BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	
Plaintiffs,	Case Number 20-cv-3010
vs.	Washington, D.C.
GOOGLE LLC,	November 14, 2023
Defendant.	1:37 p.m.

TRANSCRIPT OF BENCH TRIAL, DAY 40
(AFTERNOON SESSION)
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

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C O N T E N T S

TESTIMONY

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P R O C E E D I N G S

(Call to order of the court.)

THE COURT: All right, Mr. Dintzer.

MR. DINTZER: May I continue, Your Honor?

THE COURT: You may.

MR. DINTZER: Thank you, Your Honor.

CROSS-EXAMINATION (Continued)

BY MR. DINTZER:

Q. So we were talking about the -- whether the distribution contracts were intensely and the defaults were intensely contested.

Do you recall that?

A. I do.

Q. Okay. And on Apple, is it your position that the Apple default on Safari was intensely competed?

A. I think that's a fair general statement.

Q. Okay. Now, it's true that Bing made a proposal, is that right, to Apple?

A. Well, it depends on when you're looking at. I mean, Bing wasn't even around before 2009.

Q. I'm talking about 2016.

A. I had no way of knowing that from your question.

Q. No, that's fair. So let me rephrase.

Is it your position that in 2016, that the default -- that the Safari default was intensely competed?

A. I would think that's a fair characterization.
Q. Okay. And Bing tried to -- or made an offer to try to get the Safari default; right?
A. That's my recollection, yes.
Q. Bing tried offering everything it could and still couldn't match Google; is that right?
A. Well, I don't know if that's everything it could under the plaintiffs' theory that they would gain immensely in terms of additional data and things. You assume they would value that beyond just the current cash flows.
So if they believed that, I assume they would have been willing to bid more to get that highly valuable data; right?
MR. DINTZER: May I approach, Your Honor?
BY MR. DINTZER:
Q. Sir, we're passing this one out instead of putting it on the screen because there's a portion of it that is redacted, and we're not supposed to say it out loud. Oh, we're going to have a redacted one up on the screen, but I want you to be able to see the whole thing.
THE COURT: Hang on for a second. It looks like only -- is the second iteration of that number --
THE WITNESS: Whoops.
MR. DINTZER: No, I think we're allowed to do -- we're not going to put it up.
THE COURT: Okay.

BY MR. DINTZER:

Q. So do you see the slide, sir?

A. I do.

Q. Okay. And Mr. Cue is asked this question, and I'm going to leave out -- I see; I see. I'm going to leave out both of the redactions.

"Question: And did Microsoft later increase its offer to X percent of revenue share?

"Answer: As they got more desperate, they increased their offer to X percent. They offered to have us invest in Bing, and at one point, they offered to us to buy Bing and then ultimately offered to basically give us Bing."

Do you see that?

A. I do.

Q. And Mr. Cue testified that there was no valid alternative to Google; is that right?

A. I don't remember those precise words. I remember he said that they viewed Google as the best choice.

Q. Okay. Let's put -- this one, we can put on the screen, UPXD241. And he was asked:

"Question: And if you weren't able to reach a deal on the economic terms, you were willing to walk away from the ISA; right?

"Answer: I've been fairly clear that I didn't think at the time, nor today, that there's anybody out there who's anywhere

near as good as Google at searching. And so certainly, there wasn't a valid alternative that we could have gone to at that time."

Do you see that?

A. I do.

Q. And even though Bing had tried to offer the X percent that we had looked at in the previous slide.

Do you understand that?

A. I do.

Q. Okay. Mr. Cue also testified that he had no choice in which search engine to pick for the Safari default.

Do you recall that?

A. I don't recall those words. I know he talked about how much he valued going with Google.

Q. Okay. Let's go to UPXD220. He was asked this question:

"Question: If you were unable to reach a deal with Google in 2016, what would Apple have done?

"Answer: Ultimately -- I don't know the answer, but I'm going to speculate a little bit, and that is, it wasn't a choice to pick any of the existing search engines."

Do you see that?

"We probably would have been left with no other choice than to potentially building our own."

So as far as Apple was concerned, there was no other choice of existing search engines?

A. I think that mischaracterizes what he says when he's talking about speculating. So --

MR. DINTZER: May I approach, Your Honor?

THE COURT: Sure.

BY MR. DINTZER:

Q. Sir, this one has a box on it, so I'm handing it up. There are parts of it that I can't read out loud.

And I'm going to draw your attention to -- you're welcome to read the whole thing, of course -- to the answer as to what Mr. Cue indicated was the place where they would deal with Microsoft.

Do you see that?

A. I do.

Q. Okay. And given that testimony, Apple did not view Microsoft's -- Apple, not you, Apple did not view Microsoft's competition with Google as intense?

A. If you take that testimony at face value, I would say that's what he believed, but for competition, it's more important what Google believed. Right? Because -- I will tell you why I know that. I bet he didn't tell that to Google.

Q. Android -- so moving from Apple to Android, Android OEMs don't put their defaults out for bids when their contracts come up.

A. Well, I don't think they have a formal bid, but if somebody approached them, I assume they would be interested.

Q. Android OEMs that sell into the U.S. only negotiate their search defaults with Google.

MR. SCHMIDTLEIN: Objection.

THE WITNESS: I --

THE COURT: Hang on. What's the basis for the objection?

MR. SCHMIDTLEIN: There's no foundation. He's asking him fact questions. There's no foundation for it.

THE COURT: Well, I assume he's referring to the record or whatever he's reviewed or not reviewed. And he can either confirm that or not.

BY MR. DINTZER:

Q. Android OEMs -- do you need me to repeat it?

A. Yes, please.

Q. Android OEMs that sell into the U.S. only negotiate their search defaults with Google; is that right?

A. I don't know the full extent of what they negotiate with. So I would say -- that's all I can give you. I haven't seen evidence either way.

Q. Okay. So if you don't know how they negotiate, your conclusion about them being -- there being intense competition for the contracts, that's qualified by the fact that you don't know how they negotiate.

A. Well, I talk about the agreements. I talked about the browser agreements. The statements, you're taking out of

context, because the statement I made about intense browser agreement negotiations were with respect to Apple and the independent browsers. Remember, I dealt with those two pieces separately in my report and in my testimony? So if you look at where in my testimony I talk about that intense competition, that's for the independent browser agreements and Apple.

So I did not make that statement with regard to Android OEMs. So I wouldn't qualify the statement I made, because it was already qualified to those.

Q. Okay. Changing default search to Bing wouldn't affect market price for an Android phone, if you know?

A. Well, it depends on how it affected revenues of the Android OEMs, and given the Android -- there's competition within Android and basically what we call in economics elastic supply, I would assume that there's a change in their cost, in this case a change in the revenues they receive. It would translate into changes in prices.

Q. Have you done any analysis to determine how much less an Android OEM could sell their phone for if it had Bing as the default exclusively on the device?

A. No, because I don't know how much the revenues would fall, but if I knew how much the revenues would fall, my knowledge of economics would say a significant part of that would be reflected in the prices ultimately charged to consumers.

Q. And in describing the competition for on Android, you

intentionally do not use the word "intensely competed"; right?
A. I don't think I had evidence for that. That's why I didn't make a statement to the effect one way or the other whether it was intensely competed or not. I had evidence from the marketplace that for independent browsers and Apple there was. That's why I stated it there.
Q. Could we go to slide 110 in your deck, and it's on the screen.
I just want to make sure I get this right. OEMs pay Google for GMS; is that right?
A. Where?
Q. This is Europe. I apologize. In Europe. I was referencing your slide, 110.
You say, "European unbundling with separate pricing is the appropriate counterfactual."
Do you see that?
A. I think that's the -- yes, I think that's an appropriate counterfactual for unbundling, not for everything but for unbundling, yes.
Q. So let's talk about that. So Google receives a license fee from the OEMs for GMS; right?
A. Yes.
Q. Okay. And you have the arrow, the OEMs, and Google. And then Google pays a fee to the OEMs so that they will -- for the placement of Google Search in Chrome; is that right?

A. Yes.
Q. Okay. And these fees, roughly, not exactly, but roughly net out; is that right?
A. Yes. I think the empirical fact for Europe is they roughly net out.
Q. Okay. So combined, this is zero either way, zero cost for either side, roughly?
A. Yeah, it induces transaction costs and could create problems if you can't set the prices right, because remember, there's not just one price. There are multiple prices going in both directions.
Q. And this is the EMADA; right?
A. That is the EMADA.
Q. And this exists in the EU even though there's a choice screen that assigns the search default; right?
A. Yes.
Q. Okay. So the existence of a choice screen assigning a search default did not prevent the transfer in these two directions on the EMADA; right?
A. Well, it affected other parts of the deals. This is a regulated solution, though. So you've got to be careful. I'm not sure this gives us a very good idea of what the competitive dynamics of that would be. Right?
I mean, this was negotiated as part of a regulatory solution. So I'm not sure you can take the pricing change you

see here as indicative of that.

Q. Okay. So no further questions on that, sir.

Google doesn't track -- we're going to go to the subject of pass-through. You've talked about pass-through; right?

Google doesn't track pass-through for rev share; correct?

A. Not that I know of.

THE COURT: Sorry. Can you just specify what you mean by "pass-through"?

MR. DINTZER: Sure.

BY MR. DINTZER:

Q. Sir, the idea of pass-through is that when Google pays for rev share for a default to a carrier or OEM, the question of whether that passes through to the consumer.

Am I roughly getting that right, just to explain the concept so we can move forward with that?

A. Yeah.

Q. Okay. And so the question is, does money that goes from Google to the carrier OEMs in some way pass through to the benefit of the consumer? Right?

A. It's not a question of -- pass-through is the process by which that happens.

Q. Fair enough. I just wanted to get a baseline for the concept. So then I will re-ask my question. I think I got an answer, but it's important.

So Google doesn't track pass-through for rev share; right?

A. Well, you can't really track it at a given OEM. Right? Because that's not how pass-through works.
Q. So you cited no Google docs or OEM docs showing that they pass through money from the MADA to -- or the rev share paid on the MADA to consumers; right?
A. Well, you're misunderstanding how pass-through happens. Pass-through doesn't just happen at a given OEM, because pass-through happens in a marketplace. So for example, if you look at an individual firm and their costs go down, they may pass through some -- they will pass through some, but it may be only part. But when you give it to all the firms, like all the OEMs or all the carriers, then they're not just passing through because their costs went down, but because the other people lowered their prices, right, because they're competing against one another.

