harmed by Google's anticompetitive and unlawful conduct in Texas. Nine other states joined Texas to represent the interests of their citizens harmed by the same conduct. Google's Motion to Transfer Venue Pursuant to 28 USC § 1404(a) (the "Motion") seeks to force Texas and the other nine Plaintiff States,[1] seven of which are located closer to Texas than California, to litigate on behalf of their citizens on Google's home turf. But Google has not come close to meeting its burden to show that Plaintiffs' choice of forum should be set aside. Instead, Google ignores controlling legal principles by repeatedly attempting to shift its burden to Plaintiffs. That telling effort should not be countenanced. Regardless, Plaintiffs have ample evidence showing the convenience—and importance—of adjudicating this dispute in this forum.

BACKGROUND

Google generates billions of dollars annually from online advertising. (Compl., ¶ 3.) Nearly all of today's online publishers (both large and small) use Google to sell their online display ad space in "ad exchanges" and "ad networks," which are the centralized electronic trading venues where display ads are bought and sold. (*Id*. at ¶ 4.) Publishers also depend on Google's ad server, which acts as the publisher's inventory management system and helps the publisher sell its

[1] Google did not meet and confer with Plaintiffs about this Motion as required by Local Rule CV-7(h). As detailed in Texas's Reply in Support of Its Motion For Interim Protective Order, Google failed to satisfy its substantive meet and confer obligations with Texas. (Doc. 34.) And as acknowledged in Google's certificate of conference, Google also failed to meet and confer with the other Plaintiff States—it did not even request to meet and confer regarding this Motion in any fashion with any of the other Plaintiff States before filing. For this reason alone, the Court should deny or strike Google's Motion. *See, e.g.*, *Morrison v. Walker*, No. 1:13-CV-327, 2014 WL 11512240, at *3 (E.D. Tex. Dec. 2, 2014) (striking motion for defective certificate of conference and noting that "[t]he meet and confer requirement of the Local Rules is not a perfunctory obligation"); *Konami Dig. Entm't Co., v. Harmonix Music Sys., Inc.*, No. 6:08-cv-286, 2009 WL 3448148, at *2-3 (E.D. Tex. Oct. 22, 2009) ("In light of [defendants'] noncompliance with Local Rule CV–7(h) and (i), the Court DENIES the Motion to Compel without reaching the merits of the request.").

inventory. (*Id*. at ¶ 33.) Conversely, nearly every consumer goods company, e-commerce entity, and small business now depends on Google for purchasing display ads to market their goods and services to consumers across the internet. In addition to representing both the buyers and sellers of display advertising, Google also operates the largest ad exchange. (*Id*. at ¶ 4.)

Texas, joined by the other Plaintiff States, began investigating Google's display advertising apparatus in July 2019. (Decl. of Eric Peterson, attached as Ex. A, ¶ 3.) This multistate investigation, which involved the production of approximately three million documents and the participation of sixty-four third-party witnesses (*id*. at ¶ 4), revealed that Google employs its extraordinary market power to unlawfully foreclose competition in several display advertising markets. Google's anticompetitive conduct includes unlawful tying arrangements, a pattern and practice of exclusionary conduct targeting actual and potential rivals, and even an unlawful agreement to eliminate one of Google's largest competitive threats. (Compl., ¶¶ 98-249.) Texas and the other Plaintiff States brought this action in the Eastern District of Texas—an efficient venue in a convenient location for many witnesses and sources of proof—to defend the rights of their citizens and put an end to Google's unlawful conduct.

LEGAL STANDARD

A plaintiff's choice of forum cannot be set aside without a showing of "good cause." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008). To meet that standard, the movant bears the "significant burden" of showing that the transferee venue is "*clearly* more convenient than the venue chosen by the plaintiff." *Id*. at 314-15 (emphasis added). The required showing is "materially more than a mere preponderance of convenience." *Quest NetTech Corp. v. Apple, Inc.*, No. 2:19-CV-00118-JRG, 2019 WL 6344267, at *7 (E.D. Tex. Nov. 27, 2019). Absent such a showing, "the plaintiff's choice should be respected." *Volkswagen of Am.*, 545 F.3d at 315. "By

applying this heightened standard, the plaintiff's choice of forum is given the appropriate deference." *LBS Innovations, LLC v. Apple Inc.*, No. 219CV00119JRGRSP, 2020 WL 923887, at *1 (E.D. Tex. Feb. 26, 2020).

To analyze whether a transferee forum is clearly more convenient, the Fifth Circuit has adopted a series of private and public interest factors. *See Volkswagen of Am.*, 545 F.3d at 315 (adopting factors first enunciated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.*

When applying these factors, "courts should be careful not to lose sight of the plaintiff's choice of forum and its historical significance in our jurisprudence." *Quest NetTech*, 2019 WL 6344267, at *7. With the plaintiff's choice firmly in view, courts must also "resolve all factual discrepancies in favor of the non-movant." *Vocalife LLC v. Amazon.com, Inc.*, No. 2:19-CV-00123-JRG, 2019 WL 6345191, at *3 (E.D. Tex. Nov. 27, 2019). For each factor, if the evidence presented by the movant does not show that the transferee venue is clearly more convenient, then that "factor weighs against transfer." *Rockstar Consortium US LP v. Google Inc.*, No. 2:13-CV-893-JRG-RSP, 2014 WL 4748692, at *7 (E.D. Tex. Sept. 23, 2014).

Moreover, "[w]here the present and proposed forums are both roughly similar in terms of convenience, courts should not conclude that the proposed transferee forum is 'clearly more convenient.'" *Quest NetTech*, 2019 WL 6344267, at *7 (quoting *Volkswagen of Am.*, 545 F.3d at 315). For this reason, courts in this Circuit consistently decline to transfer cases even when several public or private interest factors weigh in favor of transfer. *See, e.g.*, *Hammond Dev. Int'l, Inc. v. Google LLC*, No. 1:20-CV-00342-ADA, 2020 WL 3452987, at *5 (W.D. Tex. June 24, 2020) (denying Google's motion to transfer to the Northern District of California, even where access to proof and local interests weighed in favor of transfer); *Seven Networks, LLC v. Google LLC*, No. 2:17-CV-00441-JRG, 2018 WL 4026760, at *14 (E.D. Tex. Aug. 15, 2018) (denying Google's motion to transfer to the Northern District of California, even where the availability of compulsory process and cost of attendance to willing witnesses weighed in favor of transfer); *LBS Innovations*, 2020 WL 923887, at *7 (denying motion to transfer, even where access to proof and local interest weighed in favor of transfer); *AGIS Software Dev. LLC v. Huawei Device USA Inc.*, No. 2:17-CV-00513-JRG, 2018 WL 2329752, at *9 (E.D. Tex. May 23, 2018) (denying motion to transfer, even where access to proof and availability of compulsory process weighed in favor of transfer); *Calypso Wireless, Inc. v. T-Mobile USA, Inc.*, No. 2:08-CV-441-TJW-CE, 2010 WL 11469012, at *5 (E.D. Tex. Mar. 31, 2010) (denying motion to transfer, even where the availability of compulsory process, local interests, and cost of witness attendance weighed in favor of transfer).

ARGUMENT

Google has not met its significant burden to demonstrate that the Northern District of California is "clearly more convenient" than the Eastern District of Texas and override the Plaintiff

States' chosen forum. Indeed, *each* of the private and public interest factors weigh against transfer in this case.

I. The Private Interest Factors Weigh Against Transfer.

A. The Northern District of California does not have relatively easier access to sources of proof than the Eastern District of Texas.

Google has failed to show that the Northern District of California has more convenient access to proof. "In considering the relative ease of access to proof, a court looks to where documentary evidence, such as documents and physical evidence, is stored." *Seven Networks*, 2018 WL 4026760, at *2. A party seeking transfer "must identify sources of proof with enough specificity that a court can determine whether transfer will increase the convenience of the parties." *J2 Glob. Commc'ns, Inc. v. Protus IP Sols., Inc.*, 2009 WL 440525, at *2 (E.D. Tex. 2009). Here, Google has failed to identify *any* specific sources of proof located in the Northern District of California. Instead, Google relies on conclusory statements about the location of its headquarters and the headquarters of other entities referenced in the Complaint.[2] (Mot. at 4-5.) But headquarters are buildings; they are not sources of proof. They do not testify at trial or constitute relevant, case-specific documents. Without identifying documents housed in those buildings, this factor cannot weigh in favor of transfer.

Other courts in this district have rejected Google's vague generalities about its sources of proof. For example, in *Rockstar Consortium*, the court noted that "Google's [transfer] Motion only

[2] Google identifies several third-party entities that are headquartered closer to the Eastern District of Texas but have offices in northern California. Google does not, however, disclose its own office locations that are closer to the Eastern District of Texas. According to Google's own website, thirty-seven of Google's sixty-four offices are located closer to the Eastern District of Texas than the Northern District of California, including four locations in Texas. Indeed, Google's Dallas office is just ten miles from this Court, and its Midlothian office just fifty-four miles away. *See* Google Careers, *Our Locations*, available at https://careers.google.com/locations/ (last visited Feb. 2, 2021).

provides that Google's headquarters is located in the Northern District of California" but "does not appear to offer any evidence regarding the location of its relevant documents or infrastructure." 2014 WL 4748692, at *3. Without such evidence, "Google's Motion provide[d] neither evidence of where its documents are actually located nor evidence that these documents are more available or accessible from the Northern District of California than they would be from the Eastern District of Texas." *Id*. Similarly, in *Seven Networks*, when Google argued that relevant evidence was maintained in its Northern California offices, the court found that although many documents were "hosted in secure servers *managed from* its Northern California offices," the vast majority of Google's electronic records were not, in fact, "*stored in* its Northern California offices." 2018 WL 4026760, at *2 (emphasis in original). Instead, these documents are located in thirteen data storage centers across the country, with all but two data centers located closer to the Eastern District of Texas. *See id*.[3] Google does not have a single data center in California, much less in the Northern District, but one of its thirteen data storage centers is located in Midlothian, Texas, just over fifty miles from this Court.

In contrast to Google's scant showing, Plaintiffs have provided declarations from ten potential third-party witnesses who possess relevant documents stored closer to the Eastern District of Texas than the Northern District of California. (Ex. B-4 through Ex. B-13, filed under seal.) Additionally, as substantial discovery has already been conducted through the Plaintiff States' investigation, many sources of proof previously in the control of Google and third parties are now conveniently located at the Office of the Attorney General in Austin. *Cf. OGD Equip. Co. v.*

[3] Google's thirteen data centers in the United States are located in South Carolina, Iowa, Oregon, Georgia, Nevada, Alabama, North Carolina, Virginia, Oklahoma, Texas, Tennessee, Ohio, and Nebraska. *See* Google Data Centers, *Locations*, available at https://www.google.com/about/datacenters/locations/ (last visited Feb. 2, 2021).

Overhead Door Corp., No. 417CV00898ALMKPJ, 2019 WL 6720509, at *3 (E.D. Tex. Oct. 25, 2019) ("[T]his factor is considered neutral when discovery has already been completed."). And for any documents that might be located in the Northern District of California, Google "has identified no sources of proof that cannot be transferred electronically." *TIGI Linea Corp. v. Prof'l Prod. Grp., LLC,* No. 419CV00840RWSKPJ, 2020 WL 7346211, at *3 (E.D. Tex. Nov. 13, 2020); *see also Quest NetTech*, 2019 WL 6344267, at *4 ("No one seriously doubts that Apple's relevant documents are digitized and readily deliverable by electronic means.").

Finally, Google's bald assertion that "the challenged conduct occurred in the Northern District of California" is simply not true. As Plaintiffs have alleged, Google's anticompetitive and unlawful conduct occurred throughout the country. (Compl. at ¶ 25.) Because this is not a case where "all of the physical evidence [is] located within the proposed transferee venue," Google's reliance on *Volkswagen of America* is misplaced. *Texas Data Co. v. Target Brands, Inc.*, 771 F. Supp. 2d 630, 641 (E.D. Tex. 2011) (distinguishing *Volkswagen of America* because the evidence was "distributed across the country with some evidence in the Eastern District of Texas"); *see also TIGI Linea*, 2020 WL 7346211, at *4 ("[W]here evidence is dispersed across venues, this private interest factor will be neutral.").

B. The Northern District of California is not a more convenient forum for willing witnesses.

"The convenience of witnesses is probably the single most important factor in the transfer analysis." *Bride Ministries, NFP v. DeMaster*, No. 4:20-CV-00402, 2020 WL 6822836, at *9 (E.D. Tex. Nov. 20, 2020) (quoting *In re Genetech, Inc.*, 556 F.3d 1338, 1342 (Fed. Cir. 2009)). Generally, "[w]hen the distance between an existing venue for trial of a matter and proposed venue under § 1404(a) is more than 100 miles, the factor of convenience to witnesses increases in direct relationship to the additional distance to be traveled." *Volkswagen AG*, 371 F.3d at 204–05. This

factor, however, "primarily concerns the convenience of nonparty witnesses" and "the convenience of party witnesses is given little weight." *Seven Networks*, 2018 WL 4026760, at *9.

