PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

RESPONSE OF GOOGLE LLC AND GOOGLE CANADA CORPORATION

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PART I – OVERVIEW

1. Google LLC ("**Google**") and Google Canada Corporation ("**Google Canada**") oppose the Application commenced by the Commissioner of Competition (the "**Commissioner**") for Orders under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "***Competition Act***"). The Commissioner's Application seeks to invoke the abuse of dominance provisions of the *Competition Act* in a manner that, if accepted, will undermine rather than promote innovation and competition in Canada.

2. The Commissioner seeks to cast in a sinister light innovations implemented by Google over a period of more than a decade that: (i) are legally benign; (ii) are procompetitive in purpose and effect; (iii) are the product of and have resulted in Google's superior competitive performance; and (iv) have benefitted scores of industry participants over the years, including publishers, advertisers, viewers of digital content and even direct and significant competitors of Google.

3. The substance of the allegations of the Commissioner reveals that he objects to Google's decision to develop innovative tools and services, and seeks to compel Google to deal with, assist and supply its competitors. Google already provides competitors with access to its advertising technology ("**Ad Tech**") tools, however, and there are many ways for them to reach the businesses that use those tools without the involvement of Google. Although the Commissioner demands that Google divest certain of its Ad Tech tools and open up its infrastructure to grant fierce rivals in a dynamic and rapidly evolving market equal access to Google's technology and customer base, there is no requirement for Google to do so.

4. Contrary to various assertions in the Commissioner's Notice of Application, the Ad Tech industry is highly competitive, innovative and growing. Google faces stiff competition in the Ad Tech industry on numerous fronts, including from large and sophisticated companies with enormous resources such as Microsoft, Meta, Amazon and many others. Google's share of the relevant market has declined over time while industry output has increased dramatically, quality of service has improved and prices associated with the Ad Tech services in question have remained stable or declined.

5. To avoid this reality, the Commissioner attempts to gerrymander the "relevant market" to a narrow subset of digital advertising and then splice a single, two-sided market into three artificial ones. Assumptions made by the Commissioner to reach such a highly artificial result defy commercial reality. This Tribunal should dismiss this Application on this basis alone.

6. In fact, the relevant market is far broader than the Commissioner contends. Google and other providers of Ad Tech tools and services operate in a single, two-sided transaction platform market that connects publishers to advertisers to facilitate advertising transactions, which includes all types of digital advertisements bought and sold online, including but not limited to image, audio, video, and multimedia advertisements that may appear in a variety of online channels, such as in mobile applications ("**apps**"), on social media platforms, in video streams, through connected television platforms (known as "**Connected TV**"), and on websites.

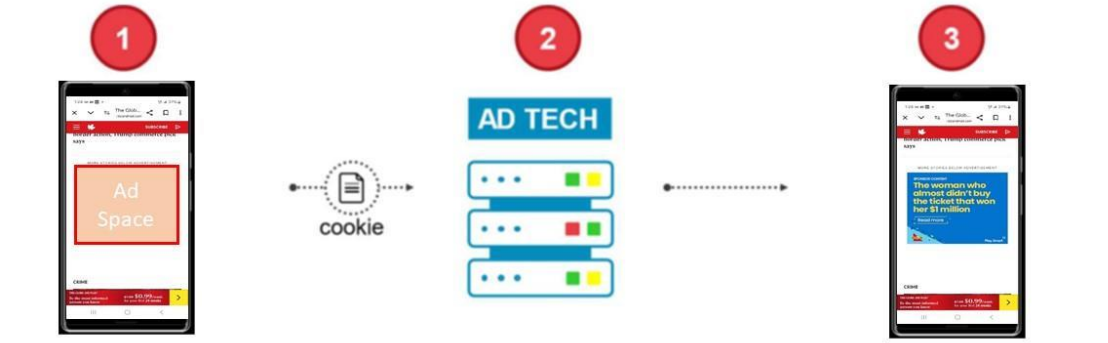
7. The relevant market is a single, two-sided platform market because Ad Tech tools and services are intended and designed to assist both: (i) publishers (entities that produce

content, like content found in apps, on Connected TV, on social media feeds and on websites) to sell advertising space on their digital properties (known as "**advertising inventory**"); and (ii) advertisers (entities that seek to show advertisements to viewers of content, or "**users**") to purchase advertising inventory sold by publishers.

8. Every user who navigates to content on a publisher's property, *e.g.*, app, Connected TV, social media feed or website, has an opportunity to view an advertisement. The display of an advertisement to a user is referred to as an "**impression**". A "**match**" occurs when advertising inventory or an impression is sold successfully by a publisher to an advertiser.

9. The fundamental purpose of Ad Tech tools and services is to facilitate matches between publishers and advertisers in respect of the sale and purchase of advertising inventory. Figure 1 below illustrates the role that Ad Tech plays in digital advertising. The example used in Figure 1 concerns a user that accesses the website of The Globe and Mail using a mobile phone.

Figure 1 – Role of Ad Tech in Digital Advertising



A user accesses The Globe and Mail's website on their mobile phone, which sends a request for content and initiates a call to fill an ad slot, along with user information stored in a cookie.

Ad Tech uses information about the publisher and user to select an advertisement.

An ad is served to the user.

10. The Ad Tech industry, and the relevant market, is therefore a two-sided platform, the success of which depends inherently upon the extent to which *both* publishers *and* advertisers transact across the platform.

11. Apart from the Commissioner's fundamentally flawed allegations pertaining to the composition, parameters and characteristics of the relevant market at issue in this Application, the Commissioner also alleges incorrectly that Google has unlawfully tied together three Ad Tech tools that it owns and operates: (i) a "**publisher ad server**" formerly known as DoubleClick for Publishers ("**DFP**"), used by publishers to help manage their advertising inventory that is made available to advertisers; (ii) a tool known as "**Google Ads**", which the Commissioner erroneously describes as an "**advertiser ad network**", that can be used by advertisers to purchase advertising inventory from publishers; and (iii) "**AdX**", a so-called "**ad exchange**" that facilitates transactions

between publishers and advertisers programmatically (*i.e.*, automatically) and in real-time for the purchase and sale of advertising inventory through an auction process that occurs in fractions of a second.

12. The Commissioner's allegation that the supposed tying together by Google of these three Ad Tech tools, along with certain other alleged conduct, constitutes a practice of anticompetitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in the artificially curated component-based markets he has proposed is entirely without merit.

13. In this Application, Google will demonstrate that the Commissioner's allegations concerning: (i) the purported "relevant markets"; (ii) Google's supposed market power; (iii) Google's supposed practice of anticompetitive acts; and (iv) the supposed impact that the conduct of Google has had on competition, are all seriously misplaced. That is so for a number of reasons, including those summarized immediately below.

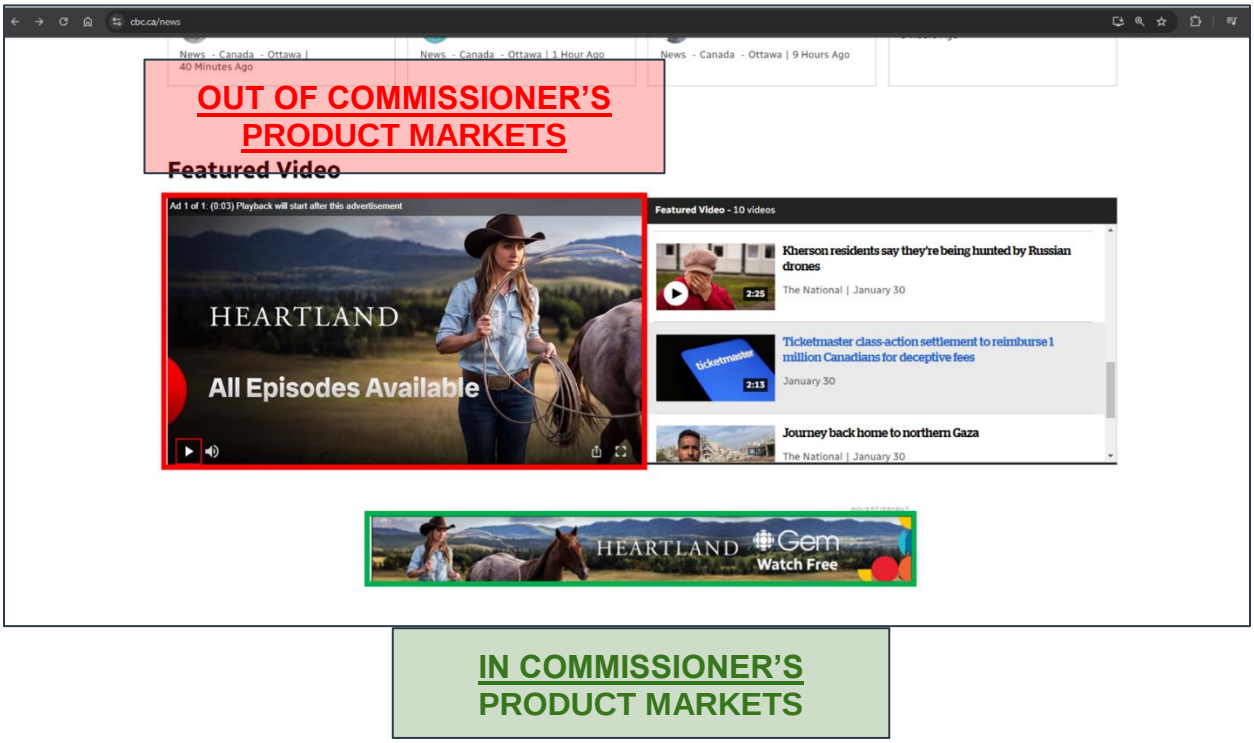
14. ***First***, the product markets asserted by the Commissioner in which Google is alleged to have abused its dominant position are untethered either to commercial reality or to proper and sensible economic and legal analyses. The Commissioner's narrow product markets are fictitious. They ignore the existence of rapid innovations in the Ad Tech industry, important product substitutes, competitive pressures and the indivisible nature of the relevant two-sided market.

15. The Commissioner's narrow product markets also focus incorrectly on a small subset of the relevant market (*i.e.*, certain website advertising) and thereby exclude all other types of digital advertising (*e.g.*, in-app advertising and Connected TV advertising)

where the *vast majority* of impressions are bought and sold by advertisers and publishers. For many years, the vast majority of users have consumed the lion's share of their content through apps, Connected TV and other channels, rather than on websites. That gulf is only increasing as matters now stand, and will continue to increase over time. To maximize their return on investment, advertisers follow users to channels where users consume content. For years, those channels have extended well beyond websites. In the same vein, publishers seek to create content that attracts more users, which in turn makes their advertising inventory more desirable for advertisers. That means that publishers today are creating digital properties that depart from traditional conceptions of a website in order to attract users and sell desirable advertising inventory.

16. The Commissioner's myopic focus therefore ignores the commercial realities of the relevant market and results in a series of absurdities. By way of illustration only, if the Commissioner's argument concerning the product markets at issue in this Application is accepted, two transactions between the same publisher and advertiser for the placement of an advertisement for the same product or service on the very same property being viewed by the same user at the same moment would be treated differently. An example of the non-sensical position taken by the Commissioner is set out in Figure 2 below.

Figure 2 – In-Stream Video Advertisement and Banner Advertisement on CBC.ca



17. In Figure 2 above, the advertisement for the television show "Heartland" that appears in the frame of the video player is excluded from all of the Commissioner's proposed product markets even though the advertisement for the same television show that appears under the frame of the video player on the website of the Canadian Broadcasting Corporation is included.

18. Ad Tech providers compete to sell matches for impressions on virtually every form of digital property, not just on websites. The Ad Tech tools and services used by publishers and advertisers to sell and buy the narrow slice of advertising inventory on websites—referred to by the Commissioner as "open web ads programmatically"—are the *same* Ad Tech tools and services used by publishers and advertisers to sell and buy other types of advertising. This includes, for example, in-app advertisements and social

media advertisements, whether programmatically or otherwise. Contrary to the Commissioner's allegations, there is no such thing as an "advertiser ad network market", "publisher ad server market" or "ad exchange market" limited to "open web ads traded programmatically".

19. In framing his case, the Commissioner has essentially ignored the tremendous evolution and development of the complex and two-sided relevant market that has occurred over the past 15 years, including significant innovations that have benefitted publishers, advertisers and users on all sides of the relevant market. As digital advertising has become increasingly sophisticated over time, the spending of advertisers for advertising inventory has shifted between different properties and different formats. Competition throughout the relevant market has become increasingly fierce and effective. Competitive dynamics have required Google and other providers of Ad Tech tools and services to evolve and develop new ways to serve publishers and advertisers more effectively and efficiently under drastically different market conditions. Put simply, the Commissioner's Application reflects a fundamental misunderstanding of the manner in which the relevant market currently operates, where it has come from, and where it is headed.

20. Slicing and dicing the relevant market in the manner proposed by the Commissioner would be unfair and improper, including because doing so would: (i) exclude numerous substitutes and sources of competition from Ad Tech tools owned and operated by other service providers that are designed to perform, and do in fact perform, the same or highly similar functions as those performed by Google Ads, AdX and DFP; and (ii) fail to reflect properly, or at all, the manner in which virtually all industry

participants conceive of and participate in the relevant market. The intended result of the Commissioner's selective and unprincipled removal of Ad Tech transactions, tools, services and service providers from his proposed definition of the "relevant markets" is to exaggerate dramatically the proportion of advertising transactions that involve the use of Google's Ad Tech tools. In reality, Google does not dominate or substantially or completely control the properly defined relevant market.

21. That is so regardless of whether the geographic boundary of the relevant market is defined as Canada, North America[1] or the world, as the Commissioner proposes in paragraph 81 of his Notice of Application.

22. ***Second***, there is no merit to the Commissioner's contention in paragraph 142 of his Notice of Application that Google has pursued a "systematic campaign of interrelated and interdependent anticompetitive actions, designed to and with the effect of facilitating the exercise of new or increased market power and entrenching and enhancing" Google's existing market power. In support of this position, the Commissioner alleges that Google has engaged in four specific anticompetitive acts over a 15-year period, namely: (i) the tying together of Google's Ad Tech tools; (ii) the use by Google of an innovative technology called "Dynamic Allocation"; (iii) the use by Google of an innovative feature known as "Project Bernanke"; and (iv) the implementation by Google of "Unified Pricing Rules".

[1] The term "**North America**" is used in this Response to mean Canada and the U.S., ***and not*** Canada, the U.S., and Mexico.

23. These allegations are tactical in nature, and the result of a series of fundamental misunderstandings or mischaracterizations concerning the purpose, use and effect of the Ad Tech tools of Google at issue in this Application. Distilled to its essence, the Commissioner criticizes Google for: (i) refusing to give its competitors additional access to Google's technology and customer base; (ii) taking perfectly lawful and legitimate advantage of significant investments that Google has made in the Ad Tech tools in question as well as of the superior competitive performance associated with the use of those tools; and (iii) making sensible and appropriate commercial decisions to differentiate its Ad Tech tools from those of competitors in the relevant market.

24. The law of abuse of dominance in Canada does not compel a business to collaborate with its direct competitors, however, or to facilitate or ensure their success. Nor is there anything remotely untoward associated with Google's continuous innovations in the relevant market. These innovations have been implemented by Google in an effort to ensure that its Ad Tech tools remain viable, attractive to publishers and advertisers, and competitive in the face of intense and dynamic competition.

25. Each of the acts alleged by the Commissioner to be anticompetitive in nature was the result of entirely appropriate decisions made by Google to improve the quality and performance of its Ad Tech tools and of the Ad Tech ecosystem more generally. Each feature of Google's Ad Tech tools impugned by the Commissioner has benefitted publishers and/or advertisers, and improved matches made between publishers and advertisers for advertising inventory. The features of Google's Ad Tech tools at issue in this Application have generated increased revenues for publishers and higher returns on investments made by advertisers. They have also made the advertising ecosystem safer

for advertisers, publishers and users alike by reducing risks of fraud and other misconduct. Not one of the acts complained of by the Commissioner was undertaken for the purpose or with the effect of affecting competition adversely.

26. Moreover, as explained below, claims in respect of a number of acts alleged by the Commissioner are statute-barred by the passage of the three-year limitation period provided for in subsection 79(6) of the *Competition Act*. For all other alleged instances of abuse of dominance that are not statute-barred but relate to conduct allegedly engaged in by Google prior to the amendment of the *Competition Act* in June 2022, the Commissioner is required to prove a violation of section 79 based on the language of the *Competition Act* as it existed before it was amended. All of the amendments to sections 78 and 79 of the *Competition Act* were substantive in nature and none of those amendments have retroactive or retrospective effect.

27. ***Third***, none of the conduct of Google complained of by the Commissioner has resulted in a substantial prevention or lessening of competition in any: (i) properly defined relevant market; or (ii) of the three artificial product markets proposed by the Commissioner. To the contrary, competition and innovation in the relevant market is more vigorous and effective now than it has ever been. As discussed below, Google's share of the relevant market has declined over time while industry output has increased dramatically and prices associated with the Ad Tech services in question have remained stable or decreased. In addition, the Commissioner's allegation concerning the supposed existence of high barriers to entry in the relevant market is contradicted by the frequent entry into the market of new competitors and the aggressive and successful expansion in that market of existing competitors.

28. Google does not have any substantial degree of market power in any properly defined relevant market in Canada, North America or the world. Google has not engaged in any act intended to have a predatory, exclusionary or disciplinary effect on a competitor, or an adverse effect on competition in any relevant market. Nor did any act engaged in by Google have such an effect. Google has certainly not engaged in a practice of such acts. Furthermore, Google's actions have not had, are not having and are not likely to have the effect of preventing or lessening competition substantially in any properly defined relevant market.

29. Misusing the abuse of dominance provisions of the *Competition Act* to force Google to surrender to its competitors differentiating features associated with its Ad Tech tools would compromise or negate many of the significant benefits that publishers and advertisers that use Google's cohesive suite of Ad Tech tools have been able to enjoy. These include improvements in ad safety, the enhanced ability to combat invalid ad traffic and fraud, safeguarding and preserving user privacy, significantly increased efficiencies, the reduction of prices associated with the services in question, the promotion of significant investments in innovation and increasing speeds of service.

30. Even if the Commissioner could somehow prove that Google has abused its position of dominance under sections 78 and 79 of the *Competition Act*, the remedies sought by the Commissioner are overbroad, disproportionate, contrary to the public interest and unwarranted in the circumstances. What is more, the remedies sought by the Commissioner: (i) are designed to impose and have the effect of imposing true penal consequences upon both Google and Google Canada; (ii) are beyond the jurisdiction of this Tribunal to grant; and (iii) contradict Canada's treaty obligations with the U.S.

31. In this regard, the Commissioner's demand in paragraphs (a)c. and 217(a)(iii) of his Notice of Application for an extraordinary financial penalty against Google and Google Canada of "three times the value of the benefit derived from [their] anticompetitive practice" or "3% of [their] worldwide gross revenues" amounts to a request for a punitive fine that could potentially be measured in the billions of dollars. A financial penalty of that magnitude is constitutionally impermissible in an otherwise civil proceeding of this nature and contrary to the public interest. The very threat of such a fine will diminish or negate the incentives of Google, Google Canada and many other businesses to invest and innovate, thus undermining consumer welfare.

32. The fine sought by the Commissioner is unprecedented in Canadian law. His request for that fine engages constitutional and quasi-constitutional rights guaranteed to Google and Google Canada pursuant to the *Canadian Charter of Rights and Freedoms* (the "***Charter***") and the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) (the "***Bill of Rights***").

33. Violations of the rights of Google and Google Canada under the *Charter* and the *Bill of Rights* have already occurred, and will inevitably occur hereafter if the Commissioner's Application is permitted to proceed. In this regard, Google and Google Canada repeat and rely upon the content of their Notice of Constitutional Question dated February 14, 2025. In the circumstances, the filing of this Response is without prejudice to the assertion by Google and Google Canada of their rights guaranteed by the *Charter* and the *Bill of Rights*.

34. Beyond the constitutional infirmity that lies at the heart of the Commissioner's Application, the extraterritorial divestiture order sought by the Commissioner in paragraphs (a)a. and 217(a)(i) of his Notice of Application (the "**Divestiture Order**") against Google, a non-resident of Canada, in respect of assets that are owned, operated and located outside of Canada, is disproportionate, overbroad and neither reasonable nor necessary to overcome any effects of Google's business practices in Canada. The extraterritorial nature of the Divestiture Order sought by the Commissioner also exceeds this Tribunal's jurisdiction under its enabling statute as well as under the *Competition Act*.

35. Finally, the demand of the Commissioner for the extraordinary financial penalty as well as the extraterritorial Divestiture Order conflict with Canada's obligations under the Agreement between the United States of America, the United Mexican States, and Canada executed on November 30, 2018 (the "**USMCA**") as well as the *Canada–United States–Mexico Agreement Implementation Act*, S.C. 2020, c. 1.

36. This Application should be stayed immediately having regard to the existing and ongoing violations of the constitutional and quasi-constitutional rights of Google and Google Canada referred to above for the reasons set out in the Notice of Constitutional Question. If the Commissioner is permitted to proceed with this Application, however, it should be dismissed in its entirety. Google and Google Canada seek their costs of this Application from the Commissioner pursuant to paragraph 8.1(3)(a) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

PART II – ADMISSIONS AND DENIALS OF GOOGLE AND GOOGLE CANADA

37. Except as expressly admitted below, Google and Google Canada deny the allegations in the Commissioner's Notice of Application. Google and Google Canada deny that any conduct they engaged in was unlawful, inappropriate or untoward. Google and Google Canada further deny that the Commissioner is entitled to any of the relief sought in his Application.

PART III – MATERIAL FACTS ON WHICH GOOGLE AND GOOGLE CANADA RELY

A. Google LLC and Google Canada Corporation

38. Google is a limited liability company organized and existing under the laws of the State of Delaware. Google is an indirect subsidiary of Alphabet Inc. Alphabet Inc. is a publicly traded company incorporated and existing under the laws of the State of Delaware. Alphabet Inc. and Google are both headquartered in Mountain View, California. Google operates as a successful technology company that provides to its customers numerous internet-related products and services, including Ad Tech tools and services. Google has no employees in Canada.

39. Google Canada is a corporation organized and existing under the laws of Nova Scotia. Google Canada is a separate corporate and legal entity from Google. Google Canada has offices in Montreal, Toronto, Ottawa and Waterloo. The principal relationship between Google Canada and the Ad Tech services provided by Google is that Google Canada provides local sales support and customer management for certain customers of some (but not all) of the Ad Tech tools that Google owns and operates.

40. The vast majority, if not all, of the assets, servers, software, source code and algorithms used by Google to operate its Ad Tech tools, services, platforms, and technologies are located outside Canada.

B. The U.S. Litigation

41. The Commissioner's Application is preceded by antitrust litigation initiated against Google by the U.S. Department of Justice (the "**DOJ**") in January 2023 (the "**U.S. Litigation**"). In the U.S. Litigation, Google is alleged to have unlawfully monopolized markets that are similar to the markets proposed by the Commissioner in this Application in violation of sections 1 and 2 of the *Sherman Act*, 15 U.S.C. §§ 1-38. The supposed anticompetitive conduct alleged by the DOJ in the U.S. Litigation is substantially the same as the conduct complained of by the Commissioner in this Application. The remedies sought in the U.S. Litigation are also similar to at least some of the remedies sought by the Commissioner. Specifically, in the U.S. Litigation, the DOJ seeks a divestiture of DFP and AdX and an order prohibiting Google from engaging in similar alleged anticompetitive conduct.

42. The U.S. Litigation proceeded to trial in respect of the issue of liability only before U.S. District Judge Brinkema in the Eastern District of Virginia in September 2024. Closing arguments were completed in late November 2024. Judge Brinkema took the matter under reserve. As of the date of this Response on February 14, 2025, Judge Brinkema has not yet released her decision concerning liability.

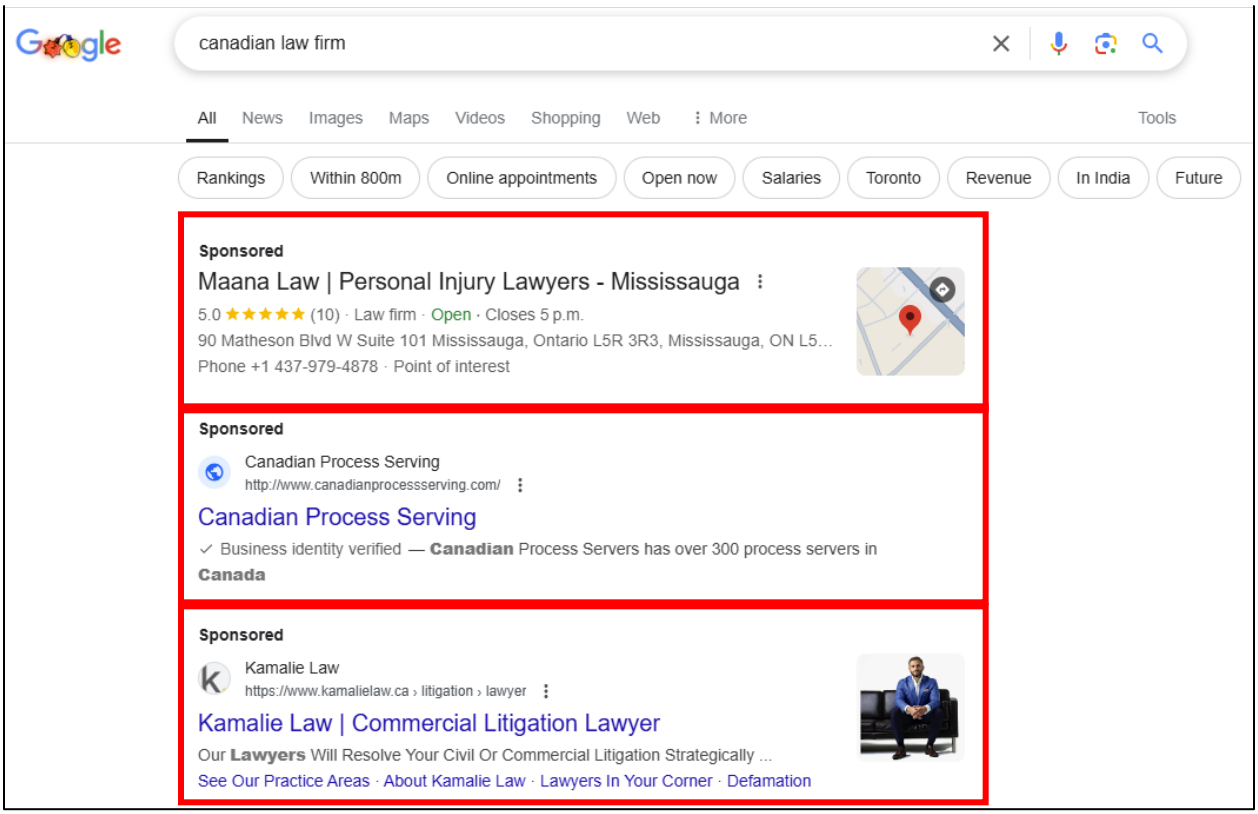
C. Overview of the Digital Advertising Industry

(i) Digital Advertising

43. Like traditional newspapers, radio stations and television broadcasters, publishers that own and operate digital properties—such as apps or websites—help fund their operations, including the creation of content on their properties, by selling advertising space (defined above as advertising inventory) on their properties. Digital advertising inventory can be divided into two broad types: (i) "**search advertising**"; and (ii) "**display advertising**".