So the pass-through in an industry with multiple players is not a single-player concept. It happens at the market level.
Q. My only question is, you haven't shown us any documents, you haven't identified any documents, whether Google's or carriers or OEMs, that show the amount of pass-through?
A. Not the amount. We have documents that talk about at the OEM level, certainly the carrier level that talk about pass-through and that they consider that as one of the things, the costs that they have or the benefits they get from the RSA.
Q. Okay. And which documents are you referring to?

A. We talk about it in the report. There's discussions of how, for example, the lower -- the lower costs they have or their RSA payments help them compete.

Q. Okay. In the ordinary course, Google makes no effort to track how its payments for search distribution are used by Android partners; correct?

A. No. I wouldn't expect them to. That's a hard thing to do.

Q. And there's no testimony in the record of a direct connection between rev share and phone prices; correct?

A. On Android?

Q. Well, we can start with Android. On Android.

A. We looked at things for Apple. We didn't look at things for Android.

Q. So you didn't look at rev share for Android?

A. But the economics is even clearer on Android where you have a competitive market with elastic supply.

I'm sure as Professor Whinston can tell you, there would be high pass-through in a market like that.

Q. Many factors affect the pass-through rate; is that right?

A. Well, in a competitive market with elastic supply, you would tend to expect very high pass-through rates as a matter of underlying economics.

Q. Let's go to slide 100 in your deck.

Pass-through depends on variables that are difficult to estimate. Do you agree with that?

A. Well, if you're trying to measure it as opposed to assess whether it's going to happen, those are two very different things.

Q. So why don't we go to my question. Pass-through depends on variables that are very difficult to estimate; right?

A. Not in the competitive market with elastic supply, no.

Q. For example, supply and demand conditions in a market can affect pass-through.

I think you said that; right?

A. Yeah, elastic supply together with industrywide cost reductions is going to tend to have high pass-through.

Q. Supply and demand in the cell phone market could affect OEM pass-through rate; right?

A. I mean, it could, but I'm telling you, if you have elastic supply in a competitive marketplace, you can expect high pass-through.

Q. You have no econometric data that Google's payments to OEMs and carriers affect the final price for Android phones; correct?

A. I do not have the data with which to do that.

Q. And you haven't sought to quantify pass-through; right?

A. I'm basing it on economics.

Q. And you don't have direct evidence on how moving to a choice screen would affect the price of Android phones; right?

A. Well, I think directionally, it's going to lead to lower payments. That's going to lead to higher prices for phones.

But I haven't quantified it.

Q. You haven't done that. And you don't have -- well, I think we got that.

Let's go to UPXD254.

THE COURT: Can I ask a question while we're on the subject of choice screens and phone prices?

Has there been any analysis since the choice screen was instituted in Europe and the impact on phone prices in Europe? Not that necessarily you've done it, but are you aware of any analysis?

THE WITNESS: No, I mean -- the only thing we've looked at some is on the RSA payments themselves, which would be the driver of pass-through. But given that you have to wait until the contracts get renegotiated, it's taking some time for that to happen.

So it does appear like there's been some reduction very recently, but I don't know of a study that's linked that through to phone prices.

THE COURT: Thank you.

BY MR. DINTZER:

Q. So now let's put up UPXD254.

This was Mr. Rosenberg's testimony. Have you read Mr. Rosenberg's testimony?

A. Parts of it.

Q. Okay. And he was asked:

"Question: And you don't have any understanding as to how carriers or OEMs use the revenue share payments that Google pays them?

"Answer: I don't.

"Question: There's no requirement that carriers or OEMs use the revenue share payments they receive from Google to lower the price of Android devices to consumers?

"Answer: That's true."

And it goes on.

And one of the reasons that Google has established the go-to market was to find a way to fund phones separate from the RSA; right?

A. You'd have to ask them, but if they view parts of that as a replacement for parts of the RSA, I would say with that, that's a --

Q. Well, Google's go-to-market payments, you understand, were aimed at phones above $400; right?

A. Right. So those would be pressing particular kind of phones that satisfy particular characteristics.

Q. And the go-to-market agreements did not require search exclusivity or placement for Google Search; right?

A. I don't know what all you're calling the go-to-market agreements. There's been a variety of different agreements. The post -- the recent period's complicated, because the carrier agreements are different on each of them.

Q. Sir, are you familiar with the go-to-market agreements?
A. You're talking about the whole replacement for the RSA or just part? I don't know by name. I know kind of what's going on with the replacement deals for the RSAs.
Q. Okay. And did you see the testimony or read the testimony that Google is creating go-to-market agreements with their partners to ensure investment in the Android system?
A. I have looked at the deals themselves. I did prior to the testimony. So I've looked at -- we've examined the deals themselves.
Q. And do you understand that those payments did not require search exclusivity or placement for Google Search?
If you don't know, that's fine.
A. I mean, you're -- when you say "those agreements," you mean that part of the agreements that Google has with its various OEMs?
Q. Let's go to D287.
This is Ms. McAllister. Did you read her testimony?
A. I don't recall reading her testimony.
Q. "Question: Let me ask a better, more precise question.
The go-to-market agreements did not require carriers to pre-install Google Search --
"Answer: No, it did not.
"Question: -- on devices? It also didn't require Google Search to be set as the default search engine on the Android

devices that qualified?

"Answer: The go-to-market deal did not. That was in the RSA agreement.

"Question: Got it. And the go-to-market agreement did not require that the devices that qualified had Google Search exclusivity?

"Answer: No."

So Google is setting up these go-to-market agreements to encourage investment by the partners in the Android system; right?

A. What they did is that used to be -- there used to be kind of one big thing called the RSA. They split it into pieces. So they still have an RSA component, and they added -- they broke it into a go-to-market component and the RSA component. And the RSA component is -- doesn't involve the search side.

Q. Okay. And so with these go-to-market payments, Google is able to funnel money to their partners for investment in the platform without seeking exclusivity; right?

MR. SCHMIDTLEIN: Objection.

THE WITNESS: Well --

THE COURT: Hang on. I think it's the wording of the question you're objecting to?

MR. SCHMIDTLEIN: He mischaracterized the agreements.

THE COURT: The agreements will speak for themselves. But he can answer the question if he knows the answer.

THE WITNESS: I would have to go back and see all the terms of the agreements. But the search part is separated out now. That's the part I focused on.

BY MR. DINTZER:

Q. Let's go to slide 17.

I can't show part of this. So let me know when you have it up on your screen, sir.

A. I know the slide. Go ahead.

Q. Okay. You testified about a possible link between Google's ISA payments and Apple prices; is that right?

A. I did.

Q. Okay. And so what we're seeing on this slide, without talking about where the lines go, we're looking at Apple's gross margin and services margin; is that right?

A. Well, we have three lines.

Q. And the device sales -- I was going to do them in parts, but and device sales margin; is that right?

A. That's correct.

Q. And you say on the slide, "Higher service margins, including the revenue share, are offset by lower device margins"; right?

A. That's correct.

Q. And so what you're saying is that this may show pass-through and that the ISA payments could be affecting the price of the phones; right?

A. That would be one interpretation of it, yes, simple interpretation of what's going on.
Q. Well, fair enough, because when you used this on direct, you indicated that these movements could be a coincidence.
A. They could be.
Q. Okay. And you can't causally -- separate from this, you can't causally link the Google payments and Apple prices; right?
A. I cannot eliminate the possibility that this is a coincidence, but either you have them by coincidence or it's a simple story that it happened the way with pass-through.
Q. And you have no econometric analysis proving causality between payments to Apple and iPhone prices going down?
A. I don't think I could. My testimony, I think, is clear as to what I'm saying.
Q. Okay. And factors other than the pass-through of services revenue could contribute to the decline in the device margins?
A. It could. I mean, I think I've been clear from the beginning, yes.
Q. Okay.
THE COURT: Could I ask a question about this? I can't remember whether we've talked about the directionality of the device sales margin. But we've heard testimony that at some point, I can't remember the exact year, Apple continued to sell or kept selling older phones and did so at a lower price. Whether that was to compete with lower-priced Android phones or

not, I'm not sure, but the bottom line is, they now offer lower-priced older model phones.

THE WITNESS: Yeah.

THE COURT: Could that have some impact on this trend?

THE WITNESS: I don't remember when that happened. So I don't think that would apply throughout the period. Maybe during some of the period. So I would say maybe part of this could be accounted for by that, but I don't think it would be accounting for the whole time period.

THE COURT: Okay. Thank you.

BY MR. DINTZER:

Q. Now, Google pays much more rev share to Apple than to Android partners; is that right?

A. Yes. I mean, that's because on Apple there's no other agreements that lead to placement. Right? We also have the EMADA leading to placement on Android phones. So you can sort of think on Android, they're getting placement in two pieces, some of it through the MADA and then some additional through the RSA.

In Apple, all the -- the entire placement is all through the ISA, whatever you want to call it. It's all through that.

So the two are not really comparable, for reasons you see. One is for part of it, and the other is for the whole.

Q. So when Google is pricing the RSA, it's considering --

MR. SCHMIDTLEIN: Your Honor, I don't know that this

type of comparative discussion has been had in open court.

THE COURT: Let me just ask what the issue is. What are we heading toward and --

MR. DINTZER: I'm just looking at the answer, because it wasn't quite -- he headed in a direction, and I need to see what he was saying.

I'm not saying any numbers, so if that's their concern.

MR. SCHMIDTLEIN: He also heard this morning that we had you talking about comparators within different companies, and he's now doing it across different companies.

MR. DINTZER: I mean, my question was, Google pays much --

MR. SCHMIDTLEIN: Yes, that's your question.

MR. DINTZER: I see. I'm almost certain that that's been said before in court. But that's fine. If we need to close it --

THE COURT: I don't recall exactly what we're talking about, so you'll have to --

MR. DINTZER: I can't --

THE COURT: No, I understand. Why don't you finish up, and then we will -- we can come back to this and see what we need -- if anything, we need to do about it.

MR. DINTZER: Understood, Your Honor.

If I could converse with counsel, because he may be thinking I'm asking something different than I am asking.

THE COURT: Why don't you take a couple minutes.

(Counsel conferred.)

