Summary and Commentary on USA vs Google Proposed Final Judgment

Key elements:

Only a comprehensive set of remedies can "thaw the ecosystem and finally reverse years of anticompetitive effects". Proposed Final Judgement (PFJ) requires Google:

a) to provide access to search index and disclose data *sufficient to level the scale-based playing field it has illegally slanted*, including, at the outset, licensing syndicated search results that provide potential competitors a chance to offer greater innovation and more effective competition in search text and search advertising;
b) to stop third-party payments that exclude rivals by advantaging Google and discouraging procompetitive partnerships that would offer entrants access to efficient and effective distribution; and
c) to reduce its ability to control incentives across the broader ecosystem via ownership and control of products and data complementary to search.

Why divest?

The DOJ's summary is less convincing than the PFJ since: prohibitions of practices that have excluded competitors include preferential treatment of Google search *or search access point in its exclusive and default agreements with competitors and suppliers*; the Search Access Point is defined as "*any software, application, interface, digital product, or service where a user can enter a query and receive (or be directed to a place to receive) a response that includes information from a GSE. Search Access Points include OS-level Search Access Points (e.g., widgets), browsers (including Search Access Points within browsers such as browser address bars), and search apps as well as their widgets*."

In essence, if preference and deals that promoted search were prohibited, but not browsers, then browsers which can operate as search access points would enable Google to achieve the same outcome using its control over the Chrome browser. The central aim of the PFJ is to provide a kickstart for search competition by allowing third party access to Google's search index and its ads data horde (just like NASDAQ information is available to all to better understand the market), and there is then a critical need to prohibit its agreements with rivals that prevent competition in search.

Pending the outcome of the remedy "*Google may not release any other Google Browser during the term of this Final Judgment absent approval by the Court.*" Does this restrict Google from making changes to is current browser including the proposed Privacy Sandbox changes? Self-preferencing in the use of data is prohibited. Circumvention and non-compliance are for the Technical Committee.

As to Android — the OS which search competitors rely where "Google has myriad obvious and not-so-obvious ways to favor its own search products"—two options:

1. divestiture: the most straightforward solution—the first option—would be to divest Android, which would prevent Google from using Android to exclude rival search providers.
2. behavioral remedies that may be more protracted and less certain due to Google's conduct. Behavioural remedy subject to Technical Committee. (Similar to Microsoft and similar issues about technical discrimination will arise).

Given Google (and Apple's) abuse of their operating systems to steer users away from open web standards for interacting with rival publishers' internet properties and into their App Stores, governed by unilaterally dictated taxes on user payments, interoperability must be preserved for web standards without circumventing interference by the Android operating system.

Google will also be effectively quarantined from AI that could be used for search:

> "*the remedy must restore incentives for innovation and disruptive entry that Google's conduct has—for over a decade—diminished. For example, in recent years "[t]he integration of generative AI is perhaps the clearest example of competition advancing search quality." Op. at 41. AI has the ability to affect market dynamics in these industries today as well as tomorrow. The remedy must prevent Google from frustrating or circumventing the Court's Final Judgment by manipulating the development and deployment of new technologies like query-based AI solution.*"

So the PFJ requires the divestiture of Prohibited Investments: "*Within thirty (30) days of entry of this Final Judgment, Google must notify Plaintiffs of any investment, holding, or interest in any Competitor, any company that controls a Search Access Point or an AI Product,* ***or in any technologies, such as AI Products, that are potential entrants into the GSE or Search Text Ads markets or reasonably anticipated competitive threats to GSEs****. Within six (6) months, Google must divest any such interest and immediately refrain from taking any action that could discourage or disincentivize that company from developing products or services that compete with, disrupt, or disintermediate Google's GSE or Search Text Ads.*"

7 Proposals:

(1) stop and prevent exclusionary agreements;
(2) prevent Google self-preferencing via ownership and control of search-related products;
(3) prevent Google from stifling or eliminating emerging competitive threats through acquisitions, minority investments, or partnerships;
(4) disclose data critical to restoring competition;
(5) increase transparency and control for advertisers;
(6) end Google's unlawful distribution; and
(7) allow for the enforcement of the PFJ while preventing circumvention.

(i) <u>Stopping and Preventing Exclusionary Agreements with Third Parties</u>

PFJ prohibits Google from providing third parties something of value (including financial payments) to make Google the default general search engine or otherwise discouraging those third parties from offering competing search products; See Op. at 216 (finding "Google's distribution agreements are exclusionary contracts that violate Section 2" and "clearly have a significant effect in preserving [Google's] monopoly.")