Google's Motion failed to identify even a single potential nonparty witness, willing or unwilling. For this reason, Google has failed to provide any evidence that would allow the Court to analyze the single most important factor in the transfer analysis. In contrast, Plaintiffs have provided declarations from a representative sample of thirteen potential nonparty witnesses, including three industry associations that represent many more potential nonparty witnesses, who are located closer to the Eastern District of Texas than the Northern District of California and are willing to travel to this district to testify at trial. (Ex. B-4 through Ex. B-13, filed under seal; Decl. of Danielle Coffey, attached as Ex. C; Decl. of Jason Kint, attached as Ex. D; Decl. of David Newell, attached as Exhibit E.) These witnesses would provide relevant and material testimony about, for example, the product markets at issue, competition and barriers to entry in those markets, Google's exclusionary conduct, the anticompetitive effects of that conduct, and Google's deceptive trade practices. Plaintiffs have further identified thirty-four witnesses who participated in the Plaintiff States' investigation and are located closer to the Eastern District of Texas. (Ex. A, ¶ 3.) As Google acknowledges, "[t]he importance of presenting live testimony in court cannot be forgotten." (Mot. at 7.)[4]

For several reasons, Google's laundry list of employees is unpersuasive. First, as potential party witnesses, these employees are afforded little weight in the transfer analysis. *See Seven*

[4] Even if Google had identified specific willing witnesses, this factor would not favor transfer because "a transfer should not be made where the only practical effect is to shift inconvenience from the moving party to the non-moving party." *Perritt v. Jenkins*, No. 4:11-CV-23, 2011 WL 3511468, at *5 (E.D. Tex. July 18, 2011); *see also TravelPass Grp., LLC v. Caesars Entm't Corp.*, No. 5:18-CV-153-RWS-CMC, 2019 WL 3806056, at *14 (E.D. Tex. May 9, 2019) ("With witnesses scattered all over America, a trial in either this district or in Illinois will be inconvenient for some and convenient for others.").

Networks, 2018 WL 4026760, at *9. Second, as with documentary evidence, a movant must provide specific evidence regarding the witnesses' location and the substance of their testimony. *See, e.g.*, *Rockstar Consortium*, 2014 WL 4748692, at *4 (finding that this factor weighed against transfer where Google provided "little, if any, evidence for the Court to work with as to what the witnesses would actually testify to[,] where the witnesses actually live[,] which, if any, of the[ ] witnesses will be called to testify and whether any of the witnesses are willing or unwilling"); *TravelPass Grp. LLC v. Caesars Entm't Corp.*, No. 5:18-CV-00153-RWS, 2019 WL 4071784, at *7 (E.D. Tex. Aug. 29, 2019) ("[W]ithout knowledge of how many witnesses are located in each location and their importance to the issues presented at trial … this factor weighed against transfer."). Google has provided no specificity for its listed employees. Even still, Google's argument fails on its own terms. The majority of Google's own witnesses—eighty-seven of the 151 listed employees—are located *closer* to the Eastern District of Texas than to the Northern District of California. (*See* Mot. Ex. A, filed under seal.)

C. The Northern District of California does not have superior availability of compulsory process for unwilling witnesses.

As with the convenience of willing witnesses, the availability of compulsory process weighs in favor of transfer *only* when the movant identifies specific nonparty witnesses and shows the relevance of their testimony and their unwillingness to travel to plaintiffs' chosen forum. *See Quest NetTech*, 2019 WL 6344267, at *5. Google provides only the vague possibility of unwilling witnesses with a reference to "witnesses from Facebook or other relevant third parties." (Mot. at 6.) Google has once again failed to meet its evidentiary burden. *See Vocalife*, 2019 WL 6345191, at *4 ("The Court gives more weight to those specifically identified witnesses and affords less weight to vague assertions that witnesses are likely located in a particular forum.").

This factor weighs heaviest when the transferee venue has "absolute subpoena power," meaning that "all relevant and material non-party witnesses reside within the subpoena power of a particular court." *Volkswagen of Am.*, 545 F.3d at 316. In light of the nationwide distribution of advertisers, publishers, competitors, and consumers harmed by Google's anticompetitive conduct, Google does not—and cannot—contend that the Northern District of California has absolute subpoena power in this case. To that end, Plaintiffs have identified seventy-nine potential third-party witnesses located within 100 miles of this Court who could be subpoenaed for trial in this Court. (Ex. A-1.) For this additional reason, the availability of compulsory process weighs against transfer. *See, e.g.*, *Perritt v. Jenkins*, No. 4:11-CV-23, 2011 WL 3511468, at *5 (E.D. Tex. July 18, 2011) (finding that this factor weighed against transfer "because transfer would merely redistribute the inconvenience of lacking the ability to subpoena non-party witnesses"); *Principal Tech. Eng'g, Inc. v. SMI Cos.*, No. 4:09-CV-316, 2009 WL 4730609, at *6 (E.D. Tex. Dec. 8, 2009) (same).

D. Transfer to the Northern District of California would not promote judicial economy.

As Google acknowledges, the "fourth private-interest factor follows from the first three." (Mot. at 8.) For this reason, Google's failed showing on the first three factors also dooms its contentions under the final factor.

Google devotes nearly a page to calculating the distance between each Plaintiff State and each of Texas's outside counsel and the Eastern District of Texas. Google posits: "If they are not inconvenienced by travel to Texas, they will not be inconvenienced by travel to the Northern District of California." (*Id.*) But the operative question is not whether the Eastern District of Texas is the most convenient forum for all of the parties and their counsel—the question is, rather, whether the Northern District of California is clearly more convenient than Plaintiffs' chosen

forum. And even if the convenience to the Plaintiff States and counsel was relevant, each of Texas's outside counsel and eight of the ten Plaintiff States are closer to the Eastern District of Texas than the Northern District of California. Moreover, each Plaintiff State seeks to enforce the same federal laws and similar state laws, so judicial economy is well served by each Plaintiff States' decision to coordinate with Texas, which led the multistate investigation, and to jointly litigate this case in this district.

Google's arguments about the private class actions pending in the Northern District of California are similarly unavailing. Indeed, transfer would hinder, not promote, judicial economy in this case. Google's argument hinges on the purported similarity between the "central allegation" of Plaintiffs' complaint—one phrase in a 116-page Complaint—and allegations in the private class actions. (Mot. at 10.) However, even with a "high degree of overlap on the issues," when cases involve different claims, parties, defenses, and damages, transfer does not serve the interests of judicial economy. *See, e.g.*, *TravelPass*, 2019 WL 3806056, at *15–16 (denying transfer to jurisdiction with pending antitrust class action involving the same underlying anticompetitive conduct).

The private class actions cited by Google involve different claims, parties, defenses, and damages than this case. Those cases were filed by individual publishers and advertisers seeking to represent putative classes of publishers and advertisers. Discovery has yet to commence and is stayed pending resolution of Google's motion to dismiss. If the private class actions survive dispositive motions, then the parties must undertake substantial discovery and motion practice related to class certification, none of which is relevant to this case. With this long road ahead, the judge presiding over the class actions has represented that trial will be set for no earlier than the

middle of 2023. (*See* Order on Motion to Stay Discovery, *In re Google Dig. Advert. Antitrust Litig.*, attached as Ex. B-1.)

In stark contrast, this case is not in its infancy. It is the product of an eighteen-month investigation by the Plaintiff States, resulting in the production of approximately three million documents and the participation of sixty-four witnesses. (Ex. A, ¶ 4.) This case was filed by sovereign states as *parens patriae* on behalf of citizens harmed by Google's anticompetitive conduct—a far broader population than implicated by the putative private classes. The Plaintiff States also allege state-law claims not at issue in the private class actions, including consumer protection and deceptive trade practices claims that are dissimilar to the class-action plaintiffs' claims. These state-law claims will necessitate different evidence, witnesses, and experts than the class claims. This case is therefore not "duplicative" of the private class actions—to the contrary, the class actions will likely duplicate much of the fact-finding efforts already completed by the Plaintiff States.

The class-action plaintiffs are also subject to various arguments and defenses not applicable to the Plaintiff States. For example, in its recently filed Motion to Dismiss in *In re Google Digital Advertising Antitrust Litigation*, Google argued that several of the plaintiffs were bound to arbitrate based on their agreements with Google. (*See* Motion to Dismiss, *In re Google Dig. Advert. Antitrust Litig.*, attached as Ex. B-2.) This, and any argument or defense based on Google's contractual relationship with the class plaintiffs, is inapplicable to the Plaintiff States.

Moreover, it is this contractual relationship that dictated the class plaintiffs' forum because Google uses its market power to force advertisers and publishers to file their cases in the Northern District of California pursuant to forum selection clauses in contracts of adhesion. (*See* Ex. C, ¶ 5.) Thus, the fact that these plaintiffs filed in the Northern District of California provides no indication

of the relative convenience of that forum. Google should not be permitted to use its market power over others to subject sovereign states to a forum selection clause under the guise of convenience.

Because "transfer can often disrupt and stall litigation, increasing costs and adding years to the time of final resolution of the dispute," and considering the procedural and substantive differences between this case and the private class actions, transfer of this case to the Northern District of California would inevitably "disserve judicial economy." *TravelPass*, 2019 WL 3806056, at *9.

II. The Public Interest Factors Weigh Against Transfer.

A. The Northern District of California has greater administrative difficulties flowing from court congestion.

In addition to the case-specific inefficiencies identified above, forum-specific realities also demonstrate that this case will be resolved more quickly and efficiently in this district than in the Northern District of California. According to the latest available data, as of September 2020, judges in this district had fewer pending cases and completed more trials annually than judges in the Northern District of California. Specifically, Eastern District of Texas judges had on average 654 pending cases and completed 14 trials annually, while Northern District of California judges had 870 pending cases and completed only 6 trials.[5] Cases in this district are also resolved more quickly. Here, the median time from filing to disposition is 8.9 months and from filing to trial is 18 months, while cases in the Northern District of California take 11.4 months and 44.5 months, respectively. Given the scope and magnitude of ongoing harm to competitors, publishers, advertisers, and consumers wreaked by Google's anticompetitive and unlawful conduct, transfer

[5] U.S. Courts, *Federal Court Management Statistics—Profiles as of Sept. 30, 2020,* available at https://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2020 (last visited Feb. 2, 2021).

to a district where it will take, on average, 2.5 times longer to try this case is more than a mere inconvenience. (*See* Ex. C, ¶¶ 6-9; Ex. D, ¶ 5; Ex. E, ¶ 5.) Thus, the assured delay in the resolution of this case in the Northern District of California weighs heavily against transfer. *See Peloton Interactive, Inc. v. Flywheel Sports, Inc.*, No. 218CV00390RWSRSP, 2019 WL 2303034, at *5 (E.D. Tex. May 30, 2019) (finding that a ten-month average trial delay weighed against transfer and noting "the importance of this factor due to the increased harm from delay of trial"); *TravelPass*, 2019 WL 4071784, at *10 ("[C]onsidering the statistics that show that a trial would occur significantly earlier if the case proceeds in the Eastern District of Texas, this factor weighs heavily against transfer.").

B. The Northern District of California does not have a superior local interest in this dispute.

In its attempt to move this case to its own backyard, Google ignores Texas's interest in having the rights of its citizens adjudicated in Texas. A sovereign State's choice of forum within the State inherently carries with it the interests of its own citizenry. Here, the advertisers, publishers, competitors, and consumers located in the Eastern District of Texas all have a keen interest in this litigation. *See Bride Ministries*, 2020 WL 6822836, at *10 ("[T]he State of Texas has an interest in ensuring its residents and businesses are protected from harm."). Indeed, with an estimated population of 4.2 million, the Eastern District of Texas accounts for approximately [redacted] online display advertising auctions run every single day in the district. (Decl. of Brooke Smith, attached as Ex. B, ¶ 3.) Plaintiffs' potential witnesses further buttress this forum's relation to the litigation. *See Bride Ministries*, 2020 WL 6822836, at *10.[6]

[6] In an attempt to minimize the interest of the nine other Plaintiff States, Google once again shifts the burden to these states to prove the convenience of their chosen forum. That is not the standard. Deference to Plaintiffs' chosen forum is reflected in Google's "elevated burden of proof" to show

California, which has not joined this lawsuit to bring claims on behalf of its citizens, does not have the same local interest in protecting its citizens. Additionally, courts in this circuit caution against overemphasizing "the interest a distant community may have in its hometown corporate pillar." *Seven Networks*, 2018 WL 4026760, at *14. And while Google's presence in the Northern District of California obviously generates some local interest in that venue, its presence in Texas implicates that same interest. *See Vocalife*, 2019 WL 6345191, at *7 ("[T]his Court has previously rejected [defendant's] argument that its presence in this District does not give rise to a local interest.").[7]

C. Texas's state law claims are governed by Texas state law.

In addition to federal antitrust claims, Texas brings claims under Texas law: the Texas Business and Commerce Code and the Texas Deceptive Trade Practices Act. (Compl., ¶¶ 308-356.) Therefore, although not addressed in Google's Motion, "this court's familiarity with Texas law weighs against transfer." *Calypso Wireless*, 2010 WL 11469012, at *5.

CONCLUSION

Because Google has not shown, and cannot show, that the Northern District of California is clearly more convenient than this district and because each of the private and public interest factors weighs against transfer, the Court should deny Google's Motion.

Dated: February 2, 2021

---

that the transferee forum is "clearly more convenient." *Seven Networks*, 2018 WL 4026760, at *2. Because Google has failed to carry that burden, the Plaintiffs States' choice must be respected.

[7]Google Data Centers, *Lone Star State,* available at https://www.google.com/about/datacenters/locations/midlothian/ (last visited Feb. 2, 2021) ("Google has been proud to call Texas home since 2007. We remain deeply committed to our Texas roots and are excited to officially break ground on our first-ever Texas data center.").

Respectfully Submitted,

/s/ Ashley Keller
Ashley Keller
Admitted Pro Hac Vice
ack@kellerlenkner.com
150 N. Riverside Plaza, Suite 4270
Chicago, Illinois 60606
(312) 741-5220
Warren Postman
wdp@kellerlenkner.com
1300 I Street, N.W., Suite 400E
Washington, D.C. 20005
(202) 749-8334
KELLER LENKNER LLC

/s/ Mark Lanier
Mark Lanier (*lead counsel*)
Texas Bar No. 11934600
Mark.Lanier@LanierLawFirm.com
Alex J. Brown
Alex.Brown@LanierLawFirm.com
Zeke DeRose III
Zeke.DeRose@LanierLawFirm.com
10940 W. Sam Houston Parkway N. Suite 100
Houston, Texas 77064
Telephone: (713) 659-5200
Facsimile: (713) 659-2204
THE LANIER LAW FIRM, P.C.