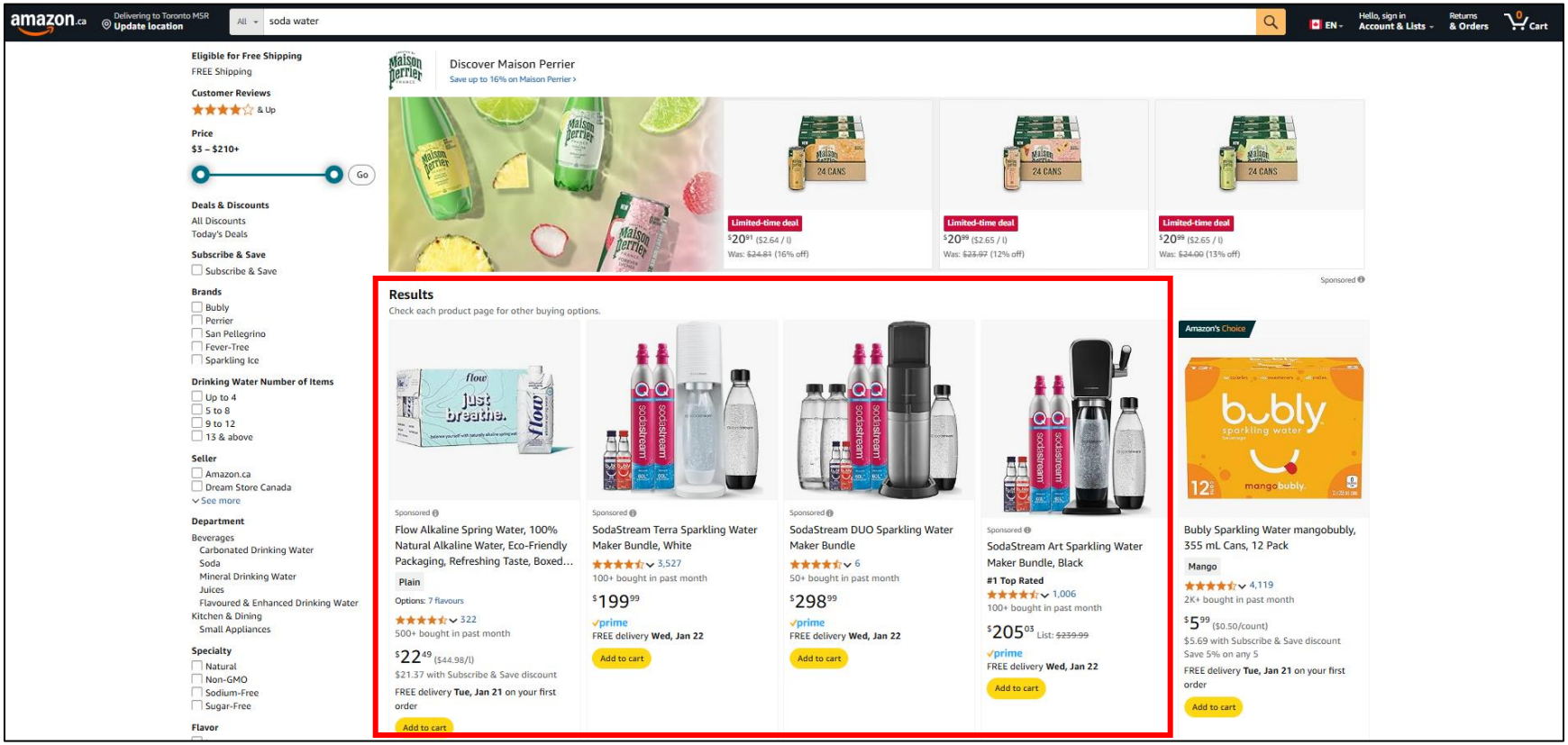
44. Search advertising refers to advertisements that are shown in connection with results displayed in response to a search query. Search advertisements can include text, images, audio, video or multimedia, depending on the functions enabled by the search engine operator. Examples of search advertisements are depicted in Figure 3 below, with red boxes highlighting advertisements that appear when searching the phrase "canadian law firm" on Google.ca while on a computer located in Toronto.

Figure 3 – Example of Search Advertisements
(Query for "Canadian Law Firm" on Google.ca)



45. Additional examples of search advertisements are depicted in Figure 4 below, with a red box highlighting advertisements that appear when searching the phrase "soda water" on Amazon.ca while on a computer located in Toronto.

Figure 4 - Example of Search Advertisements
(Query for "Soda Water" on Amazon.ca)



46. In contrast, display advertising refers to digital advertisements that are not linked to a search.

47. Like search advertisements, display advertisements can appear on different types of properties and in different formats. The various types of properties on which display advertisements may appear include apps, social media feeds, Connected TV and websites of any type, including those of traditional publishers like TheGlobeandMail.com and of retailers like Walmart.ca. These properties can be accessed using a computer as well as using a mobile device. Display advertisements can include text, images, audio, video or multimedia and can take the form of banner, native,[2] "in-stream video",[3] or "out-stream" video advertisements.[4]

48. In paragraphs 28, 29 and elsewhere in his Notice of Application, the Commissioner refers to and relies upon a purported distinction between "**closed channel**" publishers—meaning those who sell their advertising inventory "to advertisers through their own systems"—and "**open channel**" publishers—meaning those who sell their advertising inventory to advertisers "through third party [A]d [T]ech tools—*i.e.*, software they do not own themselves". The Commissioner then relies on this distinction to limit his proposed product markets to Ad Tech tools that only transact display advertisements on open channel websites. In taking this position, the Commissioner artificially excludes significant

[2] Native advertisements are similar to banner advertisements except that they attempt to match the look and feel of the publisher's property. Although users know they are advertisements, they fit more seamlessly into the content on the property.

[3] In-stream video advertising is a type of advertising that refers to advertisements that are played before or during video content within the frame of the video being displayed.

[4] Out-stream video advertising is a type of advertising that refers to advertisements that are played independently on the property rather than within a traditional video frame.

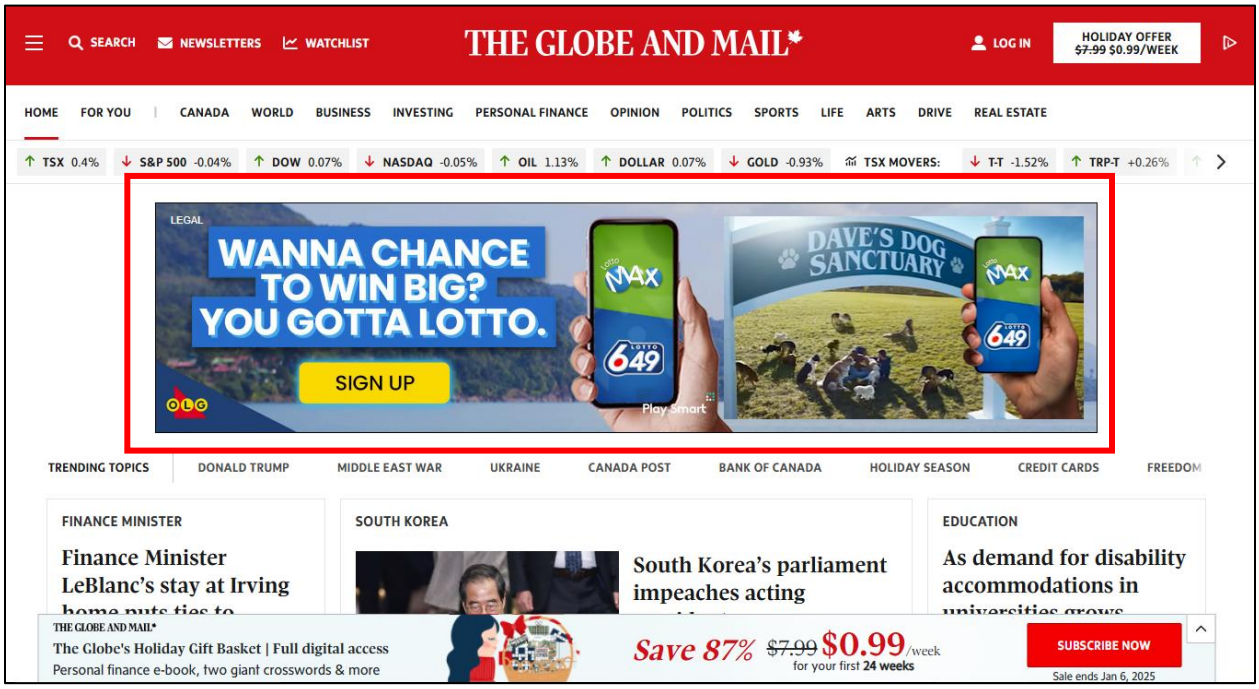
portions of the advertising businesses of major Ad Tech competitors like Amazon and Meta from his proposed definitions of the supposedly relevant markets. As explained below, Google does not agree that the relevant market in this Application can be restricted in the manner alleged by the Commissioner.

49. The commercial reality is that all Ad Tech tools are used to sell or facilitate matches between advertisers and publishers for advertising inventory across numerous formats and channels. In large measure, advertisers in the relevant market treat advertising through open and closed channels to be interchangeable. The high level of substitution between different formats and channels of advertising and the ease of substitutability between different formats and channels demonstrate that there is a single, two-sided platform market involving matches between publishers and advertisers for advertising inventory.

50. Examples of advertisements that appear in several different formats on what the Commissioner describes as “open channel” and “closed channel” properties are set out on the next several pages. All of these different types of advertisements are served using the same or substitutable Ad Tech tools.

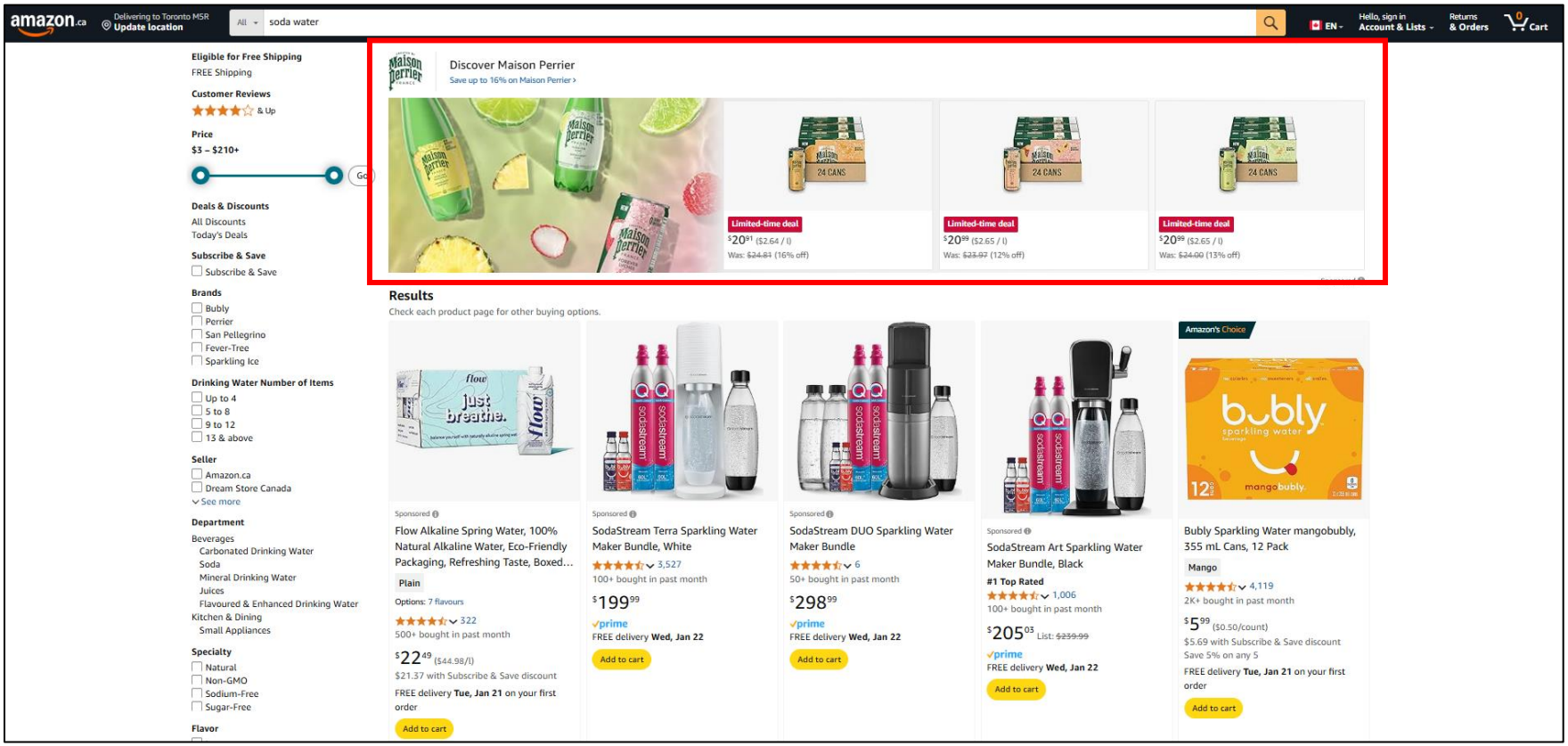
51. The red box in Figure 5 below depicts an example of a banner advertisement on the website of The Globe and Mail, which is an open channel property. The banner advertisement contains text, image and video elements.

Figure 5 – Example of an Advertisement on an Open Channel Website (Banner Advertisement on TheGlobeandMail.com)



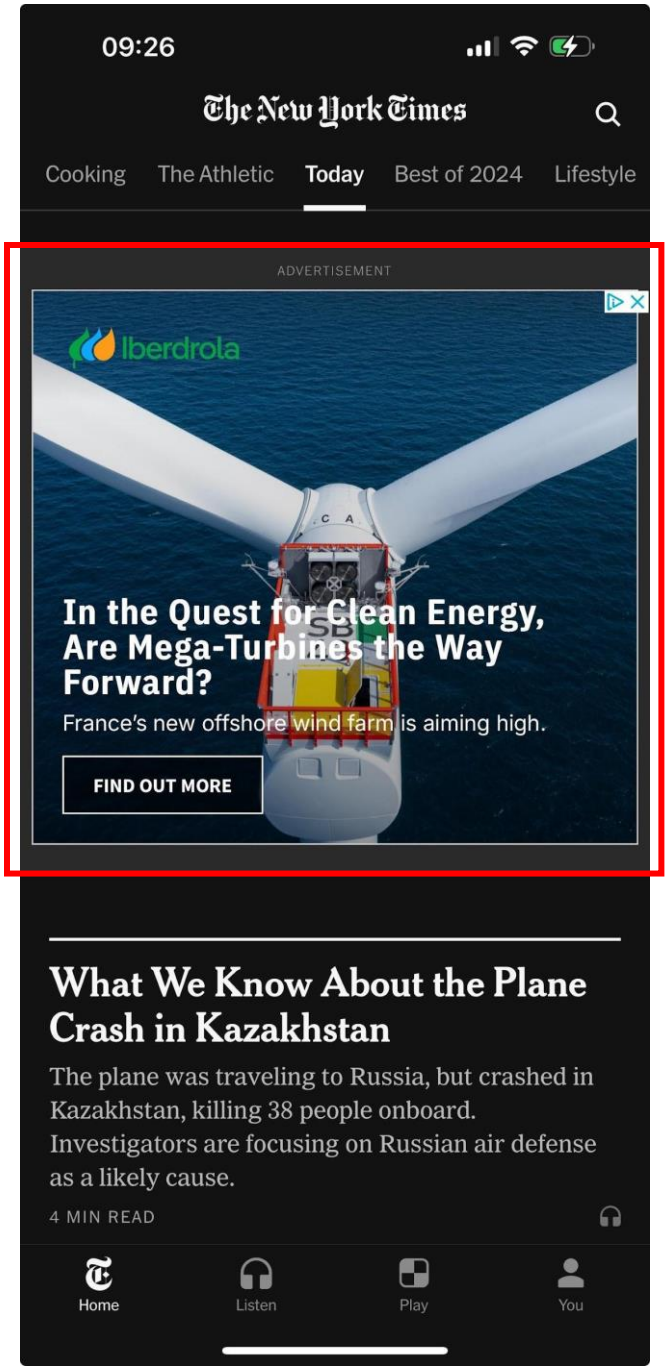
52. The red box in Figure 6 below depicts an example of a native advertisement on the website of Amazon.ca, which is a closed channel property. The native advertisement contains text and images.

Figure 6 – Example of an Advertisement on a Closed Channel Website (Native Advertisement on Amazon.ca)



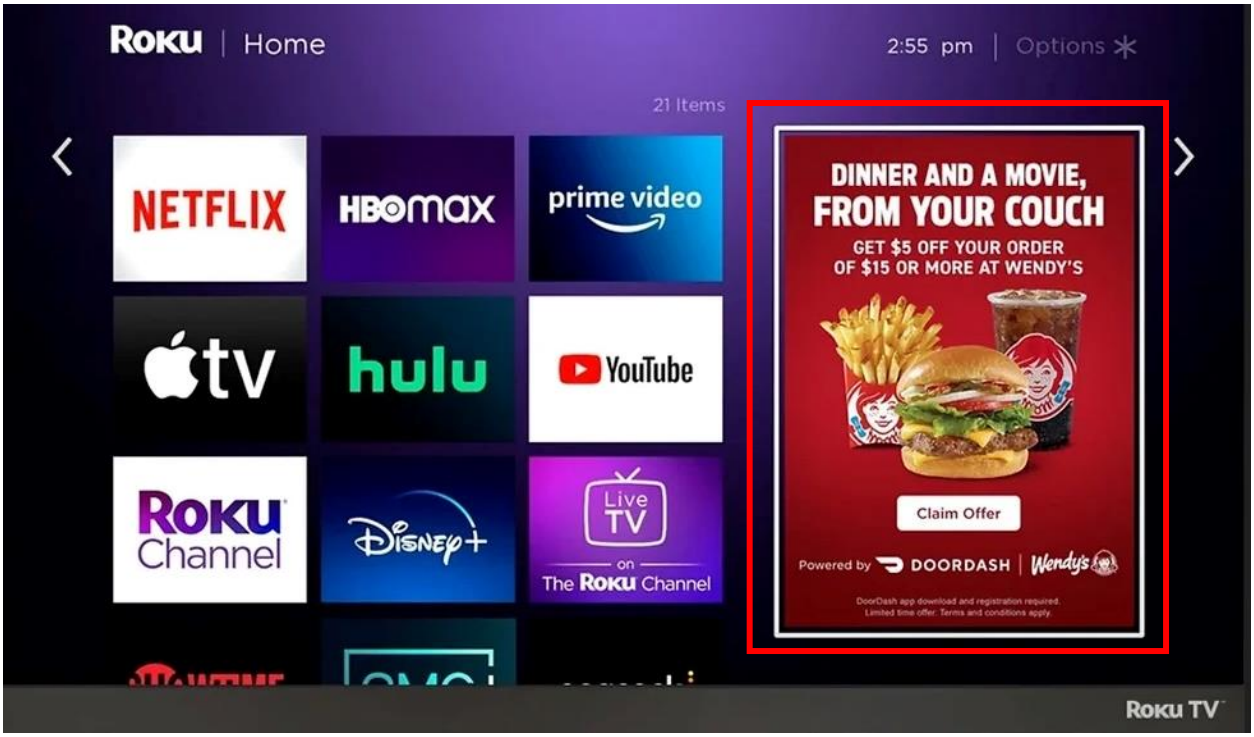
53. The red box in Figure 7 below depicts an example of an advertisement within the app of The New York Times, which is an open channel property. The advertisement contains text and images.

Figure 7 – Example of an Advertisement in an Open Channel App (In-App on The New York Times App)



54. The red box in Figure 8 below depicts an example of an advertisement within the Connected TV platform of Roku, which is an open channel property. The advertisement contains text and images.

Figure 8 – Example of an Advertisement through Connected TV (In the Roku App on a Connected TV)



55. The red box in Figure 9 below depicts an example of an in-stream video advertisement on the website of Global News. The red box in Figure 10 below depicts an example of an out-stream video advertisement on the website of the National Post. The websites of both Global News and the National Post are open channel properties.

Figure 9 – Example of an In-Stream Video Advertisement (Video on GlobalNews.ca)

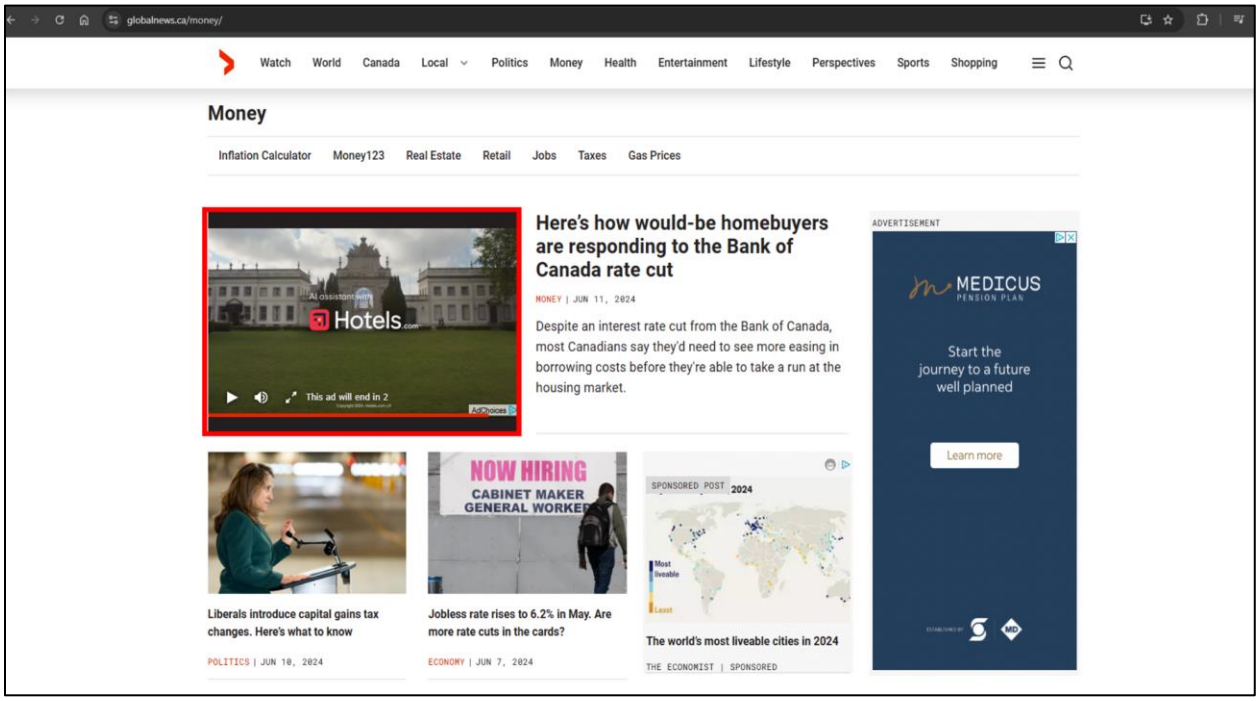
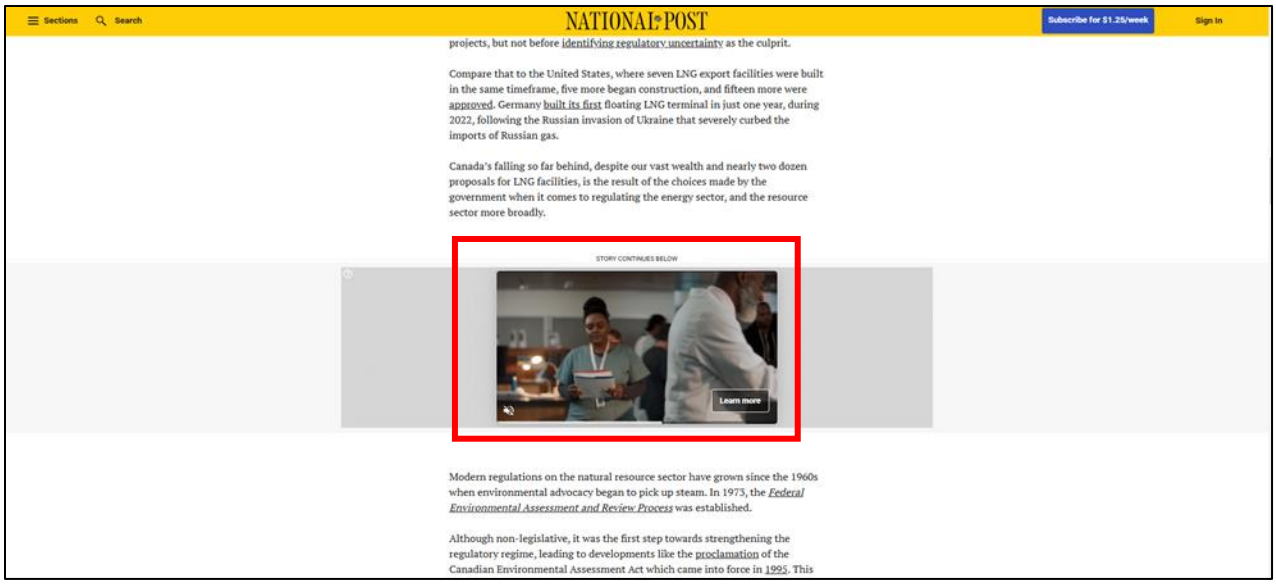


Figure 10 – Example of an Out-Stream Video Advertisement (Video on NationalPost.ca)



56. In-stream and out-stream video advertising are important and rapidly growing types of advertising.

57. The Commissioner has attempted to restrict this Application to a narrow sliver of the relevant market even though publishers generally make their advertising inventory available across different properties and advertisers typically shift their advertising spending across different formats and channels, often using the same or similar Ad Tech tools. The narrow sliver relied upon by the Commissioner has been cherry-picked for the tactical purpose of manufacturing artificial "markets" in which Google can be alleged to be dominant. The Commissioner's alleged markets do not reflect the commercial realities of any properly defined relevant market or of the Ad Tech business carried on by Google and other market participants.

58. The Commissioner's approach is particularly unfair and misguided having regard to the nature and extent of the extraordinary remedies he has sought. Even though the Commissioner alleges that Google engaged in misconduct in only a sliver of the relevant market, he has sought a Divestiture Order requiring Google to dispose of entirely two important tools in Google's Ad Tech offering, namely DFP and AdX. Those tools are used by Google to conduct digital advertising business that is well outside the boundaries of the artificially narrow markets advanced by the Commissioner.

59. The Commissioner has also sought to impose the single largest fine ever in Canada—not only in an abuse of dominance proceeding, but in ***any*** proceeding, either civil or criminal.

(ii) The Sale of Matches for Digital Advertising Inventory

60. There are three principal categories of participants in the relevant market: (i) advertisers (*i.e.*, buyers of advertising inventory); (ii) publishers (*i.e.*, sellers of advertising inventory); and (iii) users (*i.e.*, viewers of properties, including advertisements that may appear on those properties).

61. Participants in the digital advertising industry have developed a number of practices and tools to facilitate the purchase of advertising inventory by advertisers, and the corresponding sale of advertising inventory by publishers. The platforms and technologies developed to facilitate the buying and selling of advertising inventory are the product of extensive innovation by Google and other participants in the relevant market. Google has made significant investments in research and development, as have other market participants. Without Ad Tech, the internet would look very different than it now does, and be far less vibrant and dynamic.

62. Buying and selling advertising inventory can occur either directly or indirectly. In both instances, these transactions can be achieved through automated (*i.e.*, "**programmatic**") or non-automated means. "**Direct transactions**" occur where advertisers and publishers transact directly with each other, including through advertising or media agencies, to purchase or sell advertising inventory. "**Indirect transactions**" occur where advertisers purchase advertising inventory from publishers through a third-party intermediary, often via an automated high-speed auction process. Advertisers and publishers may also be represented by advertising or media agencies in indirect transactions.

63. A significant amount of spending by advertisers in the relevant market is associated with direct transactions. For example, direct transactions accounted for approximately 50% of the revenues earned by publishers from the sale of web display advertising inventory using DFP to advertisers in North America in 2023. Direct transactions usually involve the negotiation by publishers and advertisers of arrangements concerning a "guaranteed" number of views of an advertisement. For example, an advertiser might enter into a direct transaction with a publisher like The Globe and Mail to display a specific advertisement to individuals that visit The Globe and Mail's app or website 1,000,000 times over a defined time period for a specific price.

64. The Ad Tech tools of Google and other participants in the relevant market facilitate both direct and indirect transactions between publishers and advertisers. As the Ad Tech industry continues to innovate and evolve, direct transactions are increasingly being delivered programmatically.

65. Advertising inventory can be bought and sold using several different pricing models. Two primary pricing methods are: (i) cost per thousand (*i.e.*, mille) impressions of an advertisement ("**CPM**"); and (ii) cost per click ("**CPC**") of an advertisement.[5] When using the CPM model, a $10 CPM means that an advertiser is paying $10 to the publisher (less fees paid to the Ad Tech tool providers that facilitated the match) to show the specific advertisement 1,000 times in accordance with other applicable criteria. When using the CPC model, a $0.01 CPC means that an advertiser is paying $0.01 to the publisher (less

[5] There are other pricing mechanisms such as cost per action (generally measured as a fee charged for some action taken by a user after an advertisement is clicked on) and cost per view (a fee charged for each view of a video advertisement) as well.

fees paid to the Ad Tech tool providers that facilitated the match) each time a user of the publisher's property clicks on the specific advertisement.

66. Google and other owners and operators of Ad Tech tools through which publishers sell and advertisers purchase advertising inventory earn revenues in different ways depending upon the particular tool used. By way of example, on the advertiser (or "buy") side, advertisers using Google Ads pay Google to place their advertisements based on a share of revenue (sometimes referred to as a "**revenue share**" or "**take rate**"). This means that Google earns revenue by charging a percentage of an advertiser's winning bid before the remainder of the amount of the bid is paid to other intermediaries and, ultimately, to the publisher. The revenue share earned by Google varies by impression. Fundamentally, Google's compensation for the Ad Tech services it provides is tied to the match facilitated by the use of Google's Ad Tech tools.

67. Ad exchanges also typically operate based on a revenue share model. The revenue share on an ad exchange is typically a percentage of the price an advertiser pays to purchase an impression after any revenue share that is charged by the provider of the buy-side Ad Tech tool is deducted. The percentage of revenue owed to the operator of the ad exchange is typically paid to the operator before the balance of the amount in question is paid by the advertiser to the publisher. This is how Google earns revenue associated with the services provided by AdX.