MR. DINTZER: I think we've gotten to the answer. I'm going to go ahead and ask the question. I'm just going to rephrase it to make sure that we're inside the line.

THE COURT: Okay.

BY MR. DINTZER:

Q. Google pays much more total dollar rev share to Apple than it does total dollar rev share to its Android partners; is that correct?

A. You mean like the -- if you just said total dollars going out the door, all --

Q. In the two directions.

A. I think that's already been in evidence in this case. So yeah, I could say that.

Q. Okay. And you talked about how for the RSA the thinking is that part of the money is for -- that they can -- that the percentage set by the RSA is set based on the consideration that they've already provided a benefit in the MADA, so that can affect whatever percentage rate Google is going to set for the RSA.

A. Well, it's not just they've already provided a benefit. They've already received a benefit because of the placement they got through the RSA. Right? It's both sides that have added to the equation beforehand.

Q. The existence of the MADA affects the RSA payment that Google will make to its Android partners?
A. I would think that's what economics would tell me, because you're -- the value transferring between both sides is smaller because you've already made part of the transaction already.
Q. Okay. When negotiating revenue share, Google does not consider the effect in the smartphone market of these payments to Apple; is that correct?
A. I can't speak for Google. I don't know what they consider or not.
Q. Let's go to UPX -- changing subjects, let's go to UPX1128.
THE COURT: Can I go back for a moment? Maybe I'm just not following your point about the MADA/RSA pricing interaction.
So if -- why wouldn't it be the case that the RSA payments on the Android devices would be higher as a percentage because Google is not receiving any kind of compensation for the MADA placement?
THE WITNESS: No, but the --
MR. SCHMIDTLEIN: Your Honor, this is sort of a little bit of the discussion. I think Mr. Dintzer is talking about total payments.
THE COURT: Right.
MR. SCHMIDTLEIN: In other words, which goes to the volume of devices, not revenue share percentages between Apple

and Android. And that's the issue that I wanted to make sure he wasn't talking about in open court.

THE COURT: I'm just asking him about the relative percentage of the Android vertically. I'm not talking about anything across devices.

MR. SCHMIDTLEIN: Understood.

THE WITNESS: I can do it without money, because you don't need the money side.

Think about when they get the agreement with Apple. They would be going from no pre-installation to default status on Safari. When you go on Android, going from nothing to where they end up is -- is done in two steps.

You're paying for -- you buy part of it at the MADA stage. Right? So they're getting placement of the widget in Chrome and GSA in a folder in the MADA. So that payment is not going to show up -- the payment for that value is not going to show up in the RSA.

Whereas, when you look at Apple, you're looking at the entire from nothing to full. On Google, when you put on the RSA, you're going from what you've already gotten in the MADA to full. So it's like you bought on the Android, you're buying it in two pieces. You're getting some pre-installation through the MADA and the rest of it through the RSA. On Apple, it's coming in one fell swoop, and so there's only one payment that shows up in that transaction.

THE COURT: I think I follow you.

THE WITNESS: So it's like, you don't even have to think about the cash. It's really like the real value flowing in the other direction back to Google. They're buying it in two chunks. I'll get some through the MADA, and then I will buy the rest through the RSA. And Apple, the payment's going to reflect the whole ball of wax.

So when you're comparing across Google and Apple, you wouldn't expect them to necessarily be the same, even if the economics were the same, because you're only buying a part of it through the RSA on Android.

THE COURT: Okay. Thank you.

BY MR. DINTZER:

Q. When Google sets the RSA percentage for carriers, it is taking into account the prior agreement and what they've already got in the MADA; right?

A. I would think so. That's what -- as an economist -- I can't speak for Google. As an economist, that's what I would expect them to do, yes.

Q. Okay. Let's go to UPX1128. And that's not in your binder. So I need to hand this one up.

MR. DINTZER: May I approach, Your Honor? This is an updated version based on confidentiality negotiation.

BY MR. DINTZER:

Q. And, sir, if you can see that this is a 2000 -- let's see.

The date will be on the second e-mail. The date is 2016; it's in October 2016. It's a chain.

Do you see that?

A. Okay. I do see that. I didn't see it on the first page. Yeah, I see it on the second page.

Q. Right. And the top of it goes to a whole bunch of people at Google, including Ms. Porat, who is the CFO, and others that have appeared at trial.

Do you see that?

A. I do.

Q. Okay. And if you will see, it says "BC constituents."

Do you see that? That's at the top of the e-mail.

A. Yes. This is about Amazon and something in India?

Q. No. The second line says, "We did not have time to review the Amazon India."

A. Oh, I'm sorry.

Q. So the top line, it says "BC constituents."

Have you heard testimony or seen testimony about who the BC constituents are?

A. Not that I recall.

Q. Oh, okay. Let's go to -- it says, "Thank you for your time today and for staying on beyond the allotted time to finish up the OEM and carrier rev share proposal."

Do you see that?

A. I do.

Q. If you go to number 1, it says, "OEM and carrier rev share," and then a link to materials.

Do you see that?

A. I do.

Q. Okay. And the first blackened line says, "Reason for BC review: Maximum distribution commitment." And we're not going to say the stuff in the red boxes.

Okay? Do you see that?

A. I do.

Q. And then the next one says, "Asks for BC." So these were the asks for the BC. "Our offer strategic Android carrier and OEM partners," and then there's a box, "revenue share for secure distribution and placement for Search and Assistant."

Do you see that?

A. I see that.

Q. Okay. So the BC is being asked for approval for revenue share, and it explains why they're seeking revenue share. It's to secure distribution and placement for Search and Assistant.

Do you see that?

A. I do.

Q. Okay. Farther down, under "rationale in support of deal," do you see that? It says "Google receives search exclusivity on in-scope devices with regional exclusions; expected to increase mobile and tablet search revenue coverage," and then it has a percentage increase.

So they're asking to increase their rev share. Do you see that?

A. That sentence isn't about increasing rev share.

Q. I'm sorry. Increase of exclusivity. Do you see that?

A. No. It's -- the increase is in their coverage.

Q. Do you understand that the rationales that they list here, that there's no discussion of free rider problems, concerns about free riders? Is that right?

A. I don't see anything here about that. It doesn't mean that's not one of the reasons they would get increases in revenue.

Q. Do you see any discussion here about price of phones and the possibility that phones are going to rise -- that these rev share payments would affect the price of phones?

A. I don't in this e-mail, no.

Q. Okay. And then farther down, it says under the heading "discussion" -- do you see that?

A. I do.

Q. And it says -- the third bullet says, "Goals are set to additional restrictions on third-party Search and Assistant." So these are the goals. So "additional restrictions on third-party Search and Assistant, ensure security updates, and cover strategically important regions; TAC increase projected to be," and I can read this, "$299 million over two years."

Do you see that?

A. I do.
Q. So those are the goals -- when Google is considering increasing rev share payments for carriers and OEM partners, those are the goals that the BC actually considers; correct?
A. I mean, they're talking about coverage increase here. Right? They're not talking about changing the deal. Right?
Q. I will let the document speak for itself, sir, but there's no discussion about some of the -- well, there's no discussion about pass-through at all, is there?
A. No.
Q. Okay. And then if we go to the next page, 098, two bullets down, it says, "TAC payout to," and then there's a box which I won't read, "due to historical precedents and a desire to anchor new," box, "partnerships at lower rev share."
Do you see that?
A. I do.
Q. So one of the goals is to anchor, whoever is in that box, partnerships at a lower rev share, not to increase the amount of money to invest in Android but to pay them as little as possible?
A. Well, you're always considering both costs and benefits. Right? There's a cost to paying more, and there's a benefit to paying more.
Q. You haven't seen any rev share documents that consider the value of expanding the overall search pie as part of the

calculation; right?
A. Not as a part of the calculation, but we certainly have seen discussions of trying to expand the Android platform.
Q. Okay. So let's go to UPX580. This is in your binder. Let me know when you get there, sir.
A. I'm there.
Q. Okay. And the subject here -- this is dated September 5th, 2017. The subject is "BC deal review: Agenda for Tuesday, September 5th at 8:30."
Do you see that?
A. I'm sorry. Where are you looking?
Q. Just the subject line at the top. You can see it on the screen, sir.
A. Okay. I see it now in the document. Okay.
Q. Okay. And then at the very -- the greeting, it says, "Hi, Ruth and Kristin. The Android team is bringing the renewal of the Samsung mobile search revenue share deal to BC tomorrow, Wednesday," and there's a link. "Please see below key terms and finance perspective."
Do you see that?
A. I do.
Q. And if we go on this document towards the bottom third, there's a line that says, "In exchange for revenue share, Samsung has agreed to the following."
Do you see that?

A. Yes.
Q. And under "search," it says, "Google as default search engine with exclusivity."
That's one of the things that Google is getting for its rev share; right?
A. Is this on Samsung direct-to-consumer devices, or does this apply also to carrier devices? I can't tell.
Q. I'll let the document speak for itself, sir. You're welcome to look at what you like.
It says that what they're getting for the revenue share, "Google as default search engine with exclusivity."
Do you see that?
A. I agree, but I can't tell from that what it's covering. Samsung has two types of devices: Ones that they sell themselves direct to consumer, and the other goes through the carriers. And the agreement's kind of -- what Samsung gets varies on which one it is.
Q. Okay. Let's go to the next one. It says, "Samsung browser and keyboard cannot be enabled with Bixby."
You understand that that's Samsung's search assistant?
A. Okay, I understand what Bixby is.
Q. Okay. Let's go to page 943. There's a chart. Under "search," it has the first box, which is "this deal."
Do you see that?
A. Yes.

Q. And it says, "Device exclusivity (home screen exclusivity in EU, TR, KR); Russia subject to agreement with Yandex as approved by FAS."

And then the next point is, "Default on all access points."

Do you see that?

A. I do.

Q. And then the second box, the one next to it, it says "device exclusivity," and this is the new standard RSA for OEMs.

Do you see that?

A. I didn't see those words you just said.

Q. Okay. Then finally, let's go to two pages later, 945, under "deal team stakeholders for Samsung," it says, "Hi, BC constituents."

Do you see that?

A. Where are you talking about?

Q. It's showing on the screen. It's on page Bates 945, about a third of the way down.

A. Okay.

Q. And it says, "Samsung RSA," and then there's a link, "reason for BC review, nonstandard RSA top partner."

Do you see that?

