IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03010-APM HON. AMIT P. MEHTA [redacted]
STATE OF COLORADO, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03715-APM HON. AMIT P. MEHTA [redacted]

PLAINTIFFS' OPPOSITION TO NON-PARTY PETITIONER APPLE INC.'S MOTION TO QUASH TRIAL SUBPOENAS

Plaintiffs in the above-captioned cases ("Plaintiffs") respectfully request that the Court deny Apple's motion to quash the trial subpoenas served on Eduardo Cue, John Giannandrea, and Adrian Perica. *See* Non-Party Petitioner Apple Inc.'s Motion to Quash Trial Subpoenas, ECF No. 643 ("Motion"). Apple's motion finds no support in case law, disregards a well-established preference for live trial testimony, and ignores the Court's instruction at the August 11, 2023 hearing.

BACKGROUND

This case centers on the distribution agreements by which Google shares search advertising revenue with partners in exchange for exclusive access to search defaults. Apple is

chief among Google's distribution partners. In 2020, [redacted] Google's United States search revenue share payments—totaling [redacted]—went to Apple pursuant to the parties' Information Services Agreement (ISA). With a large and loyal customer base and a walled-garden operating system, Apple's distribution platform is unrivaled in terms of its crucial scale and importance.

As the Court is aware and Google implicitly acknowledges, Google's conduct with respect to the Apple ISA, and that agreement's impact on search competition, will be a central issue at trial. *See, e.g.*, Tr. of Apr. 13, 2023 Hr'g on Summ. J. at 25, 27–28 (questioning Google's counsel about whether Apple's defaults were open to competition on the merits); *see generally* Def.'s Statement of Mat. Facts in Supp. of Summ. J., ECF No. 423 (dedicating 94 paragraphs to Google's agreements with Apple compared to 78 for Mozilla and 40 for Android). There's no surprise here; Apple has had a central role in this case since Plaintiffs filed their initial complaint almost three years ago. *See* Complaint, ECF No. 1, at ¶ 121 ("The current version of the Google-Apple agreement substantially forecloses Google's search rivals from an important distribution channel for a significant, multi-year term."); *see also* Tr. of Apr. 14, 2022 Hr'g. at 14 (rejecting Apple's request to shorten Rule 30(b)(6) deposition time "given the importance" of the Apple-Google relationship).

Messrs. Cue and Giannandrea will provide non-duplicative testimony based on personal knowledge that is central to the issues being tried. As the executive responsible for negotiating the ISA and managing the Google relationship, Mr. Cue will address the exact issues the Court has indicated it is interested in hearing about—namely, the meaning of the ISA's provisions and their impact on search competition. *See* Tr. of Aug. 11, 2023 Hr'g ("Aug. 11 Hr'g Tr."), at 43 ("It's really what the provision means and its consequences that are the guts of the case, not what

the text of the provision is."). He is also expected to testify about his engagement with Google's competitors, Microsoft and DuckDuckGo. Mr. Giannandrea was *Google's* leading search executive until 2018 when he joined Apple. Among other relevant projects at Apple, Mr. Giannandrea has [redacted] of Google and competing search engines. Mr. Giannandrea's testimony is expected to cover these [redacted] as well as his work at Google, the importance of scale for search engines, and his guidance of Apple's search efforts. Apple has not identified scheduling conflicts for either witness.

Apple additionally seeks to quash the trial subpoena to Mr. Perica, whose deposition testimony has been designated. The decision to designate Mr. Perica's testimony reflects the care with which Plaintiffs have chosen their live witnesses. As Apple acknowledges, Plaintiffs have repeatedly informed Apple that there is no present intention to call Mr. Perica at trial. Motion at 4 n.6. Apple also acknowledges that the Court, during a hearing on August 11, 2023, deferred ruling on subpoenas to witnesses, like Mr. Perica, who presumptively would not be called to trial and were being subpoenaed only in the event trial proceeds unexpectedly. *Id.*; *see also* Aug. 11 Hr'g. Tr. at 7–8.

Plaintiffs would be prejudiced if denied the opportunity to call and examine employees from Google's largest distribution partner. Given Apple's central role in the case, the Court should deny Apple's motion to quash subpoenas for three of its executives.