68. On the publisher (or "sell") side, Google charges no "**ad serving fees**" for the use of DFP for the sizable number of publishers that transact below a specified number of impressions per month. In 2022, over 87% of the publishers that used DFP in North

America paid ***zero*** ad serving fees. The ad serving fees charged by Google for the use of DFP to those publishers that pay ad serving fees are a fixed cost (in the range of fractions of a cent) per impression served.

(iii) The Evolution of Ad Tech

(a) The Digital Advertising Industry During the Period From the Early 2000s to 2008

69. Ad Tech tools were initially developed to assist publishers in maximizing their advertising revenues by selling their left-over, or "remnant", advertising inventory that remained unsold after all obligations under direct transactions with advertisers had been satisfied. In the early 2000s, the use by publishers of Ad Tech tools and services to sell their remnant inventory through indirect transactions was at a nascent stage. The primary source of demand for advertising inventory at that time flowed through "**ad networks**"—which aggregated remnant inventory from multiple publishers and resold the inventory to advertisers. Ad networks functioned in similar fashion to an online marketplace in which publishers and advertisers would connect with each other in an attempt to sell and buy remnant advertising inventory. Both publishers and advertisers were (and are) served by ad networks. For that reason alone, there was and is no such thing as an "advertiser ad network" as suggested by the Commissioner throughout his Notice of Application, including in paragraph 5.

70. In the period between 2000 and 2009 there was a proliferation of ad networks. A publisher that wished to sell advertising inventory to advertisers had to determine where and how that inventory would be offered for sale. The main method of doing so at the time was through the "**waterfall**" system. Google did not create the waterfall system.

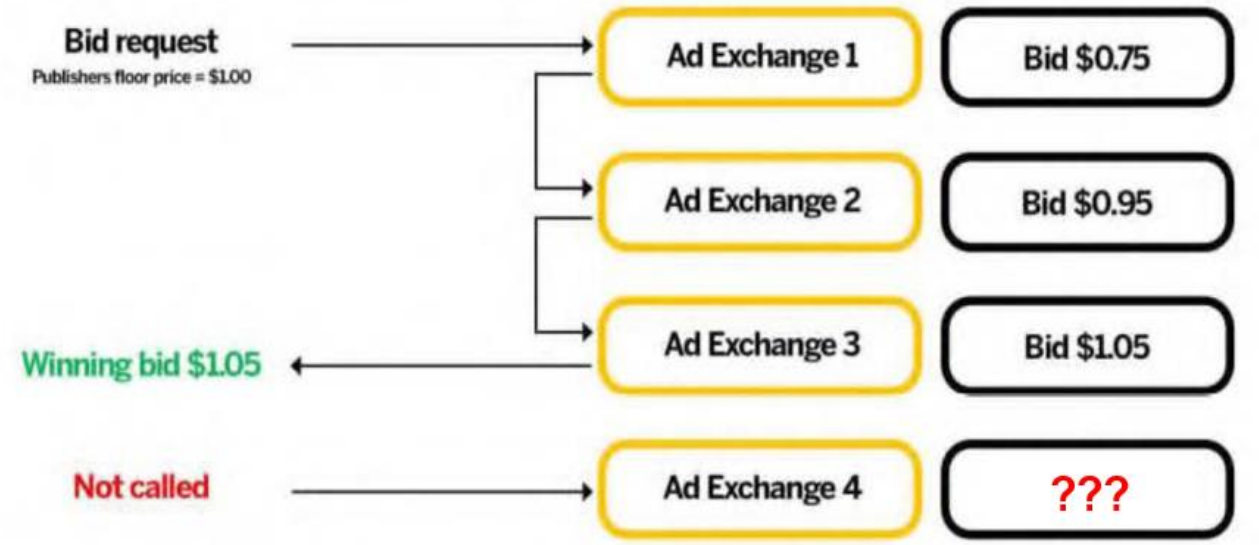
71. At a high and simplified level, the waterfall system was typically run using a "**publisher ad server**" (a type of Ad Tech tool used by publishers to manage their advertising inventory) through which a given publisher would offer its advertising inventory to ad networks and other sources of advertiser bids in a sequential order. Publishers would organize ad networks and other sources of advertiser bids in an order of priority they selected. Publishers would also set a price for a particular impression (that they would frequently change) that would be compared against advertiser bids from ad networks and other sources. When an impression became available, the publisher ad server would query, one-by-one in the order set by the publisher, each ad network or source of advertiser bids. Once the publisher ad server found a bid from an advertiser that met the publisher's criteria, the publisher ad server would stop querying the remaining ad networks or sources of advertiser bids in the publisher's waterfall and award the impression to the advertiser that met the publisher's criteria. The publisher ad server would then send a signal to the ad network or source of the advertiser's bid, which would return the advertisement to be shown.

72. As illustrated in Figure 11 below, the waterfall system was inefficient because publishers would not know whether advertisers using ad networks or Ad Tech tools that ranked lower in priority in the waterfall would have paid more for the same impression that was sold to an advertiser using an ad network or Ad Tech tool that ranked higher in the waterfall. This "left money on the table" for publishers. However, the waterfall system was the industry standard technology at the time.

73. Contrary to the implication embedded within the diagram set out in paragraph 56 of the Commissioner's Notice of Application, under the waterfall method neither the

publisher nor the Ad Tech tool provider was aware of the potential bids available from ad networks or sources of advertiser bids that ranked lower in priority in the waterfall if a bid was accepted from a source higher in the waterfall. Therefore, neither Google nor any other Ad Tech tool provider had knowledge of whether the publisher selling advertising inventory through the waterfall method obtained the highest available price for each impression. A corrected version of the diagram in paragraph 56 of the Commissioner's Notice of Application is set out in Figure 11 immediately below.

Figure 11 – Corrected Simplified Illustration of the Waterfall Method



74. Figure 11 above depicts the manner in which the waterfall system operated. In this example, the publisher selling advertising inventory has set a floor price of $1.00. The publisher's ad server would query the publisher's first chosen source of advertiser bids in the waterfall, but the highest advertiser bid from that source was $0.75 and did not meet or exceed the publisher's price floor. The publisher's ad server would then query the next source, but the highest advertiser bid from that source was $0.95 and also did not meet

or exceed the publisher's price floor. The publisher's ad server would then query the third source. The third source does contain an advertiser willing to bid an amount equal to or greater than the publisher's price floor (*i.e.*, $1.05). The publisher ad server would therefore sell the advertising inventory to the advertiser bidding from the third source in the waterfall instead of continuing to offer the advertising inventory to sources lower in priority in the waterfall. The publisher would therefore not know whether there was any advertiser from a source lower in priority in the waterfall willing to pay more for its advertising inventory than the winning bid of $1.05.

75. By approximately 2005, a type of Ad Tech known as "**ad exchanges**" had been developed. Ad exchanges increased the efficiency of transactions in the advertising industry by enabling multiple advertisers to submit bids for a given piece of advertising inventory via an auction process.

76. At the time, ad exchanges typically ran "**second price auctions**". In a second price auction the winning bidder generally pays a price equivalent to the second highest bid (or the floor price of the auction set by the seller, whichever is greater). In a second price auction, the winning bidder does not pay the amount of its bid no matter how high it bid. For example, in a hypothetical auction of an impression with no other constraints where Bidder A bids $1.00 and Bidder B bids $1.50, Bidder B will win the auction but only be required to pay $1.00. The theory behind second price auctions is that they generally encourage bidders to bid more aggressively because they will ultimately only have to pay the amount necessary to win the auction.

77. This is in contrast to what is known as a "**first price auction**", in which the winning bidder generally pays the amount they bid. Bidders in a first price auction generally bid lower than they would bid in a second price action because bidders must, on their own, manage their bid down to the amount necessary to win the auction and reduce the risk that they significantly outbid the next highest bidder. In the period after 2005, ad exchanges were incorporated into the waterfall process described above.

(b) The Digital Advertising Industry During the Period From 2008 to 2014

78. By 2007, Google recognized that it could better serve publishers and advertisers if it offered a publisher ad server to help publishers manage their advertising inventory. Ad Tech tools of this nature had existed in one form or another since the 1990s. To this end, in 2008 Google won a competitive bidding process and acquired a company known as DoubleClick Inc. ("**DoubleClick**"). Other companies that submitted bids to acquire DoubleClick included Microsoft.

79. In acquiring DoubleClick, Google assumed ownership of a number of Ad Tech tools and services operated by DoubleClick. These included DoubleClick's publisher ad server (known as DoubleClick for Publishers, defined above as "DFP") as well as its nascent ad exchange (known as AdX). The acquisition of DoubleClick was approved by the U.S. Federal Trade Commission and was reviewed without objection by the Canadian Competition Bureau (the "**Bureau**"). Indeed, the Bureau raised no concerns pertaining to Google's ownership or operation of the business of DoubleClick then or during the ensuing period of more than 15 years.

80. In 2009, Google launched two major improvements to DFP and AdX. Google: (i) integrated AdX with Google Ads; and (ii) added "**real-time bidding**", a protocol that allowed advertisers and publishers to communicate in a high-speed auction for available advertising space in a fraction of a second after a user visited a webpage. Both of these improvements were innovations brought to market by Google that benefitted publishers, advertisers and users.

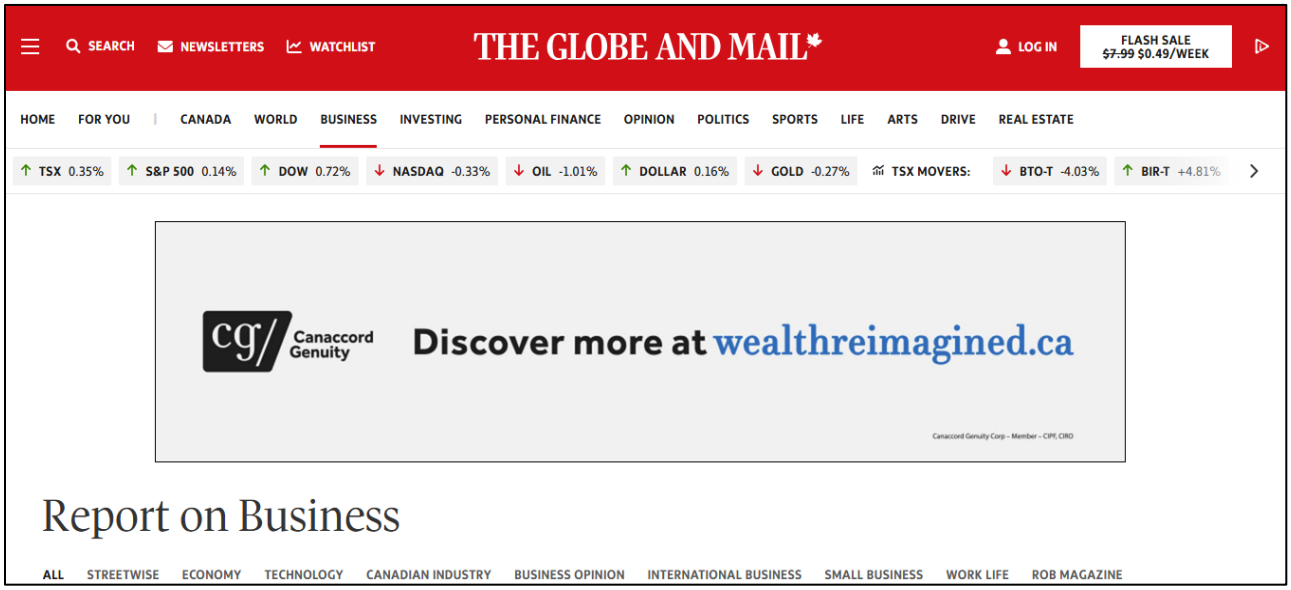
81. One of the principal advantages associated with real-time bidding is that advertisers receive information concerning the profiles of users visiting a given publisher's property prior to having to submit a bid into an auction for that publisher's advertising inventory. Prior to the advent of real-time bidding, advertisers had to submit static bids in advance (*i.e.*, before a user visited the publisher's property) that specified the amount of money an advertiser would pay for an impression that had certain characteristics. In other words, advertisers could not tailor their bids to the profile of the actual user visiting a particular property, such as an app or website. Auctions conducted within the waterfall process were also more efficient with real-time bidding because it promoted competition among advertisers for a particular impression.

82. The knowledge provided by real-time bidding was valuable because it allowed for more specific and targeted placement of advertisements. This benefitted advertisers, publishers and users alike. With real-time information in hand, an advertiser might be able to better infer the broad demographic profile of a particular user visiting a property. For example, an advertiser in the financial industry might infer that a user visiting The Globe and Mail's finance webpage would be more likely to be a middle-aged finance professional rather than a teenage student, and might use that information to decide to

bid more on that particular impression to ensure that their advertisement appeared on that particular webpage when that particular user visits the webpage than would an advertiser in the entertainment industry.

83. Figure 12 below is illustrative of the type of targeting enabled by real-time bidding. In this example, the wealth management firm Canaccord Genuity evidently outbid other advertisers for the impression available on The Globe and Mail's business webpage to ensure that its advertisement for wealth management services was displayed to a user visiting The Globe and Mail's business webpage rather than the advertisement of another advertiser.

Figure 12 – Example Advertisement on TheGlobeandMail.com's Business Webpage



84. Through the innovation of real-time bidding, advertising inventory in the relevant market became significantly more valuable, both for advertisers and for publishers.

Competing Ad Tech tool providers developed their own versions of real-time bidding soon after Google launched this innovative and procompetitive feature.

85. Beginning in 2009, there was a proliferation of Ad Tech tools in the relevant market developed specifically to assist advertisers with managing their bids for advertising inventory across multiple ad networks, ad exchanges and direct deal channels.

(c) The Digital Advertising Industry During the Period From 2014 to 2019

86. In approximately 2014, a new technology known as "**header bidding**" began to emerge as a result of robust competition in the relevant market. Header bidding was developed by participants in the market that compete against Google. Header bidding consists of computer code that enables an auction to be run on a publisher's website (rather than on the ad server of a third-party intermediary) in a way that facilitates multiple ad exchanges competing in real time for a publisher's digital advertising inventory. In other words, it is an "auction of auctions".

87. Header bidding became popular among publishers, as it offered advantages over the old waterfall method. Most notably, comparing real-time—rather than static—bids from multiple exchanges led to increased revenues for many publishers.

88. Header bidding, however, also brought with it new risks. For one, running an auction on the publisher's website slowed down the speed at which the webpage loaded. This, in turn, had a negative impact on the experience of the end-user. Header bidding also introduced more potential for advertising fraud and could artificially inflate prices for advertising inventory by resulting in a scenario in which the same advertiser would be

competing against itself by submitting multiple bids for the same advertising inventory being sold by a publisher simultaneously through multiple ad exchanges.

89. To compete with the rise of header bidding, in 2016 Google developed its own product that placed multiple ad exchanges in real-time competition with one another, known as "**Open Bidding**". Open Bidding was originally known as "Exchange Bidding". Open Bidding allows publishers to sell their advertising inventory not only through AdX but also through dozens of competing ad exchanges. Open Bidding was an improvement upon header bidding for several reasons. Most notably, it allowed properties to load faster because auctions for the advertising inventory of publishers were run on Google's servers rather than by publishers on their own properties. This is known as "**integrated header bidding**" in the Ad Tech industry. Integrated header bidding features have also been incorporated into ad exchanges and publisher ad servers offered by competitors of Google. These include, among others, Microsoft.

90. One consequence of the emergence of these various "auction of auctions" solutions was that publishers were now selling advertising inventory using multiple auctions with many different exchanges and sources of advertiser bids, each of which could have different auction rules and parameters. As ad exchanges began to experiment with the first price auction format referred to above, non-Google ad exchanges also experimented with auction rules that made it less transparent as to whether an auction was conducted on a first-price or second-price basis.

91. At the same time, publishers and advertisers were becoming increasingly savvy and sophisticated in leveraging Ad Tech tools for their own advantage. Because Ad Tech

tools could be configured to run simultaneous auctions for the same digital advertising inventory of the same publisher using different parameters, some publishers and advertisers leveraged this ability (and the complex and confusing auction process described above) to game the system. Publishers did so, for instance, by "price fishing" or "multi-calling".

92. Price fishing refers to a tactic by which publishers called for (*i.e.*, sought) bids from the same advertisers on different ad exchanges for the same impression using different price floors. This tactic had the effect of artificially inflating the price an advertiser had to pay for that impression. Multi-calling is a similar tactic used to extract artificially higher prices from advertisers by calling the same bidder multiple times on the same ad exchange.

93. It was in this increasingly complicated environment that, in 2019, Google launched its "**Unified First Price Auction**" feature in AdX. In doing so, Google aimed to increase simplicity and transparency for participants in the relevant market, and to ensure that all auctions for the same advertising inventory were conducted on an equal footing so that the advertiser that valued the impression of a particular publisher the highest would win the auction. Implementing the Unified First Price Auction feature in AdX also involved the implementation of a corollary feature in DFP known as the Unified Pricing Rules. As explained in paragraphs 267 to 268 below, Google denies that there was anything anticompetitive or otherwise improper in introducing or using the Unified Pricing Rules.

(d) The Digital Advertising Industry in the Period Since 2019

94. As described above, since its inception the relevant market has been defined by vigorous and dynamic competition as well as by the development and successful deployment of disruptive, innovative technologies that continue to this day to reshape the market. The advertising industry has grown to become a complex web of competing, substitutable and complementary third-party and proprietary Ad Tech tools and services that continue to evolve and improve.

95. New technologies and innovations, such as programmatic direct deals, supply path optimization and artificial intelligence (each of which is described below), have impacted and will continue to impact materially the competitive dynamics in the relevant market. Google has invested heavily in its Ad Tech tools in an effort to improve their efficiency and capabilities with a view to increasing their superior competitive performance. These investments have benefitted advertisers, publishers and users.

96. "**Programmatic direct deals**" (also known as "programmatic guaranteed deals") refers to direct deals between publishers and advertisers for advertising inventory that are transacted automatically rather than manually through the use of Ad Tech tools and services. Without the use of such tools, the process of arranging direct deals manually can be inefficient, burdensome and time consuming. Programmatic direct deals have introduced efficiencies for advertisers and publishers. Google has developed programmatic direct deal capabilities on Display & Video 360 ("**DV360**"), AdX and DFP so that direct transactions between publishers and advertisers can be negotiated and executed more efficiently and expeditiously.

97. "**Supply path optimization**" is an emerging trend in the relevant market by which advertisers and publishers are seeking to reduce the number of intermediaries involved in their transactions for advertising inventory in order to increase their revenues (in the case of publishers) and returns on investment (in the case of advertisers). This trend arose in response to the complexity driven by header bidding and its attendant multiple layers of auctions. The desire of advertisers and publishers for supply path optimization has led providers of traditional Ad Tech tools to offer services that more directly connect advertisers to publishers (and vice versa) in ways that are more efficient and break down historical distinctions between sell-side and buy-side Ad Tech tools. Indeed, supply path optimization permits publishers to connect with advertisers and advertisers to connect with publishers without using any intermediary Ad Tech tools (like ad exchanges) offered either by Google or by Google's competitors.

98. In addition, the increasing proliferation and importance of "**artificial intelligence**" in recent years has imposed new competitive pressures on providers of Ad Tech to innovate by effectively integrating new technologies and features into their tools and services. One significant innovation made possible by artificial intelligence is "**automated ad buying**", which allows advertisers to establish parameters for the advertising inventory they wish to acquire, and allow Ad Tech tools to make purchasing decisions for them. The use of automated ad buying may well further enhance the sorts of efficiencies that participants in the relevant market value highly.

D. Ad Tech Tools Offered by Google

99. Set out below is an overview of the suite of Ad Tech tools and services offered by Google to participants in the relevant market.

(i) Google Ads

100. Google Ads was launched in 2000. It was originally known as AdWords. When it was first created, Google Ads was a buying tool used by advertisers to place advertisements on Google's search results page.

101. Today, Google Ads is a platform through which advertisers can purchase advertising inventory on Google's search results page, as well as on apps, video platforms and other webpages owned and operated by Google. Google Ads can also be used by advertisers to purchase advertising inventory sold by third-party publishers on their apps, video platforms and websites using Google sell-side Ad Tech tools. Advertisers using Google Ads can also purchase advertising inventory made available by third-party publishers that use non-Google sell-side Ad Tech tools through features known as "**AwBid**" and "**gBid**". AwBid is a feature of Google Ads that Google launched in 2011. AwBid allows advertisers using Google Ads to purchase advertising inventory on websites sold by third-party publishers via ad exchanges other than AdX. gBid is a feature of Google Ads that began serving a sizable amount of traffic in 2022. gBid allows advertisers using Google Ads to purchase in-app advertising inventory sold by third-party publishers via publisher Ad Tech tools other than AdMob (discussed below).

102. The more than 2 million third-party video platforms, apps and websites where display advertising inventory bought and sold using Google Ads can appear is referred to as the "**Google Display Network**". The various search result pages, including third-party search result pages, that advertisers using Google Ads can place advertisements on is referred to as the "**Google Search Network**".

103. Advertisers can establish accounts that enable them to use Google Ads at no cost. In addition, Google Ads does not impose any minimum spend requirements. Instead, advertisers pay to use Google Ads based on the revenue share model discussed in paragraph 66 above.

(ii) Display & Video 360, Also Known As "DV360"

104. DV360 is a buy-side Ad Tech tool that allows advertisers to buy advertising inventory from more than 80 sources, including Google's AdX and a number of third-party ad exchanges. DV360 has overlapping functionality with Google Ads but provides more granular controls to advertisers. Many advertisers use both Google Ads and DV360 as well as a number of other non-Google buy-side Ad Tech tools. DV360 enables advertisers to buy advertising inventory, including video advertising, across multiple channels such as apps and websites.

105. Google also operates a buy-side Ad Tech tool known as Search Advertising 360 ("**SA360**"). SA360 is an interface between advertisers and digital properties on which search advertising can be purchased. SA360 allows advertisers to manage their search advertising campaigns across multiple search engines.

106. Finally, Google also offers a buy-side Ad Tech tool known as Campaign Manager, which offers to advertisers functionality such as advertising campaign reporting, media planning, optimization and targeting.

(iii) AdSense

107. While Google Ads initially connected advertisers only to Google's properties, Google Ads was soon opened up for use by third-party publishers through a tool known

as "**AdSense**". AdSense initially enabled providers of third-party search engines to sell search advertising inventory on their search results pages to advertisers using Google Ads. For more than 20 years, since 2003, AdSense has also enabled third-party publishers in the Google Display Network to sell display advertising inventory to advertisers using Google Ads. AdSense also enables third-party publishers to sell display advertising inventory to advertisers using DV360 and non-Google buy-side Ad Tech tools.

108. AdSense serves numerous advertising formats, including search advertisements as well as banner, native, video and web-based game advertisements.[6] AdSense is used by millions of publishers of all shapes, sizes and descriptions that seek a simplified solution for selling their advertising inventory. Advertising inventory available through AdSense can be purchased by advertisers using Google Ads, DV360, and third-party buy-side Ad Tech tools. Notably, and contrary to the allegations of the Commissioner in his Notice of Application that demand from advertisers using Google Ads is tied to the use of AdX and DFP, AdSense is one of several mechanisms through which publishers—whether using DFP or not—can connect with advertisers that use Google Ads without using AdX.

(iv) AdMob

109. Like AdSense, AdMob is an ad network, albeit one that focuses on in-app advertisements. AdMob, like AdSense, allows publishers to sell advertising inventory to advertisers that use Google Ads, DV360 and competing buy-side Ad Tech tools. Like

[6] Google offers a number of products with the AdSense branding. The AdSense Ad Tech tool that enables the sale of search advertising inventory through AdSense is known as "AdSense for Search". The AdSense Ad Tech tool that enables the sale of display advertising inventory through AdSense is known as "AdSense for Content". For convenience, and given the focus of the Commissioner's Notice of Application on display advertising, AdSense for Content is referred to as "AdSense" in this Response.

AdSense, AdMob provides a mechanism for publishers—whether using DFP or not—to access demand from advertisers who use Google Ads without using AdX.

(v) DoubleClick for Publishers, Also Known As "DFP"

110. DFP is an Ad Tech tool that helps publishers (both large and small) sell, forecast, serve and report the numerous advertising campaigns run on their properties including in-app, web and video advertising campaigns. DFP is one of many tools publishers may choose to use to make advertising inventory on their properties available for purchase by advertisers and to manage the demands of advertisers for advertising inventory.

111. Publishers may use DFP to sell advertising inventory indirectly through a number of channels, including AdX, third-party ad exchanges and third-party ad networks. Publishers may also use DFP to enter into direct transactions with advertisers and/or connect with advertisers directly without going through an intermediary ad exchange by using supply path optimization. Through DFP, a publisher is able to place its advertising inventory for auction on more than 100 third-party ad exchanges, all of which compete with AdX.

112. Publishers do not, however, need to use DFP and AdX together. In fact, publishers using DFP must take affirmative action to access AdX and undergo a vetting process involving multiple steps before they obtain access to AdX. Even then, publishers using DFP who are given access to AdX can choose to make only some or none of their advertising inventory available to be sold through AdX. Moreover, publishers that elect to use DFP and are given access to AdX can simply and easily turn off AdX altogether. And, indeed, the vast majority of publishers that use Google's Ad Tech tools do not use DFP

or AdX. Instead, most publishers that use Google's Ad Tech tools use only AdSense (sometimes in combination with AdMob) to sell their advertising inventory rather than DFP and/or AdX.

(vi) AdX

113. AdX is an ad exchange that connects publishers seeking to sell their advertising inventory with advertisers looking to place their advertisements via auctions that take place in fractions of a second after a user navigates to an app or website. As alluded to above, two major innovative improvements that Google made to AdX following Google's acquisition of DoubleClick's nascent ad exchange in 2008 were: (i) appropriate integration with Google Ads; and (ii) real-time bidding functionality.

114. Notably, not all purchases or sales of advertising inventory facilitated by Google's Ad Tech tools involve the use by publishers or advertisers of AdX. As explained above, publishers who do not make their advertising inventory available through AdX can access demand from advertisers that use Google Ads via AdSense or AdMob. Advertisers who use Google's buy-side Ad Tech tools can also access the advertising inventory of publishers sold on third-party exchanges via DV360, or via Google Ads through AwBid and/or gBid.

115. In 2018, Google combined the functionalities of DFP and AdX into a single user interface called "**Google Ad Manager**". Google Ad Manager provides publishers with a single platform for delivering, measuring and optimizing advertising in-app, on mobile devices, in video formats and on websites. Publishers, however, were not and are not

required to use both DFP and AdX or either of them. DFP and AdX simply became accessible through the same interface.