The PFJ also prohibits Google from entering exclusive agreements with content publishers; bundling, tying, or comingling its general search engine ***or search access points*** (**emph added**) with any other Google product; entering revenue share agreements related to the distribution of general search services; or participating in investments in, collaborations with, or acquisitions of its competitors or potential competitors in the general search services or search text ads markets without prior approval of the United States.

(ii) Prohibited Ownership And Control That Enables Self-Preferencing

The PFJ requires Google to divest Chrome to prevent self-preferencing over search access points and kick start competition in search. Court recognized, "*Google's near-complete control of the most efficient search distribution channels is a major barrier to entry," and the Chrome default is "a market reality that significantly narrows the available channels of distribution and thus disincentivizes the emergence of new competition.*" Op. at 159.

The PFJ further provides that "*Google is prohibited from owning not only a browser—following its divestiture of Chrome it may not re-enter the browser market for five years—but also from owning or acquiring any investment or interest in any search or search text ad rival, search distributor, or rival query-based AI product or ads technology.*"

Google's financial entanglements with current or future rivals risk compromising the proposed remedy. Investments in or acquisitions of potential rivals would stifle emerging competition or reduce their incentives to challenge Google. Such arrangements frustrate the PFJ's remedial goals of fostering innovation and transforming the general search and search text ads markets over the next decade. Google must disclose any such investments it owns, immediately refrain from using these interests to discourage or disincentivize competing products, and must divest these holdings within six months.

PFJ also provides for further contingent structural relief—the divestiture of Android—if Plaintiffs' proposed conduct remedies are not effective in preventing Google from improperly leveraging its control of the Android ecosystem to its advantage, or if Google attempts to circumvent the remedy package. See, e.g., United Shoe, 391 U.S. at 249–51.1 [i.e., USA holds control over Google] (see page 8 of the PFJ).

Alternatively, Google may also choose to divest Android at the outset in lieu of adhering to the requirements of Section V as they relate to Android.

(iii) Conduct Remedies That Prevent Self-Preferencing

Google cannot circumvent the Court's remedy by providing its search products preferential access to related products or services that it owns or controls, including mobile operating systems (e.g., Android), apps (e.g., YouTube), or AI products (e.g. Gemini) or related data.

PFJ prohibits, among other things, Google from using any owned or operated asset to preference its general search engine or search text ad products. The PFJ further prohibits Google from engaging in conduct that undermines, frustrates, interferes with, or in any way lessens the ability of a user to discover a rival general search engine, limits the competitive capabilities of rivals, or otherwise impedes user discovery of products or services that are competitive threats to Google in the general search services or search text ads markets. Op. at 119–21, 210 addressing Google's contractual restrictions on preinstallation of Chrome and Chrome widget on android home screen.

(iv) Restoring Competition Through (section c Disclosure of Scale Dependent Data), and Syndication And Data Access

Data at scale is the "essential raw material" for "*building, improving and sustaining*" a competitive general search engine. Op. at 226 (finding that "*Google's exclusive agreements…deny rivals access to user queries, or scale, needed to effectively compete*.").

PFJ aims to remedy this anticompetitively acquired advantage. The intent is to open up markets to competition and deprive Google of the fruits of its lawbreaking. As set out in Section VI, provides disclosure of and access to "scale dependent data necessary to compete."

"These remedies are intended to make this data available in a way that provides suitable security and privacy safeguards for the data that Google must share. Google is prohibited from using and retaining data to which access cannot be provided to **Qualified Competitors** on the basis of privacy or security concerns."

"Qualified Competitor" means a Competitor who meets the Plaintiffs' approved data security standards set by the Technical Committee and agrees to regular data security and privacy audits by the Technical Committee.

So the definition of Privacy and Security will be settled by the Technical Committee.

> PFJ p13 C states: "*Any User-side Data that Google collects and uses as part of any of its products consistent with this Final Judgement can presumptively be shared with Qualified Competitors consistent with personal privacy and security, as Google is prohibited from using and retaining data to which access cannot be provided to Competitors on the basis of privacy or security concerns".*
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> PFJ E states*: Ads Data: For the term of this Final Judgment, Google must provide Qualified Competitors, at no cost, with access to all Ads Data on a non-discriminatory basis while safeguarding personal privacy and security. Any Ads Data that Google collects and uses as part Case 1:20-cv-03010-APM Document 1062-1 Filed 11/20/24 Page 13 of 35 14 of any of its products consistent with this Final Judgement can presumptively be shared with Qualified Competitors consistent with personal privacy and security, as Google is prohibited from using and retaining data to which access cannot be provided to Competitors on the basis of privacy or security concerns*
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> **(v) <u>Access to Search Index:</u>**

1. Google must provide, at marginal cost, ongoing access to its Search Index to Qualified Competitors such that it is equally available to Qualified Competitors and Google.
2. Google must make available, through the Search Index, all content from any Google-owned website, property, or other operated platform (e.g., all Google owned or operated properties such as YouTube) which Google uses in its own Search Index.
3. Google must provide the Search Index with latency and reliability functionally equivalent to how Google is able to access its Seach Index.
4. Nothing in this Section VI purports to transfer intellectual property rights of third parties to index users.