A. I do.

Q. And under "asks for BC," "requesting approval for mobile search revenue share agreement with Samsung at," and there's a

box, "gross on current and new devices."

Do you see that?

A. I do.

Q. Under "rationale," it says, "Rationale in support of the proposal: Secures Google access on Samsung devices, including Google as default search/exclusive search."

Do you see that?

A. I do.

Q. And then it notes something about Bixby. It mentions security upgrades and then something called daydream support.

Do you see that?

A. I do.

Q. There's nothing in here that says that -- well, nothing in here about pass-through; right?

A. No.

Q. Nothing in here about supporting low-priced phones throughout the world or throughout the United States?

A. No.

Q. And there's nothing in here that says that Google believes that if they don't enter into one of these exclusive agreements, it won't matter because they'll keep all the customers anyways?

A. I mean, first off, under -- the low-priced phones is due to the MADA, and this is not a MADA agreement. This is an RSA agreement. So I wouldn't expect to see anything about low-priced phones here.

If you look at my testimony, the discussion of low-priced phones was about the MADA, not about the RSAs.

Q. Okay. There's nothing in here that says that Google believes that if they don't enter in one of these exclusive agreements, it won't matter because they'll keep all the customers anyways; right?

A. I'm sorry. What was that question?

Q. There's nothing in here -- nobody suggests that if they don't get the exclusive term, it won't matter because they'll have the same number of customers anyways? Nobody's suggesting that; right?

A. I didn't follow the many negatives in that statement. So I'm really -- I'm not trying to be funny. There's too many negatives for me.

Q. Okay.

THE COURT: Why don't we move to the next question. The document says what it says.

MR. DINTZER: Thank you, Your Honor.

BY MR. DINTZER:

Q. No further questions on that document, sir.

Now, an OEM can't sign an RSA like the one we've just been looking at, that discussion, unless they've already signed the MADA; right?

A. That's the way it works, yes.

Q. And OEMs would consider the add-on benefits of signing the

RSAs when they consider the MADA?
A. The net benefits, not the gross benefits.
Q. Yes. But --
A. The value they get -- if you sign the RSA, you get the option to sign the MADA. And of course, it's got benefits, and maybe you're giving something up because you could do something else. It would be the net value that they would consider when signing the MADA.
Q. But one of the things that -- and I'm just going to reframe it with what you just said, but I think it captures it.
When you sign the MADA, one of the things you get is optionality, the option of the RSA, and that optionality and the benefits of it from the RSA has value?
A. You should be clear, it's not just the optionality, which would mean your value being able to go either way. If there's a net value to doing the RSA, even if you know that's coming, you would consider that in the MADA.
Q. You would consider that when deciding to sign the MADA?
A. Yes.
Q. And thinking about the advantages of the RSA -- well, I think we've covered that. So let's go to slide 95.
You discuss how the MADA was important for low-cost phones in this one; right?
A. Yes.
Q. "The MADA barter has enabled many low-priced models."

All this slide is showing is the price of smartphones shipped; right? That's all you've got here; right?
A. Yes.
Q. Okay. There's no causality that you're trying to show in this slide about the MADA barter and prices being lower; right?
A. This is evidence consistent with what you'd expect under the MADA. I don't think we can -- we don't have an experiment where we have the MADA and not have the MADA and causal link other than the only experiment we have is Apple versus Android, and Android has facilitated the lower-priced devices.
Economics would say the MADA is a part of that, but I can't -- I don't have the Android devices with or without the MADA to make a comparison with.
Q. Because all Android -- everybody who does Android signs the MADA; right?
A. Well, everybody -- well, no, there are other --
Q. In the --
A. There are other Android devices out there. So don't -- be clear about that.
Q. Let me sharpen my question just so we don't waste time.
Everybody who sells an Android phone in the U.S. signs the MADA.
A. I don't know that's literally true, but -- because there are -- there used to be like, for example, Fire Phones and stuff like that. But worldwide, more non-MADA Android is out there

worldwide than there would be in the U.S. I can't say there are none in the U.S. I don't know that fact.

Q. You haven't seen any documents that link the MADA bundle with the sale of low-cost phones; right?

A. I don't recall documents saying that. I know, though, Google viewed the MADA and the zero-priced license as an important part of the design decision of Android, of the Android model that they built.

Q. You haven't quantified how many, if any, low-priced Android devices would leave the U.S. market if the MADA bundle was disallowed in the U.S.?

A. I don't -- I don't know that, because we don't have empirical data to do that. As I've been saying throughout, my approach is always to try to use market evidence to say what I can say.

Q. You haven't seen any data from Europe or Russia that showed that low-end cell phone makers left the market after the MADA bundle was disallowed?

A. Well, I don't have evidence on that, no. I haven't seen the data.

Q. Let's go to slide 109.

And the slide says, "Browsers have long been a primary access point."

Do you see that?

A. Yes.

Q. Okay. And the search widget is actually by itself overtaking the browsers in your slide; right?
A. That's correct.
Q. Browser -- the search widget actually is a more important access point if you measure it just by search volume than browsers; right?
A. Yeah, that assumes a degree of precision that may be beyond here. I would say they're very close.
Q. The search widget is connected to the Google Search app.?
A. What do you mean by "connected"?
Q. Do you understand that the search widget actually operates through the Google Search app.?
A. Yeah. I just didn't know what you meant by "connected."
Q. That's fine.
A. It's the same functionality, but it's Google Search no matter if you do it in a browser or in a search app. or in the widget. You're getting the same search engine.
Q. Do you have an understanding that if you took the Google Search app. off your phone, if you could, that the search widget wouldn't work?
A. Well, you'd have to keep the code there. You could get rid of the app. as an access -- the app. as an access point. But they use the same -- my understanding -- I'm not a computer scientist. My understanding is it's the same underlying search functionality, and you can either access through the search bar

or through an icon.

So I assume you could take the icon off for the search app. and leave the guts to support the widget, but I'm not the scientist here. Somebody else can answer that.

Q. Okay. But you do understand they're connected? That's really the only point I wanted to make.

A. I think they use the same underlying functionality is the best way to think about it.

THE COURT: Why don't we move on. I think this is fairly well-established.

MR. DINTZER: That's fine. No further questions on that.

BY MR. DINTZER:

Q. And the iPhones come with Safari browser pre-installed; is that right?

A. I think that is pretty well understood.

Q. And Apple has said that they will not have third-party apps. on their devices out of the box; is that right?

A. That's my understanding of what they've said, and it's pretty consistent with what they do.

Q. And in determining how much revenue share to pay Apple for Safari to default, Google considers that Apple does not allow third-party apps. on the device; is that right?

A. I can't say I know that for sure, but I would assume they do.

Well, let me be careful. It's not that they don't allow third-party apps. on the device. I think you misspoke. They don't pre-install third-party apps. on the device.

Your statement was incorrect as stated. So I wanted to fix it.

Q. No, that's fair; that's fair. And I think we -- just to make sure it's clean --

THE COURT: I think it's clear. I think by week 10, I understand this.

MR. DINTZER: Thank you, Your Honor. And I apologize.

If I may have a moment to confer with my colleagues.

THE COURT: Sure.

(Counsel conferred.)

MR. DINTZER: We have no further questions, Your Honor. We pass the witness.

THE COURT: Terrific. Thank you, Mr. Dintzer.

Mr. Cavanaugh or Mr. Sallet? Do the States intend to question?

MR. SALLET: We had many questions. Mr. Dintzer has asked all of them.

THE COURT: Terrific. Now, that's efficient.

All right. Mr. Schmidtlein, redirect.

REDIRECT EXAMINATION

BY MR. SCHMIDTLEIN:

Q. Professor Murphy -- could we get UPX1128 pulled back up.

Professor Murphy, this is a document that Mr. Dintzer handed you.

A. I've got a lot of paperwork.

THE COURT: It's not in the binder. It was a handout.

THE WITNESS: Okay.

BY MR. SCHMIDTLEIN:

Q. Now, this is a document the plaintiffs pushed into evidence. It is an e-mail amongst a lot of people at Google, including Ms. Braddi, Ms. Kartasheva, Mr. Roszak, Mr. Rosenberg, even Mr. Giannandrea, who have all testified as witnesses at this trial but none of whom were asked about this document.

THE COURT: Is there a question coming?

MR. SCHMIDTLEIN: There's a question coming, Your Honor.

BY MR. SCHMIDTLEIN:

Q. Do you know whether, in fact, the subject matter of this document pertains to devices sold in the United States or not?

A. I don't. I think I asked kind of about that, and I was confused. But I do not.

Q. Do you know whether this document pertains to any Samsung devices sold anywhere in the world?

A. This document, I don't have any reason to believe it involves -- Samsung, in fact, is excluded, it says right there.

Q. Okay. You can put that aside.

Now, Professor Murphy, you were shown some documents

yesterday, some very old documents yesterday about Apple and choice screens from, I think, the 2007-ish time period.

Do you recall whether those documents related to the situation of users downloading a Safari version for Windows?

A. That's my understanding, yes.

Q. And did you have a view as to whether a possible view of a Safari version downloaded onto Windows was economically similar to a Safari version that came preloaded on Apple devices?

A. No. As I think I stated in my testimony yesterday, I don't think they would be similar.

Q. And do you recall whether Mr. Cue testified about whether Apple was interested in employing a choice screen for Safari versions that came preloaded on Apple devices?

A. I do. I know he testified -- I remember his testimony saying Apple was not interested in that.

Q. Okay. You also were asked some questions yesterday, I think, about whether if Google and Apple had entered into some sort of a different agreement, Apple would have been allowed to send queries sort of on the same version of Safari to multiple different search engines, in other words, send query 1 to Google and send query 2 to Bing.

In your review of the evidence in this case, have you seen any instance in which any browser provider, whether Apple or anyone else in the history of browsers, has designed their browser to split queries across multiple search engines?

MR. DINTZER: Objection, Your Honor. That kind of crossed the line as far as leading.

The history of browsers --

THE COURT: Will you just simplify the question, Mr. Schmidtlein. He can answer it.

BY MR. SCHMIDTLEIN:

Q. Are you aware of any instance or precedent for a browser splitting queries amongst multiple search engines?

A. No, and I didn't need to be led here. I believe that's expressed in my report. So I think it's something -- query splitting is something Professor Whinston has talked about. If it wasn't in my report, it's certainly something I considered after he said it, because I don't remember which of his reports that came up.