E. Intense Competition in the Digital Advertising Industry

116. As both the output of advertising and the optionality of Ad Tech tools has increased, prices for Ad Tech related products and services, including for the use of Google's Ad Tech tools, have either fallen or remained consistent even though the quality and efficiency of the Ad Tech tools and services provided in the relevant market has improved. Moreover, the share of total advertising revenues transacted using Google's Ad Tech tools has decreased over time, including as a result of significant competition Google faces in the relevant market. By way of example only:

(a) **Microsoft** is a sizable and well-funded competitor, with annual revenues in the range of approximately US$245 billion and approximately 228,000 employees as of 2024. Microsoft is a long-time Ad Tech competitor in the relevant market. For the past two decades, Microsoft has competed with Google through its own suite of integrated Ad Tech tools. Microsoft operates on both sides of the relevant two-sided market and has an end-to-end suite of Ad Tech tools. One of the Ad Tech tools that Microsoft ultimately acquired—AppNexus—became a significant player in header bidding, fuelling its growth and challenging competitors in the Ad Tech industry, including Google. Similarly, the Microsoft Audience Network permits advertisers to buy advertising inventory both on Microsoft owned-and-operated properties and on the properties of third-parties. Microsoft has also integrated its Ad Tech tools with its other products, both to take advantage

of numerous associated synergies and to bolster its competitive advantage. Microsoft has successfully won business from Google in the relevant market. For example, Microsoft outbid Google to become the provider of Ad Tech tools and services for Netflix beginning in 2022 despite Google making a number of concessions in an attempt to win the business of Netflix. After Microsoft won Netflix's business, Netflix announced that by 2025 it would deploy and use its own in-house Ad Tech tools;

(b) **Meta** (the owner of Facebook) is also a sizable and well-funded competitor, with annual revenues of approximately US$165 billion and approximately 67,000 employees as of 2024. Meta is both a publisher with significant quantities and types of advertising inventory and a supplier of Ad Tech tools and services. Meta has created its own integrated suite of Ad Tech tools, featuring a proprietary publisher ad server, auction capabilities and a buying tool for advertisers. Through Meta's advertiser Ad Tech tool, advertisers can purchase ads on Meta's owned-and-operated platforms as well as on third-party properties. More than a decade ago, in 2014, Meta launched the Facebook Audience Network (now the Meta Audience Network), which linked Meta's properties with third-party website publishers and advertisers. In recognition of the significant increase in advertising on mobile apps, Meta shifted its focus in 2020 to serving advertisers seeking to purchase in-app advertising inventory by transitioning the Facebook Audience Network from selling third-party web-based advertising inventory to selling third-party in-app advertising inventory. Meta is able to leverage user data from its highly

popular social media and messaging platforms to offer unique Ad Tech services in direct competition with the Ad Tech products and services offered by Google. Google has lost business in the relevant market to Meta and considers Meta to be a significant competitive threat;

(c) **Amazon** is both a publisher with significant quantities and types of advertising inventory and an Ad Tech provider that competes directly with Google. Amazon is also a sizable and well-funded competitor, with annual revenues of approximately US$638 billion, and approximately 1.5 million employees as of 2024. Amazon sells advertising inventory on its website and in its mobile apps through its Ad Tech tools. It also offers integrated proprietary advertiser and publisher Ad Tech tools to third-party publishers and advertisers that are used to buy and sell advertising space on third-party properties in addition to Amazon's own properties. Since at least 2015, Google has recognized Amazon's Ad Tech tools as a significant competitive threat in the relevant market. As the owner and operator of the world's most widely visited e-commerce website, Amazon leverages its valuable user consumption data to improve the matches its Ad Tech tools can provide to advertisers and publishers;

(d) **TikTok** is a social media company specializing in the delivery of short-form video content. TikTok offers a self-service platform called TikTok Ads Manager that enables advertisers to place advertisements within TikTok's enormously popular app. TikTok's Pangle product also enables advertisers to effectively reach broad audiences by placing advertisements within third-

party apps. Google has lost business in the relevant market to TikTok and other major social media companies offering their own proprietary Ad Tech tools. Although as of the date of this Response TikTok's future is uncertain in the U.S., to date the Government of Canada has only ordered the wind-up of the Canadian business carried on by TikTok Technology Canada, Inc. The Government of Canada has not, to date, indicated an intention to ban the use of TikTok or advertising on TikTok in Canada;

(e) **Criteo** is a third-party provider of advertiser and publisher Ad Tech tools. Even though Criteo's advertiser Ad Tech tool charges take rates that are higher than the revenue shares charged by Google's advertiser Ad Tech tools, Criteo has been able to win business from Google in the relevant market. It has also continued innovating and developing new Ad Tech tools and features and competes actively against Google. In 2017, Criteo launched its Direct Bidder tool that integrates directly with a publisher's header bidding software. Direct Bidder bypasses ad exchanges like AdX entirely, and exerts competitive pressure on Google's Ad Tech services;

(f) **The Trade Desk** is one of the largest third-party providers of advertiser Ad Tech tools in the world, and is a major competitor to Google in the relevant market. In 2022, The Trade Desk launched a publisher Ad Tech tool known as OpenPath through which it enters into direct agreements with publishers for the sale of their advertising inventory and provides a direct link between advertisers and publishers, thereby bypassing the involvement of AdX and other ad exchanges;

(g) **Magnite**, a provider of Ad Tech tools to publishers, describes itself as "the world's largest independent omni-channel sell-side advertising platform". It considers the Ad Tech business to be "highly competitive", and recognizes that it competes actively against a number of "formidable competitors". Magnite was founded in 2007 and was a pioneer in developing Ad Tech tools for publishers. Today, Magnite is valued at more than US$2.5 billion. It grew its annual revenues by more than 350% in the period from 2018 to 2022. Magnite also recently launched Clearline, a supply path optimization tool that provides advertising agencies with direct access to the advertising inventory of publishers. Clearline allows publishers and advertisers to sell and purchase advertising inventory without using ad exchanges, including AdX. Magnite also represents that Clearline immediately had "broad support" and "and adoption across the industry"; and

(h) **Equativ** is a vertically integrated Ad Tech tool provider that offers Ad Tech tools to buy and sell display advertising. Equativ has also positioned itself as a leading Connected TV advertising Ad Tech tool provider, and facilitates more advertising inventory transactions on Connected TV formats in a number of geographic areas than Google. Equativ is growing rapidly in terms of revenue and number of employees. According to its CEO, Equativ is taking market share from its competitors. He describes Equativ's publisher ad server as "probably [Equativ's] strongest asset". Equativ's Ad Tech tools have direct access to advertisers that use Google Ads and DV360.

117. In addition to the competitors listed above, numerous other competitors also compete fiercely with Google for business in the relevant market. For example, PubMatic (like Google and Microsoft) owns and operates its own Ad Tech tools both on the buy-side and on the sell-side of the relevant market, as well as its own ad exchange. Notably, in 2009, PubMatic developed real-time bidding functionality for its Ad Tech tools shortly after Google did so. Index Exchange and OpenX are also competitors of Google that offer ad exchanges that compete with AdX.

118. Set out in Figure 13 below is an illustration of the diverse array of at least some of the many competitors in the relevant market.

Figure 13 – Illustration of Competition in the Digital Advertising Industry

(i) In-House Ad Tech Tools

119. In addition to competing against third-party providers of Ad Tech tools, including those described above, Google also competes with sizable and well-funded publishers who own and operate their own in-house Ad Tech tools. These include Disney, Reddit, Snapchat, Pinterest, eBay and LinkedIn. Disney, Reddit and Snapchat are examples of former users of Google's Ad Tech tools that have replaced their use of Google's Ad Tech tools with their own in-house Ad Tech tools. They use their in-house Ad Tech tools to compete effectively and efficiently in the sale of advertising inventory to the same third-party advertisers Google provides Ad Tech tools and services to.

120. Proprietary in-house Ad Tech tools are used by publishers to sell the same advertising inventory in the same formats through the same channels as are serviced by third-party Ad Tech tools, including Ad Tech tools provided by Google. Publishers may choose to only own and operate certain Ad Tech tools in-house while purchasing other Ad Tech services from third-party providers. An in-house Ad Tech tool operator may also choose to offer some of its Ad Tech tools to other third-party publishers. The result is increasing optionality in the supply and use of Ad Tech tools and services and a competitive landscape in which publishers can and often do compete in the relevant market against Google and other third-party providers of Ad Tech tools.

121. Notwithstanding the enormous innovation that has already taken place and that will continue to radically alter the relevant market in the future, the Commissioner's Application focuses tactically on an artificially narrow set of Ad Tech tools and services that were developed in the early years of the digital advertising industry dating back to 2008. The Commissioner's Application essentially ignores a number of significant

innovations, developments and other changes that have fundamentally altered the various ways in which publishers and advertisers connect and carry on business in the relevant market.

F. The Commissioner's Allegations Regarding Google's Practice of Anticompetitive Acts are Tactical in Nature, Factually Inaccurate and Unavailing

122. In paragraphs 142 to 193 of his Notice of Application, the Commissioner alleges that in the period since 2008, Google has engaged in four interrelated and interdependent anticompetitive acts. Specifically, the Commissioner alleges that: (i) the tying together of Google's Ad Tech tools; (ii) the use by Google of an innovative technology called "Dynamic Allocation"; (iii) the use by Google of an innovative feature known as "Project Bernanke"; and (iv) the implementation by Google of "Unified Pricing Rules", were improper. Each of these allegations is without merit. The Commissioner's allegations are factually wrong, barred by the passage of applicable limitation periods, or both.

(i) Google Does Not Tie Together its Ad Tech Tools

123. From the most basic and fundamental perspective, the Commissioner's central allegation in paragraphs 149 to 166 of his Notice of Application that Google has unlawfully "tied" together Google Ads, AdX and DFP evinces a manifest misunderstanding of the manner in which the relevant market operates. All of Google Ads, AdX and DFP interoperate with numerous Ad Tech tools that are owned and operated by third parties. Conversely, none of Google Ads, AdX or DFP requires the exclusive use of each other to buy or sell advertising inventory.

124. Contrary to the allegations of the Commissioner in paragraphs 149 to 166 of his Notice of Application, access by publishers to the demand of advertisers that use Google Ads for advertising inventory is not conditional upon the use by publishers of either AdX or DFP. As noted above, most publishers do not use DFP or AdX. Indeed, publishers are not even eligible to use AdX without completing a threshold vetting process that is intended to better ensure that the advertising inventory they will offer through AdX is legitimate and safe.

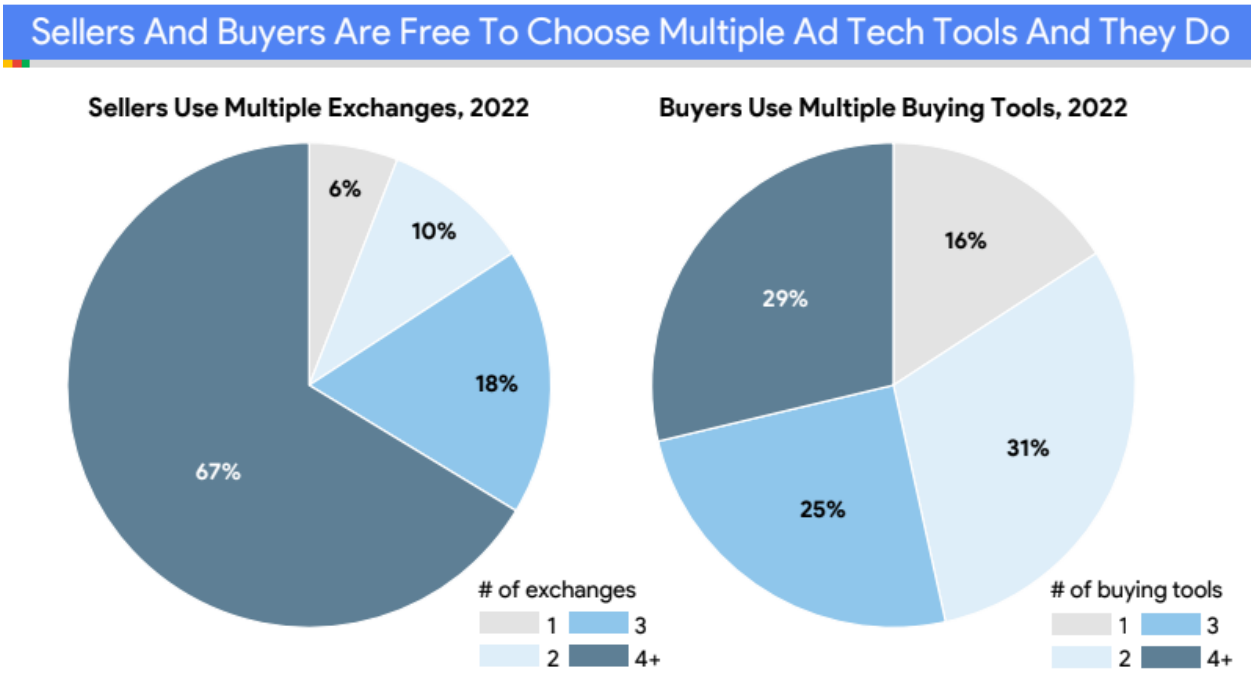
125. The Commissioner's allegation that publishers that use competing, non-Google Ad Tech tools cannot access the demand of advertisers that use Google Ads to purchase advertising inventory is also incorrect. As described above, Google Ads permits publishers who use competing Ad Tech tools to sell advertising inventory to advertisers that use Google Ads through AdSense and AdMob. Google Ads also bids directly into non-Google ad exchanges via programs called AwBid and gBid. AdX can also be integrated with non-Google owned publisher ad servers via AdX Direct tags.

126. In addition, the demand for advertising inventory associated with advertisers that use Google Ads is accessible through a variety of non-Google buy-side Ad Tech tools. That is so for a number of reasons, including because the vast majority of advertisers that use Google Ads do not use it exclusively. Rather, they use it in conjunction with multiple other competing buy-side Ad Tech tools. The simultaneous use by participants in the relevant market of multiple different and competing Ad Tech tools is known as "**multi-homing**". The vast majority of advertisers and publishers "multi-home" by using competing Ad Tech tools in buying and selling advertising inventory.

127. As such, the foundational allegation of the Commissioner in paragraph 157 of his Notice of Application that “the only way to access the majority of Google Ads’ demand is through AdX” is manifestly wrong. Advertisers that use multiple competing Ad Tech tools are, by definition, accessible to publishers through the use of Ad Tech tools other than AdX.

128. For example, an advertiser might use Google Ads and DV360 as well as buy-side Ad Tech tools from The Trade Desk and/or Criteo to purchase advertising inventory. Publishers that wish to gain access to the demand of that advertiser for advertising inventory could easily connect with the advertiser by making their advertising inventory available on a number of third-party ad exchanges or other sell-side Ad Tech tools that interoperate with any one or more of those buy-side Ad Tech tools. An illustration of the proportion of advertisers and publishers that use multiple buy-side Ad Tech tools and ad exchanges to purchase and sell advertising inventory is set out in Figure 14 below. As Figure 14 illustrates, in 2022, only 16% of advertisers used a single buy-side Ad Tech tool and only 6% of publishers used a single ad exchange.

Figure 14 – Proportion of Publishers and Advertisers that Use Multiple Buy-Side Ad Tech Tools and Ad Exchanges



129. Contrary to the allegations of the Commissioner in paragraphs 158 to 161 of his Notice of Application, Google has not conditioned "access to AdX on the use of DFP". Google does not require publishers to use either AdX or DFP, let alone to use both together. The Commissioner's allegation that DFP and AdX are somehow necessary tools that must be used by publishers in order to access the demand of advertisers that use Google Ads for advertising inventory is flatly contradicted by the fact that the vast majority publishers using Google's Ad Tech tools do not use AdX or DFP.

130. In summary, and contrary to the allegations of the Commissioner in paragraph 162 of his Notice of Application, Google has not tied together Google Ads and AdX. Nor has Google tied together AdX and DFP. The use by publishers and advertisers of one of these Ad Tech tools is not conditional on their use of the others. In this regard: (i) publishers can and do access AdX without using DFP; (ii) publishers can and do access DFP without

using AdX; (iii) publishers can and do access AdSense and AdMob (and therefore advertisers that choose to use Google Ads) without using either AdX or DFP; and (iv) advertisers using Google Ads can and do bid on advertising inventory made available by publishers that do not use either AdX or DFP.

131. In addition, the tying allegations of the Commissioner are logically incoherent given that the customers of Google that use Google Ads, AdX and DFP are different. Only advertisers use Google Ads. And only publishers use AdX and DFP. Contrary to the suggestion of the Commissioner, these three Ad Tech tools of Google can hardly have been "tied" with each other given that different universes of customers use those tools and the services they provide. Advertisers cannot be victims of an alleged (but non-existent) tie between AdX and DFP because they do not use those tools. Nor can publishers be victims of an alleged (but non-existent) tie between Google Ads and AdX because they do not use Google Ads.

132. The mere fact that publishers or advertisers may derive advantages from using some combination of Google Ads, DFP or AdX does not constitute an unlawful tie under the abuse of dominance provisions in section 79 of the *Competition Act* or otherwise.

(ii) Google Did Not Give AdX an Improper "First Look" or "Last Look" Advantage, or Use Dynamic Allocation Improperly

133. Contrary to the allegations of the Commissioner in paragraphs 167 to 178 of his Notice of Application, in the period of some 16 years since 2009, Google has not "leveraged DFP's substantial market power to funnel transactions to AdX, thereby further strengthening the position of its ad exchange, relative to other exchanges" including by way of the use of so-called "**first look**" and "**last look**" advantages.

134. The terms “first look” and “last look” were not Google tools or features. Rather, they describe consequences associated with the use by certain publishers of a feature within DFP called “**Dynamic Allocation**”. Dynamic Allocation was designed to increase the revenues of publishers. Dynamic Allocation was not developed by Google. Instead, this was a feature embedded within DFP when Google acquired DoubleClick in 2008.

135. As used by the Commissioner in his Notice of Application, the term “first look” is a short-hand description of the manner in which Dynamic Allocation functioned within the waterfall process referred to in paragraphs 70 to 74 above in the period between the acquisition of DoubleClick by Google in 2008 and approximately 2015. What the Commissioner refers to as “last look” is a short-hand description of the manner in which Dynamic Allocation functioned within the waterfall process in the period between approximately 2015 and 2019. All of this took place well before the expiration of the relevant three-year limitation period prescribed in subsection 79(6) of the *Competition Act*.

136. The Commissioner was well aware of the existence and function of Dynamic Allocation by 2016 at the latest. Indeed, the Bureau published a Position Statement on April 19, 2016 in which the Commissioner concluded correctly that: (i) “there has been no exclusionary effect on competing ad exchanges as a result of” Dynamic Allocation; (ii) “publishers suggest that [Dynamic Allocation] is beneficial because it provides them with an opportunity to increase revenue”; (iii) Dynamic Allocation “is optional, so publishers can decide for themselves whether or not to use [the] feature”; and (iv) Dynamic Allocation “has not resulted in a substantial lessening or prevention of competition in the market”.

137. In the period before Google acquired DoubleClick in 2008, Dynamic Allocation involved DFP connecting to AdX to inquire whether an advertiser placing a bid through AdX was willing to pay more than the highest bid value expected in the waterfall established by the publisher. In certain configurations, AdX would "first" run an auction using the highest expected value in the waterfall as the floor price. If no advertiser bid in the auction run by AdX met or exceeded that floor price, the advertising inventory would then be offered to the waterfall. Publishers were always able to choose or control whether to enable Dynamic Allocation and how to configure it. Publishers who enabled and configured Dynamic Allocation in the manner described above saw an increase in their revenues associated with the sale of their advertising inventory.

138. Although Google continued to offer Dynamic Allocation after it acquired DoubleClick in 2008, it did so in a fashion that was paired with real-time bidding through AdX. As stated above, real-time bidding was enabled by Google in 2009.

139. The Commissioner alleges in paragraphs 171 and 172 of his Notice of Application that Google's "first look" advantage became a "last look" advantage in approximately 2015 with the advent of header bidding. The implication that Google took some sort of action in that period to give AdX a "last look" advantage is without merit. Dynamic Allocation operated the same way in the period after 2015 as it had in the period before 2015. In the period after 2015, however, publishers chose to configure DFP to take into account bids received through header bidding.

140. Previously, price floors established by publishers on AdX were based on static values that publishers assigned to other ad exchanges in their waterfall. After header

bidding emerged, however, price floors established by publishers on AdX could change based on bids that publishers received simultaneously from other ad exchanges competing in the header bidding auction for advertising inventory. This meant that publishers could choose to input the highest bid from a header bidding auction into DFP as the price floor to be used in an AdX auction. Dynamic Allocation would then trigger an AdX auction for the advertising inventory auctioned through header bidding using the amount of the highest bid obtained through header bidding as the price floor for the "last" AdX auction.

141. If an advertiser bidding through the last auction conducted by AdX was willing to pay a higher price than the highest bid received through header bidding, that advertiser would win the advertising inventory. At the same time, the publisher would receive more revenue than it otherwise would have. This is what the Commissioner refers to in his Notice of Application as the "last look". As with "first look", publishers were in full control of whether to enable and how to configure Dynamic Allocation. Publishers that chose this "last look" configuration received more revenue for the sale of their advertising inventory than they otherwise would have in the absence of Dynamic Allocation.

142. Publishers were never required by Google to use Dynamic Allocation. Many did so, however, because they concluded that it was in their best interests to do so. They made that choice while retaining full control over whether to enable and use Dynamic Allocation. Moreover, publishers were fully able to configure Dynamic Allocation in such a manner as to avoid giving AdX a "first look" or "last look". Publishers could have also configured DFP to exclude bids from AdX altogether.

143. In addition, publishers could, and frequently did, set “first look” and “last look” price floors on AdX at amounts that were higher than the price floors used in auctions on other ad exchanges as well as the maximum bid generated from auctions conducted on other ad exchanges. As a result, Dynamic Allocation was a revenue maximizing tool for publishers. It ensured that publishers that chose to use this feature received the maximum revenue for their advertising inventory.

144. Moreover, nothing prevented competing providers of publisher Ad Tech tools from developing their own versions of Dynamic Allocation.

145. In paragraphs 174 to 175 of his Notice of Application, the Commissioner alleges that another Ad Tech feature known as “**Sell-Side Dynamic Revenue Share**” combined with Dynamic Allocation to hamper improperly the ability of other providers of Ad Tech tools from competing against Google in the relevant market.

146. Google’s launch of Sell-Side Dynamic Revenue Share in 2015 had no connection to “last look”, or to Dynamic Allocation. Sell-Side Dynamic Revenue Share was an additional feature Google developed to dynamically adjust the AdX revenue share to enable advertisers that placed bids that were sent through AdX to win auctions that might not otherwise have resulted in a successful bidder. If no bid in an auction exceeded the floor price set by the publisher, AdX could reduce its revenue share to potentially increase the value of the bid of an advertiser sent through AdX to enable that bid to exceed the publisher’s floor price, permit the advertiser to prevail in the auction and allow the auction to clear. The resulting increase in auctions with winning bids caused by Sell-Side Dynamic Revenue Share benefitted advertisers (who were able to acquire additional advertising

inventory) and publishers (who received increased revenues from the sale of their advertising inventory).

147. Although the first version of Sell-Side Dynamic Revenue Share only reduced the AdX revenue share, subsequent versions permitted the AdX revenue share to both decrease and increase. Sell-Side Dynamic Revenue Share was discontinued in 2019 after the launch of the Unified First Price Auction.

148. As pleaded above, the applicable limitation period associated with the use by Google of Dynamic Allocation and Sell-Side Dynamic Revenue Share expired years before the Commissioner commenced this Application.

149. Contrary to the allegations of the Commissioner in paragraph 176 of his Notice of Application, Dynamic Allocation (either on its own or in conjunction with Sell-Side Dynamic Revenue Share) did not give AdX an unfair or improper informational advantage. Nor did Dynamic Allocation somehow restrict the ability of publishers to “multi-home”. As described in paragraphs 111 to 112 above, publishers who used DFP could integrate with dozens of other ad exchanges, and could choose not to use AdX at all. Dynamic Allocation was an innovative and procompetitive feature designed to improve upon the traditional waterfall set-up and increase revenues for publishers that used Google’s Ad Tech tools. It did not, however, deny Google’s competitors “essential revenue and scale, thereby reinforcing its market power across the ad tech stack”.

150. For all of these reasons, the Commissioner’s allegation that Google somehow gave its Ad Tech tools an unfair or impermissible advantage through the use of Dynamic Allocation (and Sell-Side Dynamic Revenue Share) is legally flawed, statute-barred,

contrary to important purposes underlying the *Competition Act* and, in any event, plainly wrong. At all times, the use of Dynamic Allocation was entirely within the control of publishers. It was up to publishers to determine whether and how the use of Dynamic Allocation would serve their interests. The Commissioner's allegation in paragraph 173 of the Notice of Application that "[l]ast Look had no material benefit to publishers and publishers could not opt-out" is entirely without merit.

(iii) Project Bernanke Was Procompetitive

151. In paragraphs 179 to 185 of his Notice of Application, the Commissioner alleges that Google engaged in a practice of anticompetitive acts by implementing a function known as "**Project Bernanke**" on the advertiser side of the relevant market.

152. Project Bernanke was the successor to a feature known as Dynamic Revenue Sharing that was introduced by Google in 2013. Both Dynamic Revenue Sharing and Project Bernanke were bid optimization programs used in Google Ads to help advertisers win more bids for impressions. Project Bernanke achieved this objective by increasing the revenue share Google Ads charged for some impressions to allow it to use the additional funds generated by that increase to reduce the revenue share of Google Ads for other impressions. This enabled advertisers that used Google Ads to win additional impressions and reduced the number of unsold impressions on AdX. Publishers were able to sell successfully more of their advertising inventory and advertisers were able to acquire successfully more of that inventory than they would otherwise have been able to in the absence of Project Bernanke.

153. In the circumstances, Project Bernanke was quintessentially a procompetitive initiative. Under Project Bernanke, Google Ads would increase certain bids made by advertisers in auctions conducted through AdX by decreasing its revenue share when, based on the historical data of Google Ads, it predicted that the bids flowing through competing Ad Tech tools would be higher than the bids of the advertisers flowing through Google Ads. Project Bernanke therefore allowed advertisers that used Google Ads to prevail in an auction for advertising inventory that they might have otherwise lost. Google Ads would then increase its revenue share in respect of bids for advertising inventory that faced less competition. The increased revenue share balanced the decreased revenue share. The net result was to leave Google Ads in a neutral position in respect of its overall revenue share.

154. Project Bernanke was legally innocuous. It helped advertisers using Google Ads win more auctions and assisted them in placing advertisements in front of greater numbers of users. As a result, Project Bernanke benefitted advertisers and publishers. Moreover, Google Ads did so without changing the prices paid by advertisers for advertising inventory given that the revenue share was taken out of the amount paid to publishers, without increasing the overall revenue share of Google Ads. Project Bernanke led to an overall increase in revenues for publishers.

155. Project Bernanke later became known as "**Global Bernanke**", which targeted an average Google Ads revenue share across all publishers. Global Bernanke then became known as "**Alchemist**", which updated the Global Bernanke algorithm to function in the Unified First Price Auction. Alchemist led to similar benefits for advertisers, publishers and users.

156. The Commissioner's attempt to use the phrase "negative take rates" to cast Project Bernanke (or its successor programs) in a negative light is without merit. The Commissioner's allegations fail to take into account two important and obvious facts. ***First***, the overall revenue share charged by Google Ads was never negative. ***Second***, the reduction by Google Ads of its revenue share below zero in certain circumstances allowed advertisers using Google Ads to win auctions they otherwise would have lost. Consequently, advertisers using Google Ads with Project Bernanke were *better off* than they would have been without Project Bernanke. The fact that Project Bernanke allowed Google Ads to outperform one or more competing buy-side Ad Tech tools in winning auctions for impressions is of no moment. That was the very procompetitive purpose of Project Bernanke. Project Bernanke made the relevant market more competitive rather than less, and is the very sort of innovative initiative the Commissioner should embrace and support rather than criticize and impugn. Moreover, Project Bernanke is one of many elements demonstrating the superior competitive performance of Google Ads.

(iv) Unified Pricing Rules Do Not Restrict the Ability of Publishers to Transact with Rival Ad Exchanges on Their Own Terms

157. The allegations of the Commissioner in paragraphs 186 to 193 of his Notice of Application concerning the implementation by Google in 2019 of Unified Pricing Rules within DFP reflects a misunderstanding of the manner in which the Unified Pricing Rules operate, the reasons they were adopted, and the effect of those Rules.

158. After the advent of header bidding in approximately 2014, publishers were increasingly running multiple auctions through many different ad exchanges that involved many different buy-side Ad Tech tools, each of which had different auction rules. By the

late 2010s, this led to a very complex system that was confusing for market participants and susceptible to significant misuse, including by unscrupulous actors.

159. For example, as noted above, one of the key tactics used by publishers to manipulate the dynamics of the auction process involved setting variable price floors for the same advertising inventory across multiple ad exchanges in an effort to "fish" for a higher price for the same impression. This created problems both for advertisers and for publishers, including by creating confusion concerning how to value an impression.

160. Following the introduction of header bidding in 2014, the digital advertising industry began to move away from second price auctions and towards first price auctions. In 2019, Google followed this market-wide transition and shifted AdX to a Unified First Price Auction to establish a level playing field and make auctions simpler by comparing all bids for the same advertising inventory of the same publisher in the same auction using the same auction mechanics. As part of this shift, Google also implemented Unified Pricing Rules. Unified Pricing Rules were a change to DFP that required publishers to set a single price floor for the same impression over all ad exchanges. While publishers could still set different price floors for specific advertisers, under Unified Pricing Rules they could not set a price floor for any ad exchange—including AdX—that was higher or lower than for other ad exchanges.

161. Contrary to the suggestion of the Commissioner in paragraphs 186 to 193 of his Notice of Application, the Unified Pricing Rules were not adopted by Google as a strategy to reduce the competitiveness of competing ad exchanges or to eliminate discrimination against AdX. Instead, they were implemented by Google in an effort to ensure fairness

by simplifying a complex and confusing auction process that was vulnerable to questionable tactics used both by advertisers and by publishers in an effort to game the system to the disadvantage of other participants in the relevant market.

162. Moreover, the use of different price floors did not make sense under the United First Price Auction (which is a simultaneous first price auction format) as compared to older sequential second price auction formats. That is so because price floors do not work the same way in a simultaneous auction versus sequential auction, or in a first price auction versus a second price auction. In a Unified First Price Auction, publishers had less need for ad exchange-specific price floors in their efforts to maximize their revenues associated with the sale of their advertising inventory and benefitted instead from the simplicity of a single price floor across all ad exchanges.

163. Finally, the Commissioner's allegation in paragraph 186 of his Notice of Application that the Unified Pricing Rules were established by Google to eliminate publisher discrimination against AdX and reduce the competitiveness of competing ad exchanges is baseless. Indeed, the Commissioner's allegation is nonsensical given that: (i) publishers can and do bypass AdX by using AdSense and AdMob; and (ii) publishers using DFP can and do choose to discriminate against AdX by simply refusing to make their advertising inventory available to advertisers through AdX and use instead any or all of AdSense, AdMob and dozens of third-party ad exchanges.

PART IV – GROUNDS ON WHICH THE APPLICATION IS OPPOSED

164. There is no basis for any of the relief sought by the Commissioner in this Application. When the relevant market is properly defined without the artificial limitations

and distortions the Commissioner seeks to impose, it becomes apparent that Google does not possess, and has not exercised or misused, a substantial degree of market power in the relevant market. In the alternative, even in the artificially narrow markets the Commissioner seeks to rely upon, Google does not possess or exercise a substantial degree of market power.

