

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,)	
)	
Plaintiffs,)	
)	
vs.)	CV No. 20-3010
)	Washington, D.C.
)	November 9, 2023
GOOGLE LLC,)	9:30 a.m.
)	
Defendant.)	Day 38

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

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PLAINTIFF'S	ADMITTED
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UPX2114	9628
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PSX00866.020	9632
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PARTY

ADMITTED

DX3246

9633

1 P R O C E E D I N G S

2 COURTROOM DEPUTY: All rise. The Court is now in
3 session; the Honorable Amit P. Mehta now presiding.

4 THE COURT: Please be seated, everyone.
5 Good morning, everyone.

6 COURTROOM DEPUTY: Good morning, Your Honor.
7 This is Civil Action 20-3010, the United States of America,
8 et al., versus Google LLC.

9 Kenneth Dintzer for the DOJ.

10 Jonathan Sallet on behalf of Plaintiff States.

11 John Schmidtlein for Google.

12 THE COURT: All right. Good morning, everyone.
13 I hope you are well.

14 Okay. So anybody want to raise anything before a
15 few matters that I have?

16 MR. SCHMIDTLEIN: Good morning, Your Honor.

17 As we noted yesterday, we're going to start off
18 today with Mr. Levy from Facebook. I have binders of
19 exhibits that are going to be referenced --

20 THE COURT: Okay.

21 MR. SCHMIDTLEIN: -- during his deposition.

22 There is one exhibit where there are some
23 redactions that Facebook has requested. I don't know if
24 there's a dispute as to those, and I think we're okay on
25 redactions having to do with the exhibits that are

1 referenced in the deposition, so I think that one is going
2 to be ready to play.

3 If you are following along in the clip report we
4 gave you yesterday, this morning the government has asked to
5 take out a small section, which I think we have been able to
6 remove, but we don't have new clip reports for you.

7 So if you see --

8 THE COURT: Okay. That's fine.

9 MR. SCHMIDTLEIN: -- a small little section that
10 skips, don't be alarmed, that's on purpose. I don't think
11 it materially changes the length which, I said, is about
12 54 minutes --

13 THE COURT: Okay.

14 MR. SCHMIDTLEIN: -- this morning.

15 So that's for our first order of business this
16 morning.

17 We did get last night the ordering of the rebuttal
18 witnesses from the plaintiffs. They are still, as they,
19 I guess, noted yesterday, they have Mr. Davies as some sort
20 of conditional may-call witness as the first witness for
21 Wednesday, I guess, assuming that we're going to get done
22 with Professor Murphy on Tuesday.

23 As we have indicated previously, Mr. Davies is an
24 improper rebuttal witness for a whole variety of reasons.
25 That is fully briefed.

1 He is also an improper witness under *Daubert*. He
2 is basically, as I now understand it, he is going to try to
3 respond on factual issues that he thinks that Mr. -- or
4 Professor Murphy does economic analyses as part of his
5 economic opinions. Mr. Davies is not an economist. He
6 purports to be some sort of smartphone industry expert. And
7 he is offering essentially factual opinions, in our
8 judgment, factual opinions that should have been adduced
9 from the actual fact witnesses like those you have seen
10 either live or by video deposition of the carrier witnesses.

11 He also was initially disclosed as an affirmative
12 expert witness in the case. He was supposed to testify, I
13 believe, in week two, and, for reasons that only the
14 plaintiffs know, he was not called as an affirmative
15 witness.

16 So the issues that he is being offered on, to the
17 extent that they could be viewed as appropriate, were issues
18 that should have been offered in the plaintiffs'
19 case-in-chief and not in rebuttal.

20 And so I don't want to make Your Honor do more
21 work than you need to, but this is a real live issue, and
22 Mr. Davies should not be permitted to lead off.

23 In our view, Mr. Oard should be able to testify
24 first thing on Wednesday. He should have limited opinions
25 that are addressed only to Professor Fox's DRE; and then,

1 given the length of testimony which they've estimated to be
2 two hours, he will be off the stand by early Wednesday
3 afternoon, in our view. Professor Whinston, they've
4 indicated his testimony is two and a half hours, we think he
5 should take the stand Wednesday afternoon, and we will bid
6 you at least a brief adieu on Thursday under that schedule.

7 So that is our position. Again, we would like
8 that ruled on. Thank you.

9 THE COURT: Okay.

10 Mr. Dintzer, before you --

11 MR. DINTZER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. DINTZER: So counsel raises a number of
14 issues; I'll try to hit them.

15 We were under the impression that the Court wanted
16 to wait and address the Davies issue after Professor Murphy
17 testified to see if there was a live issue. We are prepared
18 to have an argument on that if the Court -- if it pleases
19 the Court. But as far as we're concerned, I mean, if
20 Professor Murphy doesn't go into the waters that he and
21 Mr. Davies have conflicted about, then we won't have
22 anything to rebut, and, if he does, then we believe we
23 should be able to rebut it. But we are prepared to address
24 their filing if the Court -- if that would please the Court.

25 With respect to our schedule, if Mr. Davies

1 testifies, he'd testify first. If he doesn't, either
2 because Professor Murphy doesn't go into these waters or
3 because, obviously, if the Court grants their motion and we
4 can't bring him, then Professor Oard would be the first
5 person, he would testify Wednesday morning.