Ken Paxton,* Attorney General of Texas
Kenneth.paxton@oag.texas.gov
Brent Webster,* First Assistant Attorney General of Texas
Brent.Webster@oag.texas.gov
Grant Dorfman, Deputy First Assistant Attorney General
Grant.Dorfman@oag.texas.gov
Aaron Reitz,* Deputy Attorney General for Legal Strategy
Aaron.Reitz@oag.texas.gov

Shawn E. Cowles, Deputy Attorney General for Civil Litigation
Shawn.Cowles@oag.texas.gov
Nanette DiNunzio,* Associate Deputy Attorney General for Civil Litigation
Nanette.Dinunzio@oag.texas.gov

Christopher Hilton, Deputy Chief, General Litigation Division
Christopher.Hilton@oag.texas.gov
Matthew Bohuslav, Assistant Attorney General, General Litigation Division
Matthew.Bohuslav@oag.texas.gov
Ralph Molina, Assistant Attorney General, General Litigation Division
Ralph.Molina@oag.texas.gov

David Ashton, Assistant Attorney General
Antitrust Division
David.Ashton@oag.texas.gov
Kim Van Winkle,* Chief, Antitrust Division
Kim.VanWinkle@oag.texas.gov
Bret Fulkerson, Deputy Chief, Antitrust Division
Bret.Fulkerson@oag.texas.gov
Nicholas G. Grimmer, Assistant Attorney General, Antitrust Division
Nick.Grimmer@oag.texas.gov
Trevor Young,* Assistant Attorney General, Antitrust Division
Trevor.Young@oag.texas.gov

Eric Hudson, Assistant Attorney General, Special Litigation Division
Eric.Hudson@oag.texas.gov

Paul Singer,* Senior Counsel for Public Protection
Paul.Singer@oag.texas.org

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548 (MC059)
Austin, TX 78711-2548
(512) 936-1414
* Applications for pro hac vice forthcoming

Attorneys for Plaintiff State of Texas

On behalf of the Plaintiff States

CERTIFICATE OF SERVICE

I certify that on February 2, 2021, this document was filed electronically in compliance with Local Rule CV-5(a) and served on all counsel who have consented to electronic service, per Local Rule CV-5(a)(3)(A).

/s/ Ashley Keller
Ashley Keller

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

The State of Texas, *et. al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 4:20-CV-957-SDJ Hon. Sean D. Jordan

DECLARATION OF ERIC PETERSON

I, Eric Peterson, declare based on personal knowledge as follows:

1. I am an investigator at the Office of the Attorney General for the State of Texas ("OAG").

2. This declaration is provided in support of Plaintiffs' Opposition to Google's Motion to Transfer Venue. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently thereto.

3. The OAG began investigating Google's anticompetitive conduct in July of 2019. As part of the OAG's investigation and before the filing of this lawsuit, approximately 3 million documents were produced and 64 third-party witnesses were interviewed or submitted documents in response to a Civil Investigative Demand. 34 of these third-party witnesses have headquarters that are closer to the Eastern District of Texas than the Northern District of California.

4. Attached hereto as Exhibit A-1 is a list of publishers and advertisers that employ potential third-party witnesses in this case and are located within 100 miles of the Court. These third

parties were identified by OAG staff after evaluating public lists of publishers and large advertisers in Dallas, Fort Worth and surrounding counties and determining which entities likely sold or purchased display and/or video ads from Google. For advertisers, OAG staff researched publicly available data about the company, including its business model and web presence. For publishers, OAG staff examined the publishers' site for Google display ads, reviewed the webpage source code, and/or reviewed the site's ads.txt file if available. These publishers and advertisers likely have relevant and material information about Google's advertising business and could be subpoenaed for trial at this Court.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/1/21 (date), in Austin, TX (location).

(Signature)

Exhibit A-1

Exhibit A-1

Company	Address	Miles from Courthouse
7-Eleven	1722 Routh St., Ste. 1000, 1 Arts Plz Dallas, TX 75201	24.6 miles
A.H. Belo Corp.	1954 Commerce Street Dallas, TX 75201	26.9 miles
American Airlines	1 Skyview Drive Fort Worth, TX 76155	31.1 miles
At Home	1600 E Plano Pkwy Plano, TX 75074	17.8 miles
AT&T	208 S. Akard Street Dallas, TX 75201	25.4 miles
Atmos Energy	1800 Three Lincoln Centre, 5430 LBJ Freeway Dallas, TX 75240	14.5 miles
Baylor Scott & White Health	3500 Gaston Avenue Dallas, TX 75246	25.7 miles
Borden Milk Product	8750 N. Central Expressway Dallas, TX 75231	22.0 miles
Brinker International	3000 Olympus Blvd. Dallas, TX 75019	23.7 miles
C&S Media Inc.	101 S. Main Street Farmersville, TX 75442	31.0 miles
Caliber Home Loans	1525 S Belt Line Rd Coppell, TX 75019	19.2 miles
Cash America International	1600 West 7th Street Fort Worth, TX 76102	45.7 miles
Chili's	6820 LBJ Freeway Dallas, TX 75240	16.1 miles
Chinos Holdings	301 Commerce Street Suite 3300 Fort Worth, TX 76102	44.9 miles
CHRISTUS Health	919 Hidden Ridge Irving, TX 75038	24.8 miles
Chuck E. Cheese's	1707 Market Place Blvd, Suite 20 Irving, TX 75063	21.8 miles
Cici's	5601 Executive Dr Ste 400 Irving, TX 75038	23.0 miles
Cinemark	3900 Dallas Parkway, Suite 500 Plano, TX 75093	3.5 miles
ClubCorp	3030 Lyndon B Johnson Fwy Suite 600 Dallas, TX 75234	17.6 miles

Comerica	1717 Main Street Dallas, TX 75201	24.6 miles
Copart	14185 Dallas Parkway Dallas, TX 75254	13.0 miles
Corner Bakery Café	12700 Park Central Drive Dallas, TX 75251	17.1 miles
D.R. Horton	1341 Horton Circle Arlington, TX 76011	36 miles
Dallas Business Journal	2515 McKinney Ave. Suite 100 Dallas, TX 75201	23.9 miles
Dallas Examiner	4510 Malcolm X Blvd. Dallas, TX 75215	28.8 miles
Dallas Observer	2030 Main Street, Ste 410 Dallas, TX 75201	24.7 miles
Dave & Buster's	2481 Mañana Drive Dallas, TX 75220	21.4 miles
Dean Foods	2711 North Haskell Avenue Dallas, TX 75204	25.8 miles
Dr Pepper Snapple Group	5301 Legacy Drive Plano, TX 75024	0.6 miles
Essilor USA	13555 N Stemmons Freeway Dallas, TX 75234	18.7 miles
Exela Technologies	2701 E. Grauwyler Road Irving, TX 75061	24.9 miles
Exxon Mobil	5959 Las Colinas Boulevard Irving, TX 75039	22.2 miles
Focus Newspapers of DFW	1337 Marilyn Ave. DeSoto, TX 75115	39.1 miles
Fort Worth Business Press	3509 Hulen Street, Suite 200 Fort Worth, Texas 76107	49.6 miles
Fossil Group	901 S. Central Expy Richardson, TX 75080	19.0 miles
Frito-Lay	7701 S Legacy Dr Plano, TX 75024	3.2 miles
Funimation	1200 Lakeside Parkway Flower Mound, TX 75028	19.1 miles
Gainesville Daily Register	306 E. California Gainesville, TX 76240	62.4 miles
GameStop	625 Westport Pkwy. Grapevine, TX 76051	25.9 miles
Greyhound Bus Lines	350 North St. Paul Street Dallas, TX 75201	24.5 miles

Haggar Clothing	1507 Lyndon B. Johnson Freeway Farmers Branch, TX 75234	20.4 miles
Herald Banner	2305 King St. Greenville, TX 75401	45.3 miles
Herald Democrat	603 S. Sam Rayburn Freeway Sherman, TX 75091	45.5 miles
Horizon Health	1965 Lakepointe Dr Suite 100 Lewisville, TX 75057	13.6 miles
id Software	1500 N Greenville Ave Richardson, TX 75081	18.0 miles
J.C. Penny	6501 Legacy Dr. Plano, TX 75024	2.4 miles
Jacobs Engineering Group	1999 Bryan Street Suite 1200 Dallas, TX 75201	24.4 miles
KDFW Fox 4 News	400 N. Griffin Street Dallas, Texas 75202	24.2 miles
Kimberly-Clark	351 Phelps Drive Irving, TX 75038	24.9 miles
La Madeleine	2201 Merit Drive #900 Dallas, TX 75251	17.3 miles
La Quinta Inns & Suites	909 Hidden Rdg Ste 600 Irving, TX 75038	24.7 miles
Lennox International	2140 Lake Park Blvd Richardson, TX 75080	13.4 miles
Lone Star Steakhouse	5055 W Park Blvd Suite 500 Plano, TX 75093	4.2 miles
Mary Kay	16251 Dallas Parkway Addison, TX 75001	11.8 miles
Match.com	8750 N Central Expy Dallas, TX 75231	22.0 miles
Michaels Stores	8000 Bent Branch Dr Irving, TX 75063	23.8 miles
MoneyGram	2828 N Harwood St #15 Dallas, TX 75201	23.4 miles
Motel 6	4001 International Parkway Carrollton, TX 75007	9.1 miles
NBC DFW	4805 Amon Carter Blvd. Fort Worth, TX 76155	29.1 miles
Neiman Marcus Group	1618 Main Street Dallas, TX 75201	25.5 miles
Omni Hotels & Resorts	4001 Maple Avenue Ste. 500 Dallas, TX 75219	22.5 miles
Rambler Newspapers, Inc.	627 South Rogers Irving, TX 75060	31.2 miles

Red Mango	2811 McKinney Ave Dallas, TX 75204	24.3 miles
Sally Beauty Holdings	3001 Colorado Boulevard Denton, TX 76210	25.6 miles
Six Flags	1000 Ballpark Way Arlington, TX 76011	36.2 miles
Smoothie King	9797 Rombauer Rd #150 Coppell, TX 75019	19.1 miles
Southwest Airlines	2702 Love Field Dr Dallas, TX	23.9 miles
Star Local Media	3501 E Plano Parkway #200 Plano, TX	12.4 miles
Steward Health Care System	1900 N. Pearl Street Suite 2400 Dallas, TX 75201.	24.4 miles
Tenet Healthcare	14201 Dallas Parkway Dallas, TX 75254	12.9 miles
Texas Health Resources	612 E Lamar Blvd Arlington, TX 76011	37.2 miles
Texas Instruments	12500 TI Boulevard, South Campus Dallas, TX 75243	19.7 miles
Topgolf	8750 N. Central Expy, Suite 1200 Dallas, TX 75231	21.0 miles
Toyota Motors	6565 Headquarters Dr. Plano, TX 75024	2.8 miles
Tuesday Morning	6250 LBJ Freeway Dallas, TX 75240	15.6 miles
Van Alstyne Leader	603 S. Sam Rayburn Frwy Sherman, TX 75091	45.5 miles
WFAA-TV Channel 8	606 Young St Dallas, TX 75202	25.0 miles
Wingstop	5501 LBJ Freeway, Fifth Floor Dallas, TX 75240	14.4 miles
YUM China Holding (Pizza Hut)	7100 Corporate Drive Plano, TX 75024	2.6 miles

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

The State of Texas, *et. al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 4:20-CV-957-SDJ Hon. Sean D. Jordan

DECLARATION OF BROOKE SMITH

I, Brooke Smith, declare based on personal knowledge as follows:

1. I am an attorney at the law firm Keller Lenkner LLC, counsel for the State of Texas in this matter.

2. This declaration is provided in support of Plaintiffs' Opposition to Google's Motion to Transfer Venue. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently thereto.

3. Attached as Exhibit B-1 hereto is an Order on Motion to Stay Discovery entered on December 8, 2020 in *In re Google Digital Advertising Antitrust Litigation*, Case No. 20-cv-03556-BLF (N.D. Cal.).

4. Attached as Exhibit B-2 hereto is Defendant's Notice of Motion and Motion to Dismiss First Amended Consolidated Class Action Complaint: Memorandum of Points and Authorities In Support Thereof filed on January 15, 2021 in *In re Google Digital Advertising Antitrust Litigation*, Case No. 20-cv-03556-BLF (N.D. Cal.).

5. Attached as Exhibit B-3 hereto is a highly confidential document that was produced by Google during the Plaintiff States' investigation. I have reviewed this document, which has been filed under seal. According to this document, [redacted] Based on publicly available data, I have determined that the Eastern District of Texas has an estimated population of 4.2 million,[1] which is roughly 1.3% of the United States Population.[2] Using the number of auctions represented in Exhibit B-3 and the population of the Eastern District of Texas, I have calculated that Google runs approximately [redacted] advertising auctions in the Eastern District of Texas per day.

6. Attached as Exhibits B-4 through B-13 hereto are declarations from potential third-party witnesses in this matter. These witness declarations have been filed under seal due to the highly confidential and sensitive nature of the information contained therein. I have reviewed these declarations and believe that each of the declarants has information that is relevant and material to this matter. Each declarant is located closer to the Eastern District of Texas than the Northern District of California and is willing to testify as a fact witness in the Eastern District of Texas, Sherman Division if this case goes to trial.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 2, 2021, in Chicago, IL.