165. Nor is there any basis for the Commissioner's allegations that Google has engaged in a practice of anticompetitive acts or abused its alleged position of dominance. There was (and is) a legitimate and compelling procompetitive rationale for all of the conduct at issue. Google did not intend for its actions to have predatory, exclusionary or disciplinary effects on its competitors or to have adverse effects on competition. Nor did any of the actions of Google at issue in this Application have such an effect. Google's actions, made with considerations of the participants and dynamics on both sides of the relevant market in mind, were efficiency enhancing. They had the effect of increasing dramatically the output of the relevant market as a whole, improving matches between publishers and advertisers, enhancing the revenues earned by publishers in selling their advertising inventory, and improving the success of advertisers in placing their advertisements. Users also benefitted as a result.

166. Moreover, competition has not been lessened or prevented, either substantially or at all. The relevant market would not have been more competitive in the absence of the conduct of Google complained of by the Commissioner. The enhanced output, significant price competition, availability of choices and high quality of service and innovation that characterize the relevant market would be no greater today but for Google's conduct. Instead, the opposite is true.

167. Furthermore, as stated above, a number of the claims and allegations of the Commissioner are barred by the passage of the applicable limitation period provided for in subsection 79(6) of the *Competition Act*.

168. Finally, and in any event, the remedies proposed by the Commissioner are inappropriate, unwarranted and contrary to the public interest. They are also legally impermissible. Regrettably, the Commissioner seeks to punish Google for its success and innovation. If granted, the remedies sought by the Commissioner will inevitably undermine the rights and interests not only of Google but also of advertisers, publishers and users in the relevant two-sided platform market.

169. As pleaded in paragraphs 31 to 33 above, because the extraordinary financial penalties sought by the Commissioner are truly penal in nature, Google and Google Canada are entitled in this proceeding to the protection of important rights guaranteed both by the *Charter* and by the *Bill of Rights*. Those rights have already been violated by the Bureau and the Commissioner, and will inevitably continue to be violated if this Application is allowed to proceed. Moreover, the highly intrusive divestiture remedies sought by the Commissioner exceed the statutory jurisdiction of this Tribunal.

A. The Commissioner Has Incorrectly Defined the Relevant Market

170. Correctly defining the relevant market in this Application is critical. It is the Commissioner's obligation to prove that Google substantially or completely controls a properly defined class or species of business throughout Canada. That critical threshold test, however, cannot be satisfied here. Instead, Google is not dominant under any

plausible definition of the relevant market that is consistent with commercial reality, the prevailing law and accepted economic principles.

171. Contrary to the allegation of the Commissioner in paragraph 81 of his Notice of Application, this Application does not "implicate[] three relevant product markets […] publisher ad servers, advertiser ad networks and ad exchanges", all limited to "programmatic open web display advertising". The Commissioner has gerrymandered his proposed markets in ways that do not accord with commercial reality. His proposed markets fail to capture important innovations in the relevant market that have occurred in the period since 2008. These include the overwhelming shift of users from websites to apps, the increasing prevalence and importance of streaming video, and the advent of supply path optimization, among many others.

172. The Commissioner has excluded improperly from his proposed definition of the "relevant product market" numerous substitutes for the Ad Tech tools and services in question as well as substitutable channels and formats of advertising that are bought and sold using the same or substitutable Ad Tech tools and services.

173. Moreover, in the Commissioner's attempt to segregate the relevant market into artificial silos consisting of isolated, component-based elements of the two-sided platform at issue, he fails to engage with or assess important elements, attributes and dynamics of the relevant market. These include the interdependence of demand, feedback effects and changes in profits on all sides of the platform. The segregated, component-based product markets proposed by the Commissioner are tactical artifices created by the Commissioner for the purposes of this Application.

(i) The Relevant Product Market is a Single, Two-Sided Platform

174. As stated above, Google and other providers of Ad Tech tools and services operate in a single, two-sided transaction platform market that connects publishers to advertisers to facilitate advertising transactions, which includes all types of digital advertisements bought and sold online, including but not limited to image, audio, video, and multimedia advertisements that may appear in a variety of online channels, such as in apps, on social media platforms, in video streams, through Connected TV, and on websites. This is so for several reasons.

175. ***First***, as noted above, the fundamental service provided by owners and operators of Ad Tech tools to publishers and advertisers is the *match* between advertisers and publishers for advertising inventory. Accordingly, the Tribunal must assess the relevant market in which this match is made. The better the match, the greater the benefits for all participants in the relevant market.

176. ***Second***, participants in the relevant market view Ad Tech tools as a suite of services that connect advertisers and publishers in respect of the purchase and sale of advertising inventory. One tool is useless in the absence of interoperability with another. For example, Google Ads, DV360 and other competing buy-side Ad Tech tools are used by advertisers to connect with publishers on the other side of the relevant two-sided market. Moreover, the functionality of Ad Tech tools is not limited to isolated formats of advertising. There is no such thing as an Ad Tech tool that serves only “programmatic open web display advertising”. Rather, Ad Tech tools facilitate matches across multiple advertising formats and channels and are used by publishers and advertisers in

multifaceted ways. The relevant market cannot, therefore, be artificially sliced and diced in the manner proposed by the Commissioner.

177. ***Third***, Ad Tech tools and services are used to connect advertisers and publishers in the relevant market. The success of providers of Ad Tech tools and services is therefore premised upon their ability to attract and assist advertisers and publishers on both sides of the relevant two-sided market. The quality of matches between publishers and advertisers for advertising inventory that is provided by Google's Ad Tech tools and services depends on Google's ability to attract the broadest universe of qualified and legitimate advertisers and publishers. The provision of Ad Tech tools and services, therefore, benefits from so-called "network effects". Network effects are a market-defining characteristic whereby the utility and value of the service the platform provides increases as the number of participants on both sides of the platform increases. The existence of network effects means that providers of Ad Tech tools and services in the relevant market must be sensitive to the prices that are charged to participants on both sides of the platform. They cannot raise prices on one side of the platform without incurring the risk of creating a feedback loop of declining demand on both sides of the platform.

178. If more advertisers use Google's Ad Tech tools and services in the relevant two-sided market, more publishers will find those tools and services to be useful and attractive. The reverse is also true. The application of network effects in the relevant two-sided market means that the attractiveness of an Ad Tech tool to publishers depends on the number of advertisers using either that tool or associated Ad Tech tools. Google would not be as successful as it has been in the relevant market by serving publishers but not advertisers, or advertisers but not publishers.

179. ***Fourth***, the prices charged by various providers of Ad Tech tools and services are borne both by publishers and by advertisers that participate almost simultaneously in a single transaction that results in a match. Prices in the relevant market are therefore most appropriately assessed across the entire transaction, rather than in watertight compartments.

180. The relevant market—*i.e.*, the two-sided platform market that includes activity generated by the use of any and all Ad Tech tools and services that facilitate matches between advertisers and publishers for advertising inventory—is the smallest market in which a hypothetical monopolist would have the ability to impose and sustain a small but significant and non-transitory increase in price above levels (or decrease in quality below levels) that would likely exist in the absence of an impugned anticompetitive practice. All Ad Tech tools and services that facilitate matching advertisers with publishers in transactions involving the purchase and sale of advertising inventory compete with each other in the relevant market. The Ad Tech tools and services of many participants in the relevant market are, in fact, functionally interchangeable, have minimal switching costs and are frequently substituted for one another or used by publishers and advertisers at the same time.

181. Adopting a narrower and highly artificial market definition—including the three excessively narrow markets proposed by the Commissioner—would be entirely inappropriate, flatly inconsistent with commercial reality, and result in overlooking significant competitive constraints in the relevant market. Advertisers and publishers have many options to connect to each other that are not accounted for in the Commissioner's Application. Those alternate pathways facilitate the same transaction—the match

between a publisher and an advertiser for advertising inventory—and exert competitive pressures that are not accounted for in the Commissioner's three component-based markets. By way of example only:

(a) just like Google Ads, DV360 and dozens of other competing buy-side Ad Tech tools can be and are in fact used to connect advertisers that use Google Ads to a host of different publishers. Just like DFP and AdX, AdSense connects publishers to advertisers that use Google Ads. Strategically, however, the Commissioner purports to exclude from his proposed product markets activities in the relevant market that occur through all of DV360, competing buy-side Ad Tech tools and AdSense. There is no proper or principled basis for these exclusions;

(b) numerous third parties that supply Ad Tech tools and services that use header bidding are important competitors of Google. Their Ad Tech tools and services are direct substitutes for the Ad Tech tools and services provided by Google. For example, a publisher using header bidding technology in an effort to sell its advertising inventory may be able to eliminate altogether its use of DFP or other publisher Ad Tech tools. Yet activity associated with header bidding is excluded from all of the Commissioner's proposed markets. That is so even though header bidding has been adopted by approximately 80% of publishers and in spite of the Commissioner's own allegation that header bidding was a competitive threat to Google's display advertising business. Once again, there is no proper or principled basis for these exclusions; and

(c) the rise of supply path optimization has led to the advent of tools that can facilitate more direct connections between publishers and advertisers, including by bypassing ad exchanges, buy-side Ad Tech tools and publisher ad servers. For example, although The Trade Desk was historically considered a buy-side Ad Tech tool provider, it now offers OpenPath. OpenPath directly connects advertisers to publishers without the need for an ad exchange. Similarly, Magnite, historically thought of as being a sell-side Ad Tech tool provider, now offers ClearLine. ClearLine integrates publishers directly with advertisers without the need for a buy-side Ad Tech tool.

182. All of these unprincipled exclusions from the supposedly relevant product markets concocted by the Commissioner have been made for obvious tactical purposes. The gerrymandering the Commissioner has engaged in has the effect of inflating dramatically the supposed market power of Google in narrow slices of the relevant market. The approach taken by the Commissioner in defining the supposedly relevant markets is inappropriate and impermissible.

(ii) "Programmatic Open Web Display Advertising" Does Not Properly Define the Boundaries of the Relevant Product Market

183. The Commissioner's proposed definition of "relevant markets" also excludes many channels and formats of advertising. All of the Commissioner's proposed product markets are limited to "programmatic open web display advertising". In other words, the Commissioner alleges that the relevant market in which Google supposedly exerts dominance is the market for buying and selling "display advertising" inventory: (i) rather

than other types of non-display advertising inventory; (ii) on websites only (rather than on other properties like apps or Connected TV); (iii) through indirect transactions on ad exchanges only (rather than through direct transactions between publishers and advertisers); (iv) on websites of publishers that use third-party Ad Tech tools only (rather than on websites of publishers that use their own in-house Ad Tech tools); and (v) that takes the form of static banner advertisements only (rather than video, social media, or native advertisements). All of these limitations are technical in nature and improper. They are intended to and do in fact reduce artificially and significantly the size and scope of the relevant market the Tribunal should properly have regard to in assessing the Commissioner's allegations of abuse of dominance.

184. In practical terms, the adoption by the Tribunal of the artificially narrow markets proposed by the Commissioner would lead inexorably to a commercially absurd result in which:

(a) an auction of advertising inventory leading to the placement by an advertiser of an advertisement on the website of a publisher such as The New York Times would form part of the relevant market, even though an auction using the same Ad Tech tools and services leading to the placement of the very same advertisement in The New York Times app would be excluded from the relevant market;

(b) an advertisement placed by Air Canada on the website of The Globe and Mail via an auction process using Ad Tech tools and services would form part of the relevant market, but the placement of that very same

advertisement in that very same advertising space would not form part of the relevant market if the advertising inventory of The Globe and Mail was sold directly by The Globe and Mail to Air Canada. That is so even if the same or substitutable Ad Tech tools and services were used to effect that direct sale of advertising inventory;

(c) an advertisement placed on the websites of Facebook or Instagram (both owned by Meta) as a result of an auction for advertising inventory conducted using Meta's proprietary Ad Tech tools would not form part of the relevant market, even though the placement of that very same advertisement on the website of The Globe and Mail using comparable third-party Ad Tech tools and services would be included in the relevant market;

(d) an advertisement that appears beside a video would be included in the relevant market, but an advertisement that appears within the frame of the same video on the very same property would not form part of the relevant market; and

(e) an advertisement that appears on a non-search results webpage would be included in the relevant market even though an identical advertisement directed to the very same user that appears on a search results webpage would not.

185. Illustrative examples of the types of advertisements that are included in and excluded from the alleged product markets of the Commissioner are set out in Figure 15 to Figure 19 below.

Examples of Advertisements that are Inside and Outside of the Commissioner's Alleged Product Markets

Figure 15 – Website vs. In-App Advertisement on The Globe and Mail's App and Website

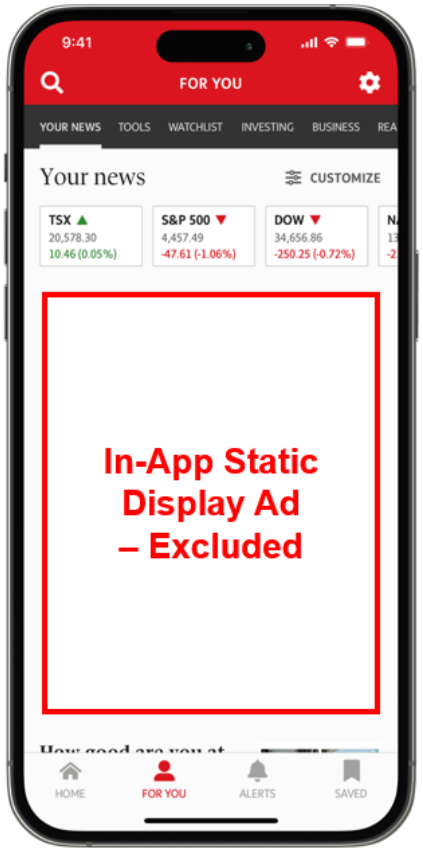


Figure 16 – Advertisement on Closed Channel Property (Amazon.ca) vs. Open Channel Property (Billboard.com)

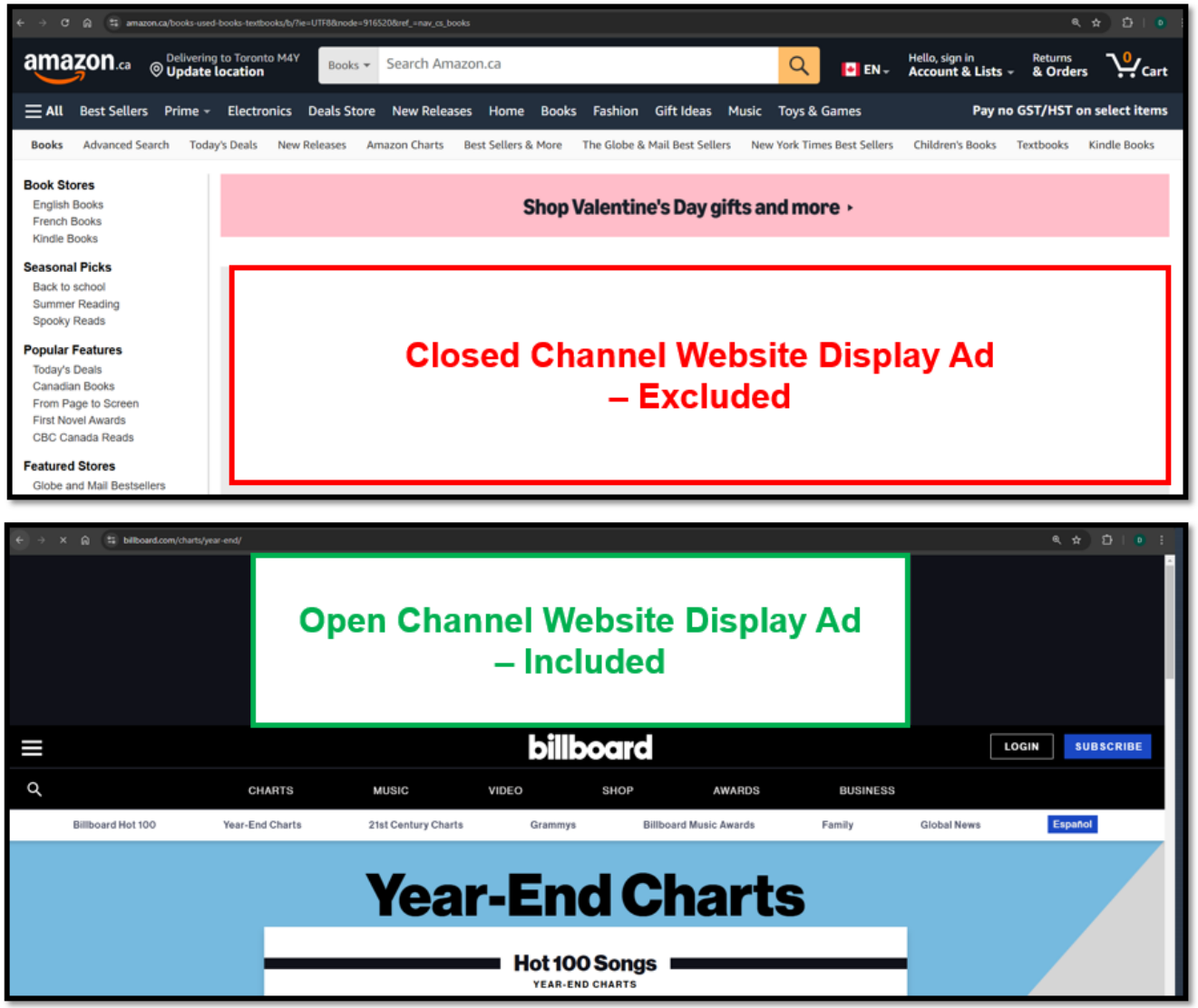


Figure 17 – Static Display vs. Native Advertisement on the NationalPost.com

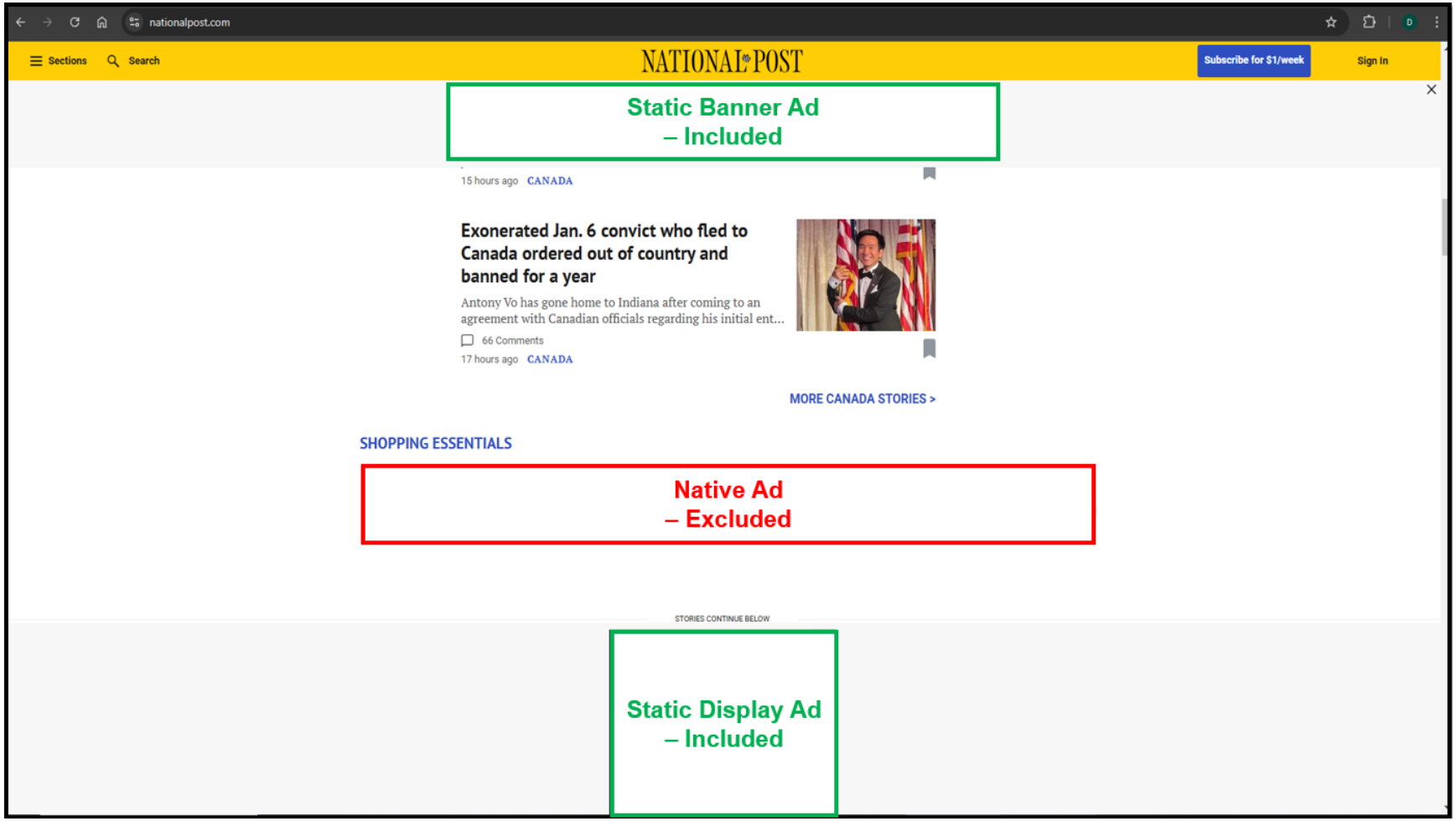


Figure 18 – In-Stream Video vs. Banner Advertisement on CBC.ca

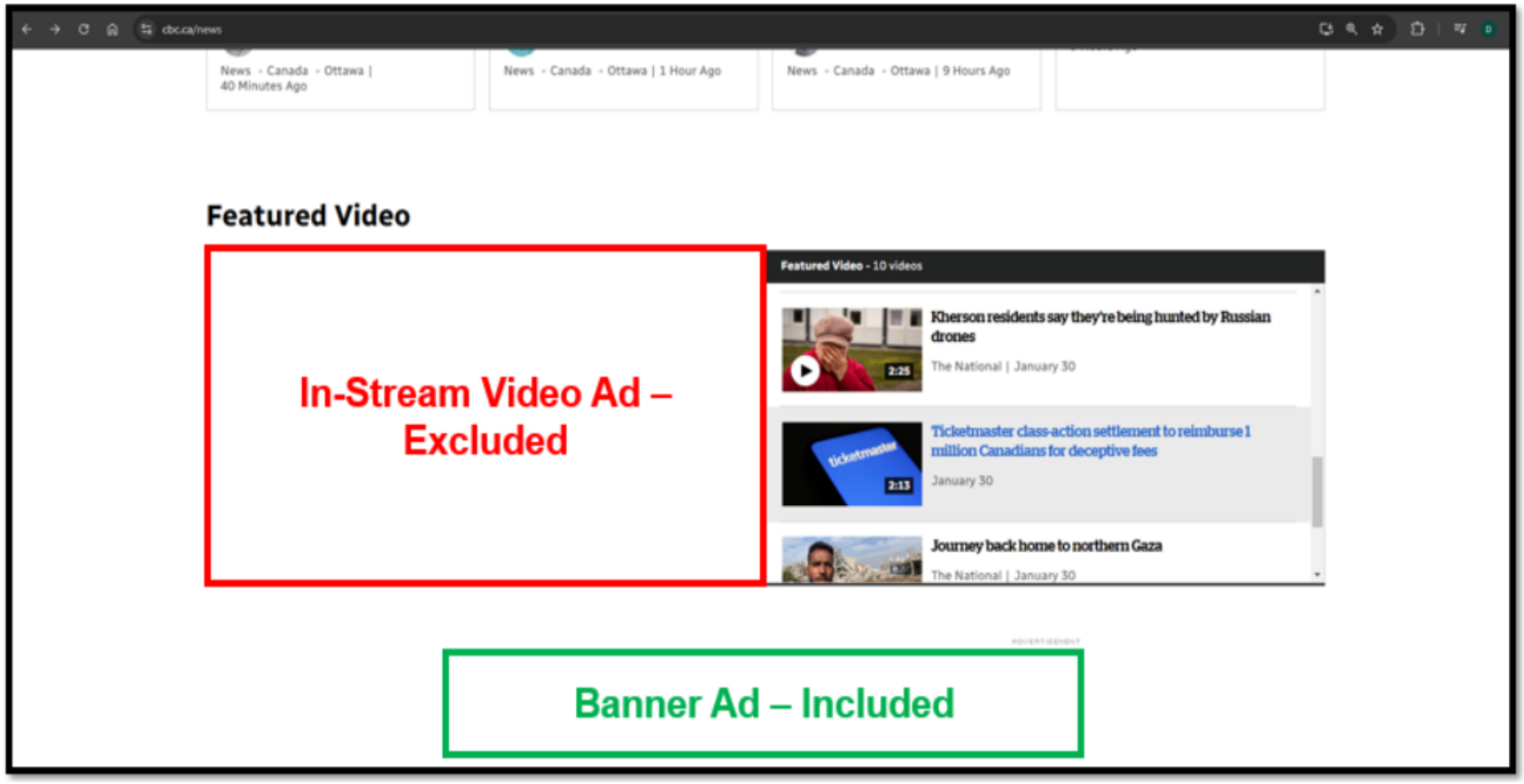
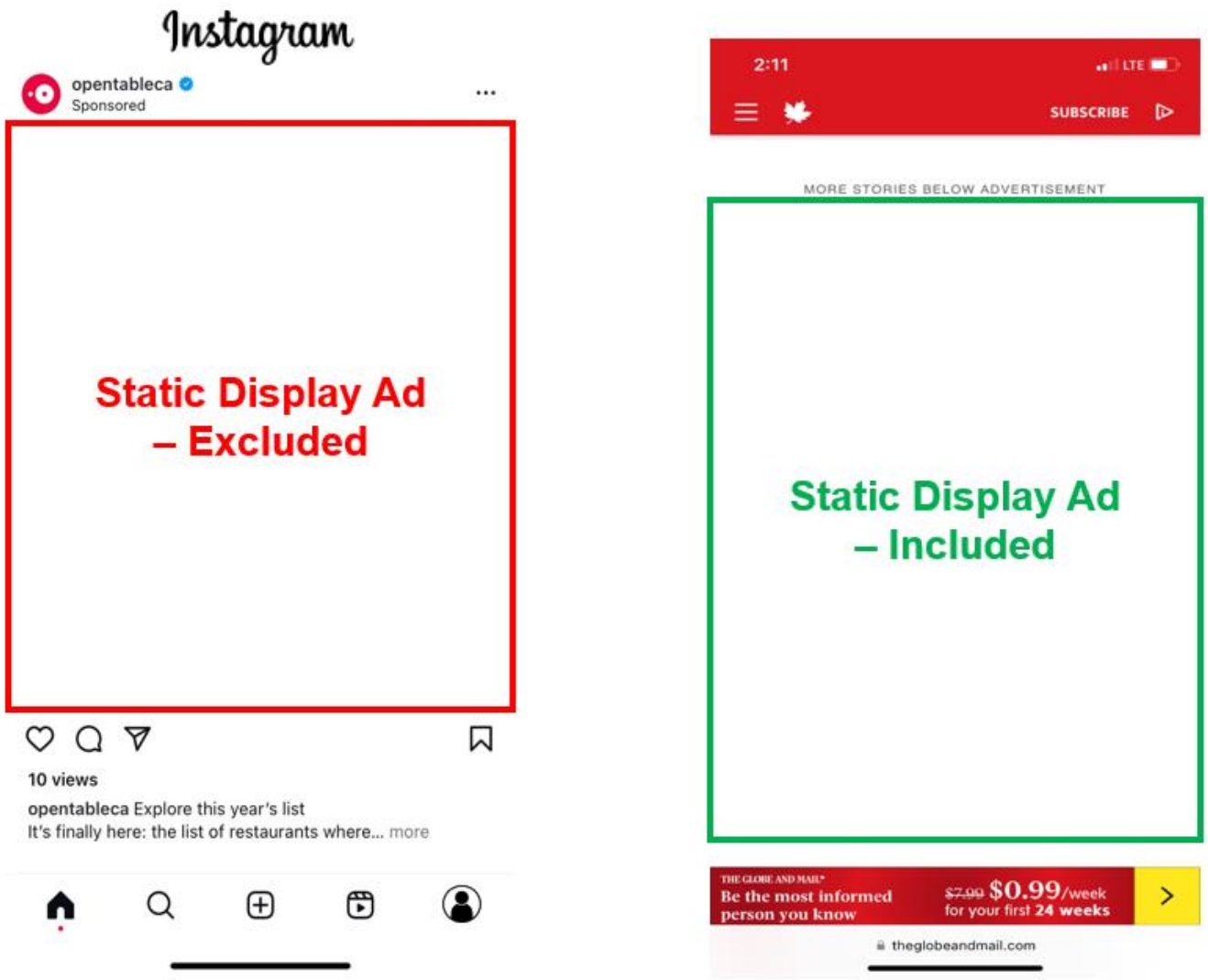


Figure 19 – Static Display Advertisement on The Globe and Mail's Website on a Mobile Device vs. the Instagram App



186. Contrary to the allegations of the Commissioner in paragraphs 82 to 85 of his Notice of Application, the product markets he proposes do not reflect fairly or properly the "boundaries" or commercial reality of the relevant market. This is so for a host of reasons, including because advertisers and publishers are easily able to—and frequently do—substitute different channels and formats of advertising for one another.