6 Either way, for Professor Whinston to be fully
7 prepared, we would like to call him Thursday, given that we
8 have not raised any issues about Google's carrying Professor
9 Murphy to next week and all of us sitting through video and
10 half-days to accommodate him, and we've made no issue.
11 We're kind of surprised that they didn't even raise this
12 with us before they raised it with the Court. But we stand
13 ready, of course, to do it as the Court would prefer.

14 THE COURT: Okay.

15 Let's do this. Let me go back. I read the papers
16 a few days back. Let me refamiliarize myself with them when
17 we take a break this morning, and then we can have a
18 conversation about it after the videos have run, and so it
19 will be fresh in my mind.

20 You know, I would -- well, let's just do it that
21 way, and we'll have some time obviously probably later this
22 morning or just around lunchtime to have a discussion about
23 that.

24 MR. DINTZER: We appreciate that, Your Honor.
25 Thank you.

1 THE COURT: All right. So -- all right.

2 Just quickly then, unless there's anything else,
3 let me just state for the record, I have reviewed the
4 parties' designations for Mr. Levy, it is, right, and
5 Mr. Ezell's proposed video depositions that will be played
6 in open court.

7 In both instances, both -- at least the third
8 parties; that is, Facebook in one case and AT&T in the
9 other, and also presumably Google, at least with respect to
10 Mr. Ezell's transcript, is seeking the muting of certain
11 testimony in open court. That information largely falls
12 into three categories. One is revenue share percentages
13 that are reflected in Mr. Ezell's transcript, revenue share
14 amounts that are reflected in Mr. Ezell's transcripts, and
15 then internal figures concerning impacts of certain
16 technological changes that are reflected in the Facebook
17 transcript of Mr. Levy.

18 So I've reviewed those proposed redactions or
19 mutings for public playing. I think it is appropriate,
20 given the *Hubbard* factors, to do it that way.

21 Again, while there is a public interest because
22 these are being presented in an open, public trial, these
23 are not numbers that have been publicly disclosed
24 previously. They are highly sensitive commercial
25 information that, if disclosed, could cause either

1 competitive disadvantage or the disclosure of material,
2 nonpublic information that could have market effects in
3 particular, certainly Facebook's projections about revenue
4 losses as a result of certain changes made by Apple.

5 So I think, for those reasons, I agree that the
6 propose -- I'm fine with the proposed redactions in the
7 transcript and muting those portions while the live
8 transcripts are being played -- excuse me, while the live
9 testimony is being played.

10 All right. So with that --

11 MR. SCHMIDTLEIN: Just one more thing just to
12 clarify for the record.

13 On the Levy one, just to clarify, we're doing this
14 a little bit out of order in the sense of the other
15 depositions you've seen sort of have just played
16 sequentially as the deposition occurred. In this, we're
17 flipping them a little bit because Google's examination of
18 Mr. Levy came second in time during the deposition. As you
19 recall, we had a discussion about how to allocate the time
20 when both parties cross noticed.

21 THE COURT: Right.

22 MR. SCHMIDTLEIN: So you will hear sort of
23 Google's examination first even though it occurred second in
24 time and then the counter-designations from government
25 counsel's examination will be the second encounters.

1 THE COURT: Great. Okay. Thank you.

2 MS. TRAGER: Good morning, Your Honor.

3 Lara Trager.

4 With respect to the video designations of
5 Mr. Levy, there's also one document that we understand is in
6 the Court's binder only in redacted form, and we have
7 stickered that and would like to hand that up.

8 THE COURT: Okay. Thank you.

9 MS. TRAGER: Thank you.

10 THE COURT: Just two more housekeeping matters.

11 With respect to the filings from Apple and Google
12 last night about the two exhibits, I've reviewed both of
13 those filings that were made, I want to give it some more
14 thought. I had hoped to be in a position to rule orally
15 this morning, I don't think I am, because I do want to take
16 a closer look at the prior transcripts and some of my prior
17 rulings before I make a firm decision. So we'll either
18 issue a written order this afternoon or I may just rule
19 orally on Monday.

20 And then insofar as the exhibits that were
21 presented to me on October 19th, I will be ready to talk
22 about those at the end of the morning, so we can discuss
23 those after the video exhibits have been played, okay?

24 All right. With that, we roll the tape.

25 (Video deposition of Daniel Levy played)

1 THE COURT: Can we pause this for a moment? Can I
2 have somebody direct me to where in this document he's
3 being -- it's a long email so I want to just have where you
4 all are.

5 I see where we are. Thank you.

6 (Video played)

7 MR. SCHMIDTLEIN: That's the conclusion of
8 Mr. Levy.

9 The next one Your Honor, the witness we would call
10 is Jeffrey Ezell from AT&T. The approximate run time on his
11 video is about an hour and 47 minutes. So we're happy to
12 start that or we'll break or whenever.

13 THE COURT: Why don't we go ahead and start it and
14 we'll break at our usual time at 11:00.

15 MR. SCHMIDTLEIN: Okay.

16 MS. TRAGER: May I, Your Honor?

17 THE COURT: Yeah.

18 MS. TRAGER: Before we move on to that, I would
19 just like to note that most of the documents included in the
20 testimony that was just played via video have been admitted
21 but not all, and we would move to admit the ones that have
22 not. May I read those into the record?

23 THE COURT: Sure.

24 MS. TRAGER: UPX2113, UPX2114, UPX2116, UPX2117,
25 and UPX2131. Thank you.

1 THE COURT: All right. Thank you, Counsel.

2 (Plaintiffs' Exhibits UPX2113, UPX2114, UPX2116, UPX2117,
3 and UPX2131 received into evidence.)