But I have had the opinion -- I've examined the question you have, is that a practice we see that's met the market test, and the answer is no.

Q. Are you aware of any evidence in this case of Apple asking for a carve-out from Google to set another search provider as the default for private browsing?

A. I do not recall them saying they wanted to do that. I believe Mr. Cue actually addressed whether they would set DuckDuckGo for that purpose. And his testimony is there. It's no use me trying to recall exactly what it was, but it's in the record.

Q. Now, the Court asked you a question yesterday about barriers to entry.

Do you have a view as to whether the challenged agreements increase barriers to entry?

A. I don't believe they do. That's not to say barriers -- it's not tough to enter the general -- it's a big investment. There's a lot you have to do to get in general search. A lot of that is independent of agreements. There's a lot involved in that.

As I said yesterday, you know, the agreements -- first off, there's a lot of volume that's outside the default agreements. Right? Even if you take Professor Whinston's numbers, like 50 percent is outside these default agreements. Right? So there's a lot there.

But also, as I tried to emphasize yesterday, the ability to actually contract for promotion, whether it's a default or something smaller than a default, can actually be helpful for people trying to enter, because I'm not good enough yet, but I can kind of what I call buy my way in. Right? I can get you to adopt me today knowing that I'm going to get the value of more experience and more market exposure.

So the ability to have those kind of payments that I talk about as enhancing competition once people are in can actually facilitate entry. I think I talked about that yesterday.

So I would view two things that are important. One,

there's a lot of open volume that people could come in without touching the agreements. The other is, agreements of various types can actually facilitate somebody coming in, because it gives them the ability to kind of compete even though they might not quite be all the way there in quality yet.

Q. Now, yesterday, I know during the direct, you presented a pie chart that examined the volume of search traffic that occurs on iOS devices outside the Safari default. I think you were asked some questions about the nature of the Safari default and whether that was sort of a de facto exclusive by my colleague, Mr. Dintzer.

Did you also perform a similar analysis with respect to how much traffic comes off of or occurs on Mac computers outside of the Safari default?

A. I did, and the numbers are -- even more occurs outside the Safari default on Mac computers than on iOS devices. If you remember the numbers from yesterday, it's sort of the other -- yeah, it's bigger on Mac devices, and not trivially -- and non-trivially bigger.

Q. Now, you were also asked some questions --

THE COURT: I'm sorry. Can you just specify what the other search entry points would be on Mac, having been a Mac user?

THE WITNESS: Another browser. It could be a search -- a downloaded search app. Because remember, the -- it

could be a downloaded search app., could be direct navigation to one of the search sites. It could be any of those kinds of things. Or a bookmark, it could be that, too.

BY MR. SCHMIDTLEIN:

Q. Now, you were also asked some questions about the implementation of the European choice screen and the impact that that had on Android and the support of Android partners in Europe.

Did the implementation of the European choice screen result in zero RSA payments for the search widget and Chrome on Android devices in Europe?

A. I mean, under the MADA? I'm a little confused.

Q. No, under the -- as a result of the choice screen, were the RSA payments for the widget and Chrome either reduced to zero or substantially reduced?

A. Well, we know that RSA rates have been going down as contracts have been renegotiated. I don't know the magnitude.

Q. Okay. Now, you were asked some questions earlier today about why you had used a choice screen to assess and compare competitive outcomes in the real world, even though you didn't view a choice screen as a proper but-for world.

Did Professor Whinston offer an opinion on a but-for world as a part of his opinions in this case?

A. He did not, and I stated that in my testimony.

Q. Did you focus on a choice screen because that was the

parity world that Professor Whinston identified in his analysis?

THE COURT: I would just ask you to rephrase the question, Mr. Schmidtlein.

BY MR. SCHMIDTLEIN:

Q. Where did you get the idea of using a choice screen in your analyses?

A. Well, I actually got it from two places. One, I think it is a simple way of thinking about the parity that Professor Whinston talks about as a but-for world -- he doesn't call it but-for world. I don't want to put words in his mouth. As a useful analytical exercise or something, he called it. Right? I don't want to put words in his mouth.

But he talked about parity, and a choice screen would be an example of that.

The other reason I really thought a choice screen was a useful thing to consider to kind of get your bearings on things was this case is fundamentally, at least on the browser side, about access. That is, do rivals have access to users and if the contracts denied people access.

And I viewed the choice screen as answering that question of moving from a world where the plaintiffs allege they've been -- that certain sellers have been denied access to a world where they clearly have access. So it's to sort of get at that access differential. So I thought it provided a useful benchmark.

The reason I don't think it's a but-for world is because I don't think that's a competitive outcome that people would go to. Competition will lead to the kind of things I think about, where people are actually monetizing their distribution potential.

But given that this kind of goes all the way to direct equal access, whatever you want to call it, I viewed it as a useful benchmark for that reason.

Q. You were asked some questions on cross-examination about the right of first refusal in the Apple agreement pertaining to Siri and Spotlight.

In your review of the record, did you see any evidence that Apple had ever served an advertisement on Siri and Spotlight?

A. My understanding, they have not, and I believe I state that in my report.

Q. And are you aware of Apple having a search ads business?

A. Again, as I think I said in response to Mr. Dintzer, I believe they do not.

Q. If you can take a look at UPX6024, those are the interrogatory -- or the Rule 30(b)(6) responses.

A. Okay. It's all the way at the back.

Q. It's volume 2, and it's the very last tab.

A. Okay.

Q. You were asked some questions about Google's reliance on certain analyses or claw-back analyses that included reference

to the Apple Maps situation. And Mr. Dintzer excerpted portions of these responses onto some slides, and I want to ask you about some portions of the slide -- or portions of these responses that Mr. Dintzer didn't include on his slides.

Now, if you will look at -- turn to page 15. And there were portions of this that I think were included on slides, but if you will turn over to page 16 and the first paragraph there, the very last sentence of the first paragraph reads, "Neither the Mozilla experience nor the Apple Maps experience provided a perfect comparator in assessing a claw-back rate on Safari."

Do you agree or disagree with that statement?

A. I would agree with that statement.

Q. If you will go down -- you were then asked some questions about assessments that Google did using some of these same comparators in assessing Android negotiations, Android claw-backs.

So if you will go down to the bottom paragraph on page 16, you were read or you were shown in slides excerpts from that paragraph as well. But again, Mr. Dintzer did not include on the slide the following sentence: "Again, these estimates did not provide perfect comparators, and Google will never arrive at a best estimate of the claw-back rate for these scenarios."

Do you agree or disagree with that statement?

A. Again, I should have said this on the previous statement as well, I don't agree with the first part, that -- or I agree with

the first part, that they don't provide perfect comparators. I can't contradict the second part, because I don't know that they did arrive at a best estimate, but Google's better to testify whether they did or not.

Do you understand what I'm trying to say? The first part is sort of a factual question. I know they're not perfect or even very good estimates. The second part, to the best of my knowledge, Google never arrived at a best estimate, but, you know, that's for them to testify to, not me.

Q. Finally, you were asked some questions about the following paragraph on page 17. Again, you were asked questions as to whether Google had taken into account in its negotiations specific offers made by rivals.

And again, I think Mr. Dintzer excerpted, I believe, the first sentence from that paragraph, but he didn't excerpt other portions, including, "As to actual offers, Google has not had access to the particular revenue share terms offered by a competitor during negotiation with the above partners."

Would you expect Google to have access to particular competing offers that were being made by rivals?

A. Given my experience, I would assume they typically would not have that information.

Q. Okay. You were also asked some questions on cross-examination about the benefits that Google got from entering into RSA agreements with Android partners, and you

rattled off a list of a number of different benefits.

Do you recall whether or not a benefit that was available under the RSAs was revenue share payment for placement of Chrome in the hotseat?

A. Yes, that's a part of the RSA, and that would be a part of what generates presumably incremental volume.

Q. And does having Chrome in the hotseat impact Android device quality and competition with the iPhone, in your view?

MR. DINTZER: Objection, Your Honor; leading.

THE COURT: It's overruled. You can answer that.

THE WITNESS: It would depend on what the alternative was, but given Chrome is the -- I think the evidence would say it's the highest quality browser, it would improve the quality in -- putting Chrome in the hotseat.

BY MR. SCHMIDTLEIN:

Q. Would you expect putting Chrome in the hotseat would increase overall search usage?

A. Again, given that the market evidence would suggest that it's the best browser on Android, I would assume it would increase usage, yes.

Q. Now, you were asked some questions about Apple and questions around Apple's potential for entering the search market.

Are you familiar with the term or the concept of "make or buy"?

A. Yes. I talk about it frequently.
Q. Okay. And is the concept or the notion of make or buy a very, very prevalent thing in the economy?
THE COURT: Just rephrase the question.
BY MR. SCHMIDTLEIN:
Q. Describe what make or buy is.
A. Make or buy is when you have the option between doing something for yourself or having somebody else do it for you. Basic idea in economics is, it's going to come down to which you think is -- gives you the best deal.
Effectively, the way -- the most common way I would teach my students is if you can do it at lower costs than the guy who is supplying you, you're probably going to want to do it for yourself. If your costs are higher than his, the best thing to have happen is you negotiate him down to at or -- let's say I can do it for a hundred and he can do it for 80. Well, I'm not going to pay more than a hundred, because I can do it myself for a hundred. He can do it for me for 80; I'm going to negotiate something between 80 and a hundred. He's happy because he'd get the business and it's profitable, and I'm happy because I'd get it for less than it would take me to do myself.
That's the basic lesson on make or buy.
Q. If there is -- a large customer in the market also has the potential to make or buy the input that it's looking to purchase, would you expect that to generate more or less

competition in the sale of that input?

A. Well, certainly, I would expect that person to be able to get a better deal, and that could, depending on the market structure, generate better deals for everybody else. It would just depend on how it works.

MR. SCHMIDTLEIN: All right. No further questions, Your Honor.

THE COURT: Okay.

MR. DINTZER: I failed to move in a document, if I may.

THE COURT: Sure. Well, why don't we excuse Professor Murphy and wish him well.

Professor Murphy, thank you for all your work, and safe travels home.

THE WITNESS: Thank you so much. I appreciate it.

MR. DINTZER: Your Honor, UPX2086, I failed to move it in.