ARGUMENT

"The quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances." *U.S. Dep't of Treasury v. Pension Benefit Guaranty Corp.*, 301 F.R.D. 20, 25 (D.D.C. 2014) (quotation omitted). As the movant seeking relief, Apple bears the burden of demonstrating that a subpoena should be quashed. *Id.* Apple falls well short of this high bar. Neither the considerations governing quashing a subpoena nor the well-established

preference for live trial testimony support Apple's request. Moreover, Apple's motion parades out-of-context snippets of cases to demand action that is truly without precedent. The Court should reject Apple's request. Finally, quashing Mr. Perica's trial subpoena is unnecessary in light of the Court's August 11 instruction deferring ruling on subpoenas to witnesses who presumptively will not be called to trial. Aug. 11 Hr'g. Tr. at 7–8.

I. Apple's Position Is Unsupported By Law

The Court should reject Apple's generalized claims of inconvenience as failing to establish the "extraordinary circumstances" required to support a motion to quash based on undue burden. *See Pension Benefit Guaranty Corp.*, 301 F.R.D. at 25. Certainly, Apple's motion fails to distinguish Messrs. Cue and Giannandrea from other non-party witnesses whose testimony will be presented at trial, many of whom are also senior executives located on the West Coast.

Two principles guide a court's evaluation of whether a trial subpoena imposes undue burden. *See BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 358 (D.D.C. 2018). On one hand, a court should be "generally sensitive to the costs imposed on third parties," while, on the other, a court should weigh (1) whether the evidence is "unreasonably cumulative or duplicative;" (2) whether the evidence can be obtained in a "more convenient, less burdensome, or less expensive" way; and (3) whether the evidence is "proportional to the needs of the case." *Id.*[1]

[1] The proportionality consideration accounts for six concerns: the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the information in resolving the issues, and whether the burden or expense of the information outweighs the likely benefit. *BuzzFeed*, 318 F. Supp. 3d at 358. But Apple's motion addresses only two of these. *See* Motion at 9 (mentioning only the parties' relative access to relevant information and whether the burden outweighs the likely benefit).

When these factors are applied to Apple's motion, the company's burden claims dissolve. In fact, Apple relies primarily on *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Project Veritas Action Fund*, No. CV 17-1047, 2022 WL 3655277 (D.D.C. Aug. 25, 2022) (cited by Motion at 8–9), a case that actually helps illustrate why the subpoenas to Messrs. Cue and Giannandrea are proportional to the needs of the case. The petitioner in *AFL-CIO* was a non-party labor union that had terminated contracts with the plaintiff, who was required to prove at trial that the union had terminated the contracts specifically because of the defendant's conduct. 2022 WL 3655277, at *1–2. At issue were trial subpoenas to the union's chief of staff and elected president. *Id.* at *1, *3. The court denied the union's motion to quash the chief of staff's subpoena because he had "direct knowledge of a major issue at trial." *Id.* at *5. Thus, the chief of staff's testimony could prove "crucial" to the factfinder's determination. *Id.* at *6; *see also BuzzFeed*, 318 F. Supp. 3d at 360 (rejecting the government's opposition to providing testimony that would be "clearly important" to—if not "dispositive of"—a central issue in the case) (cleaned up). By contrast, the *AFL-CIO* court quashed the union president's subpoena because "the evidentiary interest in [the president's] testimony [was], at best, negligible" and only covered ground addressed by the other union witnesses. 2022 WL 3655277, at *6–7 (cleaned up); *see also id.* at *7 (finding "no support for the position that [the president] will have anything important to say at trial").

Because the Apple witnesses have information crucial to the case, and because their testimony is non duplicative, *AFL-CIO* does not support Apple's motion. Mr. Cue repeatedly led Apple's negotiations for the operative ISA. He will testify about those negotiations as well as the ISA's competitive effects. Mr. Cue will also testify about his discussions with Google's competitors—Microsoft and DuckDuckGo—who sought [redacted]

Mr. Giannandrea, Google's former head of search, will testify about scale, search engine quality, and Apple's search capability. Thus, this testimony will address central issues in this case.

