



USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 12/17/2020

21st Floor
 1251 Avenue of the Americas
 New York, NY 10020-1104

John M. Magliery
 212.603.6444 tel
 212.379.5212 fax

johnmagliery@dwt.com

December 11, 2020

Via ECF

The Honorable Stewart D. Aaron
 United States Magistrate Judge
 Daniel Patrick Moynihan United States Courthouse
 500 Pearl Street
 New York, NY 10007

Application GRANTED IN PART and DENIED IN PART. Google now has provided dates certain for the four depositions at issue. (See ECF No. 157.) The depositions shall go forward on the dates provided by Google unless Plaintiff's counsel is unavailable or the parties agree otherwise. In either case, the depositions still shall occur prior to the close of fact discovery. Google's related request for an extension of the fact discovery deadline (*see id.*) is granted and the Court adopts the proposed schedule set forth in ECF No. 157-1. SO ORDERED.
 Dated: December 17, 2020

Re: *SM Kids, LLC v. Google LLC, et al.*, Case No. 18 Civ. 2637 (LGS) (SDA)

Dear Judge Aaron:

We represent Plaintiff SM Kids, LLC (“SM Kids”) in the above-captioned matter. We write pursuant to Your Honor’s Individual Rule II.B to request that the Court schedule a discovery conference on a motion to compel certain depositions of Defendants Google LLC, Alphabet Inc., and XXVI Holdings Inc. (collectively, “Google”) already ordered by the Court, to proceed on dates certain. As set forth below, Google has failed and refused to commit to any of the dates requested by SM Kids for one week, after multiple meet and confer sessions and numerous communications seeking to schedule the depositions, for which only 30 days remain in fact discovery to complete.

On December 3, 2020, this Court issued an order that SM Kids may proceed with four depositions of Google: a Rule 30(b)(6) deposition; Timothy Alger; Adam Barea; and one of the following individuals: Malik Ducard, Ruchi Bezoles, or Pavni Diwanji. (*See* Dkt. No. 145.)

On December 4, 2020, SM Kids sent an e-mail to Google with proposed dates for the four witnesses and asked to meet on confer on this (and other) issues. (*See* Exhibit 1.) Google agreed to meet and confer on December 7, 2020. (*See id.*) During that meet and confer, however, counsel for Google explained that he was not prepared to discuss the proposed deposition dates and suggested that the parties meet and confer on that topic on the following day, December 8. Counsel for both parties subsequently met and conferred on December 8, but inexplicably, counsel for Google *again* represented that he was unable to discuss the deposition dates for Google’s witnesses; he could neither agree to SM Kids’ proposed dates nor offer any alternative dates. Counsel for Google represented that he would respond regarding witness availability by either the end of the day or no later than the following one. After not hearing from counsel for Google on the next day, December 9, undersigned counsel asked for an answer by e-mail. On December 10, counsel for Google again promised to respond by the end of the day. (*See* Exhibit 2.) Counsel for Google failed to fulfill that promise, instead responding on December 11 in an e-mail that failed to acknowledge or address SM Kids’ proposed deposition dates. (*See* Exhibit 3.) On December 11, undersigned counsel spoke with counsel for Google on the telephone, during which Google once again did not confirm any

DWT.COM

Anchorage | Bellevue | Los Angeles | New York
 Portland | San Francisco | Seattle | Washington, D.C.

December 11, 2020

Page 2

dates for depositions of its witnesses, nor explain why the dates were not provided, merely saying that Google needed more time and would respond next week.

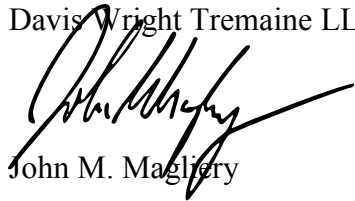
There is now only one month left in fact discovery, a time period that includes multiple holidays. SM Kids has met and conferred with Google on this topic three times and followed up with multiple e-mails. Meanwhile, SM Kids has offered dates for Stephen Garchik, Tammy DePaolis, and Bobby Friedman, all of which are confirmed. Google cannot be permitted to take depositions of SM Kids witnesses while declining to provide dates for its own depositions, already ordered by the Court. Given the brief period remaining in discovery, SM Kids respectfully requests that the Court order depositions of the Google witnesses to take place on dates certain, as follows:

Timothy Alger on December 17;
Google's 30(b)(6) witness on December 21;
Adam Barea on December 23; and
Malik Ducard on January 6.

We are grateful for the Court's attention to this matter.

Respectfully submitted,

Davis Wright Tremaine LLP



John M. Maglery

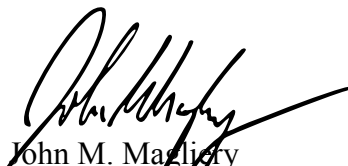
cc: All counsel of record (via ECF)

December 11, 2020

Page 3

CERTIFICATION

I hereby certify that the parties met and conferred by phone on this dispute on December 7 and 8, 2020. Cyrus Ansari, Geoffrey Brounell, Christopher Donati, and I attended on behalf of SM Kids. Ian Shapiro, Jane van Benton, and Charlie Low attended on behalf of Google. On December 11, 2020, I advised Ian Shapiro that if we did not receive confirmation of deposition dates, we would be at an impasse, and offered to speak by telephone. Mr. Shapiro and I subsequently spoke, but he did not offer any dates for Google witness depositions, not explain why he could not, only committing to get back to me next week.



John M. Maglirny
Attorneys for Plaintiff SM Kids, LLC