4 MS. WASZMER: Your Honor, when we discussed this
5 with the government yesterday, they told us they would give
6 us a chance to try to respond to whatever they sought to
7 admit so I just ask the chance for us to discuss with them.

8 THE COURT: Oh, okay. When you say respond, you
9 mean --

10 MS. WASZMER: So there are more exhibits that we
11 were presented and we asked them yesterday whether they were
12 going to seek to admit them and they said we'd deal with it
13 later. I would just like to confer with my colleagues and
14 the government because there's more documents in that
15 binder.

16 THE COURT: Oh, okay.

17 I just assumed that these were the exhibits that
18 were referred to during the deposition.

19 MS. WASZMER: We would just like a chance to look
20 at them. Because we're in meet-and-confers about all
21 exhibits being pushed in.

22 THE COURT: Okay.

23 MS. WASZMER: Thank you.

24 (Video deposition of Jeffrey Ezell played)

25 MR. SCHMIDTLEIN: I'd ask to pause there if that's

1 a good time.

2 THE COURT: That's a great time. Thank you.

3 All right. Let's resume at 11:15. See you all
4 shortly. Thank you.

5 COURTROOM DEPUTY: All rise. This Court stands in
6 recess.

7 (Recess from 11:01 a.m. to 11:18 a.m.)

8 COURTROOM DEPUTY: All rise.

9 This Honorable Court is again in session.

10 THE COURT: Please be seated. Thank you,
11 everyone.

12 MR. SCHMIDTLEIN: So, Your Honor, mindful of,
13 I know we usually break at 12:30 for lunch. The remainder
14 of the video is going to -- if we play it all the way
15 through right now, we'll go till, I think, roughly 12:45.

16 THE COURT: Okay.

17 MR. SCHMIDTLEIN: So with your indulgence,
18 let's -- we'd like to just play it and be done.

19 MR. SALLET: Can I just note one thing that you
20 and I talked about?

21 At the end, even though it will be 12:45,
22 Mr. Schmidtlein and I have an agreement on the introduction
23 of some exhibits, a statement about a couple of exhibits and
24 an agreement that some contested issues should be dealt with
25 in post-trial briefing.

1 Might I do that at the end as well?

2 THE COURT: Sure.

3 MR. SALLET: Thank you.

4 THE COURT: That's fine.

5 Yeah, we'll have some time to wrap things up.

6 We've got some issues that I want to -- now I see
7 Professor -- I mean, Mr. Davies' rebuttal, I want to talk
8 about that and a few other things. So we'll just tack that
9 on to the end of the testimony instead of breaking it up
10 with lunch.

11 All right.

12 (Video deposition of Jeffrey Ezell continued)

13 THE COURT: All right, everyone.

14 MR. SCHMIDTLEIN: Your Honor, just for the record,
15 there were a variety of exhibits that you were able to see
16 and you had in your binder.

17 It's my understanding all of those exhibits have
18 already been admitted into evidence, so no more housekeeping
19 needs to be done on the Ezell deposition.

20 THE COURT: Okay. Terrific. Thank you.

21 All right. Mr. Sallet, you wanted to put
22 something on the record?

23 MR. SALLET: Yes. Thank you, Your Honor.

24 So Google and we, Mr. Schmidtlein and I, have
25 reached an agreement on the handling of a set of exhibits

1 that have been in controversy.

2 I'd like to hand up a set and push into evidence
3 exhibits on which we agree, although there is a statement
4 I will make as attached to four of them.

5 So these -- this is an agreement on different
6 documents that we have been discussing, some of which have
7 to do with SA360, for example, one of which is a correction
8 of a mistake, we just made a typographical error earlier.
9 Google agrees to this.

10 We've also agreed that an explanation will be
11 provided to the Court as regards to the exhibits that have
12 the most digits in them. There are four Baker exhibits,
13 PSX00866.020, -021, -022, and -023.

14 And as to those exhibits, we want to represent
15 that they contain analysis from the plaintiffs' expert --
16 Plaintiff States' expert Jonathan Baker, regarding SVPs
17 share of visits referred by general search firms. At the
18 request of the defendant, the Plaintiff States represent
19 that these figures contain analysis from Similarweb, which
20 monitors website traffic and does not include traffic to SVP
21 apps.

22 Defendants have moved into evidence similar
23 analysis from their expert, Professor Elzinga, such as
24 DX0256, containing information in both website and app
25 traffic for the same SVPs.

1 THE COURT: Terrific.

2 MR. SALLET: Thank you, Your Honor.

3 THE COURT: Thank you.

4 All right. Ms. Waszmer?

5 MS. WASZMER: Your Honor, Wendy Waszmer for
6 Google.

7 Just to clean up on the exhibits from the Levy
8 video deposition designation, Ms. Trager and I have reached
9 an understanding and as to the government's exhibits that
10 she sought to introduce, UPX2113, UPX2114, UPX2116, UPX2117,
11 and UPX2131, Google does not object to admission.

12 And then we just have one that was also
13 referenced, DX3246, and Ms. Trager has indicated the
14 government does not object to that admission. Thank you.

15 MS. TRAGER: That's right.

16 THE COURT: All right. Terrific.

17 (Plaintiffs' Exhibits UPX2113, UPX2114, UPX2116, UPX2117,
18 and UPX2131 received into evidence.)

