

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

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

HON. AMIT P. MEHTA

STATE OF COLORADO, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

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

HON. AMIT P. MEHTA

**COLORADO PLAINTIFF STATES' SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO APPLE INC.'s MOTION FOR LIMITED INTERVENTION**

Plaintiffs' joint opposition memorandum explains that Apple's motion to intervene should be denied because it fails two of Rule 24(a)'s four requirements: Google is and will adequately represent Apple's interests and Apple's motion is untimely. *Deutsche Bank Nat'l Tr. Co. v. F.D.I.C.*, 717 F.3d 189, 192 (D.C. Cir. 2013). Colorado Plaintiff States join that submission in full, which is sufficient to demonstrate that Apple cannot make the necessary showing to warrant Apple's intervention.

As explained herein, there are two additional grounds for denial because Apple's motion fails Rule 24(a)'s two *other* requirements: Apple has not demonstrated a legally protected

interest in the present remedies phase of this case and Apple has not demonstrated any legally protected interest that the action would threaten to impair. *See id.*

Apple plainly describes its purported interests: (i) to preserve “the status quo in Apple’s relationship with Google” and ensure that no remedy will “undercut” its existing contract with Google (Apple Mot. at 9); and (ii) to advance “its ability to enter into future contracts with Google across a host of domains, including general search, AI, and other related areas” (*id.* at 6). This broad assertion is not limited to changes in the existing contract and, as demonstrated below, is much too speculative to support intervention under Rule 24(a).

Neither ground establishes a legally protected interest under Rule 24. *First*, Apple’s claimed interest in defending the “status quo” in its contractual relationship with Google is nothing more than an effort to overturn the Court’s liability decision. The Court has already declared the Google-Apple ISA illegal, and there is no protected interest in benefitting from illegal conduct. *See, e.g., Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998) (citing *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981) (putative intervenors “have no legally protectable right to benefit from an invalid discharge”)). No case cited by Apple holds otherwise. *Second*, Apple does not have a legally protected interest in future, speculative contracts of unspecified and unknown terms. *See United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (contrasting the requirement of “a legal interest as distinguished from interests of a general and indefinite character”). Again, no case cited by Apple holds otherwise.

Apple’s arguments as to the separate requirement that it demonstrate impairment of a legally protected interest fare no better. Because Apple has not demonstrated a legally protected interest, it follows that it has no protectible interest that can be impaired. Apple instead cites

several inapposite cases, none of which supports a legally protected interest under Rule 24 premised on a claimed series of potential future agreements that Apple has not identified and to which Google has not, as far as we know, yet agreed.

For the reasons described below and in the joint opposition, Apple's motion to intervene should be denied.

ARGUMENT

I. Apple Fails to Demonstrate a Legally Protected Interest

To intervene by right, Apple must establish that it has “an interest relating to the property or transaction that is the subject of the action.” Fed. R. Civ. P. 24(a)(2). Apple argues that it can intervene by right based on (i) “contractual rights under the ISA” and (ii) “its rights to enter future contracts with Google.” Apple Mot. at 7. Neither is a legally protected interest given the case's current posture.

First, Apple asserts an interest in defending its existing ISA with Google at this remedies phase. *Id.* at 8. However, the Court already held that Google maintained its unlawful monopolies due in part to the ISA. Memorandum Opinion (“Op.”), ECF No. 1032, at 204, 276. Apple has no right to re-open the Court's liability holdings at this remedies phase of this proceeding. *See Arizona v. California*, 460 U.S. 605, 615 (1983) (permission to intervene does not carry with it the right to relitigate matters already determined in the case); *In re Geisser*, 554 F.2d 698, 705 n. 6 (5th Cir.1977) (same); *see also United States v. Microsoft*, 231 F. Supp. 2d 144, 153 (D.D.C. 2002) (liability findings “provide an essential foundation” to the Court's remedies analysis and are a baseline against which remedial proposals should be “measure[d]”).

Yet Apple seeks to intervene at the *remedies phase* to defend the legality of a contract that the Court had already determined to be illegal at the *liability phase*. Rule 24(a) requires a “legally protectable interest,” not “any interest the applicant can put forward,” *Mova Pharm.*

Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (citing *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C.Cir.1984)). Apple points to no case granting intervention to defend an unlawful arrangement. Nor can it, as such an interest is by definition not legally protected. *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998) (citing *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981) (“no protectable interest in positions that they may have obtained due to specific discriminatory employment decisions”)). If Apple wished to protect the ISA, the proper time to intervene was at the liability stage. *See In re N.Y.C. Policing During Summer 2020 Demonstrations*, 27 F.4th 792, 800 (2d Cir. 2022) (citing *United States v. Los Angeles*, 288 F.3d 391, 398-99 (9th Cir. 2002)) (“there is a crucial difference between an interest in unconstitutional practices . . . and an interest in the outcome of litigation seeking a determination that certain practices are unconstitutional”). Apple’s continued devotion to the unlawful ISA is an attempted end-run around the Court’s liability findings and is not a proper basis for intervention.