187. There is, in fact, immense substitutability in advertising. Advertisers treat non-website advertising channels and Ad Tech tools that service those channels as substitutes for "programmatic open web display advertising" because advertisers follow users wherever they may be, and allocate their spending on advertising to maximize their return on investment in their efforts to reach users. That is so regardless of whether the advertisements: (i) are shown on a website or on other platforms or channels; and (ii) take the form of so-called "display", "search" or other advertising formats. Publishers also adjust their monetization efforts to follow user attention with a view to capturing spending by advertisers. They do so by, among other things, prioritizing their in-app content over website content if users visit the app more frequently than the website, and by making the same advertising inventory compatible with multiple advertising formats. Because the central purpose of Ad Tech tools and services is to match advertisers and publishers in transactions involving advertising inventory, substitution by participants on one side of the transaction (*i.e.*, advertisers) can cause substitution by participants on the other side of the same transaction (*i.e.*, publishers).

188. Not one of the exclusions proposed by the Commissioner from his proposed product markets is appropriate. Instead, all of those exclusions were made by the Commissioner for the tactical purpose of manufacturing artificial product markets in which

the importance and supposed impacts of the competitive presence of Google have been greatly exaggerated.

(iii) "Publisher Ad Servers" is Not a Relevant Product Market

189. Contrary to the allegations of the Commissioner in paragraphs 86 to 92 of his Notice of Application, "publisher ad servers used in the programmatic sale of web ads through open channels"—the supposed product market the Commissioner alleges DFP falls within—is not a relevant product market in this Application. That is so for many reasons, including those explained above.

190. Contrary to the allegation of the Commissioner in paragraph 92 of his Notice of Application, publishers are not locked into the use of a single publisher ad server. That is simply not the way in which the relevant market operates. Instead, many of the largest publishers have devised and implemented their own in-house Ad Tech tools that provide ad serving functionality. In fact, a number of those publishers previously used DFP before switching to their own proprietary solutions (or vice versa). Smaller publishers also have cost-effective options to switch to using their own Ad Tech tools, and can do so in relatively short timeframes.

191. Moreover, the Commissioner's proposed "publisher ad servers" product market excludes entirely sell-side Ad Tech tools that facilitate the sale of advertising inventory for in-app or in-stream video formats only. This is so notwithstanding that DFP is used by market participants to facilitate the sale of advertising inventory not only on websites, but also in-app and video formats. Sell-side Ad Tech tools and services that target in-app and

in-stream video advertising formats impose competitive constraints upon DFP given the high substitutability of Ad Tech tools and advertising formats in the relevant market.

192. Contrary to the allegations of the Commissioner in paragraph 90 of his Notice of Application, and as noted above, the adoption by Google some six years ago, in 2019, of Unified Pricing Rules was not a degradation of DFP. Nor does the adoption by Google of the Unified Pricing Rules somehow demonstrate the contours of a relevant product market.

(iv) "Advertiser Ad Networks" is Not a Relevant Product Market

193. Contrary to the allegations of the Commissioner in paragraphs 93 to 99 of his Notice of Application, "[a]dvertiser ad networks used in the programmatic buying of web ads through open channels"—the supposed product market the Commissioner alleges Google Ads falls within—is not a relevant product market. That is so for a number of reasons, including those explained above.

194. As a preliminary matter, this proposed product market is incompatible with commercial reality. Fundamentally, an "ad network" serves *both* publishers *and* advertisers. There is no such thing as a one-sided "advertiser ad network".

195. The Commissioner's proposed definition of the phrase "advertiser ad network" in paragraphs 93 and 94 of his Notice of Application appears to rely on a seriously outmoded conception of the phrase "ad network" (which is different than a supposed "advertiser ad network") as a network that aggregates third-party publisher inventory to offer advertising inventory to advertisers. The Commissioner's understanding of "ad networks" is obsolete. Today, the term "ad networks" is commonly understood by participants in the advertising

industry to refer to Ad Tech tools offered by companies like Facebook, Amazon and TikTok. Those tools primarily enable publishers to sell their advertising inventory on their own digital properties, and sometimes the advertising inventory of third-party publishers. Although the Commissioner refers to Google Ads in this Application as an "advertiser ad network", he has carved out of his proposed product market other ad networks that offer significant advertising inventory to advertisers. Once again, this unprincipled approach has been followed by the Commissioner for tactical purposes.

196. Contrary to the allegations of the Commissioner in paragraph 96 of his Notice of Application, advertisers can and often do substitute their spending for advertising inventory between "ad networks" and other buy-side Ad Tech tools. This includes, most notably, demand side platforms like Google's DV360 and those offered by companies such as The Trade Desk, Amazon and Bell Media, all of which the Commissioner has excluded improperly from his proposed "advertiser ad network" market. He has done so even though these tools, like "advertiser ad networks" are used by many advertisers to purchase advertising, including "web ads through open channels" across multiple advertising inventory sources. Indeed, Google Ads often competes head-to-head with other buy-side Ad Tech tools in the same ad exchange auctions. Advertisers often simultaneously use multiple buy-side Ad Tech tools, including both demand side platforms and "advertiser ad networks".

197. Contrary to the allegations of the Commissioner in paragraph 95 of his Notice of Application, demand side platforms cannot be differentiated from "advertiser ad networks" on the basis that the latter: (i) "generally provide a more easy-to-use, turnkey or automated experience"; or (ii) "typically charg[e] advertisers on a cost-per-click" basis

rather than a cost-per-mille or CPM basis". These distinctions are not uniformly present. Even if they were, they do not prevent or impair significant substitution between different buy-side Ad Tech tools. In any event, the distinctions alleged by the Commissioner are meritless for at least three additional reasons.

198. ***First***, large, sophisticated advertisers account for a significant portion of the advertising spend both on "advertiser ad networks" and on demand side platforms. The majority of advertising spend on both Google Ads and DV360 has come from very large advertisers;

199. ***Second***, Ad Tech tools like DV360 and "advertiser ad networks" cannot be distinguished on the basis that demand side platforms offer CPM pricing rather than CPC pricing. For example, Google Ads, like other buy-side Ad Tech tools, converts any CPC bids made within its platform to CPM pricing prior to submitting them to ad exchanges. Like Google Ads, a number of demand side platforms, including the Ad Tech tools of Amazon and DV360, offer advertisers the option of paying on a CPC basis; and

200. ***Third***, and contrary to the allegation of the Commissioner in paragraph 96 of his Notice of Application, the user interfaces of Ad Tech tools like DV360 do not inhibit smaller advertisers from using them. The Google Ads user interface and DV360 user interface are similar, and advertisers take similar steps to arrange and implement advertising campaigns using both interfaces. Examples of the similar interfaces of Google Ads and DV360 when starting an advertising campaign are set out in Figure 20 and Figure 21 below:

Figure 20 – Google Ads Campaign Start Interface

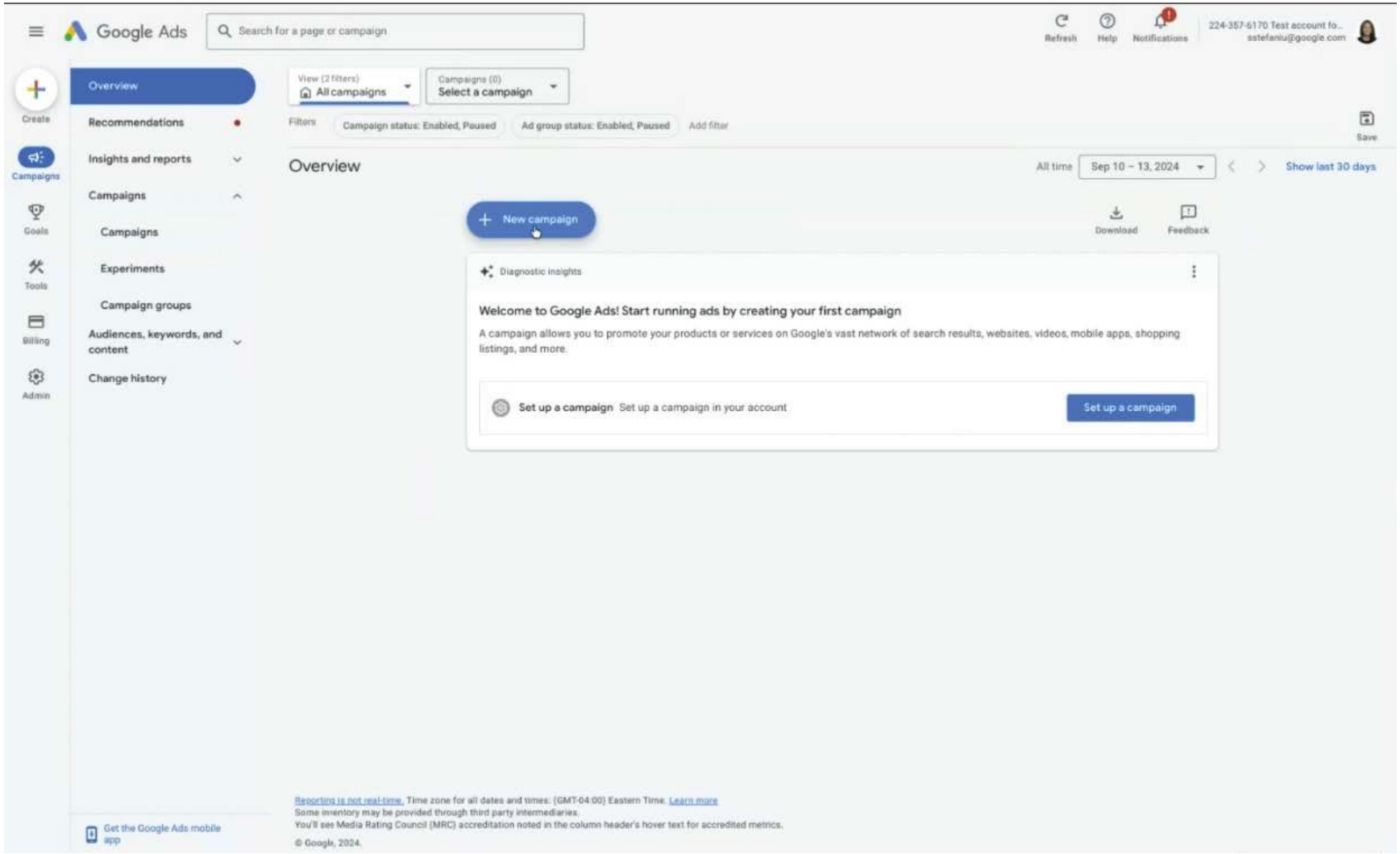
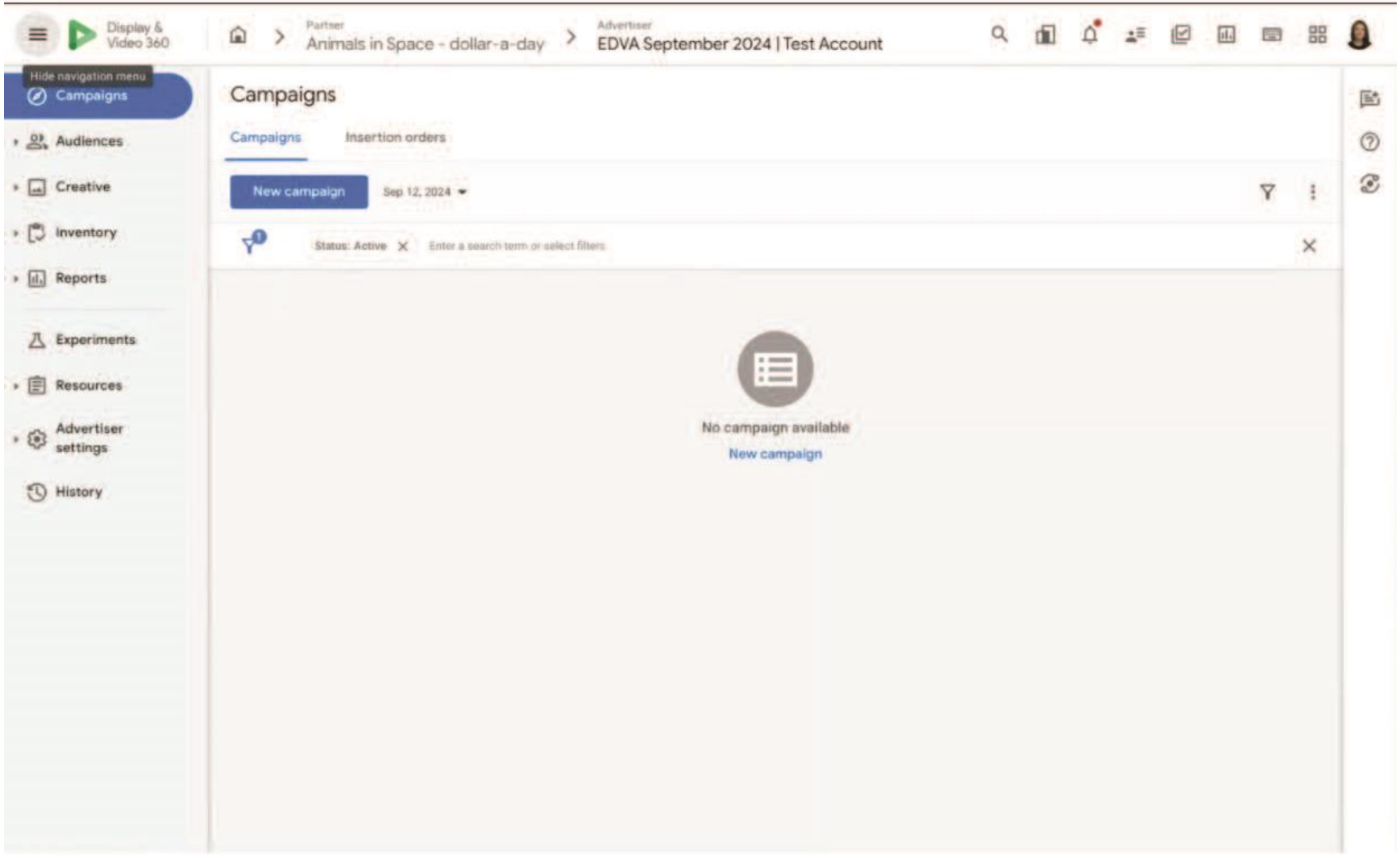


Figure 21 – DV360 Campaign Start Interface



201. The Commissioner's attempt to limit the supposedly relevant market to buy-side Ad Tech tools and services that facilitate static banner advertising transactions on websites only is also improper. Equally improper is the Commissioner's attempted exclusion from the relevant market of Ad Tech tools and services that facilitate the placement of video advertisements. Indeed, Google Ads facilitates the placement of advertisements of every description both in-app and on websites and in a variety of formats, including video. The ad networks of Meta and Microsoft, as well as a host of other demand side platforms, compete with Google Ads in respect of the placement of all manner of advertising in a variety of different formats. Accordingly, it is inappropriate for the Commissioner to gerrymander the supposedly relevant product market(s) in this Application to exclude those buy-side Ad Tech tools.

202. Contrary to the allegation of the Commissioner in paragraph 98 of his Notice of Application, Google has not "severely restricted advertisers' ability to bid on third-party ad exchanges" or "deliberately curtailed the functionality of Google Ads". As explained above, DV360 allows advertisers to bid across dozens of third-party ad exchanges. AwBid and gBid also allow third-party exchanges to seek bids from Google Ads.

203. Finally, and contrary to the allegation of the Commissioner in paragraph 99 of his Notice of Application, Google does not "recognize[] advertiser ad networks as a distinct product market as compared to other ad tech tools". Rather, Google Ads and DV360 compete with each other as well as with other buy-side Ad Tech tools for the same advertisers in the same auctions.

(v) "Ad Exchanges" is Not a Relevant Product Market

204. Contrary to the allegations of the Commissioner in paragraphs 100 to 106 of the Notice of Application, "[a]d exchanges used in the programmatic trading of web ads through open channels" is not a relevant product market for the purposes of this Application, including for the reasons explained above. This is the supposed product market the Commissioner alleges AdX falls within.

205. Ad exchanges are hardly the only means that can be used—or that are in fact used—to facilitate transactions between publishers and advertisers for the sale of advertising inventory. There are, in fact, numerous Ad Tech tools that allow publishers to auction or sell their advertising inventory without having to transact through AdX or any of the dozens of other ad exchanges. For example:

(a) publishers can and do often sell their advertising inventory and access the demands of advertisers through ad networks, or through self-service platforms like the Google Display Network, without using ad exchanges. Sales of advertising inventory of this nature are reasonable substitutes for ad exchanges; and

(b) publishers also sell their advertising inventory and access advertiser demand through direct deals with advertisers. These transactions can be completed without using any Ad Tech tools or, in the case of programmatic direct transactions, via the use of some combination of Ad Tech tools. In some cases, the very same Ad Tech tools that facilitate an indirect auction can also facilitate a programmatic direct transaction.

206. The above options are all reasonable substitutes for “[a]d exchanges used in the programmatic trading of web ads through open channels”.

207. As with the previous two product markets alleged by the Commissioner, it is also inappropriate to limit the supposed ad exchange market to Ad Tech tools that facilitate transactions on a subset of websites and in respect of only one particular type of advertising format. AdX and many other ad exchanges facilitate auctions for advertising inventory that takes many forms, including banner, in-stream video, native, in-app, and Connected TV advertising.

208. Contrary to the allegation of the Commissioner in paragraph 103 of his Notice of Application, the 20% take rate charged by AdX is not “significantly above competitive levels”.

209. Notably, AdX’s 20% take rate has remained in effect for almost two decades. That rate was implemented by DoubleClick prior to its acquisition by Google in 2008. In other words, that take rate was in effect long before the Commissioner alleges the existence of any market power. Google has not increased that take rate in the period since it acquired DoubleClick even though: (i) Google has made significant improvements to AdX in the last 16 years; and (ii) AdX facilitates a significantly greater volume of transactions between publishers and advertisers today than it did in 2008. In addition, Google’s AdX take rate for all transaction types, including programmatic direct transactions running through AdX, decreased from 2014 to 2022.

B. The Relevant Geographic Market Is North America, Comprised of Canada and the United States

210. Contrary to the allegations of the Commissioner in paragraphs 107 to 110 of his Notice of Application, the relevant geographic market is not Canada, North America (as the Commissioner uses that term) or the world. Instead, the relevant geographic market is Canada and the U.S. (defined in this Response as "North America"). A hypothetical monopolist in the relevant market, or even in the artificially narrow markets proposed by the Commissioner, could not profitably impose and sustain a small but significant and non-transitory increase in price above competitive levels within Canada only.

211. Moreover, many users and providers of Ad Tech tools and services operate the Canadian components of their business as part of a broader North American business. Ad Tech sales to Canadian advertisers and publishers may originate from the U.S. or vice versa. Similarly, agreements may be entered into between advertisers and publishers in Canada or in the U.S. for the purchase and sale of advertising inventory in respect of advertisements to be shown to users located in both countries. Consequently, traditional geographic borders do not assist in defining the contours of the relevant geographic market at issue in this Application.

C. Google Does Not Substantially or Completely Control an Ad Tech Market, However Defined

212. No matter how the relevant market or markets in this Application are defined, Google does not substantially or completely control them. This is true of the correct two-sided relevant market defined in paragraphs 6 and 174 above, as well as of the artificial markets proposed by the Commissioner. In this regard: (i) the Commissioner's allegation concerning the supposed "uniqueness" of the demand of advertisers that use Google Ads

for display advertising inventory is patently wrong; (ii) the allegations of the Commissioner concerning alleged barriers to entry in the relevant market are manifestly incorrect; and (iii) when viewed against the reality of the actual competitive landscape and real world facts, Google is not dominant either in the alleged publisher ad server market or in the advertiser ad network markets proposed by the Commissioner.[7]

(i) Google Does Not Substantially or Completely Control the Relevant Two-Sided Market

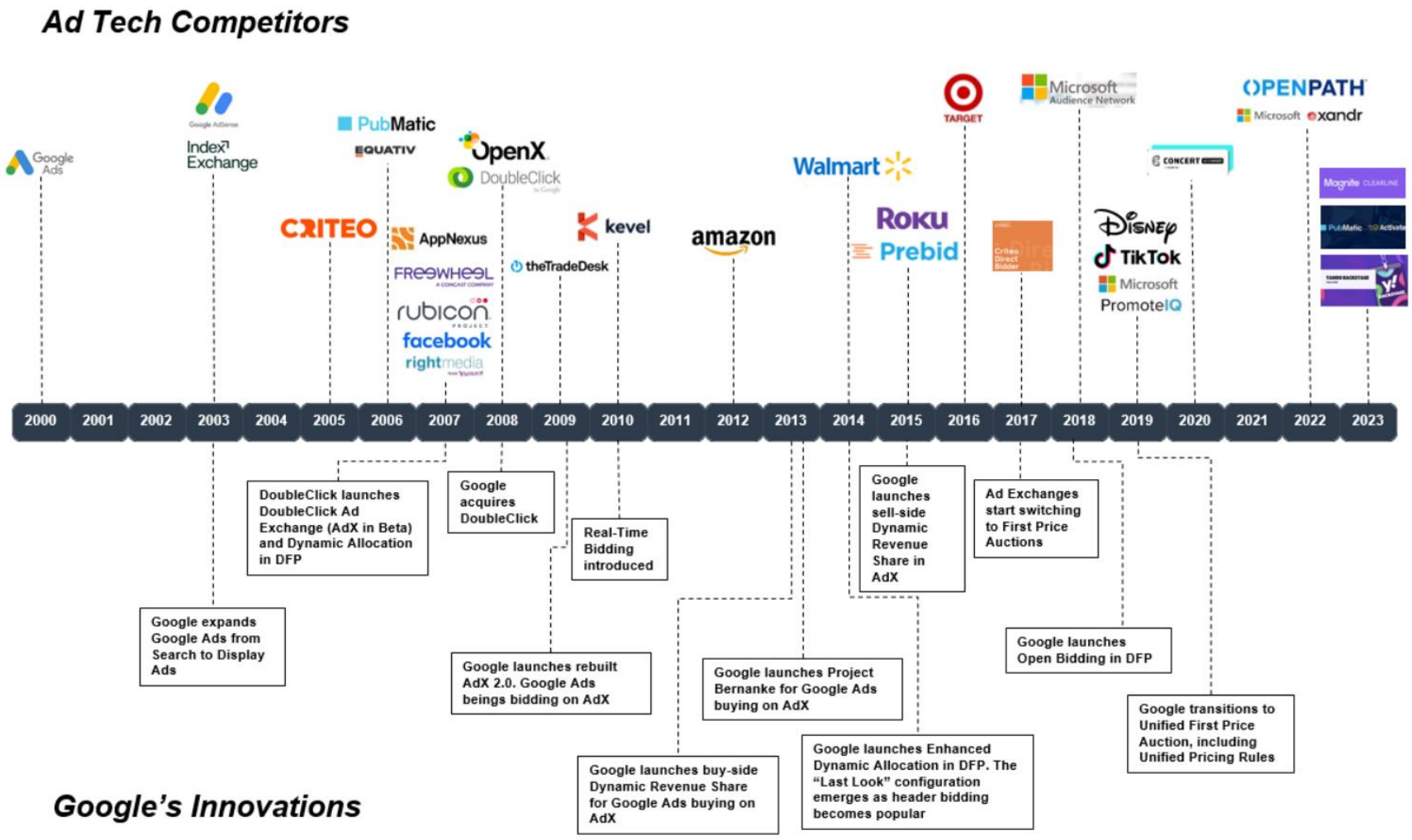
213. Google does not have the ability to profitably raise prices to supracompetitive levels or to degrade the quality or variety of its tools, services or innovation in the relevant market, either over a non-transitory period or at all. The significant number of participants in the relevant market and the extraordinary nature and degree of innovation, evolution and output over the period of more than 15 years that the Commissioner has placed at issue in this Application is compelling evidence of Google's lack of a substantial degree of market power. Any suggestion that Google has or has exercised: (i) an ability to restrict the output of other existing or potential market participants; (ii) the latitude to increase its prices to supracompetitive levels; or (iii) the ability to restrict or degrade non-price dimensions of competition in the relevant market, including the terms upon which it or others carry on business, is misplaced and unrealistic when the plethora of options available both to publishers and advertisers for the sale and purchase of advertising inventory is properly considered.

[7] The Commissioner appears to concede in paragraphs 113 to 141 of his Notice of Application that Google does not substantially or completely control his proposed market for "[a]d exchanges used in the programmatic trading of web ads through open channels" as he does not assert or allege that Google exercises such control.

214. A thriving and competitive relevant market is intertwined into the daily lives of Canadians. In a single day, a user might well view advertisements from the same advertiser on numerous occasions—first in a weather app when checking the weather in the morning, subsequently when reading the morning news in an app or on a website, next when scrolling through a social media feed on Instagram or TikTok during the commute to work, in the afternoon while looking to make a purchase on Amazon, and in the evening when checking the hours for the local gym, a store or restaurant or opening an app to check the schedule for social activities. Each of the individual impressions Canadians see throughout the day are the result of advertiser and publisher matches that could have been sold by hundreds of different service providers using a host of competing Ad Tech tools, or the use by market participants of countless combinations of those tools.

215. Indeed, as illustrated in Figure 22 below, the relevant market is highly competitive and characterized by, among other things, numerous competitors, new entrants and aggressive competition. Google faces pressures from a range of rivals that compete for the business of both publishers and advertisers.

Figure 22 – Timeline of a Sample of New Entrants and Google's Innovations in the Relevant Market



216. In response to these competitive pressures, Google has invested billions of dollars to develop product improvements and innovations that have increased output dramatically and improved the quality and efficiency not only of its Ad Tech tools, but also of the relevant market. For example, Google has been instrumental in developing and implementing numerous important innovations in the relevant market such as real-time bidding, Dynamic Revenue Share and the Unified First Price Auction.

217. An examination of both direct and indirect indicators of market power reveal that Google does not hold a substantial degree of market power in the relevant market.

218. ***First***, Google's prices are not supracompetitive. Nor have they ever been. Indeed, Google's prices across its Ad Tech tools have remained relatively constant over time, and are lower than the prices charged by many of its competitors. At the same time: (i) publishers that use Google's Ad Tech tools to sell their advertising inventory are making more money now than they were before; (ii) advertisers that use Google's Ad Tech tools to purchase advertising inventory are spending less per click (or engagement) than they were before; and (iii) users viewing content are being served with higher quality advertisements than they otherwise would have access to, and that they are more likely to engage with. The average monthly revenues generated by publishers that use AdX to sell their advertising inventories have increased steadily. Similarly, the average click-through rates of advertisers that use Google Ads have increased while their cost-per-click has decreased. In short, while Google's fees have been flat or decreasing, the quality of its tools and services has increased significantly.

219. ***Second***, Google's share of digital advertising spending in the properly defined relevant market in North America has decreased steadily in the period since 2015 to below 30% in 2023. Numerous rivals of Google—including TikTok, Amazon and Microsoft—have been able to grow quickly and attain sufficient scale to compete successfully with Google for digital advertising spend. While Google's revenues from its AdTech business have increased in the period since 2015, its share of digital advertising spending has been on a steady decline. This means that although output in the relevant market has increased dramatically, most of the growth in the market has accrued to competitors of Google.

220. ***Third***, Google does not have the ability to set prices (or other parameters of competition) unilaterally above competitive levels in the relevant market—or even in the artificially narrow markets proposed by the Commissioner. Nor has Google ever done so. Similarly, Google does not have significant commercial leverage over upstream or downstream firms or the ability to determine unilaterally a relevant dimension of competition.

221. ***Fourth***, Google has no ability to exclude actual or potential participants from the relevant market regardless of how it is defined. Moreover, Google has attempted to do no such thing.

(ii) The Commissioner's Allegations that Google Ads is "Unique" or "Must-Have" are Patently Wrong

222. The Commissioner's allegations of abuse of dominance rest in significant part on his meritless assertion that the demand of advertisers that use Google Ads for the digital advertising inventory of publishers is "unique" and "must-have". The Commissioner

alleges in paragraph 5 of Schedule A to his Notice of Application that this specific type of advertiser demand provides Google with the "ability and incentive to leverage its market power" within the supposed "advertiser ad network" market into other markets, including the supposed "ad exchange market" and "publisher ad server market".

