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8 FEDERAL TRADE COMMISSION,
9 Plaintiff,
10 v.
11 META PLATFORMS INC., et al.,
12 Defendants.

Case No. 22-cv-04325-EJD (VKD)

**ORDER RE DISCOVERY DISPUTE RE
DEFENDANT'S SUBPOENA TO
APPLE INC.**

Re: Dkt. No. 139

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14 Defendant Meta Platforms, Inc. (“Meta”) moves to compel non-party Apple Inc.’s
15 (“Apple”) production of documents responsive to Meta’s document subpoena.¹ Dkt. No. 139.
16 Meta and Apple do not disagree about the scope of the document requests to which Apple will
17 respond, which have been narrowed through negotiation. *See id.* at 1, 4 & n.1. Rather, they
18 disagree about how Apple should comply with its obligation to produce responsive documents.
19 Meta contends that Apple should be required to apply proposed search strings to the electronically
20 stored information (“ESI”) of particular Apple custodians for RFPs 2, 5-6 and 9-11. Apple
21 responds that it can fulfill its obligation to produce responsive documents without undertaking
22 Meta’s proposed custodial searches of ESI. The Court held a hearing on this dispute on November
23 3, 2022. Dkt. No. 175.

24 Meta argues that the discovery it seeks from Apple is highly relevant to its defenses in this
25 action. For purposes of this motion, the Court accepts Meta’s characterization. To their credit,
26 Meta and Apple have agreed on the scope of Meta’s discovery of Apple. The only question is
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28 ¹ This motion was randomly referred to the undersigned for resolution after Judge van Keulen

1 whether, in the circumstances presented, the Court should require Apple to conduct the proposed
2 custodial searches to ensure that it fully complies with its obligations under Rule 45.

3 All of the RFPs at issue ask Apple to produce “documents sufficient to evidence”
4 information about Apple’s strategic plans and development efforts, if any, with respect to what the
5 FTC has described as a market for Virtual Reality Dedicated Fitness Applications. Apple’s
6 obligations to comply with a document subpoena under Rule 45 are similar to parties’ obligations
7 to comply with document requests under Rule 34. *See Fed. R. Civ. P. 45*, advisory committee
8 notes to 1970 amendment (scope of discovery available by document subpoena under Rule 45 is
9 the same as the scope of discovery available under Rule 34); *Apple, Inc. v. Samsung Electronics*
10 *Co., Ltd.*, No. 12-cv-0630-LHK(PSG), 2013 WL 1942163 at *1 (discussing standard for discovery
11 of non-party and non-party’s obligations in responding to subpoena). While Meta correctly notes
12 that the application of search terms to ESI is a common feature of modern discovery practice—and
13 may be the only practical means to efficiently identify potentially responsive documents from a
14 large collection of ESI—this technique is not the only permissible means of identifying responsive
15 documents in all circumstances.

16 As Apple observes, Meta (appropriately) does not demand “all documents” in Apple’s
17 possession, but rather “documents sufficient to evidence” the subject matter of each document
18 request. *See Dkt. No. 139* at 4. It is reasonable for Apple to search for such responsive documents
19 by, for example, identifying those employees with relevant knowledge about the existence and
20 locations of responsive documents, and then conducting deliberate and focused searches for those
21 documents. In response to the Court’s inquiry at the hearing, Apple confirmed that the custodians
22 Meta has identified as likely to have relevant documents are among the custodians from whom
23 Apple is seeking to collect and produce responsive documents. Dkt. No. 175.

24 Meta’s principal concern is that because Apple is a competitor, its review and selection of
25 documents for production will be colored by competitive bias, even if its counsel endeavor to
26 conduct the review and production in good faith. For this reason, Meta says, the proposed
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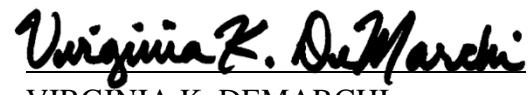
1 custodial searches are necessary to provide an “objective check” on Apple’s production.² *See* Dkt.
2 No. 139 at 2. The Court is skeptical of the premise that Apple’s status as Meta’s competitor
3 necessarily implies that Apple’s counsel and the company representatives working with counsel
4 cannot be relied upon to comply with their discovery obligations under Rule 45. That premise
5 finds no support in the case law before the Court, and Meta points to no other facts or
6 circumstances (e.g., a prior failure to properly comply) indicating that an “objective check” on
7 Apple’s production is warranted here.

8 Meta also suggests that Apple’s counsel has made representations in confidence and
9 pursuant to the protective order about Apple’s strategic plans and other matters that are
10 inconsistent with other information Meta has obtained. *See* Dkt. No. 139 at 3. For this reason,
11 Meta wishes to have Apple undertake the proposed custodial searches so that Meta can adequately
12 prepare to examine Apple’s witness on these points of alleged inconsistency during a deposition
13 set for November 14, 2022. The Court has carefully considered this concern, including the
14 confidential information that Meta and Apple disclosed under seal in their joint statement on
15 Meta’s motion to compel and during the hearing. On the record presented, the Court is not
16 persuaded that Meta requires the relief it seeks here in order to fully explore in deposition the
17 information it believes is critical to its defenses.

18 For these reasons, the Court denies Meta’s motion to compel.

19 **IT IS SO ORDERED.**

20 Dated: November 4, 2022

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23 VIRGINIA K. DEMARCHE
24 United States Magistrate Judge

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26 ² Meta indicated during the hearing that it intended the proposed custodial searches to be used to
27 identify responsive documents for production, and not merely to identify a collection of
28 documents to be further reviewed for responsiveness and production. Because the Court
concludes that Apple need not apply search strings to custodial ESI in order to comply with
Meta’s subpoena, the Court does not reach the question of whether the proposed search strings are