Making the search index available **at marginal cost** requires Google to provide rivals and potential rivals both user-side and ads data for a period of ten years, **at no cost**, on a non-discriminatory basis, and with proper privacy safeguards in place.

> NB "Ads Data" means data related to Google's selection, ranking, and placement of, Search Text Ads in response to queries, including any User-side Data (see definition below) used in that process**.**
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> NB **"**User-side Data" means all data that can be obtained from users in the United States, directly through a search engine's interaction with the user's Device, including software

running on that Device, by automated means. User-side Data includes information Google collects when answering commercial, tail, and local queries. User-side Data may also include data sets used to train or fine-tune Google's ranking and retrieval components, as well as artificial intelligence models used for Google's AI Product

Section VI further requires that Google provide publishers, websites, and content creators with data crawling rights (such as the ability to opt out of having their content crawled for the index or training of large language models or displayed as AI-generated content).

Overall, this will require an access cost system being put in place, separate accounts assessment of marginal cost and a separate search index entity will also be needed to establish a legal boundary and trap and capture assets that are included within the search index asset base for marginal cost assessment and whose use will be provided at marginal cost**.**

Syndication Licence 1

Google to syndicate (subject to certain restrictions) its search results, ranking signals, and query understanding information for ten (10) years. Google must take steps sufficient to make available to any Qualified Competitor, at no more than the marginal cost of this syndication service, a syndication license whose term will be ten (10) years from the date the license is signed and which makes available all non-advertising components of its GSE, including all organic results and all Search Features, Ranking Signals for those organic results and Search Features, and query understanding information such that a licensee is enabled to display a SERP, understand Google's ranking rationale, and how Google modified or refined the user's query.

Google must provide the license on a non-discriminatory basis to any Qualified Competitor and may impose no restrictions on use, display, or interoperability with Search Access Points, including of AI Products, provided, however, that Google may take reasonable steps to protect its brand, its reputation, and security.

For example, licensees may elect, in their sole discretion, which queries (some or all) for which they will request syndicated results and which syndication components to display or use and may do so in any manner they choose. Google may not place any conditions on how any licensee may use syndicated content under this Paragraph VII.A, nor may Google retain, or use (in any way), syndicated queries or other information it obtains under this Paragraph VII.A for its own products and services.

The PFJ only requires Google to syndicate queries that originate in the United States.

Section VII also requires Google to syndicate its search text ads for terms of one year subject to certain restrictions.

This may not be sufficient since Google's scale data advantage is derived from worldwide data.

Search text ads syndication licence 2:

"which makes available all components of its Search Text Ads product, including all types of Search Text Ads (including any assets, extensions, or similar Search Text Ad variations) appearing on Google's SERP or available through Google's AdSense for Search. Google must make the purchase of ads syndicated under this Section available to advertisers on a non-discriminatory basis comparable to Google's other Search Text Ads.

For each syndicated ad result, Google must provide to the Qualified Competitor all Ads Data related to the result, provide the license on a non-discriminatory basis, and may impose no restrictions on use, display, or interoperability with Search Access Points, including of AI Products, provided, however, that Google may take reasonable steps to protect its brand, its reputation, and security. For example, licensees may elect, in their sole discretion, which queries (some or all) for which they will request syndicated Search Text Ads and which syndication components to display or use and may do so in any manner they choose."

Publisher Opt-Out: Google must provide online Publishers, websites, and content creators an easily useable mechanism to selectively opt-out of having the content of their web pages or domains used in search indexing; used to train or fine-tune AI models, or AI Products; used in retrieval-augmented generation-based tools; or displayed as AI-generated content on its SERP, and such opt-out must be applicable for Google as well as for users of the Search Index.

(vi) Restoring Competition By Improving Transparency And Reduction Of Switching Costs

Overcharging for ads in search text ads market requires generating search text ads rivals: Section VIII, Plaintiffs' PFJ will remedy these harms by providing advertisers with the information, options, and visibility into the performance and cost of Google Text Ads necessary to optimize their advertising across Google and its rivals.