223. The Commissioner's allegations in this regard are contrived. They rest on a series of false premises, and reflect the Commissioner's misunderstanding of the contours and dynamics of the Ad Tech industry and how advertisers use Ad Tech tools and services provided not only by Google, but also by others. In reality, advertisers who choose to use Google Ads are free to and do use many alternatives to Google's buy-side Ad Tech tools and services. The inescapable reality and omnipresence of "multi-homing" in the relevant market is fundamentally inconsistent with the Commissioner's allegation of "exclusive" or "unique" demand. For example, an advertiser who chooses to use Google Ads may and often does simultaneously use Microsoft's Ad Tech tools, or those of any many other Ad Tech providers. Because advertisers come and go from Ad Tech tools and services as they like, the demand for advertising inventory generated by advertisers that use Google Ads is not somehow "unique". Although Google competes vigorously with other Ad Tech providers in a continuous effort to make its buy-side Ad Tech tools and services more attractive to advertisers, Google has no leverage over those advertisers that would somehow permit it to assert dominance over competitors in the relevant market. That is so for at least three reasons.

224. ***First***, advertisers use multiple Ad Tech tools to purchase advertising inventory. The demand flowing from advertisers for advertising inventory is therefore accessible through multiple competing Ad Tech tools and services. Publishers seeking to connect to

advertisers using multiple competing Ad Tech tools have many different pathways of doing so. Advertisers have access to similar options. In addition, advertisers that choose to use DV360 are free to bid into more than 100 third-party ad exchanges, all of which compete with AdX. Google does nothing to restrict advertisers from doing so.

225. ***Second***, the limited number of advertisers who only purchase advertising inventory through Google Ads (and do not use competing Ad Tech tools) do not generate enough advertising spend for Google Ads to properly be categorized as providing a "must-have" source of demand for advertising inventory generated by advertisers. Advertisers who use only Google Ads represent a small amount of the overall spending in the relevant market. Those advertisers are not required in any way to use Google Ads exclusively, but have made that choice because of its superior competitive performance. That is a choice they are fully entitled to make.

226. ***Third***, contrary to allegations made by the Commissioner throughout his Notice of Application, publishers can and often do access the demand associated with advertisers using Google Ads without using AdX or DFP. Advertisers that choose to use Google Ads can purchase advertising inventory that publishers sell on third-party exchanges that compete with AdX through AwBid and gBid, referred to in paragraph 101 above. Both AwBid and gBid were developed by Google to safely and reliably connect advertisers to third-party exchanges. Publishers can also use AdSense with a third-party or an in-house Ad Tech tool that competes with AdX and DFP to access advertisers using Google Ads. Publishers can also choose to use no publisher Ad Tech tool and, instead, to access

advertisers that use Google Ads by using a product known as "**Google Ads Connector**".[8] Moreover, publishers can also access AdX, including the demand associated with advertisers that use Google Ads which flows through AdX, without using DFP. No publisher is coerced or required to use Google's other Ad Tech tools to access the demand of advertisers that choose to use Google Ads. Finally, publishers can reach the vast majority of those very same advertisers without using Google's Ad Tech tools or services at all.

(iii) The Commissioner Has Significantly Overstated the Relevant "Common Structural Barriers"

227. In paragraphs 115 and 116 of his Notice of Application, the Commissioner asserts incorrectly that Google's ability to exercise market power has not been meaningfully constrained because barriers to entry and expansion in the relevant markets are high and "there are several common structural barriers that have and are likely to impede any meaningful entry or expansion". These "common structural barriers" are alleged to include barriers associated with accessing consumer data and access to sufficient scale and diversity to facilitate integration with other Ad Tech services. The Commissioner's allegations are incorrect for a number of reasons, including the following.

228. ***First***, as explained above, costs associated with developing and operating Ad Tech tools have not prevented the entry or expansion of numerous competitors in the relevant market.

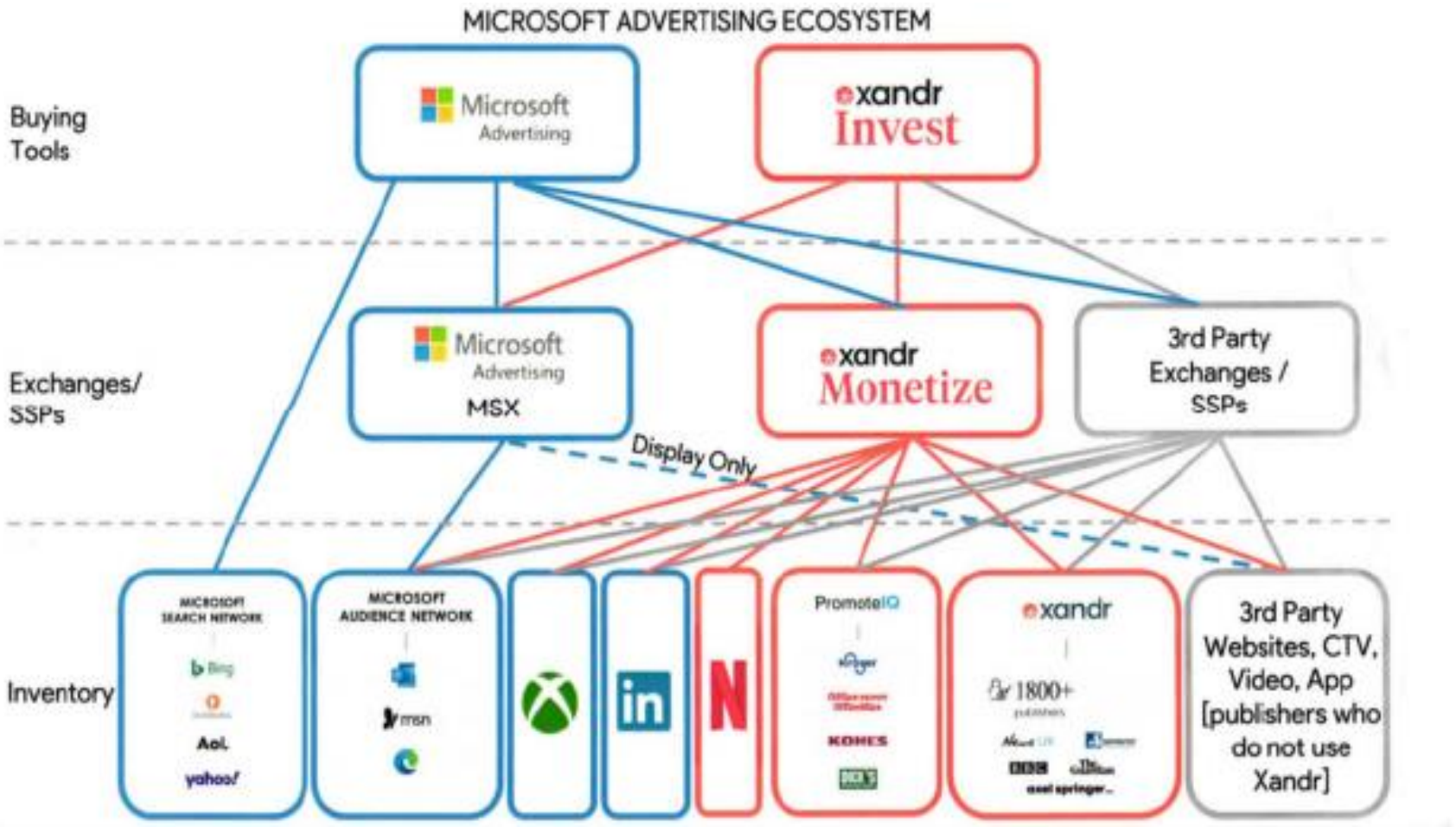
[8] Google Ads Connector is a tool that directly integrates Google Ads with publishers.

229. ***Second***, many companies, including competitors of Google that offer competing Ad Tech tools and services, have access to sufficient quantities of consumer data necessary to attain scale. These include, among others, Amazon, Meta, Microsoft, TikTok, Criteo and The Trade Desk.

230. ***Third***, the Commissioner's concerns are misplaced given the objective reality that there are numerous new Ad Tech providers that have attained sufficient scale to compete successfully in the relevant market. Indeed, the number of competing Ad Tech providers and tools available in the relevant market have increased dramatically over the last two decades. To pick one obvious example, the revenue of the Microsoft Audience Network grew by approximately 1500% in the two years after its inception.

231. ***Fourth***, as explained above, numerous competitors of Google have successfully developed Ad Tech tools that are integrated with other Ad Tech tools and services and have successfully won the business of numerous advertisers and publishers. One such competitor is Microsoft, which has developed an end-to-end integrated suite of Ad Tech tools that compete with Google's Ad Tech tools both in the properly defined relevant market and across all three of the Commissioner's gerrymandered product markets. An illustration of the breadth of Ad Tech tools and services offered by Microsoft is set out in Figure 23 below.

Figure 23 – Illustration of Ad Tech Tools Offered by Microsoft



232. ***Fifth***, the Commissioner fails to analyze or assess barriers to entry in the relevant market at all, let alone as a whole. Instead, the Commissioner assesses the barriers to entry only in the three isolated, segregated and highly artificial product markets he erroneously relies upon. Barriers to entry in the properly defined relevant market are very different from those that might conceivably be at issue in the cherry-picked product markets the Commissioner has selectively put in issue in this Application.

(iv) Google is Not Dominant in Any Publisher Ad Server Market

233. Contrary to the allegations of the Commissioner in paragraphs 118 to 129 of his Notice of Application, Google does not substantially or completely control the supposed publisher ad server market.

(a) No Direct Indicia of Substantial Market Power

234. Contrary to the allegation of the Commissioner in paragraph 120 of his Notice of Application, Google is not "generally able to dictate the terms upon which it sells or supplies its DFP product and services". Nor is the introduction by Google of Unified Pricing Rules in 2019 an "illustrative example" of its alleged exercise of market power. As explained above, the Unified Pricing Rules were designed to simplify auctions and make them more fair and transparent for advertisers and publishers. That is precisely the effect that the implementation of the Unified Pricing Rules has had.

235. Following the introduction of the Unified Pricing Rules, publishers that have chosen to use DFP to sell their advertising inventory have retained the flexibility to use non-Google Ad Tech tools, and to even favour non-Google ad exchanges when using DFP. Publishers using DFP can favour non-Google ad exchanges by simply clicking a check

box to remove AdX and use non-Google ad exchanges instead to sell their advertising inventory. Publishers can also make their advertising inventories available to advertisers by using, for example, AdSense or header bidding programs on their properties instead. They can also configure header bidding parameters to increase the probability that an advertiser using a non-Google Ad Tech tool will win the advertising inventory in question.

236. As pleaded in paragraph 68 above, Google imposes no fees for publishers that transact below a specified number of impressions per month while using DFP. In fact, more than 87% of publishers who use DFP do not pay any fee to Google at all. In addition, while publishers have on average earned increasing revenues using DFP over time, the fees associated with the use by publishers of DFP have been falling for almost a decade.

(b) No Indirect Indicia of Substantial Market Power

237. Contrary to the allegations of the Commissioner in paragraph 122 of his Notice of Application, Google does not enjoy a market share of over 90% in the fictitious publisher ad server market alleged by the Commissioner. Nor has Google maintained such a market share since “at least 2019”.

238. Contrary to the allegation of the Commissioner in paragraph 123 of his Notice of Application, Google has not degraded DFP, either intentionally or at all. Nor does Google face weak competitive constraints due to high barriers to entry, high switching costs or publishers that choose to use only one publisher Ad Tech tool. This is so for a number of reasons, including the following:

(a) ***Minimal barriers to entry.*** Contrary to the allegations of the Commissioner in paragraphs 115, 123 and 127 to 129 of his Notice of Application, barriers

to entry and expansion in the properly defined relevant market are modest. Nor are they high even in the artificial publisher ad server market proposed by the Commissioner. By way of example, Microsoft, Criteo and Equativ have all grown and attained sufficient scale to compete successfully. In addition, many publishers can create, and have in fact created, in-house Ad Tech tools on a cost competitive basis; and

(b) ***Minimal switching costs.*** Contrary to the allegations of the Commissioner in paragraphs 123 and 128 of his Notice of Application,[9] publishers can and do substitute publisher Ad Tech tools and services and can sell advertising inventory without using any publisher Ad Tech tool.

239. Moreover, the supposed "tie" alleged incorrectly by the Commissioner throughout his Notice of Application between Google Ads and AdX does not give DFP a unique, unfair or unlawful advantage over all other publisher ad servers. Publishers have a wide and increasing ability to mix and match Ad Tech tools, as described herein, including in paragraphs 99 to 121. Their use of DFP is far from the only route they have to access the demand of advertisers using Google Ads. Contrary to the allegation of the Commissioner in paragraph 124 of his Notice of Application, Google's alleged market power in the

[9] Throughout his Notice of Application, the Commissioner has referred to or quoted from internal Google documents that were extracted by compulsion by the Commissioner from Google and Google Canada during his investigation of the matters at issue in this Application. Given the truly penal consequences of the financial penalty sought in this Application, the compelled production of these documents from Google and Google Canada was unconstitutional for the reasons set forth in Google and Google Canada's accompanying Notice of Constitutional Question. The use of these documents in the Commissioner's Notice of Application compounds the violation of the rights and freedoms at issue. Moreover, these documents have been taken out of context or mischaracterized by the Commissioner in his Notice of Application, and their significance has been dramatically overstated. By way of example, the email quoted in paragraph 128 of the Notice of Application was authored by a former employee of Google who was employed for less than one year after the DoubleClick acquisition in 2008, was never in an operational role, had no team and was not responsible for decision-making at Google. He was not authorized to speak on behalf of Google, and did no such thing.

supposed publisher ad server market is not enhanced by the alleged tie between or among Google Ads, AdX and DFP.

(v) Google is Not Dominant in Any Advertiser Ad Network Market

240. Contrary to the allegations of the Commissioner in paragraphs 130 to 141 of his Notice of Application, Google does not substantially or completely control the supposed advertiser ad network market alleged by the Commissioner, either in North America or elsewhere.

(a) No Direct Indicia of Substantial Market Power

241. Contrary to the allegations of the Commissioner in paragraphs 131 to 133 of his Notice of Application, Google Ads cannot "dictate the terms upon which it sells its services" and does not offer advertisers an "inferior quality advertiser ad network". In fact, all of Google Ads, DFP and AdX offer market participants significantly superior competitive performance within the meaning of subparagraph 79(1)(b)(ii) and subsection 79(2) of the *Competition Act*.

242. Advertisers are not restricted to using Google Ads. Indeed, most can and do use multiple competing buy-side Ad Tech tools simultaneously while using Google Ads. Advertisers that use Google Ads and seek to bid for advertising inventory available on non-Google ad exchanges can easily do so using other Ad Tech tools and services offered by Google, namely DV360, AwBid and gBid. As pleaded above, the demand for advertising inventory associated with advertisers using Google Ads is not unique or essential. Indeed, in the past several years, Google Ads has lost business in the relevant market to competitors.

243. Google has not charged supracompetitive prices for services provided by Google Ads, either in North America or elsewhere. For example, in the period between 2015 to 2024, the average revenue share charged by Google for display advertising inventory purchased by advertisers through Google Ads in North America was approximately 14%. In recent years, Google's revenue share on Google Ads has fallen below 14%.

(b) No Indirect Indicia of Substantial Market Power

244. Contrary to the allegation of the Commissioner in paragraph 134 of his Notice of Application, Google Ads does not have a market share of "at least 70%" in the supposed advertiser ad network market "as measured by impressions". As noted above, there is no such thing as an advertiser ad network. The market share associated with Google Ads would be substantially lower if the Commissioner's calculation captured fairly and properly all relevant participants and transactions in the relevant market.

245. Contrary to the allegations of the Commissioner in paragraphs 135 to 141 of his Notice of Application, the supposed advertiser ad network market does not have high barriers to entry, high switching costs or a prevalence of advertisers who use a single advertiser Ad Tech tool. The Commissioner's allegations in this regard are without merit for a number of reasons, including the following:

(a) ***Scale is not inaccessible to rivals.*** Contrary to the allegations of the Commissioner in paragraphs 136 and 137 of his Notice of Application, the fact that advertisers who use Google Ads for search advertising can also purchase display advertising inventory using the same tool is not indicative in any way of Google's alleged market power in the relevant market. As

pleaded in paragraph 225 above, advertisers are attracted to Google Ads because of its superior competitive performance. Moreover, Google Ads is just one of many Ad Tech tools that enable advertisers to purchase the advertising inventory that they require for their advertising campaigns. Nor has the "scale and diversity in demand" associated with customers of Google that place search advertisements "made entry or expansion into [the Commissioner's artificially defined market] difficult, bordering on impossible" as the Commissioner alleges hyperbolically in paragraph 137 of his Notice of Application. As explained above, numerous Ad Tech providers have attained sufficient scale to compete successfully against Google. These include, among others, Meta, TikTok, Amazon and Microsoft;

(b) ***Switching costs are minimal and multi-platform use is prevalent.*** Contrary to the allegations of the Commissioner in paragraph 138 of his Notice of Application, the relevant market is intensely competitive. Advertisers are pervasive users of multiple competing Ad Tech tools, often simultaneously. This is possible because of the low costs advertisers incur in switching between the different Ad Tech tools of different providers; and

(c) ***Barriers to entry are not high.*** Contrary to the allegation of the Commissioner in paragraph 139 of his Notice of Application, there are no "significant barriers to entry and expansion in ad tech markets, including the Advertiser Ad Network market". Gaining access to the advertising inventory of publishers and associated data does not constitute a significant barrier

to entering or expanding in the relevant market. In fact, numerous rivals to Google have successfully entered the relevant market and won market share, including by offering Ad Tech tools with functionalities that are similar to and viable substitutes for Ad Tech tools made available by Google to publishers and advertisers.

246. Contrary to the allegation of the Commissioner in paragraph 140 of his Notice of Application, the "advertiser[] demand" available through Google Ads is not unique, including for the reasons set out above. The Commissioner's assertion in this regard appears to be little more than a rebuke of vertical integration and his meritless demand that Google divest and/or make its Ad Tech tools available to its competitors. The notion that a successful and innovative business operating in a highly competitive market should be compelled to make its products and services available to its direct competitors in a manner identical to the way in which that business uses those products and services to serve its own customers, or must otherwise ensure the success of its competitors, is antithetical not only to the prevailing law in this country, but also to basic and well-established principles of free market economics.[10] Other than in extraordinary circumstances that have no application here, businesses operating in Canada have the right to decide who they do business with and on what terms.

D. Google Has Not Engaged in a Practice of Anticompetitive Acts

247. The Commissioner has selectively put in issue in this Application four out of thousands of product innovations that Google has pursued in the period since the

[10] In any event, as pleaded above, Google has made its buy-side Ad Tech tools interoperable with non-Google ad exchanges through DV360, AwBid and gBid.

emergence of Ad Tech some 25 years ago. As noted above, the four alleged anticompetitive acts are: (i) the tying together of Google's Ad Tech tools; (ii) the use by Google of an innovative technology called "Dynamic Allocation"; (iii) the use by Google of an innovative feature known as "Project Bernanke"; and (iv) the implementation by Google of "Unified Pricing Rules".

248. The Commissioner's allegations are misguided and unavailing. To the extent that Google engaged in the alleged conduct, Google did not intend to have a predatory, exclusionary or disciplinary effect on its competitors, or to have an adverse effect on competition. Nor did any conduct engaged in by Google have such an effect. Google did not intend to exclude rivals or potential rivals, or to foreclose access by its rivals to transactions, scale or customers. Nor did Google do any such thing.

249. As explained herein, the alleged anticompetitive acts cited by the Commissioner either did not occur or were rooted in sensible, legitimate and legally benign business purposes and reasons. To the extent they occurred, they were designed to serve properly and lawfully Google's Ad Tech customers, and to ensure that Google could and would continue to provide high quality, secure and reliable Ad Tech tools and services having regard to the needs and demands of publishers, advertisers and users in the face of viable and effective competing offerings made available by a host of vigorous competitors. Each of the alleged anticompetitive acts that were actually undertaken by Google were the result of decisions made by Google for the purpose of improving the quality of Google's Ad Tech tools and services, and in turn, the Ad Tech ecosystem generally. Each feature of Google's Ad Tech tools impugned by the Commissioner benefitted Google's customers by generating increased revenues for publishers, increasing returns on investments for

advertisers, protecting the ecosystem for advertisers and publishers alike from fraud and other misconduct, and/or improving the quality and quantity of matches between advertisers and publishers for advertising inventory.

(i) Business Justifications for Enabling Interoperability Between Google Ads and AdX, and Between AdX and DFP

250. Contrary to the allegations of the Commissioner in paragraphs 149 to 166 of his Notice of Application, Google did not unlawfully "condition" access to "Google Ads demand" on the use of AdX, or "condition" access to AdX on the use of DFP. As pleaded above, publishers have no contractual or legal obligation to use AdX. Most publishers are not even eligible to use AdX and the majority of publishers do not use AdX. Moreover, publishers can and do connect to advertisers that use Google Ads without using AdX at all.

251. For publishers eligible to use AdX, the DFP user interface gives publishers complete and easily accessible control over whether to use AdX. Indeed, they can do so with a simple click. Google's DFP user interface specifically empowers publishers to use rival ad exchanges and exclude the use of AdX.

252. In addition, as discussed in paragraphs 126 to 128 above, advertisers using Google Ads multi-home with competing buy-side Ad Tech tools and are readily accessible to publishers that do not use any of Google's Ad Tech tools. Advertisers using Google Ads also can and often do use DV360, which interoperates with third-party ad exchanges such that those advertisers can be reached by publishers without the use of AdX as well. There is, therefore, no unlawful tie between Google Ads, AdX and DFP.

253. In any event, even if Google had tied together its Ad Tech tools (which is denied), Google's conduct would not have been intended to have a predatory, exclusionary or disciplinary effect on a competitor, or to have an adverse effect on competition. Nor was a predatory, exclusionary or disciplinary effect, or an adverse effect on competition, the reasonably foreseeable consequences of conduct that Google did, in fact, engage in. In fact, no such effect actually occurred.

254. Google had and has valid business justifications for developing an integrated set of Ad Tech tools that are able to serve properly, efficiently and effectively both advertisers and publishers. Broadly speaking, the fact that Google's Ad Tech tools were designed to work well together makes perfect business sense, and is procompetitive in nature. Indeed, it would be surprising if they did not. Sophisticated and well-resourced competitors like Microsoft do the exact same thing. More specifically, business justifications underlying integration between Google Ads and AdX include the following:

(a) ***The integration of Google Ads and AdX offers significant benefits to publishers and advertisers.*** Google's interest in ensuring that advertisers place successful bids for the advertising inventories of publishers in safe and secure advertising environments that consist of vetted publishers and quality advertising inventory is a valid, compelling and sensible business reason for the integration of Google Ads and AdX. That integration helps safeguard the rights and interests not only of publishers and advertisers, but also of end users, including by protecting their privacy and security. As pleaded in paragraph 29 above, the integration of Google Ads and AdX also lowers prices across the relevant market while protecting against fraud and

other forms of misconduct. Moreover, integration reduces costs and increases the speed of service by reducing latency in conducting auctions and delivering advertisements to users;

(b) ***Google already offers an Ad Tech tool to advertisers that addresses the core concern the Commissioner raises.*** As noted above, DV360 provides advertisers with access to broader advertising inventory, including through the use of dozens of third-party ad exchanges. Advertisers using Google Ads are free to conduct business using DV360 as well as the Ad Tech tools of competitors, and most advertisers do exactly that. In order for DV360 to offer advertisers expanded access to advertising inventory across multiple ad exchanges, it cannot offer the same assurances as to inventory quality as is the case with Google Ads. That is so because advertising inventory available on Google Ads is subject to a vetting process engaged in by Google to ensure advertisement safety. Google cannot provide the same level of guarantees through DV360, where any publisher might make their advertising inventory available for purchase through hundreds of non-Google ad exchanges;

(c) ***Google is entitled to offer differentiated products.*** It is not improper, untoward or anticompetitive for Google to offer advertisers differentiated Ad Tech tools and services with different and innovative features like Google Ads and DV360. Both Google Ads and DV360 are designed to assist advertisers that purchase advertising inventory in the relevant market, but offer different functions. Depending on the advertiser, either DV360 or

Google Ads may be better suited to enable advertisers to achieve their goals in certain circumstances. If Google Ads were forced to connect to third-party ad exchanges in the way that DV360 does, much of the distinction between Google Ads and DV360 would be eliminated. Advertisers that are better served because of the superior competitive performance they experience on Google Ads as compared to other buy-side Ad Tech tools and make a deliberate choice to use Google Ads—a freedom of choice for advertisers the Commissioner seeks to extinguish in this Application—would therefore be prejudiced;

(d) ***Google already offers an Ad Tech feature for Google Ads that connects Google Ads to third-party ad exchanges.*** As explained above, AwBid and gBid connect advertisers that use Google Ads to third-party ad exchanges when doing so does not degrade advertising inventory quality. AwBid and gBid perform the very function the Commissioner alleges is missing from Google Ads. That said, AwBid has been expensive to develop and has experienced significant challenges. These include high volumes of fraudulent or unsecure traffic from third-party ad exchanges, brand safety concerns associated with the sale of non-vetted advertising inventory, and service speeds affected by processing connections to additional intermediary service providers. These are the very concerns integration between Google Ads and AdX was designed to alleviate, and has alleviated; and

(e) ***To make Google Ads interoperable with other exchanges, Google would have to undertake significant research and development work.*** Google Ads was not designed to handle connections with rival ad exchanges. A significant, disproportionate and burdensome amount of expensive work and trade-offs would be required to connect Google Ads with rival ad exchanges in the way that Google Ads interfaces with AdX. For these reasons, the Commissioner's allegation in paragraphs 152 and 156 of his Notice of Application concerning the alleged ease with which Google could supposedly connect Google Ads to competitor ad exchanges is clearly wrong. The Commissioner's mistaken assertion in this regard is self-serving, ignores significant technical challenges, is divorced from commercial reality and is devoid of merit.

255. Google has valid and compelling business justifications for integrating the services associated with DFP and AdX. More specifically, the business justifications include the following:

(a) ***Integration is a significant benefit for customers.*** Integrating AdX and DFP allows publishers that use both products to access the benefits of real-time bidding while ensuring that Google can offer publishers and advertisers an acceptably fast speed of service, a better assurance of safety, a higher quality of advertising inventory and lower prices. Integration has also enabled other procompetitive innovations like Dynamic Revenue Sharing. In addition, the integration of DFP and AdX enables Google to make improvements to the user experience, an example of which is the

deployment of Google Ad Manager in response to publisher feedback. Integration of DFP and AdX is both the product of and an element of Google's superior competitive performance;

(b) ***Requiring Google to deal with rivals would require significant efforts and costs.*** Contrary to the allegation of the Commissioner in paragraph 160 of his Notice of Application, Google could not enable real-time bids between AdX and rival sell-side Ad Tech tools with "minimal effort". That self-serving assertion is also divorced from commercial reality. By suggesting that Google should have re-engineered AdX to integrate with competing publisher Ad Tech tools to enable real-time bidding between AdX and third-party Ad Tech tools, the Commissioner is implying that Google should have stripped apart AdX and undertaken extraordinary effort and expense to rebuild a new ad exchange tool from scratch for the purpose of assisting its direct competitors even though Google had no legal or other obligation to do so; and

(c) ***Google made a reasonable business decision not to enable real-time bids between rival publisher Ad Tech tools and AdX.*** Although Google explored the possibility of performing the significant research and engineering work associated with integrating AdX with non-Google sell-side Ad Tech tools, it ultimately concluded that there was no justifiable business case for doing so. Notably, third parties were unwilling to share in the enormous cost associated with performing the necessary work, and there

was a lack of clarity about how major technical challenges associated with making changes of this nature could be resolved.

256. Contrary to the allegation of the Commissioner in paragraph 165 of his Notice of Application, neither Google's conduct following its acquisition of AdMeld in 2011 nor its competitive response to header bidding after it was introduced by other market participants in 2014 were intended to have a predatory, exclusionary or disciplinary effect on a competitor, or an adverse effect on competition. There was, in fact, no such effect. Nor were the reasonably foreseeable consequences arising therefrom predatory, exclusionary or disciplinary in nature. As discussed immediately above, Google made a valid and lawful business decision not to undertake the significant work that would have been required to integrate DFP with third-party ad exchanges in order to enable third-party exchanges to have identical access to real-time bidding as is available through DFP and AdX. Moreover, in response to the introduction and expansion of header bidding Google introduced Open Bidding, thereby making it possible for publishers to enable header bidding functionality while using DFP and AdX. This is the very sort of competitive response the Commissioner should embrace, rather than impugn.

257. Following its acquisition of AdMeld, Google did not degrade technology that could have facilitated real-time bids in auctions conducted by AdX in respect of advertising inventory sold by a publisher while using a third-party sell-side Ad Tech tool. Rebuilding AdMeld to enable this functionality would have required Google to perform significant and expensive technical work required to integrate AdX with third-party Ad Tech tools. Although Google considered whether rebuilding this feature would have been economically viable, ultimately it decided not to do so. Google reached that conclusion

for multiple reasons, including because building new integrations with third-party publisher ad servers would have been challenging, time consuming and expensive, and would have raised significant ad safety and security concerns.