Second, Apple claims a legally protected interest “in negotiating future contractual arrangements with Google,” encompassing “a host of domains, including general search, AI, and other related areas.” Apple Mot. at 6, 8. This is a sweeping assertion, not limited to changes in the existing ISA. And the assertion is doubly conjectural; neither Apple nor Google has described such a future contract, much less negotiated one in any domain, much less a host of them, and, even to the extent that one party describes such a future contract, there is no present evidence that the other party would agree or that actual contract terms could be hashed out and executed. *See Op.* at 106, 110-11 (describing past Apple-Google bargaining over contractual provisions).

Apple offers no legal support for its novel view that a generalized desire to contract with

a party on some speculative terms in the future constitutes a legally protected interest. To the contrary, under Rule 24 an intervenor's proffered interest must be "direct, and not contingent," and cannot be of "a general and indefinite character." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980); *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermens' Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012); *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 42 (1st Cir. 1992).

Apple's purported interest in potential future contracts with Google, as described in Apple's motion, is entirely contingent, indirect, and generalized. Courts routinely hold that such hypothetical, future actions are not a concrete interest to justify intervention. *See United States v. 936.71 Acres of Land*, 418 F.2d 551, 556 (5th Cir. 1969) (interest in "nothing more than the opportunity to bargain" was a "contingent interest or mere expectancy"); *Weingarten v. Gill*, 492 Fed. Appx. 754, at 755 (9th Cir. 2012) (future property interest that was revocable under certain conditions did not justify intervention); *N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313, 1326 (Ct. Int'l Trade 2021) (potential dealing with party to the case was an "economic interest" insufficient to warrant intervention); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Co.*, 732 F.2d 452, 464 (5th Cir. 1984) ("economic interest" was not "one which the substantive law recognizes as belonging to" the applicant). Apple's purported interest is also impermissibly generalized because it is shared by every company that might seek a similar contract. *See Heyman v. Exch. Nat. Bank*, 615 F.2d 1190, 1194 (7th Cir. 1980) (applicant's interest "may differ in size, but not in kind from the interest of every creditor"). This purported interest, like Apple's interest in continuing to benefit from unlawful conduct, fails to satisfy Rule 24.

Against this, Apple incorrectly claims that it can satisfy Rule 24(a)'s legally-protected-interest requirement simply by showing that it has constitutional standing. Apple Mot. at 7.

Apple relies on two D.C. Circuit decisions as support for this claim, but this reliance is misplaced. Apple Mot. at 7 (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015)).

In *Deutsche Bank National Trust Co. v. FDIC*, the D.C. Circuit explained that a demonstration of standing is necessary for a prospective intervenor to show that they possess “the *kind* of interest that Rule 24 protects,” but distinguished Rule 24’s requirement of an interest “relating to the property or transaction.” 717 F.3d 189, 195 (D.C. Cir. 2013) (describing two circumstances under which constitutional standing is *insufficient* to demonstrate a legally protected interest). Contrary to Apple’s suggestion, the D.C. Circuit’s subsequent decision in *Crossroads Grassroots Policy Strategies*, 781 F.3d at 320 (which relied on *Fund for Animals* for the proposition cited by Apple), did not disrupt *Deutsche Bank*’s principle that in some circumstances constitutional standing fails to support a legally protected interest under Rule 24. 788 F.3d 312, 320 (interpreting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)); *see also United States v. Facebook, Inc.*, 456 F. Supp. 3d 105, 113 n.8 (D.D.C. 2020) (citing *Deutsche Bank* and explaining, in a decision after *Crossroads*, that “there is a distinction between” constitutional standing and the legally protected interest inquiry).

Thus, even if the Court were to find that Apple has constitutional standing, that does not rectify Apple’s failure to demonstrate a legally protected interest, relating to its contract with Google, that it can defend at this remedies phase.¹

¹ Colorado Plaintiff States do not present argument as to whether Apple would have constitutional standing to sue. The Court need not reach the constitutional question where, as here, Apple’s motion fails for multiple reasons under Rule 24.

II. Apple Has Not Shown Impairment of Any Legally Protected Interest

Intervention by right under Rule 24(a) also requires that Apple show that the action “may as a practical matter impair or impede the movant’s ability to protect its interest.” Apple largely repeats its arguments relating to the existence of a protected interest and, to the extent it relies on additional cases, it fails to demonstrate compliance with Rule 24.