19 (Defendant's Exhibit DX3246
20 received into evidence.)

21 THE COURT: All right. Thank you.

22 Mr. Schmidtlein.

23 MR. SCHMIDTLEIN: Sorry, Your Honor.

24 THE COURT: That's all right.

25 MR. SCHMIDTLEIN: I've been told by my team that

1 I should clean up our houses as well.

2 I'm just going to hand up another set of exhibits
3 that we're pushing into evidence. We've conferred with
4 counsel for the plaintiffs, and I believe that the
5 representations on here they're either unobjected to or is
6 our standard hearsay, embedded hearsay objection and/or
7 they're demonstratives that will be treated as
8 demonstratives.

9 THE COURT: Okay.

10 These are previously shown or these are --

11 MR. SCHMIDTLEIN: Yes, either previously shown in
12 terms of demonstratives or exhibits that the parties have
13 conferred on about pushing in and we have agreement.

14 THE COURT: Great. Okay. Thank you.

15 MS. JENSEN: Your Honor, the government has no
16 objection except for the stated objections in the handout.

17 THE COURT: Oh, okay.

18 MR. SCHMIDTLEIN: It's the embedded hearsay.

19 MR. SALLET: And, Your Honor, Plaintiff States
20 take the same position.

21 THE COURT: Terrific. All right. Well, let's
22 just take a few minutes to address a few outstanding
23 matters.

24 To close up on an issue that was at the end of the
25 day yesterday, I had -- this was the request to seal a

1 couple of percentages that had been mentioned in the public
2 proceeding inadvertently, and I just sort of put to you,
3 Mr. Schmidtlein, whether there was any authority for me to
4 kind of retroactively remove those from the public record.

5 MR. SCHMIDTLEIN: I am told that there is mixed
6 authority at best on that proposition.

7 I will also -- I'd also just like to state,
8 Your Honor, we did get an outreach last evening from
9 Verizon's counsel, and I think they are still considering
10 whether they want to be heard on these issues, because these
11 are percentages that pertain to the negotiations with them
12 and they only heard about them late yesterday.

13 I guess I would also just say, I am aware of at
14 least one instance of inaccurate reporting of those
15 percentages, in other words, a mischaracterization by a news
16 organization that is following this proceeding about these
17 percentages. That is very harmful to us.

18 I'm also -- I just want to state for the record,
19 I'm also very troubled by Mr. Dintzer's statement yesterday
20 that -- I'm not going to characterize or I'm certainly not
21 going to suggest that people are intentionally violating the
22 rules of the Court here by disclosing these matters or that
23 people are not doing their very best; but there have been
24 numerous instances where government counsel or one of their
25 witnesses has uttered things that are confidential, that are

1 very, very sensitive business terms. We had a filing about
2 one of these the other day, where they had to pull something
3 down because their filing improperly included materials.

4 And for them to stand up and suggest at this point
5 that every time this happens, oh, that once it's out in the
6 wild, gee, there's just nothing we can sort of do about it,
7 suggests to me that whatever rules we have here have no
8 teeth to them, and I'm certainly not going to get up here
9 and try to suggest we should start sanctioning attorneys for
10 this; but if we have no mechanism, limited as it may seem to
11 the Court, to be able to try to address these things, you
12 know, we still have expert witnesses who are going to be
13 testifying about things that matter very deeply to my client
14 and to third parties here.

15 And so I'm not going to sit here and tell
16 Your Honor I've got ironclad authority, and there's
17 certainly cases out there where the courts have said, once
18 it's out, it's out. But I would respectfully ask that,
19 under these circumstances, we do have an interest and
20 Verizon may want to be heard on that, and I know there's a
21 timing issue and you are trying to be, as you should be,
22 very cognizant of pushing out transcripts and making these
23 things public.

24 I don't know if they're going to want to file
25 something today. We've told them that Your Honor is

1 urgently trying to address these things and I'm going to
2 confer with them later this afternoon.

3 But our request stands that we would like this
4 redacted, given the broad interest and the harm that we
5 think has occurred as a result of some of these disclosures
6 in the past.

7 Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. DINTZER: Your Honor, regarding this specific
10 disclosure that counsel references, it was -- there was a
11 reference made by our attorney and then there was a separate
12 reference made by the witness.

13 I don't know how you equivocate those or measure
14 those. I believe everybody is doing their best. The idea
15 of waiving sanctions and then saying, we're not asking for
16 them, I don't even know what that means. And counsel has
17 not shared their legal authority with us that they say is
18 mixed.

19 All I can say is that we've spent, I think I can
20 say with confidence, hundreds of hours doing everything we
21 can do keep the train moving, to keep confidentiality and to
22 do everything as the Court has asked, and as we believe is
23 our responsibility.

24 And so, you know, I appreciate the sensitivity
25 that they bring. My entire team appreciates that, and we

1 have all done our best. And sometimes mistakes are made by
2 us or the witness or Google's counsel or the people running
3 the charts or whatever. It raises a completely separate
4 question about what happens when that's on the record.

5 By our read, I mean, we don't have a dog in the
6 fight except for making sure that the record is accurate and
7 the public gets the information to which they're entitled
8 to. Once it's on the record, to take it off the record
9 would seem to be inconsistent.