PFJ requires Google to include "*fulsome and necessary real-time performance information about ad performance and costs in its search query reports to advertisers*".

i.e. Search Query Report: For each Search Text Ad served or clicked, Google must make available to advertisers at the individual ad level for the preceding 18-month period, data showing the query, keyword trigger, match type, cost-per-click (CPC), SERP positioning, lifetime value (LTV), and any other metric necessary for the advertiser to evaluate its ad performance. This data must be made available through an API that permits advertisers to download raw data in real time, generate reports and summaries, and perform other analytical functions to assess ad spend, ad performance, and in-campaign optimization (including the ability to assess incremental clicks generated by Search Text Ads). This data must also be provided to advertisers through periodic (at least monthly) autogenerated summaries accessible through the Google ads system interface.

Data access further requires Google to increase advertiser control by improving keyword matching options to advertisers. Op. at 263–64 (finding Google degraded SQR content and reduced control over keyword matching).

PFJ also prohibits Google from limiting the ability of advertisers to export search text ad data and information for which the advertiser bids on keywords, and further requires that Google provide to the Technical Committee and Plaintiffs a monthly report outlining any changes to its search text ads auction and its public disclosure of those changes.

(vii)Limitations On Distribution And User Notifications To Restore Competition

To address preloading on devices: ***PFJ requires Google to divest Chrome, which will permanently stop Google's control of this critical search access point and allow rival search engines the ability to access the browser that for many users is a gateway to the internet***.

In addition, the PFJ contains multiple provisions that will limit Google's distribution of general search services by contract with third-party devices and search access points (e.g., Samsung devices, Safari, Firefox) and via self-distribution on Google devices and search access points (e.g., Pixel) which will facilitate competition in the markets for general search services and search text advertising. These provisions are designed to end Google's unlawful distribution agreements, ensure that Google cannot approximate its unlawful practices with updated contracts, and eliminate anticompetitive payments to distributors, including Apple.

PFJ prohibits Google from "**offering Apple anything of value for any form of default, placement, or preinstallation distribution (including choice screens) related to general search or a search access point**.

PFJ states that "*Apple Search Access Points And Devices: Google must not offer or provide anything of value to Apple—or offer any commercial terms—that in any way creates an economic disincentive for Apple to compete in or enter the GSE or Search Text Ad market*" See Op. at 238, 240–44 ("*Apple, a fierce potential competitor, remains on the sidelines due to the large revenue share payments it receives from Google*".)

Section IX, for non-Apple distributors and third-party devices, the PFJ similarly prohibits—with limited exceptions—Google from offering anything of value for any form of default, placement, or preinstallation distribution (including choice screens) related to general search or a search access point.

(i) Choice screens The PFJ further prohibits Google from preinstalling any search access point on any new Google device and requires it to display a choice screen on every new and existing instance of a Google browser where the user has not previously affirmatively selected a default general search engine. [potential loophole, since if a user did select Google search but was not presented with meaningful information at the time of selection or Google used dark patterns, then the "affirmative" selection is not a true choice that ought to be respected on a go-forward basis.]

(ii) Choice Screen Review by DOJ and the Technical Committee (TC): Google must disclose each Choice Screen, the related distribution agreement, if relevant, and its plan for implementing that Choice Screen to Plaintiffs and the TC at least sixty (60) days in advance of the Choice Screen being displayed to any user. Each Choice Screen must provide users with a clear choice between competing products and be designed to not preference Google, to be accessible, to be easy to use, and to minimize choice friction, based on empirical evidence of user behavior. After consultation with a behavioral scientist, the TC will report to Plaintiffs whether each Choice Screen satisfies these requirements, and ultimately Plaintiffs must approve any Choice Screen offered pursuant to this Final Judgment. Plaintiffs, in consultation with the TC, may require modifications to any Choice Screen over time.

Colorado Plaintiff States have included a provision requiring Google to fund a nationwide advertising and education program to improve choice by improving consumer understanding of the benefits that Google's rivals. **The program may include short-term incentive payments to individual users as a further incentive to choosing a non-Google default on a choice screen.**

(viii) Administration, Anti-circumvention, and Anti-retaliation

Section X, Plaintiffs' PFJ requires Google to appoint an internal Compliance Officer and establishes a Technical Committee to assist Plaintiffs and the Court in monitoring Google's compliance. See United States v. Microsoft Corp

Plaintiffs reserve the right to add, remove, or modify provisions of the PFJ as needed following further engagement with market participants and additional remedies discovery.