Apple rehashes many of its same arguments in claiming an impaired legally protected interest. For example, Apple claims an impairment of an interest in maintaining the “status quo” and avoiding a “sea change in Apple’s contractual relationships with Google.” Apple Mot. at 8-9. Here, however, the “status quo” is a liability holding that the ISA contributes to an illegal monopoly. For the reasons described above, Apple has no legally protected interest in defending the legality of the ISA in the present remedies phase. Similarly, Apple has no abstract right to its ability to enter into unspecified future contracts with Google, and thus there can be no cognizable impairment of such a right.

The additional cases cited by Apple do not carry the day. Apple relies principally on *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995), and *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994). Both cases are readily distinguishable.

In *Forest Conversation*, a county sought to intervene in a suit against the United States Forest Service to protect its contracts for the use of certain public lands. 66 F.3d at 1491. The county’s contracts stemmed from how the Forest Service was implementing certain rules, policies, and studies, which prompted the county’s intervention. *Id.* Importantly, there was no question as to the validity of the county’s contracts, only the collateral damage that the plaintiff’s sought relief might have. *Id.* at 1497-98. This case is the exact opposite situation. The Court has *already* found the provisions of the ISA that Apple bases its entitlement in to be unlawful; the time for Apple to advance those interests has well gone by.

In *Sierra Club*, another environmental advocacy group sued the USFS over how it mitigated the spread of the southern pine beetle. 18 F.3d at 1203-04. The district court issued a preliminary injunction, which included preliminarily enjoining certain logging practices. *Id.* at 1204. Two timber purchasers' associations sought to intervene, arguing that they relied on the enjoined practice to fulfill their existing contracts, which the court found to be sufficient to satisfy Rule 24's impairment requirement. *Id.* at 1207. Again, the facts in *Sierra Club* are inapposite to this matter. Whereas the timber purchasers' association intervention preceded a full decision on the merits, the parallel issue here—whether the relevant provision of the ISA have unlawfully excluded competition in two separate markets—has already been decided on the merits. *Cf. Glickman*, 159 F.3d at 411; *see also In re N.Y.C. Policing*, 27 F.4th at 800.

Each case relied on by Apple permitted intervention *to defend the legality* of the practices that benefited the intervenors. The time for such a defense has come and gone.

Apple also cites *Kleissler v. United States Forest Service*, 157 F.3d 964 (3d Cir. 1998), which is likewise distinguishable. That case involved a challenge to the Forest Service's approval of logging projects, and multiple logging interests moved to intervene. *Id.* at 967. One of the business intervenors had already bid successfully for such a contract, and "would now be a party to a remunerative contract for logging but for the institution of this litigation." *Id.* The *Kleissler* court specifically distinguished the intervenor's interest from "a mere expectancy of obtaining a contract in the future." *Id.* Far from supporting Apple's position, this holding underscores that Apple's interest in speculative future contracts is just such "a mere expectancy."

The *Kleissler* court also permitted intervention by two firms that had not yet successfully bid for contracts. However, the court's grant of intervention relied on the very unusual facts of that case. The prospective intervenors' entire business depended on being awarded such

contracts, and “their continued existence may be jeopardized” if plaintiffs prevail.” *Id.* The statute at issue designated forests for multiple uses and “emphasized that [other] uses are ‘not in derogation of’ timber harvesting.” *Id.* The court found that “[t]his statement of policy, when viewed in light of the district court’s finding that a victory for plaintiffs could destroy their business,” gave rise to a protected interest. *Id.* In other words, intervention required not only the existential threat that the case posed to the firms, but also a statutory scheme designed expressly to benefit their business interests. Neither the existential threat nor a statute solicitous of Apple’s interest in contracting with Google exist.

Not only does *Kleissler* fail to support Apple’s position, it also establishes the type of extraordinary showings that Apple would need to make—and has failed to make—to justify intervention based on an “existential threat.”² Apple has a market capitalization of over \$3 trillion and is one of the most valuable companies in the world. *See* Forbes, Apple Reclaims Crown as World’s Most Valuable Company From Microsoft (June 12, 2024), available at <https://www.forbes.com/sites/dereksaul/2024/06/12/apple-reclaims-crown-as-worlds-most-valuable-company-from-microsoft/>.

CONCLUSION

Apple’s motion to intervene fails to satisfy any of Rule 24’s requirements. For the reasons described above and in the joint memorandum, Colorado Plaintiff States respectfully

² The final business interest that was allowed to intervene in *Kleissler* was admitted under the doctrine allowing intervention by trade associations representing threatened businesses. 157 F.3d at 968. The association represented various lumber interests, including some that held existing sales contracts with the Forest Service. *Id.* Trade associations represent an aggregation of business interests whose members, for example, seek to preserve current contract rights in the absence of any decision declaring those contracts to be illegal. *See Sierra Club*, 18 F.3d at 1207. This holding also provides no support for Apple’s argument because Apple is not purporting to represent any coalition of similarly situated companies.

request that the Court deny Apple's motion to intervene.

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Respectfully submitted,

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