10 They show us -- we have not done the research. If
11 they show us research that says otherwise, I'd be happy to
12 discuss it. They haven't shared that with us. But I have
13 to address this with when counsel is wafting accusations
14 without any merit or -- and not even asking for anything,
15 just floating that. So I did need to address that,
16 Your Honor.

17 THE COURT: Okay.

18 You know, we'll take a look, too, Mr. Schmidlein.
19 If you want to send us any authorities that you think are
20 relevant, we're happy to take a look.

21 And in terms of the, what I think as a general
22 proposition has been inadvertent disclosures, we weren't
23 going to bat a thousand, it's just human nature, and I think
24 we've done a pretty good job overall in maintaining the
25 confidentiality -- or the areas that I think are

1 appropriately confidential and, you know, even the best
2 tennis players have an occasional foot fault, and I think
3 that's where we find ourselves.

4 Okay. So that's that.

5 Let's talk quickly about the exhibits that are
6 here. Let me just go through them if I can, and if I want
7 discussion, I'll ask for it.

8 So the first one is UPX711, which I take it is
9 simply an example of an instance in which employees of
10 Google have affixed a confidentiality -- privileged
11 confidentiality stamp to an email without getting any legal
12 advice in return.

13 MR. GOWER: Your Honor, that's a part of it, but
14 not actually the primary piece.

15 The part that we're most interested in was on
16 page 2, where the author of an email said, "I've obfuscated
17 the per device search monetization into three buckets; high,
18 medium, and low, annual 2019 search rev per device as per
19 legal guidance from a litigation perspective." We say this
20 is an instance of Google transforming evidence that might be
21 unfavorable into evidence that is either favorable or less
22 unfavorable for the purposes of it looking better later in
23 court.

24 THE COURT: Okay. Mr. Schmidtlein.

25 MR. SCHMIDTLEIN: Your Honor, they're

1 misrepresenting what the import of that email has to do
2 with. If they had asked Mr. Yoo, who sat right there in the
3 witness chair in this courtroom when he was called to
4 testify by the United States, he would have explained that
5 this has to do with making sure that monetization figures
6 that are being circulated, that are specific to certain
7 types of devices, do not get shared with other people in the
8 organization; i.e., people dealing with Apple who are not
9 allowed to get access to those types of things.

10 This has nothing to do with hiding information
11 from legal. They had an opportunity to ask the witness who
12 wrote this email and they chose not to.

13 MR. GOWER: Your Honor, we note that it says "per
14 legal guidance from a litigation perspective." It does not
15 appear to be an instance of trying to make sure that the
16 information is not leaked to a third party.

17 As to raising this with a witness, I'll note that
18 this is one of only two documents in the binder that was
19 authored by a witness that testified here. At the time we
20 moved to admit them, the witness had already left the stand.
21 We believed that pushing in documents were appropriate and
22 we believed that this document spoke for itself.

23 THE COURT: Okay.

24 Well, look, given the inference that the
25 government would like, the plaintiffs would like me to draw

1 from this, it doesn't seem to be on a topic that is relevant
2 to the issues at hand. Maybe I'm misinterpreting it, but
3 bottom line is, there was a witness here, it does seem to me
4 to be unfair for me to draw any kind of inferences from a
5 document that could have been explicated, not only by the
6 plaintiffs but Google would have had an opportunity to have
7 done that while the witness was on the stand. So given that
8 feature of this, I am going to exclude that particular
9 exhibit.

10 All right. Let's turn to the next one which is
11 UPX929. And I take it this is an example of what we saw
12 yesterday concerning sort of guarded language about
13 antitrust topics or antitrust issues.

14 MR. GOWER: Yes, there's two instances here of
15 mentionings of a search market, including search market by
16 country, which is exactly the market we've alleged. The
17 person who said it was told not to say that and was told
18 that this was unhelpful.

19 THE COURT: Let me just ask Google what their view
20 is on this one. I don't think any of these witnesses have
21 come in to testify. I don't know whether any of them were
22 deposed.

23 MR. SCHMIDTLEIN: No, Your Honor, these --
24 everybody who is involved here, this has to do with Europe
25 and matters going on in Europe. This has nothing to do with

1 the United States and none of these witnesses were called
2 to -- were deposed in the -- were deposed in this case.

3 THE COURT: All right.

4 So I'll allow this one in. I think there's some
5 probative value to this. Since we saw the document
6 yesterday that was providing advice about how to handle it
7 antitrust concepts and communications, and this, I think, is
8 an example of it even though it falls outside of the U.S.
9 market that's been alleged here. And I don't think the
10 unfair prejudice outweighs the probative value of it, unlike
11 the prior document that I'm excluding.

12 MR. GOWER: Thank you, Your Honor.

13 THE COURT: So what do we have next? Next we have
14 UPX973.

15 Now, isn't this already in evidence?

16 MR. GOWER: This is a document that we were able
17 to use with a witness after we had moved him in and it was
18 the only opportunity after moving so we did it.

19 Sorry, the initial motion was on October 19th,
20 I believe, and Mr. Pichai testified after that so we made
21 sure to use this document from the binder with him and it is
22 now in evidence, so this document is no longer part of our
23 motion.