(Signature)

[1] *See* https://worldpopulationreview.com/us-counties/states/tx (stating Texas population by county); https://www.usmarshals.gov/district/tx-e/general/area htm (stating counties located in the Eastern District of Texas).
[2] *See* https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade (stating total U.S. population).

Exhibit B-1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Case No. 20-cv-03556-BLF

ORDER GRANTING MOTION TO STAY DISCOVERY

IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION

This is a class action antitrust lawsuit brought by Plaintiffs Hanson Law Firm, PC, Surefreight Global LLC d/b/a Prana Pets, and Vitor Lindo (collectively, "Plaintiffs") against Defendant Google LLC ("Google"). Before the Court is Google's Motion to Stay Discovery. Mot., ECF 41. The Court finds this matter suitable for disposition without oral argument and vacates the April 8, 2021 hearing as to this motion. For the reasons stated below, the Court GRANTS Google's motion.

I. BACKGROUND

Plaintiffs commenced this putative class action on May 27, 2020. ECF 1. The First Amended Complaint alleges that "Google leveraged its monopoly in online search and search advertising to acquire an illegal monopoly in brokering display advertising—the placement of advertisements on other companies' websites." First Amended Complaint ("FAC"), ¶ 1. The FAC alleges two causes of actions for: (1) violation of section 2 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 2, for acquiring and maintaining a monopoly; and (2) violations of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. FAC. ¶¶ 236-51.

On November 9, 2020, Google filed a motion to stay discovery pending resolution of the

motion to dismiss. *See* Mot. Plaintiffs oppose this request to the extent it bars them from obtaining a "discrete set of approximately 100,000 pages of documents that Google produced to the Texas Attorney General concerning Google's business practices in the relevant digital advertising markets." *See* Opp., ECF 43 at 1.

II. LEGAL STANDARD

"The Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending." *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011). "Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990). However, a district court does have "wide discretion in controlling discovery," *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988), and that discretion extends to staying discovery upon a showing of "good cause," *see* Fed. R. Civ. P. 26(c)(1)(A). Good cause for staying discovery may exist when the district court is "convinced that the plaintiff will be unable to state a claim for relief." *Wenger v. Monroe*, 282 F.3d 1068, 1077 (9th Cir. 2002) (quoting *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981)); *see also Tradebay*, 278 F.R.D. at 601 ("Staying discovery when a court is convinced that the plaintiff will be unable to state a claim for relief furthers the goal of efficiency for the court and the litigants."). Under Ninth Circuit law, "[a] party seeking a stay of discovery carries the heavy burden of making a 'strong showing' why discovery should be denied." Gray, 133 F.R.D. at 40 (citation omitted).

Courts in this district have applied a two-pronged test to determine whether discovery should be stayed pending resolution of a dispositive motion. *See, e.g., Singh v. Google, Inc.*, No. 16-CV-03734-BLF, 2016 WL 10807598, at *1 (N.D. Cal. Nov. 4, 2016); *Gibbs v. Carson*, No. C13-0860, 2014 WL172187, at *3 (N.D. Cal. Jan. 15, 2014); *Hamilton v. Rhoads*, No. C 11-0227 RMW (PR), 2011 WL 5085504, at *1 (N.D. Cal. Oct. 25, 2011); *Pac. Lumber Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 220 F.R.D. 349, 351 (N.D. Cal. 2003). First, "a pending motion must be potentially dispositive of the entire case, or at least dispositive on the issue at which

discovery is directed." *Pac. Lumber Co.*, 220 F.R.D. at 351. Second, "the court must determine whether the pending motion can be decided absent additional discovery." *Id.* at 352. "If the Court answers these two questions in the affirmative, a protective order may issue. However, if either prong of this test is not established, discovery proceeds." *Id.* In applying this two-factor test, the court must take a "preliminary peek" at the merits of the pending motion to assess whether a stay is warranted. *Tradebay*, 278 F.R.D. at 602

III. DISCUSSION

Google requests that discovery be stayed pending resolution of their motion to dismiss. Mot. at 1. Google argues that the first prong of the test is satisfied because their motion to dismiss is potentially dispositive of the entire case. *Id*. at 2-3. Specifically, Google argues that Plaintiffs fail to allege "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Id*. at 2 (quoting *In re Nat'l Football League's Sunday Ticket Antitrust Litig*., 933 F.3d 1136, 1159 (9th Cir. 2019)). These defects are similarly fatal to Plaintiffs UCL claim according to Google. *Id*. at 3. As to the second prong of the test, Google argues that discovery is not necessary to resolve the motion to dismiss because the motion is based solely on allegations in the Complaint. Mot. at 3. Finally, Google argues that it would be a waste of resources to allow discovery to proceed, and that Plaintiffs will not be prejudiced by a stay because discovery is not necessary for the Court to rule on the motion to dismiss. *Id*. at 3-4.

Plaintiffs, on the other hand, argue that the production they seek is narrowly tailored and will further the litigation, Opp. at 5-7, that courts in this district disfavor blanket discovery stays in these circumstances, Opp. at 7-9, and that there would be minimal burden for Google to produce the Texas Attorney General report, Opp. at 9-10. They also argue that "even assuming the pendency of a potentially dispositive motion to dismiss, the Court may allow discovery even if both prongs of the stay test are met." Opp. at 5.

At the first prong of the test, the Court takes a "preliminary peek" at the merits of the underlying motion to dismiss in considering whether a limited stay of discovery is warranted. *See In re Nexus 6p Prod. Liab. Litig.*, No. 17-CV-02185-BLF, 2017 WL 3581188, at *2 (N.D. Cal.

Aug. 18, 2017). The Court notes that since the instant motion was filed, Plaintiffs have filed the FAC and parties have stipulated that Google will file a new motion to dismiss. *See* ECF 47, 52. As such, the Court reviewed Google's November 9, 2020 motion to dismiss. ECF 41. Google's motion to dismiss presents formidable arguments, which could prove difficult for Plaintiffs to overcome, even considering that leave to amend is freely given. *See id.* (finding first prong satisfied because, even though leave to amend is freely given, defendant's motion was potentially dispositive); *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016); Fed. R. Civ. P. 15(a)(2). Plaintiffs do not appear to contest this conclusion. *See generally* Opp.

At the second prong of the test, the Court finds that Google's motion to dismiss is based solely on the allegations in the Complaint do not raise any factual issues. Thus, the Court finds that the motion to dismiss can be decided without additional discovery. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) ("Discovery is only appropriate where there are factual issues raised by a Rule 12(b) motion."); *Cellwitch, Inc. v. Tile, Inc.*, No. 4:19-CV-01315, 2019 WL 5394848, at *2 (N.D. Cal. Oct. 22, 2019) (finding second prong satisfied because "the Court only needs to look at the pleadings in order to issue a decision about its motion to dismiss"). Accordingly, Google has satisfied the second prong of the test and Plaintiffs do not argue otherwise. *See generally* Opp.

The Court rejects Plaintiffs' remaining objections. The Court is persuaded that the discovery request at issue would be unduly burdensome given it size and nature, as detailed in the papers related to this motion as well as in the parties' prior statement regarding early discovery. ECF 37. The Court also finds the smattering of cases cited by Plaintiffs unconvincing given the facts and procedural posture of this case. For example, in *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, the antitrust claims were not "novel or particularly complex" and were not brought by a putative class. No. 5:16-CV-06370-EJD, 2018 WL 1569811, at *2 (N.D. Cal. Feb. 16, 2018). Other cases, such as *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, do not grapple with the conflict at issue here and, as such, do not have persuasive weight. No. 12-CV-05847-WHO, 2013 WL 5694452, at *22 (N.D. Cal. Oct. 18, 2013) (discussing a prior stay of discovery in context of a motion to dismiss).

The Court therefore finds that under Ninth Circuit law and the two-pronged approach

applied by courts in this district, Google has satisfied its burden to obtain a limited stay of discovery. Indeed, as the Supreme Court has recognized, "staying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive." *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). While Google asks the Court to stay discovery until the Court has ruled on the forthcoming motion to dismiss, *see* ECF 47 (stipulating that Google will file a motion to dismiss the FAC by January 15, 2021), the Court finds it is more appropriate to stay discovery until Google answers the amended complaint or the motion to dismiss hearing date, whichever is earliest. At the motion to dismiss hearing, Google may orally request an extension of the stay of discovery if appropriate.

To put this limited stay in context, discovery will be stayed for several months. Although the trial date in this matter has not yet been set, the Court's schedule requires that the trial be set for no earlier than the middle of 2023, over two years from now. This limited stay of discovery, therefore, does not unduly prejudice Plaintiffs and allows all parties to commence discovery with a better understanding of which claims, if any, they must answer.

IV. CONCLUSION

For the reasons set forth above, Google's motion to stay discovery is hereby GRANTED. Discovery in this case is STAYED until Google either answers the amended complaint or the motion to dismiss hearing date, whichever is earliest**.**

IT IS SO ORDERED.

Dated: December 8, 2020

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

Exhibit B-2

John E. Schmidtlein (CA State Bar No. 163520)
Benjamin M. Greenblum (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
Email: jschmidtlein@wc.com
bgreenblum@wc.com

Attorneys for Defendants Google LLC and Alphabet Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION	Case No. 5:20-cv-03556-BLF **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT: MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: April 8, 2021 Time: 9:00am Place: Courtroom 3 Judge: Hon. Beth Labson Freeman

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 8, 2021, at 9:00 a.m., or as soon thereafter as this matter may be heard, either in Courtroom 3 of this Court, located at 280 South 1st Street, San Jose, California, or by videoconference or teleconference, Defendants Google LLC and Alphabet Inc. will hereby move the Court for an order dismissing Plaintiffs' First Amended Consolidated Class Action Complaint with prejudice.

This Motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that Plaintiffs fail to plausibly plead a facially sustainable relevant market, any anticompetitive conduct by Defendants, or any antitrust injury, each of which is fatal to Plaintiffs' Sherman Act and Unfair Competition Law claims. Two of the Plaintiffs also are bound to arbitrate all of the claims asserted in this action.

The Motion is based upon this Notice; the accompanying Memorandum of Points and Authorities; the previously submitted Declaration of Michael Kreins; any reply memorandum; the pleadings and files in this action; and such other matters as may be presented at or before the hearing.

DATED: January 15, 2021

WILLIAMS & CONNOLLY LLP

By: /s/ John E. Schmidtlein

John E. Schmidtlein (CA State Bar No. 163520)
Benjamin M. Greenblum (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
Email: jschmidtlein@wc.com
bgreenblum@wc.com

Attorneys for Defendants Google LLC and Alphabet Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants' initial motion to dismiss raised several deficiencies going to the heart of Plaintiffs' last complaint. Plaintiffs' First Amended Complaint ("FAC") does little to cure these deficiencies: rather than adding detail and definition to the existing allegations, Plaintiffs simply added breadth. Each of the grounds for dismissal thus remain.

First, Plaintiffs still fail to allege a properly defined relevant product market; their amendment doubles down on distinctions between multiple services they define as part of one antitrust market, and confirms the absurdity of excluding digital advertising on all "social media" or on Amazon from the relevant product market. *Infra* Part I.A. *Second*, Plaintiffs continue to fail to plead anticompetitive conduct; behind the labels of "leveraging," "tying," and "dominance," their FAC does not identify any actionable conduct. *Infra* Part I.B. *Third*, Plaintiffs still do not plead which services in the alleged market they themselves bought. *Infra* Part I.C.

Plaintiffs' California Unfair Competition Law ("UCL") claim still relies on the same allegations, and so fails on the same grounds. *Infra* Part II. *Finally*, and in the alternative, the claims of two named Plaintiffs who are bound to arbitrate (Surefreight Global and Mr. Lindo) should be dismissed. *Infra* Part III.

BACKGROUND

Plaintiffs filed their FAC on December 4, 2020 in response to Defendants' motion to dismiss the Consolidated Class Action Complaint ("CAC"). Plaintiffs are advertisers who allegedly "paid Google directly to broker the placement of [their] display advertisements on third-party websites," FAC ¶¶ 8–23, and seek to represent a putative class of both advertisers and publishers who used Google's "display advertising services" to place or sell online display advertisements, *id.* ¶ 225.

Plaintiffs do not allege that Google has monopolized a market for "display advertising"; rather, they allege a relevant product market of "online display advertising *services*, encompassing the overall system or process that connects online display advertisers and publishers (including

Google)." *Id.* ¶ 183.[1] That alleged market "comprises advertising services and platforms, and publishing services and platforms," *id.* ¶ 186—the former constituted of advertiser ad servers ("AAS") and demand-side platforms ("DSP") used by advertisers to "store ads, deliver them to publishers, and record transactions" and to "purchase digital advertising by bidding in auctions and to manage their bids" respectively, *id.* ¶ 56; the latter of publisher ad servers ("PAS") and supply-side platforms ("SSP") used by publishers to "accept, store, and manage ads; choose where and when ads appear, and track the effectiveness of ad campaigns" and to "run auctions, interface directly with their demand side equivalents, and optimize available inventory" respectively, *id.* ¶ 55.

Plaintiffs are advertisers who claim to have "paid Google directly to broker the placement of [their] display advertisements on third-party websites." *Id.* ¶¶ 8, 14, 19. Plaintiffs describe the purchased services as "intermediation services," *id.* ¶¶ 9, 15, 20, but do not categorize them as any one of the specific "services and platforms" identified in the body of the FAC. The only service that Plaintiffs specifically claim to have purchased is the use of Google's "AdWords," but as Plaintiffs concede, that was for *search* advertising, *id.* ¶¶ 11, 16, 21; it is therefore outside the scope of the class definition and alleged relevant product market, which are limited to *display* advertising. *Id.* ¶¶ 197, 225. As to display advertising, Plaintiffs do not specify any of Google's advertiser-facing services they purchased—such as Google Ads, a tool the FAC describes as typically used by "[s]maller advertisers," *id.* ¶ 53, or Display & Video 360, allegedly "Google's main DSP," *id.* ¶ 62.