Conversely, none of the expected testimony is duplicative. Apple's motion summarizes topics addressed by Messrs. Cue and Giannandrea: of eight listed topics, only one reflects overlap between the executives. *See* Motion at 6–7. Further, their testimony will also not be cumulative or duplicative of their depositions. Apple's motion acknowledges that only a fraction of the documents on the parties' exhibit lists were used during depositions. *See* Motion at 7. Thus, *AFL-CIO* refutes rather than supports Apple's motion because these witnesses' likely testimony (1) will address important issues in this case, (2) is important to resolving those issues, (3) will provide benefits that outweigh the necessary burdens, and (4) will not be unreasonably cumulative or duplicative.

Apple's claim of undue burden is not strengthened by the other *BuzzFeed* considerations. Although Apple is a non-party and travel involves some burden and inconvenience, there is no *undue* burden. Many of the witnesses being called to trial are senior executives of their respective companies, and most are located on the West Coast. In these respects, witnesses from Apple—the richest company in the world and Google's chief search distribution partner—are situated no differently than other non-party witnesses. Also, like Messrs. Cue and Giannandrea, nearly every non-party witness produced documents and sat for a deposition. Apple's generalized burden claims are light—and certainly not undue—compared to the heavy import of its witnesses' testimony. If either Mr. Cue or Mr. Giannandrea do not need to appear at trial, it is difficult to imagine a witness who would not also move to quash their subpoena. The existence of civil discovery cannot be a basis for denying Plaintiffs a trial with live witnesses.

Other cases cited by Apple do nothing to advance its position. For example, Apple cites *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 685 (N.D. Cal. 2006), to argue that a court should quash a subpoena unless the "information is 'essential to a judicial determination of [a party's] case.'" Motion at 11. For the reasons explained, Messrs. Cue's and Giannandrea's testimony is essential. *Gonzales* also confirms that the availability of information from other sources is not a sufficient reason to quash a subpoena; this fully undermines Apple's argument that deposition testimony obviates the need for trial testimony. *Compare* Motion at 11 (arguing to quash subpoenas because deposition testimony is available for designation), *with Gonzales*, 234 F.R.D. at 685–86 (rejecting arguments that subpoena should be quashed because "information sought . . . is readily available" from other sources and that "the Government already has sufficient information").

Apple's remaining citations are also readily distinguishable because they each turned on scheduling and logistical challenges. For example, Apple's reliance on *Reddick v. Dillard Store Services, Inc.*, No. CIV 08-844-CJP, 2010 WL 3025205 (S.D. Ill. Aug. 2, 2010), is inapposite for two reasons. First, the *Reddick* court rejected the plaintiff's attempt to circumvent the 100-mile limit on trial subpoenas prescribed by the Federal Rules of Civil Procedure. *Id.* at *1. Here, however, 15 U.S.C. § 23 allows nationwide service with the court's permission, which was granted in the Court's case management order. Amended Scheduling and Case Management Order, ECF No. 108-1, at ¶ 29 ("in view of the geographic dispersion of potential witnesses in this action outside this District, the parties are permitted, under 15 U.S.C. § 23, to issue nationwide . . . trial subpoenas from this Court"); *see also United States v. U.S. Sugar Corp.*, No. C.A. 21-1644 (MN), 2022 WL 354228, at *6–7 (D. Del. Jan. 11, 2022) (recognizing nationwide service authority in antitrust cases in context of motion to transfer venue). Second,

the *Reddick* court quashed the trial subpoena because, by virtue of having listed the at-issue witness in the final pretrial order as being offered through videotaped deposition, the plaintiff's later decision to subpoena a trial appearance "derogat[ed] . . . the agreement represented in the final pretrial order." *Reddick*, 2010 WL 3025205, at *1. Here, Plaintiffs have consistently listed Messrs. Cue and Giannandrea as witnesses expected to be called to trial and informed Apple of this probability more than four months ago. *See* Pls. Ex. A (emailing counsel for Apple on April 12, 2023, and June 22, 2023, about likely calling Messrs. Cue and Giannandrea to testify at trial).

Finally, Apple has not identified any scheduling conflicts for either Mr. Cue or Mr. Giannandrea. Accordingly, Apple's reliance on cases where such conflicts existed are inapposite.[2]

Apple makes an "extraordinary" request that commands a heavy burden. But Apple fails to show that the governing *BuzzFeed* considerations support its request. Instead, Apple cites cases that only underscore why the Court should deny Apple's motion.