THE COURT: Why don't we do this. We've got a few things to talk about, and I want to give our court reporter a break. So if you would just take a look at that exhibit, and you can let me know if there's an objection after the break.

We will come back at 3:15. Thank you, everyone.

(Recess taken from 3:00 p.m. to 3:15 p.m.)

(Call to order of the court.)

THE COURT: Mr. Schmidtlein?

MR. SCHMIDTLEIN: Your Honor, before Google rests its case, my colleague, Mr. Greenblum, has some housekeeping exhibit matters --

THE COURT: Okay. Great.

MR. SCHMIDTLEIN: -- that we would like to complete. But with that, Google rests its case.

THE COURT: Terrific. Thank you, Mr. Schmidtlein.

MR. GREENBLUM: Just briefly, Your Honor, three things. First, we have a set of exhibits that I understand, after conferral with our colleagues, can be moved in either without any objection or with the embedded hearsay objection.

I will hand copies of these up to J.C. We always file these as well, but just so we have that.

Second, there's one exhibit we were not able to reach agreement with. I can hand up copies. This is DX384. This is a document produced by AT&T in the case, Your Honor. It relates to feedback that AT&T received and documented about the Backflip phone. The Court heard some testimony about that in the Ezell deposition.

I think the plaintiffs -- I will let them speak for it. I think they have a hearsay objection.

We are offering this and we've told the plaintiffs and compromised that we're offering it not for the truth of the statements or as a statement of AT&T, but for the fact that AT&T, in fact, monitored consumer feedback and for the effect on

the listener, in this case AT&T. So it's for those two limited purposes.

I've got one other thing, but let me let Mr. Gower address that.

MR. GOWER: Thank you. Cameron Gower for the United States.

Just taking a look, Your Honor, just to explain this document for a moment, this appears to be a copy and paste of a Facebook group into a Word document. There's no author identified. There's no purpose identified within the document for why it exists. There's really no context at all. This is both first-level and second-level hearsay.

We have no 902.11 document for this, even though AT&T produced 902.11s for other documents. And Google seems to recognize this, and that's why they're trying to limit the purpose. And they've offered it to show the effect on the listener, but we don't have the listener here to testify about why this document exists. It doesn't really solve the lack of context from this document, which is just a copy and paste of a Facebook group.

MR. GREENBLUM: Your Honor, the limited purpose is that they were aware of this, that they tracked it, that they maintained it. I think limited context, if that were an objection, we might have had several fewer exhibits admitted in the case.

We're simply offering it for that limited purpose.

THE COURT: Let me just ask, you know, from the face of it, it doesn't appear to be a business record, and I know you're not seeking to admit it for the truth. So at least that in and of itself is not an issue.

But its sort of provenance is a little unclear. It's from AT&T, but do you have any further information about custodian or sort of where it came from?

MR. GREENBLUM: I would have to check the metadata. We can check that. We don't have discovery information on that. I would have to check the metadata. It was certainly produced by AT&T. It's not disputed to be a document from their files.

THE COURT: Right. Let's at least -- if you could get that information for me, that might help advance the ball in terms of thinking about the document. Otherwise, it just -- it is -- I guess it is just a cut and paste from some Facebook group that is making comments about the phone, for what that's worth.

MR. GREENBLUM: Sure. No problem, Your Honor. We'll run that down.

THE COURT: To be precise, for example, if it's in the hands of a custodian that is responsible for the phone or in marketing, that may benefit your argument in some way.

On the other hand, if it's from some custodian who has no relationship to this at all, I think it's a little harder to

make the connection that it has any real probative value.

MR. GREENBLUM: We will check that.

THE COURT: Okay.

MR. GREENBLUM: We have some deposition designations and videos that we've been working with the plaintiffs on. I've got a pleading we will file. They will be -- and a flash drive for J.C.

The plaintiffs will be moving in some separately -- what we've done is there's different buckets of them, and in each case, we're moving up ours together with their counters and vice versa. So that's our bucket.

And that's it for me.

THE COURT: Terrific. Thank you. So the record will be left open for these few evidentiary issues, but with that, then, Google has rested. All right. Terrific.

All right. So where do we stand on Mr. Davies?

MS. BELLSHAW: Thank you, Your Honor. Megan Bellshaw for the United States.

Based on Mr. Murphy's testimony, we have decided not to call Mr. Davies as a part of our rebuttal case.

THE COURT: Okay. All right. So I will deny the motion as moot.

MS. BELLSHAW: Thank you, Your Honor.

THE COURT: Great. Thank you.

All right. So that, then, means in terms of scheduling,

tomorrow we have Professor Oard, if I'm pronouncing his last name correctly?

MS. BELLSHAW: Yes, Your Honor. Professor Oard will be here tomorrow.

THE COURT: And that's the lone witness that's ready to go tomorrow?

MS. BELLSHAW: Yes, Your Honor. We expect Mr. Oard's testimony not to last the entire day.

And then Professor Whinston will come on Thursday.

THE COURT: And is the expectation still that he will be about two and a half hours or so in terms of your direct?

MS. BELLSHAW: I think we expect the direct to be shorter, closer to an hour and a half. And it will be all open session.

THE COURT: Terrific. So it seems like we may be done on Thursday.

Mr. Cavanaugh, the States did formally rest?

MR. CAVANAUGH: We did. We have a few more deposition designations to hand up and, I think, a couple of additional documents, but we're not -- we don't have a rebuttal witness, Your Honor.

THE COURT: Okay.

MS. BELLSHAW: Your Honor, it's been pointed out to me that I may have misunderstood your question about the length.

We expect Professor Oard's testimony to be about an hour

and a half, but Professor Whinston we still expect to be about two and a half hours.

I apologize if I misunderstood the question.

THE COURT: All right. Helpfully, that still puts us on track to be done on Thursday. Okay. Terrific.

All right. Just a few housekeeping matters from my end. Let me just first -- what did I do with those notes? Sorry, everyone. Just bear with me a moment.

There are a handful of outstanding matters that we have been owing everybody rulings on.

With respect to first, the transcript redactions for Ms. McAllister, as we did previously, we have done sort of a line-by-line assessment of her closed session testimony.

I've applied the *Hubbard* factors to the requested redactions. And again, I appreciate everyone, including the third parties, working on doing this and making as much of the transcript available as they believe is proper.

All of that said, as I said, I have gone through, done another *Hubbard* analysis -- or done the *Hubbard* analysis line by line. And we've not -- as we have in the past, we've accepted some redactions; we have not accepted all of them.

In terms of what we have left unredacted, the following sort of passages will remain unredacted: Discussions about various agreements that were designed to incentivize OEMs and carriers to make security upgrades, there's been a lot of

discussion about that in open court, and I've not been told that there's any real differentiation about that topic in a way that would -- could cause any prejudice if that particular reference is disclosed. And it's a very high-level reference to it. So there's really nothing about it that seems to me to require redaction.

Discussions of the RSAs and as they relate to search exclusivity, even though some of that may not be a matter of public record, the discussion was at a relatively high level, one, and two, the extent that there is any differentiation among those agreements, it's not apparent to me.

But also, more importantly, these are sort of the agreements that are at the heart of the case, and this involved the 2021 variation of those. So I do think that those general terms -- and they are very general -- did not warrant redaction.

There were proposed terms about configuration of smartphones that seemingly were fairly common to all carriers and OEMs that were discussed in closed testimony and did not seem to involve any degree of differentiation, with one exception. So that has been unredacted.

There were discussions about wind-down periods in open court, and there were requests about wind-down periods in the closed session that were requested to be redacted, and I don't think they justify redaction, particularly since it's been discussed in open court. And any party that doesn't have one

now knows about the possibility of getting one if -- since some wind-down provisions have been used in other agreements.

We have continued to redact revenue share amounts. There is a bounty amount that is identified in the testimony for a particular carrier that's structured uniquely to that carrier's or OEM's contract.

And consistent with my prior rulings, I do think that the weighing of the *Hubbard* factors warrants the nondisclosure of those particular revenue shares and bounty numbers, as they could give rise to competitive harm both to Google and to the particular partner with whom the agreement has been struck, since the disclosure of that information could create competitive disadvantage in future negotiations.

And then finally, we've redacted a couple of terms of the agreements that were requested that seemed to be specific and unique, including those that touch on issues that are collateral to the litigation that were, I think, requested at the very first page -- or the very first redaction, I think, in Ms. McAllister's requested redacted testimony.

All right? We will get that out and available this afternoon, or if not this afternoon, tomorrow when we have all of that finalized.

Insofar as the request by Google to redact certain testimony that was placed inadvertently of confidential information on the public record, I've looked at the issue very

carefully. I've read all of the cases that Google has identified.

I just make the following observations: It is not the case that the Court is absolutely prohibited from sort of retroactive sealing of information that ends up on a court record. Certainly, there's no appellate court decision that says that that's beyond the power of the district court to do that. As a general matter, courts that have done it, largely in the district court, have done so when there have been extraordinary circumstances, or at least that's the wording of one district court in one of the cases that Google has cited.

What I tried to do is pay particular attention to any cases that we could find that were in comparable circumstances. We just didn't find any, including those that were cited by Google.

In particular, the case out of the Delaware courts, *in re: Trusts for Gore*, it was a case in which actually the Court did sort of retroactively, if you will, order the nondisclosure of certain information that had been inadvertently leaked in court.

However, the case is fairly distinguishable in that the circumstances there involved an open session of court in which every participant and every person who was actually present in the courtroom was actually subject to the confidentiality order. There were not members of the public present. There were not members of the media present.

And the other case that Google -- one of the other cases

that Google cited, that's out of the District of Arizona, *TriQuint Semiconductor*, actually does a very nice job of distinguishing the Delaware case, *In re: Gore*, and just notes that in that case the Court declined to do what was requested in terms of sealing.

And the Court wrote, and I think it's applicable here, "Notably, however, in *Trusts for Gore*, the Court did not just grant the moving party's request to redact the transcript based on the inadvertency of the witness's statement alone. Rather, the Court weighed the competing interests involved to conclude that an inadvertent slip of the tongue should not undo a party's efforts to maintain the confidentiality of nonpublic information. Thus, it was also relevant that the inadvertently disclosed information had no material effect on the work of the judicial system, was not important for the public's understanding of the merits of the dispute, and because no members of the public were present at the hearing, had not in any meaningful sense entered the public sphere."