24 THE COURT: That's what I thought. I thought this
25 was in evidence. That solves that one. Okay.

1 Then we've got 1039. I didn't put a note on this.
2 Help me place why --

3 MR. SCHMIDTLEIN: This is an example, Your Honor.

4 THE COURT: Hang on, Mr. Schmidtlein.

5 Hang. Let me ask counsel for the Department first
6 and then I'll get a response.

7 MR. GOWER: Right.

8 Now, this is the second of two documents that I
9 mention that are still alive that was written by a witness.
10 It was -- we believe it speaks for itself. There was a
11 request for an attorney to give advice towards the bottom of
12 the page; someone notified the person, you didn't even
13 include the attorney on the email, and then the response
14 was, "I think I just now typed, Kate, please advise, on
15 autopilot."

16 We don't believe that this requires any
17 imagination to understand what this person was saying, the
18 requests for legal advice are sometimes used on autopilot
19 and we believe that's a relevant fact.

20 THE COURT: Okay.

21 Look, again, I think this falls in the same
22 category as the first document. If this was something that
23 plaintiffs wish to have introduced, Ms. Kartasheva was here,
24 not only are you asking me to draw certain inferences that
25 she might have had the opportunity to explain, obviously

1 Google counsel could have also questioned her about it. So
2 I do think the prejudicial quality of this, not having had
3 the opportunity for a witness who was here live to explain
4 it, outweighs its probative value.

5 MR. GOWER: Understood.

6 THE COURT: All right. So the next one, 1042.

7 MR. GOWER: Yes.

8 This one, the focus is primarily on this third and
9 second email down from the top. This is Android employees
10 discussing the MADA. One writes, "Thread kill please," and
11 the other basically advises the person that rather than
12 saying "Thread kill, you should copy a lawyer and make it
13 privileged to get internal consultation."

14 THE COURT: Okay.

15 MR. SCHMIDTLEIN: This document involves matters
16 that are completely unrelated to any of the claims that are
17 in this lawsuit, and it involves witnesses who -- I mean,
18 just the subject matter, you read through this, this has
19 nothing to do with any issues in the case, and it certainly
20 has nothing to do with any witnesses who've been called in
21 the case.

22 I don't know how we can defend ourselves against
23 an email that has zero context to anything that is still
24 live in dispute in the lawsuit.

25

1 MR. GOWER: Your Honor, with respect to relevance,
2 we'd direct Your Honor to the second page of our Q2 list.
3 "What do we say when Android partners want to load the same
4 apps on their Play Store list Android devices." This thread
5 is discussing the MADA, it's discussing the Play Store.
6 We believe the relevance ties in through the MADA.

7 MR. SCHMIDTLEIN: The Q1 talks about Android run
8 time on Tizen, which is a completely different operating
9 system that Samsung operate -- I think you may have heard
10 some passing reference to it. And I think this has to --
11 I'm being told -- yeah, this has to do with matters in
12 Korea. This literally has nothing to do with the
13 United States market whatsoever.

14 THE COURT: Okay.

15 Look, in a sense, this all seems somewhat
16 cumulative to me. I understand the desire to -- because of
17 the word that was used here by the Google employee, but
18 we've seen lots of -- to the extent that plaintiffs are
19 going to stand up at the end here and ask me to draw some
20 inferences about Google's treatments of attorney-client or
21 at least the label attorney-client privilege, there are lots
22 of documents that you can use as examples of that. So given
23 the fact that this is not directly related, I think we'll
24 go ahead and just exclude it.

25 MR. GOWER: Understood. Thank you, Your Honor.

1 THE COURT: And the next three are sort of the
2 same bucket and they all just relate to changes in the chat
3 retention policy.

4 MR. GOWER: Correct.

5 The first version of the chat retention policy was
6 entered -- excuse me, the first version of a written formal
7 chat retention policy was entered through Mr. Kolotouros.

8 THE COURT: Right.

9 MR. GOWER: A 2008 emailed version of the chat
10 retention policy was entered through Mr. Pichai. These
11 three are the three most recent versions, specifically
12 descendants of the ones looked at with Mr. Kolotouros.

13 THE COURT: Any objection to these?

14 MR. SCHMIDTLEIN: No, no objection.

15 THE COURT: So they'll be admitted then.

16 (Plaintiffs' Exhibits UPX973, UPX711, UPX929, UPX973,
17 UPX1039, UPX1042 received into evidence.)

18 THE COURT: So 1095 is a document that is hard to
19 understand, but I take it you'd like to admit it because
20 somebody references a chat-off request.

21 MR. GOWER: Yes, Your Honor.

22 The relevance of this document is all at the top.
23 You can see, first of all, a note that WPA at the top is a
24 whole page auction so this is related to an auction for
25 search ads.

1 But more importantly the main reason why we've
2 introduced this is to show that even employees who want to
3 preserve chats affirmatively have those chats deleted
4 because of the history-off policy. So we think that further
5 enforces the consequences of having history-off defaulted --
6 as the default. Even employees that want to preserve their
7 chats have them lost.

8 THE COURT: Can I ask the following question,
9 which is, I mean, there are two issues here, it seems to me,
10 but -- that emerge from the same topic which is this
11 chat-off history stuff.

12 There's the question of the sanctions, and it's
13 not clear to me that this would be relevant to the sanctions
14 because the email is dated 2017, and so conduct that
15 precedes whatever the magic date is that they should have
16 preserved, this wouldn't fall within that bucket. That's
17 one.

18 Two, I mean, are you seeking to use this
19 potentially alternatively, I suppose, as sort of -- some
20 kind of state of mind evidence? Is that what we're talking
21 about here?