II. Apple Ignores The Well-Established Preference For Live Trial Testimony

The preference for live testimony is "well-established" and supports denying Apple's motion. *See Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co.*, 262 F.R.D. 293, 301 (S.D.N.Y. 2009) (denying motion to quash trial subpoena for undue burden because the availability of videotaped deposition testimony was insufficient to overcome preference for live trial testimony even where trial appearance required travel from London to New York City). Live testimony

[2] *See AFL-CIO*, 2022 WL 3655277, at *6 (quashing subpoena for union president because he was scheduled to chair one of the union's most important meetings during two days of the one-week trial); *Official Committee of Unsecured Creditors v. CalPERS Corporate Partners*. No. Civ. 1:18-cv-68-NT, 2021 WL 3081880, at *1 (D. Me. July 20, 2021) (allowing deposition designation because the non-party witness was likely obligated to travel to Canada for business during trial).

allows the factfinder "to observe the demeanor of the witness" and, of particular import in a bench trial, "question the witness." *See Kolb v. County of Suffolk*, 109 F.R.D. 125, 127 (E.D.N.Y. 1985) (regarding admissibility of designated deposition testimony); *see also* Fed. R. Civ. P. 614(b). As the Supreme Court has explained, findings of fact based on witness credibility command "even greater deference" because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

By contrast, "testimony by deposition . . . should be used as a substitute only under very limited circumstances." *Kolb*, 109 F.R.D. at 127; *see also Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) ("The deposition has always been, and still is, treated as a substitute, a second-best") (Learned Hand, J.). Even the rule allowing deposition designations underscores the need for "due regard to the importance of live testimony in open court." Fed. R. Civ. P. 32(a)(4)(E); *see also* Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.")

A court's ability to make these live observations may be particularly important where a witness—here, Mr. Cue—was previously found to have offered testimony at trial that was "not credible" and inconsistent with his sworn deposition. *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 661 n.19, 663 nn.22, 24, 666 n.28, 672 n.38, 678 n.47, 681 n.52 (S.D.N.Y. 2013), *aff'd,* 791 F.3d 290, 304 (2d Cir. 2015). Live credibility assessments may also be useful where, like here, industry-witness testimony may clash with that of experts. *See, e.g.*, *FTC v.*

Sysco Corp., 113 F. Supp. 3d 1, 37 (D.D.C. 2015) (crediting the trial testimony of industry leaders that controverted the conclusion of economics expert).

Apple ultimately seeks to deprive the Court of valuable trial evidence. By asserting that deposition designations are an equal substitute for live trial testimony, Apple ignores the fact that discovery is not trial; discovery *facilitates* trial. Moreover, the Court denied Google's summary judgment motion—in essence, trial by discovery—precisely because there were triable issues, including those relating to Apple. *See, e.g.*, Memorandum Opinion, ECF No. 626, at 36–38 (deciding that Google's "competition for the contract" defense, which included Apple's ISA, "cannot be resolved on summary judgment" and is better reserved "until trial").

The Court should conclude that Apple's testimony is properly presented through live witnesses.

III. Apple Chooses To Disregard The Court's August 11 Instructions

Finally, Apple's motion seeks to rehash two issues that the Court resolved during the August 11, 2023 hearing. First, Apple's purported concerns about disclosure of confidential information are not an appropriate basis to quash a trial subpoena, and Apple cites no case law supporting their argument. Motion at 10–11. The Court, moreover, has already issued guidance on confidentiality and ordered a mechanism to ensure that actually confidential information will be protected from disclosure. *See* Aug. 11 Hr'g Tr., at 13–22; Aug. 14, 2023 Order, ECF No. 640. Plaintiffs have complied, and will continue to comply, with the Court's orders, and Apple identifies no specific concern that cannot be protected by the Court's existing process and supervision.

During the same hearing, the Court expressly deferred ruling on subpoenas to witnesses who Plaintiffs do not presently intend to call to trial. Aug. 11 Hr'g Tr. at 7–8. Apple

acknowledges this instruction and also admits that there is no dispute that it applies to Mr. Perica. Motion at 4 n.6. Accordingly, for the reasons the Court has already explained, Apple's motion to quash Mr. Perica's trial subpoena should be denied.

CONCLUSION

For the above reasons, Apple's Motion to Quash Trial Subpoenas should be denied in full.

Dated: August 25, 2023

Respectfully submitted,

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