And I think those factors are different here than they were in the Delaware decision.

So I will also just note one other case from the Second Circuit. It's actually an interesting case, *Gambala v. Deutsche Bank*, 377 F.3d 133. It involved a similar situation of a district court sealing -- or actually refusing to seal certain confidential settlement information.

And the circuit court actually held that it was actually an abuse of discretion for the Court not to seal confidential settlement information that was placed on the public record even on the transcript, but the Court there actually distinguished or said very clearly that that circumstance was different because the way in which it ended up on the record was really at the Court's insistence that the information be disclosed. The parties had a good faith understanding that the disclosure was done in a confidential way. And thirdly and most importantly, that the casual questioning, as the Second Circuit described it, was in the course of proceedings addressing the settlement, not the adjudication of litigation.

And obviously, a trial is in a very different posture than just a open court discussion of an otherwise confidential settlement.

So as I said, we looked closely at the cases. We've done our own research, and I just did not find any authority in comparable circumstances that would justify the sort of retroactive sealing of information that was, even if inadvertently, was put on the record during a witness's testimony.

All right. So that's that issue.

We then have the issue -- there was a motion concerning two exhibits, JX24 and JX33. I intended to rule yesterday, and I neglected to do so. Let me go ahead and do that now.

With respect to JX24, I am going to decline the request to redact the portions that are in Sections 1.3 and 1.4. Section 1.3 is simply the dates by which eligibility arises for the selection of a different default engine, search engine in two countries or three countries, and those dates are long past, and I don't see the confidential nature of that giving rise to any real prejudice by its disclosure.

In terms of the fourth paragraph, Section 1.4, I do think, you know, the language already has been effectively solicited from Ms. Braddi's testimony. I do understand Google's position that the fact that that was going to be elicited was not first disclosed to Google. But ultimately, in terms of the *Hubbard* balancing, I don't think that is really a factor that plays into the balancing.

And in terms of the prejudice, which is what I focused on most in making these balancing assessments, the fact that the sum and substance of the provision has already effectively been put on the record I think really minimizes the prejudice.

Now, that, of course, is not applicable to the rev share percentage or the -- essentially, the two conditions -- it's not a rev share percentage, excuse me, the two conditions that would trigger the provisions.

So those have already been agreed to, and nothing in my ruling is meant to permit the disclosure of those two numbers.

With respect to Exhibit JX33, in Section 1A, the paragraph

that is subject to the permissible software default use that begins with that sentence, that's already been read into the record by counsel for Google. So that may be unredacted and disclosed.

The definition of search query, that, too, although has not -- perhaps not word for word, the sum and substance of it has been put into the record, and the fact of the actual words, it doesn't seem to me, would prejudice either Google or Apple, given the extent to which there's been a substantial discussion in this case about search queries and what Apple may or may not intercept and divert in terms of search traffic.

The provision that is on page 3 of the amendment that begins with "subject to permissible software default use," that, too, I think should be disclosed. I do agree there was some confusion about how this provision applies, particularly from Mr. Pichai's testimony.

Apple's concern is that other search partners could unfairly leverage the precise wording. That seems to me overstated, given that there's real no indication that Apple in fact diverts search queries to any other search partners. So it's not clear to me why that would be a concern of Apple's in terms of that disclosure. And the general sense of that cause has already been discussed quite a bit in open court.

In terms of the Section 2, that's titled "advertising and monetization," I do think that too ought to be disclosed. It's

already been discussed at a high level through Professor Whinston's examination.

Apple fairly points out that this provision I did initially have redacted from Mr. Cue's testimony. But I've gone back and actually reviewed Mr. Cue's testimony, and his testimony actually undercuts Apple's position that somehow this would prejudice them. In fact, Mr. Cue said that it was included because Google wanted it, and his words were "this was not important to us," this particular provision. And in fact, we just talked about the provision today through Professor -- through Google's expert. Although it wasn't word for word, certainly, the essence of it was brought out. So I think the actual wording of it doesn't give rise to any real prejudice.

With respect to Section 4, I do think the requested redactions in Section 4 titled "ad revenue share" are appropriate, and that's just not limited to the revenue share percentages. The second full paragraph that begins with "Google" reflects a provision that I think we've all been operating under the understanding has not been made public in any prior setting, including during this trial, and that there have been efforts made to ensure the confidentiality of that particular provision.

I do not think, notwithstanding the fact that it's been introduced at trial, that the public interest in learning about these specifics outweighs the potential prejudice to both Google

and Apple in having that particular provision disclosed. The fact of the revenue share, which this is related to, this provision, I can say that at a very high level, is certainly very well known to the public, and it does not -- it ultimately is not a material -- well, I shouldn't be so firm. Relative to the overall issue of the payment of revenue share and what that means, this particular provision doesn't have as great a probative value in what will be my ultimate decisionmaking here.

So for all of those reasons, I do think that that provision ought to be redacted in full.

And the same is true with the definitional provision that appears in the fourth paragraph. I do not understand that particular definition to have been disclosed publicly, and although the definition relates to concepts that we have discussed here in open court, the specifics of that definition which are particular to the relationship between the two entities, I think, warrants nondisclosure, and not only because of that but also, as I said about the last provision, the general tenor of that provision has already been made in open court, and so the public certainly is aware of what the provision relates to.

There is not -- there may be some public interest in the actual precise terms, but it seems to me the prejudice outweighs that, and in particular, this does sort of refer to some very specific elements of the term at issue that I do think warrant

confidential treatment.

Okay? So that is the Court's ruling on those two exhibits.

All right. So those are the open-ended issues that I had. I guess the one last thing I would like to talk about while we have a few minutes today, and I had planted a seed with the parties some weeks ago in terms of thinking about proposed findings of fact and conclusions of law.

Currently, the only thing we have in place is a 70-day due date in terms of from the last day of trial. And if the last day of trial is Thursday, I think that puts us towards the end of January, by my calculations.

MS. ONYEMA: Thank you, Your Honor. Veronica Onyema for the United States.

DOJ plaintiffs have conferred with both the States and Google regarding possible proposed scheduling. And we wanted to share our thoughts, and certainly, the States and Google will chime in with theirs.

The CMO already contemplates the filing of post-trial briefs, and we believe they're appropriate here. Given the length of trial, the complexity of the factual record, we would propose that post-trial briefs be no longer than 80 pages and that the States would have an opportunity to provide their own separate filing as well of no more than 35 pages, while also being able to join in DOJ plaintiffs' brief for overlapping claims.

In terms of the proposed findings of facts and conclusions of law, we would propose that those are two separate documents.

In terms of the proposed conclusions of law, we would propose that they are --

THE COURT: I'm sorry. When you say post-trial briefs, you're referring to -- you're contemplating a document that is different than and in addition to the proposed findings of fact and conclusions of law?

MS. ONYEMA: Correct, Your Honor.

THE COURT: And what would the post-trial briefs have in them that would not be reflected in the proposed findings of fact and conclusions of law?

MS. ONYEMA: The brief would be a -- as often occurs in post-trial briefs, it would be a narrative document that would walk through the factual record and would demonstrate hopefully, and you would agree with us the fact that we have demonstrated a Section 2 violation, and we would like the opportunity to be able to provide that in a narrative fashion.

THE COURT: Okay. I mean, it sounds to me more like an executive summary. In other words, I would assume that what you're going to do is, in however many pages, the proposed findings of fact and conclusions of law, you will cover the same ground but in a much more detailed way.

MS. ONYEMA: It will. It will be much more detailed. But again, the brief itself would walk through in a narrative

fashion. We're happy to talk further in terms of our thoughts on the length of these separate documents.

THE COURT: Okay. Maybe I'm not following what you mean by "narrative fashion." But okay. All right.

We can talk about specifics in a moment, but you're contemplating post-trial briefs and then findings of fact and conclusions of law, and what are you currently contemplating the length of those would be?

MS. ONYEMA: Yes, Your Honor.

In terms of the proposed conclusions of law, we would propose no more than 35 pages, and the State plaintiffs would have the opportunity to join that submission, but they would be able to also provide an additional submission of no more than 15 pages.

In terms of proposed conclusions of fact, we would propose 500 pages as a limit. Just to provide some context as a benchmark, at summary judgment, the DOJ plaintiffs and State plaintiffs, our factual responses to Google's motion were over 350 pages, and that did not cover the issues that were not brought in summary judgment, like market definition, monopoly power, procompetitive justifications.

So we believe 500 pages, given the extensive factual record, more than 10,000 pages, 50 witnesses, would be appropriate and consistent with precedent as well, Your Honor.

THE COURT: Okay.

MS. ONYEMA: We would also propose extending the deadline by two weeks, just given the holidays. I know the CMO currently contemplates for ten weeks. We would propose 12 weeks.

And we also do not believe that responsive briefing is necessary in this case. The one exception is that the Court had indicated for outstanding evidentiary issues, there would be a filing -- either a separate filing or responsive proposed findings of fact. So that would not be, obviously, captured there.

But that would be our proposal overall.

THE COURT: Okay.

MR. SALLET: Your Honor, if I may just briefly, just three things.

To the point Your Honor raised, we think the briefing would be helpful because there would be a synthesis. You've used the term "executive summary." I'm using "synthesis," because I think what we would do is bring together the key facts with the key conclusions of law in a way that we think would be helpful to the Court, to the extent you choose to use it, in navigating to sometimes granular filings that are findings of fact and conclusions of law. So we think it would be useful.

Secondly, there has been some back and forth with Google on this. So I'm going to go to one issue that Google has raised, perhaps inadvertently, in terms of phrasing.

But the States' separate filings would not be confined just to SA360, which is what Google has suggested. We would address the issues on which we have focused throughout the trial. And I think Your Honor knows that the way we've conducted ourselves during the trial has indicated no desire to go through repetitive, elongated repetition of issues that have been otherwise discussed. We would take the same approach with post-trial filings.

We have, obviously, some issues that are distinct from DOJ, including SA360, and a separate advertising market, as Your Honor knows. There are other factual allegations that appear in our complaint that do not appear in DOJ's. We would expect to focus on those.

We would limit repetition to -- as much as possible, but we believe it would be appropriate for us to have the discretion to use those pages as we see fit.

And then I believe DOJ gave you page numbers for us under the proposal that we and DOJ put forward but I think perhaps not on findings of fact. DOJ mentioned 500 pages for a unified brief.