Additionally, none of the named Plaintiffs is alleged to be an online *publisher* that sells online ad inventory space and so would use the publisher-facing services described in the FAC. Publishers nevertheless remain within the scope of the defined putative class. *Id.* ¶ 225.

Recognizing that much online display advertising—itself only one form of internet advertising, *id.* ¶ 30—is sold through parties that do not employ Google's advertising services, Plaintiffs have no choice but to seek to improperly narrow the relevant market further to only "[p]rogrammatic . . . ads" sold "on the open web"—apparently to be distinguished from "social media . . . ads" and "close-ended advertising services." *Id.* ¶¶ 189, 206. Plaintiffs thus try to exclude

[1] In this memorandum, all emphases are supplied, and citations omit internal case references.

competing display advertising services sold by "companies like Facebook, Twitter, and Snapchat[, which] primarily host social media content," and also all display advertising services sold by Amazon, which "primarily operates an online market for goods." *Id.* ¶ 204. Plaintiffs try to justify the exclusion of all of these competing alternatives on the alleged basis that Google's advertising services "access a *range* of publication options," whereas these other platforms sell only "their own ad inventory"—hence Plaintiffs' description that they are "close-ended" platforms—and so allegedly "do not compete for the same business." *Id.* ¶¶ 203–04, 206. But Plaintiffs nowhere explain why display ads on Facebook—the single most popular website hosting display advertising—or Amazon—another extraordinarily popular website with advertisers—do not compete with display ads on other websites that use Google's advertising services.

Plaintiffs also seek to carve out of the relevant product market the option available to advertisers to bypass Google altogether and "connect directly . . . to negotiate the placement of advertisements onto the publisher's supply of advertising space." *Id.* ¶ 190. They say this is "impractical and very rare," but concede it is a viable alternative for "large advertisers (*e.g.*, Nike, Barclays)," and for "publishers with premium, expensive inventory, such as major media sites like *Forbes*, the *Wall Street Journal*, or the *New York Times*." *Id.* ¶¶ 190, 192. The FAC's market definition fails to account for this alternative, nor explain why it should not reduce any estimated market shares pled. Plaintiffs thus apparently are limiting the relevant product market to display advertising services purchased from Google by "small- and medium-sized advertisers," *id.* ¶ 193, even though the putative class is not limited to such advertisers.

The categories of antitrust conduct alleged in the FAC are substantively similar to those in the CAC: "leveraging [Google's] monopoly power in the online search and other markets to coerce the purchase and use of its display advertising services (an unlawful tying arrangement), acquiring rivals, denying interoperability on several technological fronts, restricting competing firms' access to information, and rigging auctions that it controlled to its own advantage." *Id.* ¶ 238. Plaintiffs offer no material new allegations to bolster their claim that such conduct is cognizable under federal antitrust or state unfair competition law.

* * *

Two of three remaining Plaintiffs agreed to Google's Terms of Service providing for arbitration of disputes that "arise out of or relate in any way to" Google's advertising programs and services. Kreins Decl. ¶¶ 5, 10, 13, 15; Exs. A & D, § 13(A). Despite amending the complaint in the wake of the the prior motion to dismiss, Plaintiffs do not allege in the FAC that the arbitration clause is unenforceable in any respect.

LEGAL STANDARD

"A claim is facially plausible when it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 989 (N.D. Cal. 2020). On a Rule 12(b)(6) motion, "the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff," but need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.*

ARGUMENT

I. PLAINTIFFS FAIL TO ADEQUATELY PLEAD A SHERMAN ACT CLAIM.

"To plausibly plead a monopolization claim, plaintiffs must allege: (a) the possession of monopoly power in the relevant markets; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F. 3d 1136, 1159 (9th Cir. 2019). The FAC fails to plausibly allege any of the three required elements.

A. Plaintiffs Fail to Allege a Plausible "Relevant Market."

"For antitrust purposes, a market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003). A relevant market definition may not encompass products that are not "reasonably interchangeable by consumers *for the same purposes*." *Golden Gate Pharm. Servs. v. Pfizer, Inc.*, 433 F. App'x 598, 598–99 (9th Cir. 2011) (emphasis in original). Nor can it rest on a definition that is too narrow, failing to encompass "the product at issue as well as all economic substitutes for the product." *Hicks*

v. PGA Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018). The FAC's proposed relevant market runs afoul of both principles.

1. Plaintiffs Have Not Adequately Alleged Facts to Support a Relevant Market Comprising a Collection of Products and Services Used by Different Customers for Different Purposes.

Plaintiffs purport to describe a single market that, according to the FAC, is comprised of four different services and/or products: "publisher ad servers, supply-side platforms, demand-side platforms, and advertiser ad servers," which they abbreviate as PAS, SSP, DSP, and AAS. FAC ¶¶ 183, 186. According to Plaintiffs, two of the services (DSP and AAS) are used only by advertisers, whereas two of them are used only by publishers (PAS and SSP). *Id.* ¶¶ 55–56. Indeed, with respect to each of these pairings, Plaintiffs allege that the services are "distinct" from one another. *Id.* ¶ 76 (alleging distinctions between "ad server and exchange" for publishers, and "distinct" AAS and DSP services for advertisers). In light of these allegations, Plaintiffs fail to adequately plead a single relevant product market—because their purported market includes products and services that Plaintiffs and other advertisers admittedly do not purchase or use.[2]

The FAC seeks to evade these distinctions, insisting that Google "convert[ed]" such services into "a single intermediation market under its control." *Id.* ¶¶ 186, 188. The theory appears to refer to Google's alleged "bundl[ing] two distinct products together and rebrand[ing] the integrated entity as a single product." *Id.* ¶ 76. This does not save Plaintiffs' market definition, for at least three reasons. *First*, the FAC alleges only the bundling of services for advertisers *with other services for advertisers*, and the same with respect to services for publishers; Plaintiffs' "single intermediation market" descriptor does nothing to address the differences that the FAC alleges between services for advertisers and publishers. *Second*, the FAC describes various services for advertisers (or publishers) as essentially complementary of one another from the perspective of advertisers and publishers, respectively—rather than as substitutes. *See id.* ¶¶ 55–56. *Third*, precisely because

[2] Although business practices impacting the products and services offered to *publishers* surely could have important consequences for *advertisers*, that is not sufficient, absent other allegations not made here, to support the broad overarching services market pled by Plaintiffs here.

Plaintiffs continue to allege "unlawful tying" by Google between the respective pairs of services, FAC ¶¶ 67, 122, Plaintiffs have no choice but to characterize the services as "distinct." *See Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1350 (9th Cir. 1982) ("The existence of separate markets . . . is crucial to a finding of an unlawful tying arrangement.").

2. The "Online Display Advertising Services" Market Is Facially Unsustainable for Excluding Economic Substitutes.

The relevant market must include "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Hicks*, 897 F.3d at 1120. Here, the alleged market for "online display advertising services" on the "open web" improperly excludes other ways for advertisers to reach publishers without using Google's services, and also improperly excludes the many alternatives to online display advertising.

a. The Proposed Relevant Market Excludes Alternative Means of Accessing Online Display Advertising.

Plaintiffs exclude "major media sites" and "close-ended" websites. Plaintiffs concede that alternative services are used to access the display advertising inventory on the world's most popular websites: Facebook, Twitter, Snapchat, Amazon, *Forbes*, the *Wall Street Journal*, the *New York Times*, and other unspecified "major media sites." FAC ¶¶ 192, 204. But Plaintiffs fail to plausibly allege why users of the foregoing websites are "distinct for advertising purposes" from users of the "open web." *Hicks*, 897 F.3d at 1122. To exclude "close-ended" websites with "in-house display advertising systems" from the relevant market simply because "advertisements that appear on th[em] . . . only reach visitors to *those* websites," FAC ¶ 204, only begs the relevant question. Nowhere does the FAC explain why advertisers would not consider these websites (and the consumers who view ads on them) interchangeable with those websites accessible through Google's services—including Google's own "close-ended" YouTube website which Plaintiffs elsewhere admit is another popular place where advertisers seek to place display advertising. *See id.* ¶¶ 114, 116.

Plaintiffs exclude direct negotiation between advertisers and publishers. The FAC concedes that advertisers and publishers can "connect directly . . . to negotiate the placement of

advertisements," *id.* ¶ 190, but insist that it allegedly accounts for "a very low percentage of the display advertising market," and that it is not an option for "small- and medium-sized advertisers" and non-premium publishers. *Id.* ¶¶ 192–93. The former is no reason to exclude direct negotiation altogether from the relevant market, particularly in the absence of any articulation of how the allegedly "low percentage" was determined; and, as to the latter, nowhere do Plaintiffs purport to define a market (or a class definition) that includes only small- and medium-sized advertisers and non-premium publishers. *See id.* ¶ 183 (defining a market that "connects online display advertisers and publishers"). And Plaintiffs' class definition purports to include all publishers and advertisers who "used Google's display advertising services," without any regard to their size. *See id.* ¶ 225.

Plaintiffs exclude "social-media display advertising." The FAC pushes aside all such advertising without even defining the term, much less explaining why advertisers would not consider it interchangeable with the "*range* of publication options" accessible through Google's services. *Id.* ¶ 203. If there is some reason why "social-media display advertising" lacks what the FAC describes as the distinguishing feature of "online display advertising"—the ability to "target[] based on individual user data and profiles," *id.* ¶ 195—the FAC does not say what that reason is.

Plaintiffs exclude all advertising on "online market[s] for goods." The FAC declares Amazon outside the relevant market because it is an "online market for goods." *Id.* ¶ 204. But the FAC describes the alleged "online display advertising services market" as one that helps advertisers "market[] goods," *id.* ¶ 190, so that descriptor cannot by its terms preclude the interchangeability of Amazon with the display advertising services that Plaintiffs claim constitute a market unto themselves. Plaintiffs have failed to plausibly allege the exclusion of such websites from the relevant market.

* * *

The reason for all these exclusions is that Plaintiffs otherwise have no hope of pleading that Google has monopoly power in "online display advertising services." But that is no reason to lower the pleading standard. Without a cognizable relevant market, the FAC states no antitrust claim.

b. The Proposed Market Excludes Alternative Forms of Advertising.

As Plaintiffs acknowledge, advertisers are not limited to the internet; they can also promote their products through "print, television, radio, or billboard advertisements." *Id.* ¶ 195. Plaintiffs' restriction of the relevant market exclusively to "display advertising on the open web" is contrary to this reality, and to the Ninth Circuit's decision in *Hicks*.

Hicks rejected a proposed relevant market of advertising between commercial breaks during professional golf tournaments, because it excluded numerous "economic substitutes," including both digital advertising ("advertising through a search engine or social media platform that provides advertisers insights on users' online history"), as well as non-digital advertising ("airing commercials during golf-related television programs, radio broadcasts, or podcasts," or "put[ting] its logo on a magazine ad, or on a wall in golf course clubhouses, or any number of other places"). 897 F.3d at 1121. *Hicks* cited with approval the "many courts [that] have rejected antitrust claims reliant on proposed advertising markets limited to a single form of advertising." *Id.* at 1123 (citing *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999) (rejecting a relevant market of "email advertising" for excluding substitutes, including "the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflet, to name a few"); *Huron Valley Publ'g Co. v. Booth Newspapers, Inc.*, 336 F. Supp. 659, 662 (E.D. Mich. 1972) (rejecting a relevant market of "newspaper advertising" for excluding other "modes of retail advertising")); *see also Reveal Chat*, 471 F. Supp. 3d at 1000 (expressing "real concerns" over a "Social Advertising Market").

Plaintiffs' only effort to distinguish "online display advertising" from what they call "traditional forms of advertising" is that the former allegedly "reaches targeted consumers individually and . . . can be continuously updated and improved based on data showing how consumers are responding." FAC ¶ 196. But Plaintiffs also allege that such targeting comes at a higher cost: without it, "the prices for ad space trading . . . drop by half or more." *Id.* ¶ 195. Where the price of a form of advertising "would reflect any increased effectiveness compared to other forms of advertising[,] [t]his increased effectiveness would not place the advertising format in a distinct market because . . . companies can reach [potential] customers through other formats." *Hicks*, 897

F.3d at 1122. Standing alone, alleged increased effectiveness is insufficient to segregate one particular form of advertising from the others.

B. Plaintiffs Fail to Plead Actionable Anticompetitive Conduct.

To plead "the willful acquisition or maintenance of monopoly power," Plaintiffs must plead facts sufficient to show that Google engaged in anticompetitive acts; "mere possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *PNY Techs. v. SanDisk Corp.*, 2012 WL 1380271, at *10 (N.D. Cal. Apr. 20, 2012).

Plaintiffs fail to meet this burden. The FAC loosely refers to various alleged conduct stretching across different business units, over a period of many years, including conduct wholly unrelated to any product that Plaintiffs conceivably could have used. Attempting to plead their single count of Sherman Act monopolization, Plaintiffs refer to monopoly leveraging, tying, denial of interoperability, the acquisition of rivals, and restricting competitors' access to information. FAC ¶ 238. None of these allegations adequately pleads a Section 2 claim.

1. Plaintiffs Fail to Plead A Claim for "Monopoly Leveraging."

Plaintiffs allege that Google has leveraged monopolies in the search and search advertising markets to gain a monopoly in a separate display advertising market.[3] According to Plaintiffs, those purported search monopolies, along with "the data they generate about individual users[,] give Google an enormous advantage over online advertisers and publishers owing to the sheer volume of information Google acquires about consumers through its integrated panoply of products and services." *Id.* ¶ 88.