22 MR. GOWER: Well, I'll say first, with regard to
23 your first point, we're not saying this is sanctionable
24 conduct. I mean, this employee wants chats retained. We're
25 using this to show Your Honor that employees who do want

1 their chats retained lose them because of the default
2 setting on chats is powerful, and we think that fact,
3 although it was stated in 2017, remains -- that's a facts
4 true throughout the time of this case and throughout the
5 entire computer era.

6 So we think it goes -- yes, we think it does go to
7 spoliation. The motion even though the evidence itself
8 comes from before with the time, this is not the conduct
9 we're saying is unlawful, we're saying these are the facts
10 that should have been interpreted -- that should have been
11 known when we view the decision that Google made to set its
12 policy to history off.

13 THE COURT: Okay.

14 Well, if that's the basis, then I'm going to
15 exclude it because I do think if it's primarily -- if what
16 I'm hearing you say is this relates to the spoliation issue,
17 given that the email is prior to any investigation that was
18 launched by the Department of Justice or the States, it
19 seems to me pretty weak evidence of the spoliation argument
20 that you want to make, and so I don't see the relevance of
21 it at the end of the day to a spoliation issue. All right.
22 So I'll exclude 1095.

23 And then we've got an example, maybe this was in
24 and maybe it wasn't, but this is UPX1100, and I guess
25 I should have named the last exhibit which was UPX --

1 MR. GOWER: 1096 precedes that one.

2 THE COURT: Right, UPX1096, sorry.

3 This, I think raises the same issue, right?

4 MR. GOWER: So, Your Honor, for this one, we're
5 pointing to Bates 409, I think it's the, let's see, first,
6 second, third.

7 THE COURT: Right, this is just in terms of a
8 policy change of how the chats would be preserved?

9 MR. GOWER: So we're offering this just to show
10 that Google has the technological capability to set the chat
11 history to on and that Google has the technological
12 capability to ensure that --

13 THE COURT: Is there any dispute about that?

14 MR. GOWER: Well, I don't know. If they'll
15 stipulate to the two facts, if I can say them both, that
16 they can turn history on and that they can make it where the
17 custodian is not able to flip history off, those are the two
18 facts we're trying to establish through this email. So if
19 they're stipulated to, then we don't need this document.

20 MR. SCHMIDTLEIN: This is actually a very, very
21 technical issue that has not been raised with us. If they
22 want to raise with us the specific technical things that
23 they want a stipulation to, we'll hear them, but it hasn't
24 been raised to us, and this document certainly does not
25 provide some sort of categorical explanation on this issue,

1 that's for sure.

2 THE COURT: Okay. So why don't you all have a
3 discussion about it and then we can, if there's still a
4 dispute, we can take it up.

5 MR. GOWER: Understood.

6 THE COURT: And then UPX, and that last one was
7 UPX1096 so we're up to UPX1100. And is this --

8 Well, tell me what you think this is an example
9 of.

10 MR. GOWER: Right.

11 Yes, Your Honor.

12 If you look at the top, there's a discussion about
13 Mr. Jerry Dischler, who's not on the thread but he's
14 discussed, you've heard from him.

15 And then below, a deponent in this case says,
16 "I can set up a briefing meeting," this is on the third
17 line, and then she explains in her next message why she
18 wants to discuss it in person as opposed to in writing and
19 she says, "The DOJ case is making the content very sensitive
20 to share via email these days."

21 And we think this is another instance of Google
22 avoiding putting unfavorable facts into a preserved form.

23 THE COURT: Okay. Any response?

24 MR. SCHMIDTLEIN: This is certainly not evidence
25 of people trying to hide unfavorable facts. It's a

1 discussion about, we should talk about this live in person
2 before people start willy-nilly writing things that may or
3 may not be accurate. This is -- to the extent they -- this
4 is cumulative of others -- you know, evidence of people
5 saying, hey, listen, we're under scrutiny here, be careful
6 about how we think and write about things, and they haven't
7 used this with any witness during -- either during discovery
8 or during trial.

9 THE COURT: Okay.

10 MR. SCHMIDTLEIN: This -- I think one of the
11 witnesses who was on this chain was initially on their
12 witness list for the trial and they then dropped her and
13 didn't call her.

14 THE COURT: All right. I'll allow it in. I mean,
15 there's some probative value to it, and I don't think it's
16 unduly or unfairly prejudicial.

17 So I'll allow UPX1100 in, okay?

18 MR. GOWER: Thank you, Your Honor.

19 (Plaintiffs' Exhibit UPX1100
20 received into evidence.)

21 MR. GOWER: And just for the record, I'd like to
22 just read out the UPXs for the three chat policies, and that
23 was UPX1089, UPX1090, and UPX1091. And I understand those
24 were admitted.

25

1 THE COURT: Yes, they were admitted.

2 MR. GOWER: Great. Thank you.

3 (Plaintiffs Exhibits UPX1089, UPX1090, and UPX1091
4 received into evidence.)

5 MR. SCHMIDTLEIN: Your Honor, as you may remember
6 from the briefing on this issue, we produced, as exhibits to
7 our briefs, a voluminous collection of correspondence with
8 the department and other materials that we say evidences the
9 fact that they were aware of --

10 THE COURT: Right.

11 MR. SCHMIDTLEIN: -- all these collection
12 policies?

13 Do you want us to push those into evidence?

14 THE COURT: No.

15 MR. SCHMIDTLEIN: Okay.

16 THE COURT: No, I can now -- thank you for raising
17 it. What I can formally say is that whatever was submitted
18 in connection with those exhibits, I will consider as part
19 of the overall record. Whatever has been admitted at trial,
20 I consider to be a supplement of the record that was made in
21 writing.