And Your Honor, this is the way the summary judgment pieces were done, jointly with us and DOJ. That's what we mean by "unified."

We would ask for 100 pages for the separate State findings of fact.

I think that's -- that those are our key points.

THE COURT: Okay. Mr. Schmidtlein?

MR. SCHMIDTLEIN: Your Honor, we -- there's a couple of areas where I think we agree.

The conclusions of law, 35 pages, we do think the DOJ and the States should have a single kind of combined 35 pages on all of the issues that are comparable. And the only one, candidly, I see that's really separate is SA360. But I'm not going to lose a whole lot of sleep if he wants to spend his 15 pages of conclusions of law on other market definition. I guess they can do that.

We do not believe that a post-trial brief is necessary. I have absolutely no doubt that Your Honor and your staff are going to look primarily and very thoroughly at the proposed findings of fact and conclusions of law. The brief is just more make-work in my judgment at this point.

From our perspective, we think the page limitations should be tighter on findings of fact. We would propose 350 pages of findings of fact on sort of the main, larger, overlapping issues, 50 pages for the States' sort of specific issues. We agree with February 9th for the submission date.

But we also do believe very, very, very strongly that a responsive -- responsive papers are in order here, and here's why: There is an extraordinary amount of either deposition testimony, but more so documents that the plaintiffs have

insisted on pushing into evidence that no witness has said a word about. You've seen many examples of documents, I pointed one out somewhat amusingly with Professor Murphy, that they had lots of opportunities to ask witnesses about and they chose not to.

We anticipate that there's going to be not insignificant mischief that is going to take place on the findings of fact that they are going to push in. We believe that at summary judgment, we were able to effectively push back and persuade Your Honor that there were things that needed to be put in context.

So we would like the opportunity to respond. We would like 200 pages on the findings of fact and 35 pages on the States' findings of fact, and on conclusions of law, 25 pages and 10 pages. And we would propose that that filing be made on March the 22nd.

THE COURT: The 25 and 10 would be what?

MR. SCHMIDTLEIN: Would be on the conclusions of law.

THE COURT: And I take it you're contemplating that the plaintiffs would also have an opportunity to --

MR. SCHMIDTLEIN: Correct. Both sides could file responses to each other's initial filings, and we would propose those would come in on March the 22nd.

MS. ONYEMA: Your Honor, just a few responses.

One in terms of the post-trial brief, it's certainly not

make-work to DOJ plaintiffs. This is an important case, and we would like the opportunity to be able to highlight key facts and testimony for the Court in a cohesive submission.

In terms of any potential mischief, Google has access to the same record that we have. The trial will be complete. The record is in. And they'll have an opportunity at closing to discuss any responses as well.

So again, we don't believe responsive briefing is necessary. If the Court is inclined to grant that, we would have further thoughts on page limits, but we don't think it's necessary, and we would like the opportunity to file a post-trial brief.

MR. SALLET: Just one point, Your Honor.

The Department of Justice and the Plaintiff States have offered pages as a part of a proposal that includes the post-trial briefing, the narrative, as it were.

If it's Your Honor's preference that we not have that, then we would like a chance to look at the pages assigned to findings of fact and conclusions of law, and if Your Honor would like responses, to those as well.

And the very practical reason on part of that is, the conclusions of law pages that we've cited -- in fact, we agreed with Google for this purpose -- are not incredibly extensive. If there is no memorandum of law or legal brief accompanying them, one could imagine those particularly we might seek

additional pages.

But, Your Honor, I think we would be best off if we knew Your Honor's preference as to having the separate narrative and whether you would like to have responses.

THE COURT: Okay. Can I just ask, in terms of what you all are contemplating, I mean, there are a couple of, in my mind, and maybe there's more, but there are -- there's one big legal issue. There are a number of important legal issues, but at least that was tied into the evidentiary motions that were filed pretrial, and that's this issue of procompetitive effects in other markets.

I am quite glad I did not endeavor to try and rule on that pretrial, because it clearly is an important issue and a complex one. So that's one big issue, in my mind, that's going to require more than just a basic, you know, discussion.

And then two, the second big issue that we've just sort of reserved on is all of the hearsay that's been coming in and how you all want me to consider it. I mean, I suppose you all could reach an agreement if you thought that was something that you could come to agreement to in terms of how I should consider the various types of hearsay that have come in.

So those are the two things that -- two important things that have been top of mind for me. There may be more. And so I'm curious how you are contemplating -- and I guess the third thing is any -- we had left open the possibility of objections

in connection with proposed findings of fact and conclusions of law, and that was meant to, you know, for efficiency purposes, at least with respect to those exhibits that have been pushed in.

Now, it may be the way you all have been operating is that all of those have been resolved and that's not anything I need to worry about. But I guess that's sort of the third of the issues and where those three would be placed in this proposed post-trial briefings.

MR. SCHMIDTLEIN: So the question of the competitive effects and the various markets, I would anticipate that the parties would address that in the conclusions of law and the briefs that would get filed, you know, both initially, they would both articulate their positions on law on that, because I think it is a legal question.

Obviously, there's a factual component that goes --

THE COURT: If I could just interrupt, I think -- let me ask you this, because from my standpoint, at least as I understand it, there is not a great deal of law on this issue. Maybe I'm wrong about that, but that's my understanding.

And I want to make sure, given its importance and given how much attention has been devoted to the evidence to that issue and how important it is to Google's defense, to not give it short shrift. And so if it means carving that out and putting it in something else, that's okay with me. I mean, I don't want

that issue to suffer in terms of its amplification because you're bumping up against page limits on all of the other legal issues that you have to deal with.

MR. SCHMIDTLEIN: Okay. Let me kind of confer with my team about that, but I anticipated that we would be able to address that within that conclusions of law portion.

In terms of the hearsay, the embedded hearsay, are we going to, you know, kind of continue -- have we reached a point of mutual assured destruction on that?

THE COURT: It seems like it.

MR. SCHMIDTLEIN: That may well be sort of where we are. But that may well be an issue that we both would benefit from seeing each other's initial proposed findings of fact.

And again, one of the reasons why I want the opportunity for a response is so that we can -- if the parties need to address those issues from an evidentiary admissibility standpoint, the response would be the document to deal with those issues and other issues that would come up.

But I suspect, Your Honor, we probably need to see each other's filings before we -- I think either side is going to be in a position where they will make a final decision on their position.

THE COURT: There's been, obviously, quite a bit of it admitted in a sense. On the other hand, it's not clear to me how much of it is ultimately going to be relevant. So that's

one.

And then two -- I'm trying to remember. There have been a handful of witnesses through whom hearsay has been admitted, and maybe there was a standing objection, maybe there wasn't, but certainly, most notably in my mind is the gentleman from Samsung and his testimony that did involve those issues.

MR. SCHMIDTLEIN: Right. I think this is one that the drafting process and as both sides think about the proposed findings that they want to rely on and the bases for it, I think that is going to crystallize people's thinking on that issue much more clearly than our thinking is at week 10 of the trial right now.

THE COURT: Okay.

MR. SALLET: Your Honor, could I just briefly supplement, just for sake of completeness.

THE COURT: Sure.

MR. SALLET: In terms of the legal issues, Google's pretrial brief did raise legal objections to the States-specific allegations, most notably what it labels "a duty to deal" issue. And we would, of course, expect to address that.

Secondly, in terms of evidentiary issues, just to remind the Court, last week, Mr. Schmidtlein and I made an agreement. There was a Baker slide, a slide from Professor Baker, and the three -- Your Honor will remember the three Microsoft documents that were subject to the motion in limine that you decided

pretrial to which Google later made an objection.

We agreed, to take them backwards, that we would use, the States would use those Microsoft documents in our post-trial filings. Google would have the opportunity to object on an evidentiary ground. And Your Honor would then rule upon it.

THE COURT: Right.

MR. SALLET: We agreed on the same thing with the single Baker slide.

So these aren't the biggest issues in the world, but they're also a part of the post-trial process.

THE COURT: All right. Okay. Anybody else wish to be heard?

MS. ONYEMA: Your Honor, if I may. I neglected to mention earlier when I noted our request for 500 pages for the proposed findings of fact, I did note that in Microsoft, I understand that the amended findings of fact, they were over 700 pages. So we think given the complexity of the case, the factual record, it is a request that -- is a page limit that we will need.

THE COURT: Okay. I'm not making any pronouncements just yet, but I will just say that it doesn't give me a heart attack. I was worried about a larger number that was a multiple of 500.

In *Sysco*, I think it was 300, and that was --

MR. SCHMIDTLEIN: Your Honor has heard a lot about

negotiating and how the negotiating dynamics work.

I will tell you that the initial proposal we got from them was unlimited pages. And so we will take credit for getting you to 500.

THE COURT: I do appreciate that. I appreciate that very much, because that would not have -- that would not have worked.

All right. Let me take all of this under consideration, and then we can hammer this out tomorrow and Friday such that -- well, maybe not even Friday, tomorrow -- I mean Thursday, excuse me, so that we all know what the schedule will be as we leave court on Thursday.

Okay?

MR. DINTZER: Your Honor, just -- as long as we're sort of looking ahead, if the Court has any thoughts on closing argument, just so that we can --

THE COURT: You mean timing or structure or both?

MR. DINTZER: Whatever the Court's pleasure, just if there's -- and of course, if the Court hasn't thought about it, but if the Court has, any guidance would be helpful for us.

THE COURT: I think what I can tell you is this: I've certainly started thinking about it, and most importantly what I've been thinking about is how to essentially clear my schedule for the run-up.

In light of what you all have just proposed, let me go back

and think about it in terms of timing, one, and two, in terms of structure. Look, I would be surprised if we could get it all done in a day. I think it's probably a multi-day argument that is structured similar to the way the summary judgment was structured, but with a lot of the issues that we did not have to deal with at summary judgment, most prominently market definition and procompetitive effects.

So there's a lot to go over. So I would be surprised if we could do it in a meaningful way in two days -- excuse me, in a day. Hopefully, it can be done in two days, but we'll just have to see.

But let me think about it and give it some more thought. Obviously, I welcome everyone's thoughts and input as well.

MR. DINTZER: We appreciate that, Your Honor.

THE COURT: Thank you all very much. We will see you tomorrow. Do not wait for me.

(Proceedings adjourned at 4:04 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick — November 14, 2023

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