The claim fails as a matter of law: "an antitrust violation requires that there be anticompetitive conduct and leveraging by itself is not inherently anticompetitive in nature." *hiQ Labs, Inc. v. LinkedIn Corp.*, 2020 WL 5408210, at *12 (N.D. Cal. Sept. 9, 2020). "Monopoly leveraging is just one of a number of ways that a monopolist can permissibly benefit from its position. . . . This does not mean, however, that such conduct is anticompetitive. . . . The Supreme

[3] Without a properly pled relevant market, *supra* Part I.A, Plaintiffs of course have not adequately pled monopoly power.

Court has consistently held that there must be 'predatory' conduct to attain or perpetuate a monopoly for a monopolist to be liable under Section 2." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548–49 (9th Cir. 1991). The Sherman Act therefore does not apply "when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market." *Id.* at 548; *see also Unigestion Holdings, S.A. v. UPM Tech., Inc.*, 412 F. Supp. 3d 1273, 1286 (D. Or. 2019) ("A mere unfair advantage combined with the use of upstream monopoly power is not sufficient to state a claim for a monopoly or attempted monopoly of the second market under a leveraging theory."). Instead, "leveraging presupposes anticompetitive conduct." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004). Because Plaintiffs have not sufficiently alleged anticompetitive conduct in *either* the alleged leveraging markets or, as explained more fully below, in the alleged leveraged market, their leveraging claim fails. *See also Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 895 (N.D. Cal. 2011) ("Monopoly leveraging, on its own, is not proscribed under Section 2.").

In amending their complaint, Plaintiffs still do not sufficiently plead any anticompetitive conduct in the alleged search and search advertising markets. Plaintiffs merely assert, with no factual support, that "Google used exclusionary agreements, tying arrangements, and payoffs to barricade its general search monopoly such that competitors are denied vital distribution, scale and product recognition[.]" FAC ¶ 83. What these "arrangements," "payoffs" and "barricades" were with respect to search, who the "competitors" were, and what "products" were denied distribution, scale, and recognition, the FAC does not say; nor do Plaintiffs explain how that conduct impacted display advertising. The FAC elsewhere refers to the Department of Justice's suit against Google related to search, *id.* ¶ 162, but Plaintiffs have previously distinguished that suit from theirs, making plain that they "do not seek relief based on Google's monopolization of search." Ex. E [Plaintiffs' JPML Opp.] at 7. Because the FAC does not allege any anticompetitive conduct in the alleged leveraging search markets, there is no independent leveraging claim for the FAC to state. Accordingly, Plaintiffs' leveraging claim rises or falls with its remaining claims of Google's anticompetitive behavior.

2. Plaintiffs Fail To Plead a Tying Claim.

To sustain a tying claim in the Ninth Circuit, *first* a plaintiff must plead "that there exist two distinct products or services in different markets whose sales are tied together." *Paladin Assocs.*, 328 F.3d at 1159. To satisfy this first prong, a plaintiff "must define the relevant market for both the tying product and the tied product." *Packaging Sys. v. PRC-Desoto Int'l*, 268 F. Supp. 3d 1071, 1083 (C.D. Cal. 2017); *see also Sidibe v. Sutter Health*, 4 F. Supp. 3d 1160, 1174–75 (N.D. Cal. 2013) (dismissing tying claims for lack of plausible market definitions). *Second*, a plaintiff must show "that the seller possesses appreciable economic power in the tying product market sufficient to *coerce* acceptance of the tied product." *Paladin Assocs.*, 328 F.3d at 1159. It is "[e]ssential to th[is] second element of a tying claim . . . that the seller *coerced* a buyer to purchase the tied product. A plaintiff must present evidence that the defendant *went beyond persuasion* and coerced or forced its customers to buy the tied product in order to obtain the tying product." *Id.* *Third*, a plaintiff must show "that the tying arrangement affects a not insubstantial volume of commerce in the tied market." *Id.* This requires a plaintiff to "plead facts showing [a] negative impact on competition in the tied markets." *Sidibe*, 4 F. Supp. 3d at 1178; *see also Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) ("actual adverse effect on competition" necessary to plead tying claim).

Plaintiffs allege that Google uses tying to compel the purchase of display advertising. *First*, Plaintiffs allege that advertisers use Google's display advertising services in order to access Google's search data. FAC ¶¶ 104–05. *Second*, Plaintiffs allege that "[w]hen a Google Ads account is established for use in placing search advertisements, Google Ads is set up as the default account for placing both search *and* display advertisements." *Id.* ¶ 102 (emphasis in original). *Third*, Plaintiffs allege that advertisers can only purchase YouTube ad inventory by using Google's tools. *Id.* ¶ 116. *Finally*, Plaintiffs allege that Google has tied products together by "combin[ing]" formerly separate products. *Id.* ¶ 122. None of these allegations states a tying claim.

As an initial matter, for each of Plaintiffs' four tying theories, Plaintiffs have still failed to plead a relevant market for the allegedly tied product. *Supra* Section I.A. In addition to that flaw, Plaintiffs' tying allegations suffer from myriad additional flaws.

Plaintiffs' claim that advertisers use Google's display advertising services in order to access Google's search data is no more than a rehashing of their failed leveraging claim. That Google's display advertising services may help advertisers "to craft [a] more effective advertising campaign[]," FAC ¶ 104, merely confirms that advertisers choose Google because it offers a superior product, not that Google improperly coerces advertisers to use particular Google services that advertisers do not want.

Similarly, with respect to the allegation as to default settings for Google Ads accounts—there is no allegation in the FAC that advertisers are somehow precluded from changing the default setting and using Google services for only search or display advertising. Instead, the FAC posits in passing, without any factual support, that "[a]dvertisers that open a Google Ads account are required to buy Google search advertising." *Id.* ¶ 106. This allegation is conclusory in the extreme; the "require[ment]" is nowhere identified in the FAC.

With respect to Plaintiffs' YouTube-related allegations, Plaintiffs still fail to plead a relevant market for the alleged tying product; they continue to reference a "video-ad publishing market," *id.* ¶ 113, but do not plead facts to support such a market. According to Plaintiffs, "about half of all video ads *not appearing on Facebook and Amazon* appear on YouTube." *Id.* ¶ 114. The FAC remains devoid of any allegations regarding the makeup of the so-called video-ad publishing market as a whole, or any explanation of why video display ads on Facebook and Amazon are excluded from such a market. Those omissions make it impossible to evaluate whether Google (through YouTube) has enough economic power in the "video-ad publishing market" to force advertisers to buy Google advertising services in order to advertise on YouTube. *See, e.g.*, *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1031–32 (N.D. Cal. 2015) (denying tying claim when plaintiff alleged only that Android OS occupied a 51.7% share of the U.S. *smartphone* market, which excluded other handheld devices such as phones and tablets).

Finally, Plaintiffs' allegation that Google has "combined ad tech stack products that were once technically separate," FAC ¶ 122, does not state a tying claim. Specifically, Plaintiffs allege that "Google in 2018 merged DoubleClick for Publishers and AdX into a single product called

Google Ad Manager." *Id*. Standing alone, offering two products for sale together, or "rebranding" two products as one, *id.* ¶ 76, does not state a tying claim without allegations that each product cannot be purchased or used separately. Plaintiffs do not allege that Google actually *coerces* usage of the combined products together: they do not plead that either product is unavailable for purchase without the other. *See Apple iPod iTunes Antitrust Litig.*, 2009 WL 10678940, at *5 (N.D. Cal. Oct. 30, 2009) ("[I]n cases involving only a technological interrelationship, courts have adhered to the proposition that if the buyer is free to take either product by itself, there is no tying.").

3. Plaintiffs Fail to Plead a Denial of Interoperability Claim.

Plaintiffs allege that Google has failed to make its technologies sufficiently interoperable with those offered by its competitors. FAC ¶¶ 134–45. Chiefly, Plaintiffs allege that (1) Google's SSP "is designed to operate more efficiently with Google's own advertising service," *id.* ¶¶ 122, 135–39; (2) a user of Google's DoubleClick ad server has "a much harder time using . . . non-Google buying tool[s]" compared to using Google's buying tools, *id.* ¶¶ 140–41; and that (3) Google's "systems" do not work with the header bidding mechanism "designed by Google's competitors," *id.* ¶¶ 142–45. Even were these allegations moored in any way to whatever advertising or advertising services Plaintiffs themselves purchased, the allegations state no claim.

The Sherman Act imposes "no duty to aid competitors." *Trinko*, 540 U.S. at 411; *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020) ("Competitors are not required to engage in a lovefest."). Antitrust law therefore does not require Google to make its services interoperable—much less "efficiently" so—with its competitors' services. "[M]erely introducing a product that is not technologically interoperable with competing products is not violative of Section 2." *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *13 (N.D. Cal. July 20, 2010). Thus, in *LiveUniverse v. MySpace, Inc.*, the Ninth Circuit held that MySpace's redesign of its platform to prevent users from linking to another website stated no claim because MySpace has the right "freely to exercise [its] own independent discretion as to parties with whom [it] will deal." 304 F. App'x 554, 556–57 (9th Cir. 2008); *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp.*, 592 F.3d 991, 1002 (9th Cir. 2010) ("Plaintiffs' argument that Tyco could have made its monitors

compatible with the old sensors also fails. . . . [A] monopolist has no duty to help its competitors survive or expand when introducing an improved product design."). Google is under no duty to aid its competitors by ensuring that its products are interoperable with, much less work as efficiently or as easily with, its competitors' products. *See Apple iPod iTunes Antitrust Litig.*, 2009 WL 10678940, at *5 ("While Defendant did develop two products that worked optimally with one another, consumers remained free at all times to purchase one or the other without purchasing both.").

The lack of such a duty is for a good reason. "Antitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust laws." *Allied Orthopedic*, 592 F.3d at 1000. Such undesirability is evident on the face of the FAC. For example, Plaintiffs allege that Google's Accelerated Mobile Pages ("AMP") technology is incompatible with header bidding, which publishers can enable by placing on their websites certain javascript code. FAC ¶¶ 142, 144. But Plaintiffs concede that "[b]y limiting the type of programming codes that can be used on a page, AMP pages load faster than they otherwise would," *id.* ¶ 155—a critical feature of successful digital advertising. Similarly, Plaintiffs also concede that the design of Google's SSP is such that it "operate[s] *more efficiently* with Google's own advertising services." *Id.* ¶ 137. Such an effort at "product improvement by itself does not violate Section 2." *Allied Orthopedic*, 592 F.3d at 999.

4. Plaintiffs Fail to Plead a Claim Based on the Alleged Failure to Disclose Various Data and Information to Competitors.

Plaintiffs complain that Google has "maintain[ed] a culture of secrecy around its advertising services." FAC ¶ 146. Specifically, Plaintiffs take issue with Google's failure to publish certain metrics from its advertising services, including its "take rate," costs and fees, "time-stamp information on bids," and data concerning the effectiveness of digital ads. *Id.* ¶¶ 148, 150. Moreover, Plaintiffs challenge alleged actions that "prevent competitors from obtaining" customer data, including, for example, "the fees [Google] charges for each transaction." *Id.* ¶¶ 147, 154. Setting aside the lack of detail and vagueness in these allegations—which again are unmoored

to any particular antitrust injury suffered by Plaintiffs—such allegations fail to identify any conduct deemed anticompetitive under the antitrust laws.

In order to allege anticompetitive conduct based on the withholding of information, Plaintiffs must allege that Google had some *duty* to provide it. *See Reveal Chat*, 471 F. Supp. 3d at 1000–01. Generally, there is "no duty to aid competitor[s]." *Id.*; *see supra* Part I.B.3. Because Plaintiffs have made no allegations to circumvent that general rule here, any allegations concerning Google's failure to provide information to its competitors must be dismissed. *See Reveal Chat*, 471 F. Supp. 3d at 1001 (dismissing claims challenging Facebook's refusal to provide consumer data to its competitors because Facebook had no duty to deal). Plaintiffs' "transparency" allegations thus do not describe a circumstance in which "[t]he court can simply order the defendant to deal with its competitors on the same terms that it already deals with others in the existing retail market, without setting the terms of dealing." *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004). Courts are particularly hesitant to force competitors to share information with one another where, as here, the information is not "ma[d]e . . . available to the public"—for "an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations." *Id.*

Finally, to the extent that Plaintiffs claim that Google was under a duty to share the challenged information with its customers, rather than with competitors, *see* FAC ¶ 146, the allegations fail for the independent reason that they fail to plead harm to competition. *See LiveUniverse, Inc. v. MySpace, Inc.*, 2007 WL 6865852, at *13 (C.D. Cal. June 4, 2007) (dismissing refusal to deal claims because the "course of dealing" defendant was alleged to have unlawfully terminated was with its own "users," rather than with competitors). Whatever "failures of transparency" allegedly "prevent advertisers from knowing if they are wasting some of their spend," FAC ¶ 150, that is not a harm that the antitrust laws exist to prevent. *LiveUniverse*, 2007 WL 6865852, at *13.

5. Plaintiffs Fail to Plead Claims Based on Google's Acquisitions.

Plaintiffs allege that "[s]ince 2007, Google has made numerous key acquisitions in the interest of taking control of the entire ad tech stack." FAC ¶ 61. Plaintiffs list five acquisitions, the

latest of which occurred in 2014. *Id.* ¶ 62. Plaintiffs have not pled sufficient factual support for the claim that the acquisitions violated Section 2. In any event, none of the acquisitions took place within the four-year statute of limitations. 15 U.S.C. § 15b.

a. The Acquisition Claims Do Not Describe Anticompetitive Conduct.