(ii) The Commissioner's "First Look" and "Last Look" Allegations About Dynamic Allocation are Statute-Barred, and In Any Event Google's Conduct Was Not Anticompetitive

258. As pleaded above, the so-called "first look" the Commissioner associates with Dynamic Allocation has not existed for more than a decade, since 2014. "Last look" has not existed for some five years, since around 2019. An Application for relief under subsection 79(1) of the *Competition Act* is statute-barred under subsection 79(6) of the *Competition Act* if the conduct complained of ceased more than three years before the Application was commenced. As a result, the claims and allegations of the Commissioner in this regard are statute-barred.

259. Moreover, Dynamic Allocation simply provided an option publishers could have used if they believed it would have assisted them in maximizing their revenues associated with the sale of advertising inventory.

260. In continuing the Dynamic Allocation feature originally developed by DoubleClick, Google did not intend for the use of Dynamic Allocation to have a predatory, exclusionary or disciplinary effect on a competitor, or an adverse effect on competition. Nor were the reasonably foreseeable consequences associated with using Dynamic Allocation predatory, exclusionary or disciplinary in nature. There were, in fact, no such effects.

261. The legitimate business justifications of Google in preserving Dynamic Allocation for a period of time after Google acquired DoubleClick in 2008 included the following:

(a) ***Improvements to the inefficient waterfall system.*** Dynamic Allocation benefitted publishers and advertisers by introducing a mechanism intended to ensure that higher bids of advertisers were successful in winning impressions available on the properties of publishers. This led to a significant increase in the associated revenues of publishers and a corresponding increase in the number and quality of matches for advertisers, including because there was a greater probability that the advertiser that valued the specific impression more highly would succeed in acquiring it. Advertisers, publishers and users of digital properties benefitted as a result;

(b) ***Risk-free, higher returns.*** As explained in paragraph 143 above, Dynamic Allocation was a feature of DFP that benefitted publishers by providing them with higher returns in a risk-free way since an advertiser would only win an impression through Dynamic Allocation if the advertiser was willing to pay at least what the publisher expected to receive from the next highest demand source. The risk-free nature of Dynamic Allocation was made possible by the integration of DFP with AdX; and

(c) ***Publishers chose whether to use "first look" and "last look".*** As explained above, publishers always retained the choice to disable Dynamic Allocation when using DFP and AdX. If they chose not to do so, they made that choice because of the superior competitive performance of Google's Ad Tech tools and services rather than because of any predatory, exclusionary or discriminatory intent on the part of Google.

262. Contrary to the Commissioner's allegations in paragraphs 174 to 175 of his Notice of Application, Sell-Side Dynamic Revenue Share was designed to increase the number of auctions in which there would be a successful match between a publisher and advertiser for the sale of advertising inventory. By increasing the number of successful matches, publishers earned greater revenues and advertisers won more impressions that were valuable to them. In simple terms, through Sell-Side Dynamic Revenue Share Google made its Ad Tech tools more helpful and valuable to publishers and advertisers alike. Enhancements and innovations of this nature, like those described above, are procompetitive in nature and demonstrate that Google's success is a result of its superior competitive performance rather than the result of anticompetitive intentions or conduct.

263. The Commissioner further alleges in paragraph 177 of his Notice of Application, that Google attempted to protect Dynamic Allocation by suppressing or deprecating technologies that "stood to benefit publishers and advertisers". There is no substance to the Commissioner's allegation. As explained above, Google had a legitimate and compelling business justification for not extending identical real-time bidding technology from AdX to third-party publisher Ad Tech tools, and responded appropriately and in a procompetitive manner to header bidding by launching its own technology (*i.e.*, Open Bidding) that enabled the features of header bidding within AdX and DFP. None of this was remotely untoward or improper, or intended to have a predatory, exclusionary or discriminatory effect in the relevant market. Once again, there was no such effect.

264. Finally, and contrary to the allegation of the Commissioner in paragraph 178 of his Notice of Application, Google did not move to the Unified First Price Auction system (and in doing so render Dynamic Allocation obsolete) to "avoid being forced by regulators to

remove Last Look under disadvantageous terms". Google's legitimate and compelling business justifications for introducing the Unified First Price Auction are discussed above in paragraphs 157 to 163, and elaborated upon more fully below.

(iii) Project Bernanke Was Not Improper

265. As explained in paragraphs 151 to 156 above, the Commissioner's attempt in paragraphs 179 to 195 of his Notice of Application to cast Project Bernanke in an ominous light by asserting that Google used "negative take rates to win more auctions" is seriously misplaced. Reducing the price of a service in an effort to compete more effectively, and to assist customers in their efforts to succeed, is hardly an anticompetitive act. Project Bernanke was a legally benign and entirely appropriate program to optimize advertiser bids through Google Ads by dynamically adjusting the revenue share of Google Ads (both upwards and downwards). Project Bernanke was procompetitive in purpose, nature and effect.

266. Having regard to the wording and terms of paragraph 78(1)(i) of the *Competition Act* and to paragraphs 59 and 60 of the Competition Bureau's Abuse of Dominance Guidelines, it is also clear that the "predatory pricing" element of the abuse of dominance provisions have no application here. That is so because, among other things, predatory pricing only applies in circumstances where the seller of articles does so "at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor". Google had no such purpose or intent in implementing Project Bernanke or any of its predecessor or successor initiatives.

(iv) Google Has Not Unlawfully Restricted Access to Rival Ad Exchanges

267. As explained above, the Commissioner's allegations in paragraphs 186 to 193 of his Notice of Application that Google's Unified Pricing Rules restrict the ability of publishers that use DFP to transact freely with third-party ad exchanges in a manner that is anticompetitive are meritless.

268. Google adopted the Unified First Price Auction within AdX in 2019, and concurrently implemented the Unified Pricing Rules within DFP. These changes were made in an effort to simplify the increasingly complex auction process for advertisers, to protect them from questionable tactics engaged in by publishers, such as price fishing, and to improve the number and quality of matches between advertisers and publishers for advertising inventory. Participants in the relevant market generally view the Unified Pricing Rules as a best practice, rather than as a nefarious or anticompetitive business practice. These innovations established a more level playing field for advertisers and made auctions more fair, efficient and orderly for participants in the relevant market. The ultimate beneficiaries included not only publishers and advertisers, but also users of digital properties. While a minority of vocal publishers have complained about the Unified Pricing Rules, Google received positive feedback from many other publishers in respect of its deployment of the Unified Pricing Rules.

E. No Substantial Lessening or Prevention of Competition

269. Contrary to the allegations of the Commissioner in paragraphs 194 to 215 of his Notice of Application, Google has not engaged in a practice of anticompetitive acts. Google's conduct has not had, is not having and is not likely to have the effect of

substantially lessening or preventing competition, either in the properly defined relevant market, or in any of the three artificial markets proposed by the Commissioner.

270. The conduct of Google complained of in the Commissioner's Application has been seriously mischaracterized by the Commissioner. Google did not preserve or enhance its alleged market power in any relevant market. Contrary to the allegation of the Commissioner in paragraph 194 of his Notice of Application, the relevant market would not have been "substantially more competitive, including by way of lower prices, enhanced innovation and higher service quality" but for the conduct of Google at issue in this Application. As is demonstrated by a number of significant innovations, advancements and new entrants, the relevant market has evolved rapidly over the years, including recently, and is characterized by increasingly intense competition that has benefitted publishers, advertisers and ultimately the users of digital properties.

271. There are dozens of competitors in the Ad Tech industry today. All of those competitors are participants in the relevant market. Contrary to the unfounded claims and allegations of the Commissioner including in paragraphs 195 to 198 of his Notice of Application, Google's conduct has not: (i) deprived rivals of scale; (ii) "insulated it from competition"; (iii) enabled the exercise by Google of a materially greater degree of market power; (iv) restricted the ability of publishers or advertisers to "effectively multi-home"; or (v) "stalled, stifled and deprecated innovative technologies". By way of example only, Microsoft, Meta, Amazon and Criteo are all successful, large, innovative, sophisticated and fierce competitors of Google in the relevant market.

272. Rather, and as explained above, vigorous, healthy and effective competition exists in the relevant market. That competition has resulted in significantly increased output, stable or lower prices over time, higher quality over time, and the entry into the relevant market of successful new competitors. All of these procompetitive effects have resulted from intense competition and innovation by market participants. As pleaded above, Google's continued success in the relevant market is directly attributable to its superior competitive performance. As a result, its conduct is beyond the reach of the abuse of dominance provisions of the *Competition Act* pursuant to subparagraph 79(1)(b)(ii) and subsection 79(2) of the *Competition Act*.

273. Moreover, for each of the Commissioner's proposed markets, the "but for" world that would supposedly have existed in the absence of the conduct of Google complained of by the Commissioner is incapable of being properly identified or assessed. That is so because the Commissioner has confined his allegations in this regard to the three contrived and artificially narrow product markets that are entirely tactical in nature. There are, in fact, no separate or separable markets for publisher ad servers, advertising ad networks and ad exchanges that exclusively serve "open web display ads". Instead, the Ad Tech tools and services of Google and of many other participants in the properly defined relevant market are multi-functional and interoperable. They assist advertisers and publishers in transactions involving the placement of advertisements in multiple formats on multiple platforms and properties. The number and scope of market participants and Ad Tech tools and services the Commissioner purports to exclude from his proposed markets distorts market reality beyond recognition.

274. The Commissioner's misguided reliance upon an obsolete conception of an "ad network" to define the supposed "advertiser ad network" market speaks volumes. The artificial markets proposed by the Commissioner are premised upon his misunderstanding of Ad Tech as a static and unchanging industry. Perhaps as a result of that misapprehension, the Commissioner has alleged component-based markets for Ad Tech tools and services that never existed. Since there is no such thing as an "advertiser ad network" as proposed by the Commissioner, his proposed market for "advertiser ad networks used in the programmatic buying of web ads through open channels" is likewise fictitious. In reality, the relevant market has evolved far beyond what the Commissioner apparently envisions in the but-for world he has proffered.

F. Application of Abuse of Dominance Provisions that Existed Before June 2022

275. As this Tribunal is well aware, the abuse of dominance provisions in sections 78 and 79 of the *Competition Act* were amended multiple times in the period between June 2022 and December 2024. However, much, if not all, of the anticompetitive conduct alleged by the Commissioner in this Application occurred before those provisions were amended, beginning in June 2022.

276. Because the amendments to sections 78 and 79 of the *Competition Act* were substantive rather than procedural in nature, and because Parliament has expressed no intention to have sections 78 and 79 of the *Competition Act*, as amended, apply retroactively or retrospectively, the Commissioner must both prove his claims of abuse of dominance and limit the quantum of any financial penalty in this Application based on the wording of the *Competition Act* as it existed before June 2022.

G. Proposed Remedies Are Inappropriate In The Circumstances

277. The Commissioner seeks three remedies in this Application, namely Orders: (i) requiring Google to divest both of DFP and AdX (defined above as the Divestiture Order); (ii) prohibiting the impugned practices complained of in his Notice of Application (the "**Prohibition Order**"); and (iii) requiring the payment by Google and Google Canada of an extraordinary and unprecedented financial penalty (the "**Financial Penalty Order**"). Given that neither Google nor Google Canada have engaged in any abuse of dominance, no remedy is warranted or justifiable in the circumstances. In the alternative, the only appropriate and proportionate remedy is the issuance of a properly crafted, narrowly tailored and forward-looking Prohibition Order.

(i) No Basis for the Proposed Divestiture Order

278. The Tribunal lacks the subject-matter jurisdiction to grant the Divestiture Order sought by the Commissioner. Even if the Tribunal had jurisdiction to grant the Divestiture Order sought by the Commissioner, there is no proper basis upon which such an Order can or should be granted.

(a) The Tribunal Lacks the Subject-Matter Jurisdiction to Make the Divestiture Order Sought by the Commissioner

279. The Tribunal lacks subject-matter jurisdiction under the *Competition Act* and the *Competition Tribunal Act* to order the divestiture by Google of either of DFP or AdX. As pleaded above, Google was incorporated in the U.S., is headquartered in the U.S., has its business premises, property and equipment in the U.S., and carries on business in the U.S. The assets, software and intellectual property used by Google to operate its Ad Tech business and provide services using its Ad Tech tools are located primarily, if not

exclusively, outside Canada. As a matter of law, Parliament is presumed not to legislate extraterritorially. There is no clear and unambiguous indication either in the *Competition Act* or the *Competition Tribunal Act* that Parliament intended that subsection 79(2) of the *Competition Act* (which forms the statutory basis for the Divestiture Order sought by the Commissioner) should operate extraterritorially. This is particularly so in circumstances where the Agreement between the United States of America, the United Mexican States, and Canada executed on November 30, 2018 (defined above as the USMCA) proscribes the application of the competition laws of Canada extraterritorially in circumstances where a demand by the Commissioner for divestiture concerns the proprietary software and algorithms of a foreign company based in the U.S.

280. The Tribunal is a statutory tribunal rather than a court of inherent jurisdiction. The operative provisions of the *Competition Act* and the *Competition Tribunal Act* must be read harmoniously with the USMCA and the *Canada–United States–Mexico Agreement Implementation Act*. The jurisdiction of the Tribunal to compel the divestiture of assets by respondents to abuse of dominance proceedings initiated by the Commissioner is carefully constrained by the operative wording and terms of subsections 79(2) and 79(3) of the *Competition Act*. Unless an Act of Parliament explicitly authorizes the Tribunal to make an order having extraterritorial purpose and effect under section 79 of the *Competition Act*—and no such Act does—the Tribunal lacks the necessary jurisdiction to do so.

281. There is no statutory or other authority for the extraordinary Divestiture Order the Commissioner has sought.

(b) No Basis for the Proposed Divestiture Order

282. In the alternative, the Divestiture Order sought by the Commissioner is entirely inappropriate in the circumstances of this Application. If this Tribunal were somehow to find that Google has abused its position of dominance in a sliver of a properly defined relevant market, or in any of the artificial markets alleged by the Commissioner (which is denied), the issuance by the Tribunal of a properly crafted Prohibition Order would likely restore competition in the relevant market or markets. For that reason alone, section 79(2) of the *Competition Act* makes clear that the Tribunal cannot grant the Divestiture Order sought by the Commissioner. Moreover, compelling the divestiture by Google of either or both of DFP and AdX is not reasonable, proportionate or necessary to overcome the effects of practices complained of by the Commissioner. Furthermore, the Divestiture Order sought by the Commissioner would interfere with the rights and interests not only of Google and Google Canada, but also of countless third-parties that would be affected directly and significantly by the relief the Commissioner has sought.

(ii) The Extraordinary Financial Penalty Sought by the Commissioner is Truly Penal in Nature and Unwarranted

283. As stated in paragraph 31 above, the Commissioner also seeks an extraordinary Financial Penalty Order under subsection 79(3.1) of the *Competition Act* imposing an unprecedented financial penalty against both Google and Google Canada of up to three times the value “of the benefit derived from Google’s anti-competitive practice” or “3% of [their] worldwide gross revenues”. The Commissioner fails to make clear in his Notice of Application the period in respect of which the supposed value and revenues in question should be assessed. His allegations, however, date back more than 15 years, to approximately 2008. In the circumstances, it is conceivable that the financial penalty the

Commissioner may ultimately seek if this Application is permitted to move forward will be measured in the billions of dollars. There has never been a single fine imposed by a Canadian Court in any setting that approaches the magnitude of the financial penalty sought by the Commissioner in this proceeding.

284. In the circumstances, Google and Google Canada face the risk of the potential imposition by the Tribunal of true penal consequences at the request of the Commissioner. The Commissioner could have acted with sensible restraint in seeking significantly more modest financial penalties against Google and Google Canada. For example, he could have sought a fine of up to $25 million pursuant to paragraph 79(3.1)(a) of the *Competition Act*. He chose not to do so, however, and instead seeks far greater financial penalties under the newly enacted paragraph 79(3.1)(b) of the *Competition Act*.

285. The Commissioner must now bear the consequences associated with his tactical choice. Because of the truly penal consequences the Commissioner has asked this Tribunal to impose upon Google and Google Canada, his Application engages important rights guaranteed both to Google and to Google Canada under the *Charter* and *Bill of Rights*.

286. The rights guaranteed to Google and Google Canada are constitutional and quasi-constitutional in nature. Those rights have already been violated by the Commissioner and the Bureau, and inevitably will continue to be violated if the Commissioner's Application is permitted to proceed.

287. For these reasons, the Commissioner's Application should immediately be stayed or dismissed. If the Commissioner's Application is permitted to proceed, however, other

relief should be granted in favour of Google and Google Canada as specified in their Notice of Constitutional Question delivered concurrently with this Response. Among other things, the Tribunal should hold and declare that subsection 79(3.1) of the *Competition Act* is constitutionally invalid and of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982*.

288. In this regard, Google and Google Canada repeat and rely upon the contents of their Notice of Constitutional Question.

289. In the alternative, the demand of the Commissioner for the Financial Penalty Order is inappropriate in the circumstances. The extraordinary and unprecedented quantum of the financial penalty sought by the Commissioner is grossly disproportionate. Among other reasons: (i) the alleged anticompetitive acts of Google had no adverse effects on competition in the relevant market that were not the result of the superior competitive performance of Google; (ii) the conduct in question has benefitted considerably numerous market participants, including advertisers, publishers and users; (iii) the imposition by the Tribunal of the extraordinary financial penalty sought by the Commissioner is contrary to the public interest, inimical to a number of important purposes the *Competition Act* is intended to advance by diminishing competition and stifling innovation; and (iv) Google and Google Canada both have a strong history of compliance with the *Competition Act*.

290. Moreover, the quantum of the financial penalty demanded by the Commissioner is grossly excessive and extends far beyond simply promoting practices by Google and Google Canada that are in conformity with the purposes of the *Competition Act*, including as reflected in sections 78 and 79 of the *Competition Act*. Promoting compliance with the

Competition Act could easily be achieved by the imposition of a carefully crafted and forward-looking Prohibition Order. Instead, a financial penalty of such magnitude would be aimed improperly at punishing Google and Google Canada for the misconduct alleged by the Commissioner.

291. Finally, the magnitude of the financial penalty sought by the Commissioner is inconsistent with Canada's obligations under the USMCA and the *Canada–United States–Mexico Agreement Implementation Act*.

PART V – CONCISE STATEMENT OF ECONOMIC THEORY

292. The concise statement of economic theory of Google and Google Canada is set out in **Schedule "A"** to this Response.

PART VI – RELIEF SOUGHT

293. The Commissioner is not entitled to any of the relief he seeks in this Application. If the Commissioner is permitted to proceed with his Application notwithstanding his violation of the constitutional and quasi-constitutional rights of Google and Google Canada referred to above, Google and Google Canada respectfully ask that an Order be issued: (i) dismissing the Commissioner's Application in its entirety; (ii) declaring subsection 79(3.1) of the *Competition Act* to be invalid and of no force or effect; and (iii) granting to Google and Google Canada their costs of this Application, in an amount to be determined by the Tribunal after hearing further submissions from the parties.

294. Google and Google Canada also seek an Order of the Tribunal pursuant to rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 and rule 107 of the *Federal Courts Rules*, SOR/98-106, as well as the Tribunal's power to control its own processes

and procedures, bifurcating this proceeding to separate issues related to their supposed liability for alleged abuse of dominance from issues related to remedies that should be imposed upon them at the request of the Commissioner if liability is established.

295. Notwithstanding any bifurcation order the Tribunal might make, the constitutional issues raised herein, and in the Notice of Constitutional Question of Google and Google Canada, should be determined at or near the outset of this Application.

PART VII – LOCATION AND CONDUCT OF THE HEARING

296. Google and Google Canada intend to oppose this Application in English and respectfully request that this Application be heard in-person in Toronto, Ontario. If the Application is to be heard in both English and in French, Google and Google Canada respectfully request that simultaneous translation services be made available by the Tribunal in respect of the portion of the Application that will be heard in French.

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SCHEDULE "A" – CONCISE STATEMENT OF ECONOMIC THEORY OF GOOGLE AND GOOGLE CANADA

1. The Commissioner's allegation that Google and Google Canada have abused their positions of dominance in respect of the provision of Ad Tech tools and services is meritless and has no proper foundation in economic theory. That is so for many reasons, including because:

(a) Google has no substantial degree of market power in any properly defined product or geographic market;

(b) Google has not engaged in conduct with an intent to have a predatory, exclusionary or discriminatory effect on a competitor, or an adverse effect on competition in any market. Nor has Google's conduct had such an effect. Google's conduct in reacting to competitive dynamics cannot properly be characterized as predatory, exclusionary or discriminatory as a matter of fact, law or economic theory;

(c) Google has not engaged in conduct that has had, is having or is likely to have the effect of substantially lessening or preventing competition in any properly defined market. To the contrary, on any number of metrics, observed market outcomes reflect a well-functioning and competitive marketplace; and

(d) The Commissioner's theory of harm resulting from Google's conduct is misplaced, and based on alleged harm to competitors rather than harm to competition. The rapid and significant evolution of the relevant market that

has occurred in the period since 2008 demonstrates that there are inherently procompetitive outcomes associated with innovations brought to market by Google. Any effect on competitors associated with those innovations is the result of vigorous competition on the merits and superior competitive performance rather than of allegedly anticompetitive practices engaged in by Google.

A. Google Has No Substantial Degree of Market Power in the Relevant Product or Geographic Markets

2. Fundamentally, the service that is sold by Google and other market participants through the use of Ad Tech tools is a match (or transaction) between an advertiser and a publisher for the sale of advertising space (also referred to as advertising "inventory" or "impressions"). Because Ad Tech tools and services facilitate transactions between parties on both sides of the platform, the relevant product market is a single, two-sided platform market.

3. Only by evaluating Ad Tech as a single, two-sided platform market can one properly assess whether the market is performing its function of creating value between publishers and advertisers.

4. When the two-sided nature of the relevant market is properly considered, the Commissioner's allegations of tying are unsustainable as a matter of fact, law and economic theory. An integrated firm that serves both sides of a two-sided market has an economic incentive to consider fully the benefits and effects of innovations on both sides of the market. Ad Tech providers like Google balance the needs of publishers and advertisers to maximize the total value of advertising matches transacted.

5. Because matches for all forms of advertising inventory facilitated or arranged through the provision by market participants of similar or identical Ad Tech tools are highly substitutable, the smallest definition of the relevant product market that must be assessed by the Tribunal is the single, two-sided platform market involving matches between advertisers and publishers for the sale of advertising inventory or impressions. The relevant market includes all matches made between publishers and advertisers in respect of advertising inventory or impressions facilitated by the use of Ad Tech tools or services. These include matches made via negotiated direct deals between publishers and advertisers.

(i) The Commissioner's Proposed Product Markets are Artificial

6. The Commissioner advances three artificially curated, component-based product markets of "programmatic open web display advertising" for: (i) publisher ad servers; (ii) ad exchanges; and (iii) advertiser ad networks. These proposed product markets are under inclusive and flawed. Among other things, they exclude the vast majority of advertising transaction activity occurring between publishers and advertisers within the properly defined relevant market. The markets proposed by the Commissioner also fail to capture immense innovations in and the fast-paced evolution of the relevant market.

7. Moreover, the Commissioner's proposed product markets fail to capture any in-app, video, native, Connected TV or social media advertising. The Commissioner focuses instead solely on static banner advertising, and only on websites. The Commissioner's conception of the relevant market is frozen in a time long since passed and is divorced from the current market reality. Today, the vast majority of users view, and the vast

majority of advertiser spending focuses on, advertising in various forms and formats that extend well beyond static banner advertising on websites.

8. Both advertisers and publishers can and frequently do shift their spending and advertising inventory, respectively, from static banner advertising to other forms and formats of advertising. The wide variety of advertising formats are served by virtually identical or highly similar Ad Tech tools.

9. The Commissioner's proposed product markets are also flawed because they ignore the two-sided nature of the relevant market. There is no such thing as an isolated "publisher ad server", "ad exchange" or "advertiser ad network" market. Each of the Ad Tech tools that form the core of the Commissioner's isolated markets must interoperate with other Ad Tech tools to serve any useful purpose for publishers and advertisers, namely the matching of an advertiser and a publisher for the sale of advertising inventory or impressions. It is impossible to assess properly the effect on competition in the relevant market of services performed using an Ad Tech tool allegedly inhabiting the supposed "publisher ad server" market without also considering the effects of other Ad Tech tools in the other two product markets proposed by the Commissioner.

10. Finally, even if the Commissioner's flawed proposals for product markets were accepted by this Tribunal, the Commissioner has still failed to include all competing services performed by market participants using substantially identical Ad Tech tools within each product market for assessment by the Tribunal. Instead, the Commissioner has arbitrarily excluded from his proposed markets the effects on competition of similar services performed by a number of other market participants using similar or substitutable

Ad Tech tools. The purpose or effect of doing so is to manufacture the appearance that Google somehow exerts a substantial degree of market power in the Commissioner's artificially segregated product markets.

(ii) The Appropriate Geographic Market is Canada and the United States

11. The relevant geographic market to be assessed in this Application is Canada and the U.S. (defined collectively in this Response as "North America"). That is so because of the similar competitive conditions that exist across the United States and Canada, as well as similarities in the regulatory environments, business structures and market participants in both countries. At base, changes in the relevant market in the U.S. have immense effects in Canada.

12. Moreover, Google does not segregate how it serves advertisers and publishers in Canada from how it serves advertisers and publishers in the U.S. Canadian advertisers can and frequently do purchase advertising inventory from publishers located in the U.S. and vice versa. Advertisers and publishers in the U.S. and Canada use Ad Tech services provided by companies located in the U.S. to purchase and sell advertising inventory that ultimately are viewed by Canadian users. In this regard, Canadian users can and frequently do visit digital properties owned and operated by publishers in the U.S. and vice versa. Canadian users of digital properties are shown advertisements the placement of which is facilitated by Ad Tech tools and services provided by companies based in the U.S.

B. Google Has Not Engaged in a Practice of Anticompetitive Acts

13. In his Notice of Application, the Commissioner characterizes four innovations Google has implemented over the past 15 years or so using its Ad Tech tools as anticompetitive acts. These innovations were all designed to improve outcomes for Google's publisher and advertiser customers, and ultimately for end users. In addition, the Commissioner ignores entirely thousands of other Ad Tech innovations developed by Google during the period covered by this Application.

14. It is a well understood economic theory that the integration of complementary assets can generate significant procompetitive effects, including expanded output, lower prices, improved quality of products or services and greater investment and innovation. Balancing the interests of publishers and advertisers on both sides of the two-sided market has served to expand dramatically output in the properly defined relevant market. Prices have remained relatively stable or have declined, even though the quality of the services provided and the Ad Tech tools used have increased. Google and other market participants have invested heavily in their Ad Tech tools and innovations, to the benefit both of advertisers and publishers. These investments have helped create a well-functioning marketplace that facilitates efficient matches between publishers and advertisers for advertising inventory. Appropriate integration has also eliminated transaction costs.

15. Each of the Commissioner's allegations of anticompetitive conduct fails as a matter of fact, law and economic theory. That is so whether the conduct in question is considered in isolation or in combination. Google's actions were part of an overall procompetitive course of conduct in response to vigorous competition that enhanced competition

significantly in the relevant market. Moreover, a core foundation of the Commissioner's case—his allegation that Google exploits control over "must-have", "unique" or "essential" advertiser demand to foreclose competition—is contradicted by the data.

16. All of the anticompetitive acts alleged by the Commissioner were adopted by Google for legitimate and valid business reasons to respond to vigorous competition in the relevant market. Moreover, all of those acts were procompetitive in nature and effect.

17. The legitimate and valid business reasons for conduct engaged in by Google include: (i) developing innovations to distinguish Google's Ad Tech tools and services from those of its competitors; (ii) achieving economies of scale to more efficiently serve Google's customers; and (iii) enhancing fairness and transparency in the relevant market to ensure the long-term productivity of the market.

C. There Has Been No Substantial Lessening or Prevention of Competition

18. The Commissioner's theory of harm fails to distinguish between alleged harm to competitors (an essential element of competition) and alleged harm to competition. As a matter of economic theory, the Commissioner has not distinguished exclusion or foreclosure from competition. The fact that output is increasing, prices are flat or declining and Google and other market participants are delivering increasing value to advertisers and publishers reflects a well-functioning marketplace and the superior competitive performance of Google rather than a practice of anticompetitive acts as alleged by the Commissioner.

19. For many years, prices in the relevant market have remained stable or declined. That is so even though: (i) the quantum and quality of matches (*i.e.*, the service ultimately

provided both by Google and by other providers of by Ad Tech tools and services) have increased; (ii) the revenues of publishers associated with the sale of their advertising inventory have grown; (iii) the returns on investments of advertisers have improved; (iv) output in the relevant market has increased significantly, and (v) the market share of Google in the relevant market has fallen.

20. This is the exact opposite of what one would expect to see if the Commissioner's claims of Google exercising a substantial degree of market power were true. Using standard economic metrics and theories, the vibrant performance exhibited in the Ad Tech industry strongly supports the conclusion that Google's conduct has not prejudiced competition in the relevant market.

21. Competition in the relevant market has not been lessened or prevented at all by Google, let alone substantially.