The FAC makes specific allegations regarding only two vertical acquisitions: the 2007 acquisition of DoubleClick and the 2010 acquisition of AdMob. FAC ¶¶ 68–69. Plaintiffs acknowledge that the FTC reviewed both acquisitions and took no action against them. *Id.*

As to DoubleClick, Plaintiffs allege that, contrary to a "representation" Google allegedly made to the FTC at the time of the acquisition, in 2016 it "began merging DoubleClick web-browsing data with personal information collected through other Google services." *Id.* ¶ 68. What this has to do with Plaintiffs' antitrust claims, and in particular with the alleged monopolization of a market for display advertising services, the FAC does not say. Indeed, Plaintiffs appear to acknowledge that Google's data policies did ***not*** help Google either acquire or maintain a monopoly, as they allege that Google's already ***existing*** "monopolies enabled Google to" adopt its "data policy without risk of losing business to rivals more protective of consumer privacy." *Id.*

Regarding the AdMob acquisition, Plaintiffs complain that the FTC's "assumption that Apple would continue to build its presence in the mobile ad market," proved incorrect when Apple "abandoned its attempt to develop a competing mobile ad network" in 2016. *Id.* ¶ 69. That Apple, one of the world's largest companies, allegedly abandoned its effort to compete—untethered to any particular anticompetitive conduct by Google, and in a market ("mobile ad market") that is undefined in the FAC—clearly does not make the AdMob acquisition an antitrust violation a decade after it occurred.

Despite their amendments, then, Plaintiffs fail to sufficiently "demonstrate how" any of "the acquisitions unreasonably restricted competition." *Eastman v. Quest Diagnostics Inc.*, 724 F. App'x 556, 559 (9th Cir. 2018). Plaintiffs do not allege by how much each acquisition increased Google's share of any relevant market; nor do they make any "allegations related to the remaining competitors in the relevant market[s]." *Id.* Plaintiffs' allegations are therefore "insufficient to establish that the

merger[s] led to a greater power to exclude competitors." *Carefusion Corp. v. Medtronic, Inc.*, 2010 WL 4509821, at *8 (N.D. Cal. Nov. 1, 2010).

b. The Acquisition Claims Are Time-Barred.

Even had Plaintiffs articulated a claim as to any of the five identified acquisitions, the latest acquisition occurred in 2014, and so Plaintiffs are far out of time. *See* 15 U.S.C. § 15b ("Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred under commenced within four years after the cause of action accrued."). Plaintiffs try to plead a purported "continuing course of unlawful conduct" and "fraudulent concealment," FAC ¶¶ 217, 219–24, but come nowhere near the pleading standard for either.

To begin with, the "continuing violation doctrine does not make sense in the context of anticompetitive mergers," and does not apply here. *Reveal Chat*, 471 F. Supp. 3d at 994; *see also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599 (6th Cir. 2014) ("We have not discovered a case . . . in which the continuing violations doctrine has been applied to price increases following a merger or acquisition. Taken together, it is clear from the complete absence of supporting case law that the continuing violations does not apply to such claims."); *Complete Entm't Res. v. Live Nation Entm't, Inc.*, 2016 WL 3457177, at *1 (C.D. Cal May 11, 2016) ("find[ing] this reasoning [from *Z. Techs.*] persuasive" and dismissing antitrust claim).

If the doctrine did apply, Plaintiffs would need to allege that Google "completed an overt act during the limitations period that" was "a new and independent act" inflicting "new and accumulating injury on" Plaintiffs. *Reveal Chat*, 471 F. Supp. 3d at 994. "Merely carrying out during the limitations period a final, binding decision made prior to the limitations period does not qualify as a new overt act." *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044, 1071–72 (N.D. Cal. 2016); *see also Complete Entm't Res.*, 2016 WL 3457177, at *1. The FAC pleads no such act.

Likewise, Plaintiffs have failed to plead fraudulent concealment. To do so, Plaintiffs would have had to plead under Rule 9(b), *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868, 886 (N.D. Cal. 2015), that "(1) [Google] took affirmative acts to mislead [Plaintiffs]; (2) [Plaintiffs] did not have actual or constructive knowledge of the facts giving rise to [their] claim; and (3) [Plaintiffs] acted

diligently in trying to uncover the facts giving rise to [their] claim," *Garrison*, 159 F. Supp. 3d at 1073. Plaintiffs do not (because they cannot) deny that the acquisitions at issue were all publicly disclosed and reviewed by antitrust regulators years ago. Plaintiffs do not plead a single affirmative act to mislead, much less one specific to the acquisitions they challenge. *See Ryan*, 147 F. Supp. 3d at 886 ("Plaintiffs fail to sufficiently allege misleading conversations [with defendant]," or to "sufficiently allege affirmative acts of concealment during [legal] proceedings").

Finally, to the extent that Plaintiffs purport to seek injunctive relief, any such claim is barred by laches. *See Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 (9th Cir. 2014) ("[T]he four-year statute of limitations . . . furnishes a guideline for computation of the laches period.").

6. The FAC's Pleading Deficiencies Are Not Remedied by Allegations as to Government Investigations.

In the absence of any plausible allegation as to anticompetitive conduct, the FAC leans heavily on government investigations into various aspects of Google's businesses. *See* FAC ¶¶ 161–79. These allegations "carr[y] no weight in pleading an antitrust . . . claim." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007); *see also In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149 n.11 (N.D. Cal. 2009). The FAC also repeatedly quotes a report of the House Judiciary Committee, *see* FAC ¶¶ 158, 171, 172, 201, 205, but that report was focused on why existing antitrust law does ***not*** prohibit much of the challenged conduct.[4]

[4] *See* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf at p. 397 (urging "overriding judicial decisions that have treated unfavorably . . . refusal to deal-based theories of harm"); p. 397 ("recommend[ing] that Congress consider whether making a design change that . . . undermines competition should be a violation of Section 2, regardless of whether the design change can be justified as an improvement for consumers"); p. 403 (recommending the "[e]liminati[on] [of] court-created standards for 'antitrust injury' and 'antitrust standing'").

C. Plaintiffs Fail to Plead Antitrust Standing.

Even had Plaintiffs pled unlawful conduct, their FAC plainly fails to plausibly allege antitrust injury. Antitrust injury requires "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, . . . (4) that is of the type the antitrust laws were intended to prevent, and (5) the injured party [is] a participant in the same market as the alleged malefactors." *Reveal Chat*, 471 F. Supp. 3d at 997. "Naked assertions" of antitrust injury that are "devoid of further factual enhancement" are insufficient. *Id.* Plaintiffs' allegations fall far short of meeting this standard.

First, Plaintiffs still do not identify what particular "intermediation services" they purchased from Google, and thus fail to trace a link between the unlawful conduct and any injury to them. The FAC alleges in broad brush that Plaintiffs paid Google to "broker the placement" of "display advertisements on third-party websites." FAC ¶¶ 8–23. Plaintiffs however do not identify the particular advertiser service(s) on which they are claiming overcharges. This matters. For example, while the FAC alleges all manner of conduct related to Google's Display & Video 360—"Google's main DSP," *id.* ¶¶ 62, 76, 119, 140—that advertising service product was ***not*** used by any of the Plaintiffs, who do not describe themselves as the "enterprise advertising customers" for which the FAC says that product is "reserved." *Id.* ¶ 194. Moreover, as advertisers, Plaintiffs could not have purchased services that the FAC pleads are relevant only to publishers, i.e., the PAS and SSP "segments" of the purported relevant market, *id.* ¶ 55. *See, e.g.*, *Reveal Chat*, 471 F. Supp. 3d at 998 (dismissing for lack of allegations that Plaintiffs were "consumers" in the purported relevant market).

Second, the only form of advertiser injury alleged by the FAC is that "advertisers have paid more than they otherwise would have paid." FAC ¶ 211. But this is divorced from any particular allegedly anticompetitive practice, because again, Plaintiffs do not plead any facts to suggest that they overpaid for particular display advertising services as a result of Google's alleged monopolization of any relevant market. *See Reveal Chat*, 471 F. Supp. 3d at 997 (plaintiffs must allege an injury "flow[ing] from that which makes the conduct unlawful"). Where a plaintiff does not plead "specific facts detailing their alleged purchases, it is impossible to tell whether the

Complaint plausibly alleges that they are market participants," which itself compels dismissal. *Sahagian v. Genera Corp.*, 2009 WL 9504039, at *5 (C.D. Cal. July 6, 2009); *see also Aya Healthcare Servs. v. AMN Healthcare, Inc.*, 2017 WL 6059145, at *5 (S.D. Cal. Dec. 6, 2017) ("Plaintiffs repeatedly claim Defendants' alleged conduct resulted in higher prices and reduced output. However, Plaintiffs do not allege facts or anecdotal evidence supporting this contention.").

For these reasons, Plaintiffs have failed to plausibly allege antitrust standing.

II. PLAINTIFFS FAIL TO PLAUSIBLY PLEAD VIOLATIONS OF THE UCL.

Plaintiffs' UCL claim should be dismissed for the same reasons as their Sherman Act claim. *See Feitelson*, 80 F. Supp. 3d at 1034 (citing *City of San Jose v. Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015)); *see also Hicks*, 897 F.3d at 1124; *Novation Ventures, LLC v. J.G. Wentworth Co.*, 711 F. App'x 402, 405 (9th Cir. 2017) ("[A]ny claimed unlawfulness [or] unfairness . . . was based entirely on the alleged federal antitrust . . . wrongdoing."); *LiveUniverse, Inc.*, 304 F. App'x at 557 ("Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition."); *Sidibe*, 4 F. Supp. 3d at 1181.

That Plaintiffs allege that Google acted not only unlawfully but also unfairly does not change the result. "If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason . . . the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' towards consumers." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001). That fits the FAC to a tee. *Compare* FAC ¶ 238 (Sherman Act claim) *with id.* ¶ 247 (predicating unfairness claim on the exact same alleged conduct). Therefore, a determination that the FAC fails to allege a Sherman Act claim "necessarily implies that the conduct is not 'unfair' towards consumers." *Chavez*, 93 Cal. App. 4th at 375.

III. SUREFREIGHT GLOBAL LLC AND MR. LINDO ARE BOUND TO ARBITRATE.

Even were Plaintiffs to have stated a claim, two Plaintiffs—Surefreight Global LLC and Mr. Lindo—are bound to arbitrate such claims, and their claims therefore should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

These Plaintiffs agreed to Google's Advertising Program Terms of Service ("TOS") between 2017 and 2018, and so "agree[d] to arbitrate all disputes and claims . . . that arise out of or relate in any way to" Google's advertising programs. Kreins Decl. ¶¶ 13, 15; Exs. A & D, § 13(A). Defendants request that the Court take judicial notice of the TOS and related documents, as specified in, and authenticated by, the attached Declaration of Michael Kreins, submitted in support of Defendants' previous Motion to Dismiss. *See Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 876 (N.D. Cal. 2018) (taking judicial notice of the "TOS, the opt-out website, and the website at which advertisers accepted or declined the TOS," because, *inter alia*, "they are not the subject of reasonable dispute and their authenticity is not in question" (citing Fed. R. Evid. 201)), *aff'd*, 816 F. App'x 68 (9th Cir. 2020). These Plaintiffs' consent to the TOS means that the Court should dismiss their claims. *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014) ("[A] district court may either stay the action or dismiss it outright when . . . the court determines that all of the claims raised in the action are subject to arbitration.").

"The FAA reflects a strong policy in favor of arbitration." *Trudeau*, 349 F. Supp. 3d at 874 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). A court's role "under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013). Here, the answer to both questions is yes.

First, the arbitration agreement is neither procedurally nor substantively unconscionable. The "threshold inquiry in California's unconscionability analysis is whether the arbitration agreement is adhesive." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016). An "arbitration agreement is not adhesive if there is an opportunity to opt out of it." *Id.* This Court has previously observed that Google's TOS "make[s] it clear that advertisers can freely opt out of the Dispute Resolution Agreement provision." *Adtrader, Inc. v. Google LLC*, 2018 WL 1876950, at *4 (N.D. Cal. Apr. 19, 2018); *see also Trudeau*, 349 F. Supp. 3d at 877 ("[T]he . . . TOS provided a meaningful opportunity to opt out of the arbitration provision."). Because the agreement contains a

voluntary opt out procedure, "the arbitration provision is not procedurally unconscionable and thus not unconscionable." *Trudeau*, 349 F. Supp. 3d at 877.

Because the arbitration agreement is not procedurally unconscionable, the Court need not reach the issue whether the agreement is substantively unconscionable. *Id.* In any event, it is not "so one-sided as to shock the conscience." *Shierkatz Rllp v. Square, Inc.*, 2015 WL 9258082, at *10 (N.D. Cal. Dec. 17, 2015). First, it is bilateral. *See Garcia v. Comcast Cable Commc'ns Mgmt. LLC*, 2017 WL 1210044, at *3 (N.D. Cal. Mar. 31, 2017) (requiring "only a modicum of bilaterality"). Moreover, the TOS provides for arbitration hearings "in the county (or parish) . . . of Advertiser's principal place of business." Kreins Decl. Exs. A & D, § 13(C). Finally, the TOS requires Google to pay the arbitration fees in many instances. *See* Kreins Decl. Exs. A & D, § 13(D).

Second, the arbitration agreement plainly encompasses Plaintiffs' claims, insofar as it applies to "all disputes and claims . . . that arise out of or relate in any way" to Google's advertising programs. And the TOS extends to claims based on events that occurred before 2017: subsection 13(A)(2) expressly covers "claims that arose before Customer or Advertiser first accepted any version of these Terms containing an arbitration provision." Kreins Decl. Exs. A & D, § 13(A)(2); *Trudeau*, 349 F. Supp. 3d at 878. "On its face then, the arbitration provision applies to claims arising before the 2017 TOS." *Id.* In view of these authorities, and the filing of the initial motion to dismiss, the arbitration issue is no surprise to Plaintiffs—yet their FAC continues to stay silent on the issue, and fails to challenge the enforceability of the arbitration clause.

Plaintiffs have instead alleged, in an apparent attempt to circumvent arbitration, that they view themselves as seeking a public injunction under the UCL: "The primary purpose of such injunctive relief will be to benefit the public from the lower prices and greater innovation that will prevail in competitive digital advertising markets in the absence of Google's monopoly." FAC ¶¶ 243, 251. In view of their reference to an injunction that would "benefit the public," Plaintiffs presumably intend to seek application of the Ninth Circuit's recent holding that the California law "prohibit[ion of] the waiver of the right to pursue public injunctive relief in any forum" is not preempted by the Federal Arbitration Act. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 827 (9th Cir.

2019). Defendants will respond if and when Plaintiffs make such an argument (and preserve their rights to contend that *Blair* was wrongly decided)—the FAC itself does not do so. But it would make no difference here if *Blair* was correctly decided and applied.

As an initial matter, Plaintiffs have no right to a "public injunction" under the Sherman Act, and thus that claim at least should be dismissed in favor of arbitration. *See Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 919 (N.D. Cal. 2020) ("The public injunction is a creature of California law . . . .").

Even with respect to Plaintiffs' UCL claim, the FAC's mere recitation that Plaintiffs seek an unspecified injunction that will "primar[ily]. . . benefit the public" does not stave off arbitration. "Courts do not take relief styled as a 'public injunction' at face value." *Ajzenman v. Office of Comm'r of Baseball*, 2020 WL 6037140, at *6 (C.D. Cal. Sept. 14, 2020).

First, Plaintiffs have not even pled what they are seeking to enjoin; the FAC says simply that Plaintiffs seek "injunctive relief to restore competition in the relevant market and its constituent submarkets." FAC p.51. What exactly Plaintiffs are asking the Court to use its equitable powers to order Defendants to do is identified nowhere in the FAC, which simply describes the "form and content of injunctive relief" as a "question" common to the putative class. *Id.* ¶ 231(d). This alone warrants dismissal of any claim for a public injunction. *See, e.g.*, *Snyder v. Nationstar Mortg. LLC*, 2015 WL 7075622, at *11 (N.D. Cal. Nov. 13, 2015) (dismissing UCL claim because "Plaintiff fail[ed] to state what particular unfair business practices she seeks to enjoin," and thus "request for injunctive relief [was] not sufficiently stated") (citing *O'Connor v. Wells Fargo, N.A.*, 2014 WL 4802994, at *8 (N.D. Cal. Sept. 26, 2014) ("Plaintiff's request for injunctive relief is insufficiently stated; Plaintiff does not specify what the 'threatened conduct' he seeks to enjoin is . . . .")); *Parreno v. Berryessa Union Sch. Dist.*, 2010 WL 532376, at *1 (N.D. Cal. Feb. 8, 2010) ("Parreno's claim for injunctive relief is inadequately pleaded because it fails to specify the relief she seeks[.]"). Without any actual pleading of a request for a particular form of injunction, there is no right to a public injunction that could preclude application of the arbitration clause. *See, e.g.*, *Kramer v. Enter. Holdings, Inc.*, 829 F. App'x 259, 260 (9th Cir. 2020) (enforcing arbitration clause where "[t]he

complaint is specific in requesting damages for him and his proposed class, but it only asks in general terms 'for any and all injunctive relief the Court deems appropriate'").

Second, whatever injunction Plaintiffs intend to pursue, the FAC seeks to benefit only the class of advertisers and publishers that they seek to represent, *i.e.*, "the class of people who stand to benefit from any injunctive relief are necessarily limited only to those individuals who have entered into contractual agreements with [Google], not the public at large." *Johnson v. JP Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *7 (C.D. Cal. Sept. 18, 2018). *See also, e.g.*, *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 955 (2017) ("Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief."); *Rogers*, 452 F. Supp. 3d at 920–21 ("[T]he plaintiffs' decision to label their claim as one for a 'public injunction' seems dubious because the proposed remedy runs directly to the plaintiffs and similarly situated [private parties], with the public benefiting only collaterally."); *Sponheim v. Citibank, N.A.*, 2019 WL 2498938, at *5 (C.D. Cal. June 10, 2019) (rejecting claim of public injunction where plaintiffs sought relief on behalf of only those who "held Citibank checking accounts"); *Wright v. Sirius XM Radio Inc.*, 2017 WL 4676580, at *9 (C.D. Cal. June 1, 2017) (no public injunction because relief extended only to lifetime Sirius XM subscribers who had subscriptions canceled).

CONCLUSION

The FAC should be dismissed. As this is the third attempt by Plaintiffs to plead cognizable claims, *see* ECF 1 & 35, the dismissal should be with prejudice.

DATED: January 15, 2021

WILLIAMS & CONNOLLY LLP

By: /s/ John E. Schmidtlein
John E. Schmidtlein (CA State Bar No. 163520)
Benjamin M. Greenblum (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

Telephone: (202) 434-5000
Facsimile: (202) 434-5029
Email: jschmidtlein@wc.com
bgreenblum@wc.com

Attorneys for Defendants Google LLC and Alphabet Inc.

FILED UNDER SEAL

Exhibit B-3

FILED UNDER SEAL

Exhibit B-4

FILED UNDER SEAL

Exhibit B-5

FILED UNDER SEAL

Exhibit B-6

FILED UNDER SEAL

Exhibit B-7

FILED UNDER SEAL

Exhibit B-8

FILED UNDER SEAL

Exhibit B-9

FILED UNDER SEAL

Exhibit B-10

FILED UNDER SEAL

Exhibit B-11

FILED UNDER SEAL

Exhibit B-12

FILED UNDER SEAL

Exhibit B-13

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

THE STATE OF TEXAS, et al., Plaintiffs, vs. GOOGLE LLC, Defendant.	Civil Action No. 4:20-cv-957

DECLARATION OF DANIELLE COFFEY

I, Danielle Coffey, declare as follows:

1. My name is Danielle Coffey. I am Senior Vice President and General Counsel of News Media Alliance. I have personal knowledge of the matters discussed in this declaration.

2. News Media Alliance is a nonprofit organization representing nearly 2,000 news organizations in the United States. Our members include both large and small news media organizations, including digital and multiplatform products.

3. As a general matter, News Media Alliance members sell most of their online advertising inventory through third-party advertising technology and tools. As detailed by the State of Texas, Google operates numerous allegedly dominant advertising technology products, and thus, the vast majority of our 2,000 members and their employees have relevant knowledge regarding the issues presented in this case, and some may be called as witnesses at trial.

4. Plano, Texas is a convenient forum for News Media Alliance. For the majority of News Media Alliance members, Texas is substantially more convenient than the Northern District of California. News Media Alliance's members are spread throughout the United States, and Texas is centrally located. If the case were moved to the Northern District of California, many members would have to travel up to six hours by air and endure several more hours of heavy traffic through the Bay Area. Jesse Gary, Bay Area Commuters Spend Over 100 Hours Stuck in Traffic a Year,

KTUV (Aug. 22, 2019), https://www.ktvu.com/news/bay-area-commuters-spend-over-100-hours-stuck-in-traffic-a-year. Plano, Texas is located conveniently. It is 21.5 miles from the Dallas/Fort Worth International Airport, a hub with many available flights and comparatively light traffic.

5. Moving the case to California would also, in effect, cause state enforcers to adhere to Google's adhesive forum selection clauses. Private plaintiffs (including many of our members) must sue Google in the Northern District of California because our members are subject to non-negotiable forum selection clauses. The public enforcement action brought by Texas is not subject to such an agreement, nor should it be prejudiced by the contractual agreements that have forced private plaintiffs to file private claims in the Northern District of California, which is home to Google's corporate headquarters.

6. The Eastern District of Texas is also a better forum than the Northern District of California in terms of its ability to hear the claims in this case most promptly, which is critical due to the precarious position of the news media industry. According to the most recent report from the National Judicial Center, this district has 654 pending cases per judgeship, compared to the Northern District of California's 870 pending cases per judgeship. This district has a lower median time to trial in civil cases (18.0 months) than the Northern District of California (44.5 months).

7. Additional delays in this case would cause significant harm to news publishers. Advertising is the primary source of revenue by which news publishers maintain their operations. However, ad revenues have plummeted dramatically over the last two decades; between 2005 and 2018, news organizations saw their ad revenue fall by 70 percent. S&P Global, Newspapers Fighting for Survival as COVID-19 Ravages Ad Spending (Apr. 27, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/newspapers-fighting-for-survival-as-covid-19-ravages-ad-spending-58306183. During

that same period, Google's ad revenue increased from approximately $6 billion to $116 billion, and Google's market capitalization increased from approximately $100 billion to $1 trillion.

8. Due to the loss of online advertising revenue, a substantial portion of news publishers are suffering. Many have been forced to lay off significant portions of their workforce, leading to massive job losses across the news industry. This reality has only grown more challenging under COVID-19 and its attendant economic impact. See, e.g., Pew Rsch. Ctr., U.S. Newspapers Have Shed Half of their Newsroom Employees Since 2008 (Apr. 20, 2020), https://www.pewresearch.org/fact-tank/2020/04/20/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/; S&P Global, Newspapers Fighting for Survival as COVID-19 Ravages Ad Spending (Apr. 27, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/newspapers-fighting-for-survival-as-covid-19-ravages-ad-spending-58306.

9. Local news organizations provide unique benefits and have been the hardest hit by the loss of ad revenue. These institutions provide major value to their communities, providing coverage of distinctly local information, from corruption by local officials, to catastrophic weather events, to COVID-19 vaccine distribution. Many local news organizations are cutting budgets, leaving communities with insufficient news coverage. Some communities have become "news deserts," and have no local coverage at all. Further damage to the local news industry will have a deleterious effect on local communities and on society in general.

10. Potential monopolization and illicit agreements in the digital advertising industry directly affect the members of News Media Alliance. Allegations contained in the complaint suggest that news publishers have already suffered harms from the actions at issue in this case.

11. The procedural delay following a transfer of this case to the Northern District of California would allow Google to cause further injury to our industry that cannot be remedied.

I declare that the foregoing is true and correct to the best of my knowledge.

Executed in Arlington, Virginia, this 1st day of February 2021.

Danielle Coffey

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

The State of Texas, *et. al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 4:20-CV-957-SDJ Hon. Sean D. Jordan

DECLARATION OF Jason Kint

I, Jason Kint, declare based on personal knowledge as follows:

1. I reside in Arlington, Virginia.

2. I am employed by Digital Content Next (DCN), which has its corporate headquarters in New York, NY. I spend a significant percentage of my time working in New York, District of Columbia, Virginia, London and the European Union.

3. My job title is Chief Executive Officer of Digital Content Next (DCN). My responsibilities include analyzing research, corresponding with digital publishers, gathering insights, developing public policy positions and advising on industry changes to positively impact the industry at large to advance the future of trusted news and entertainment. DCN is positioned as the only association exclusively focused on the issues of digital content companies and represents many of the most trusted news and entertainment companies including brands who have born out of the magazine, newspaper, television and native digital industries.

4. In my role, I spend time attending events mostly in New York, Washington, DC and Europe. Our team helps to design benchmarks and best practice studies in areas related to Google's

advertising technology services and extended businesses. Additionally, I spent nearly twenty years up until late 2013 as a senior executive with responsibility for major national publisher brands including their editorial, advertising, marketing, subscription, and technology services including advertising technologies prior to and after Google's numerous ad tech acquisitions.

5. I am willing to testify as a fact witness at trial in the Eastern District of Texas, Sherman Division. Traveling to the Eastern District of Texas is more convenient for me than traveling to the Northern District of California. In fact, I have traveled to Texas more frequently in my role than I have to Northern California. Additionally, I am confident that for the majority of our DCN members, if they are willing to testify, they will find travel to Texas to be easier than Northern California. For this reason, a majority of our events and our meetings of our Board of Directors take place in New York City. Finally, we also prefer the case be heard in the Eastern District of Texas as the court's calendar appears able to accommodate this case more quickly than the Northern District of California. Given the important issues at stake and the current challenges facing the publishing industry, especially local news organizations, it is important that this case proceed as soon as possible.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28, 2021 (date), in Arlington, VA (location).

(Signature)

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

THE STATE OF TEXAS, et al., Plaintiffs, v. GOOGLE LLC, Defendant.	Civil Action No. 4:20-cv-957

DECLARATION OF DAVID NEWELL

I, David Newell, declare as follows:

1. My name is David Newell. I am the Chief Executive of the News Media Association. I have personal knowledge of the matters discussed in this declaration.

2. The News Media Association is the voice of national, regional and local news media organisations in the UK. The NMA exists to promote the interests of news media publishers to Government, regulatory authorities, industry bodies and other organisations whose work affects the industry.

3. As a general matter, News Media Association members sell most of their online advertising inventory through Google's ad platform; members' employees therefore are knowledgeable about the issues presented in this lawsuit.

4. Plano, Texas is a convenient forum for News Media Association members to travel to if they are called to testify as witnesses because Plano, Texas is about twenty-one miles from the Dallas/Forth Worth International Airport.

5. News Media Association members are under financial pressure and have an interest in the prompt resolution of the pending litigation. This forum advances the interests of News Media Association members because of its much lower average time to disposition and trial than the Northern District of California.

I declare that the foregoing is true and correct to the best of my knowledge.

Executed in London, UK, this 2nd day of February 2021.

David Newell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

The State of Texas, *et. al.*, Plaintiffs, v. Google LLC, Defendant.	Case No. 4:20-CV-957-SDJ Hon. Sean D. Jordan

ORDER DENYING MOTION TO TRANSFER VENUE

Having considered Defendant Google LLC's Motion to Transfer Venue Pursuant to 28 U.S.C. §1404(a), the Court being fully advised in the premises, the Court finds that the Motion should be DENIED.