22 MR. SCHMIDTLEIN: Thank you.

23 THE COURT: Okay.

24 All right. Let's see if we can get through this
25 last issue quickly and that concerns our expert. What did I

1 do with my papers? There they are.

2 All right. So look, I guess the question, maybe
3 let me just -- let me just put the question to the
4 plaintiffs, which is, if -- what is it about Professor
5 Murphy's testimony that you expect that you would call
6 Mr. Davies to rebut?

7 I mean, you've provided some examples, but it
8 would be helpful to have that clarified.

9 MS. ONYEMA: Veronica Onyema for the
10 United States, Your Honor.

11 THE COURT: Ms. Onyema.

12 MS. ONYEMA: At this time, we don't know
13 precisely, obviously, what Professor Murphy is going to
14 testify about. But in terms of sort of the relationship
15 between the reports between Professor Murphy and Mr. Davies,
16 we anticipate that Professor Murphy might get into talking
17 about market dynamics in terms of how OEMs respond to those
18 dynamics and enter in contracts related to these search
19 distribution contracts and the MADA. There could be other
20 issues that come up. We really would want to wait to hear
21 his testimony to be able to see what we can directly rebut
22 based on Mr. Davies expertise and his opinions that he's
23 provided.

24 THE COURT: And you just -- I think I read his
25 summary a while ago, but just give me a preview of what --

1 if he's going to testify about, sort of consistently with
2 the back and forth with Professor Murphy; and if Professor
3 Murphy brings up those topics, what's he going to come in
4 and say?

5 MS. ONYEMA: Well, in terms of what he's already
6 kind of articulated in his opinions that the Court has,
7 I believe, seen before, he'll talk about how, for example,
8 Professor Murphy's analysis of the MADA is flawed, he'll
9 talk about potentially this idea that the MADA is a barter
10 between OEMs and Google. He'd be able to talk about those
11 issues. But they would relate to his core opinions which do
12 relate to the MADA.

13 We did tell Google, I can't recall when at this
14 point, that we were not anticipating that he was going to
15 provide testimony about the excluded opinion, Opinion 5.

16 But, again, this is rebuttal testimony so it
17 really just depends on what Professor Murphy does. We would
18 be directly refuting that.

19 THE COURT: Okay.

20 So, Mr. Schmidtlein, let me put the question to
21 you, which is, do you anticipate Professor Murphy touching
22 on the subjects that might draw a request for rebuttal
23 testimony?

24 MR. SCHMIDTLEIN: Your Honor, what you've just
25 heard are facts. This is -- he's not offering an expert

1 opinion. He wants to come in here and say, I disagree with
2 the facts, the fact record about what OEMs have actually
3 done in the case, and then Professor Murphy analyzes and
4 does an economic analysis of those facts. And they want
5 this expert to come in and say, I disagree with what the
6 OEMs sort of incentives are or what the OEMs -- you've heard
7 from the OEMs and you've heard from the carriers on this
8 point.

9 So Professor Murphy does do economic analyses
10 base -- and is going to do some economic analyses and offer
11 opinions based upon observations in the record, the factual
12 observations about what OEMs and carriers have actually
13 done.

14 What this witness has been from day one is an
15 attempt to sort of rebut or try to get in, sneak in fact
16 testimony that he is completely unqualified and has no bases
17 to offer because he's not an OEM and he's not a carrier.

18 He claims to have talked to them over the years.
19 He's not talked to them about the Android operating system
20 agreements.

21 And so what you've heard here is completely
22 improper. And he has no bases -- he's offered no opinions
23 about the "barter," you know, Professor Murphy's analysis of
24 the barter.

25 And, finally, as I said before, if he wanted to

1 offer those opinions, he needed to be here in the
2 case-in-chief to offer them, not on rebuttal.

3 THE COURT: Okay. Well, just, let me just address
4 that last point.

5 I mean, I've looked at the cases that Google has
6 cited and I don't see any of them that sort of stand for
7 this proposition because somebody was designated as an
8 affirmative expert and wasn't called in the case-in-chief,
9 he can't be called in rebuttal.

10 Now, depending upon the subject matter,
11 I understand, you know, the one Third Circuit case that was
12 cited, for example, actually involved an expert doing
13 testing the night before the person was going to be called,
14 so we're in a slightly different situation, I would say.

15 But all that said, look, I think, you know,
16 I think it would be imprudent of me to make a determination
17 right now without having a full opportunity to hear what
18 Professor Murphy is going to say and what the potential
19 rebuttal is.

20 What I can do is the following, which is
21 recognizing the uncertainty of whether he's going to be
22 called or not and what he would testify about, I can order
23 them to re-jigger the order of their witnesses to ensure
24 that you have adequate time to prepare for any rebuttal if I
25 allow it.

1 MR. SCHMIDTLEIN: Okay. That would be fine.

2 I also --

3 THE COURT: Because I recognize the unfairness of
4 where we are in some sense. And if Professor Murphy
5 finishes on Tuesday, to then have Mr. Davies go first thing
6 Wednesday morning would probably be -- would put some --
7 present some challenges.

8 MR. SCHMIDTLEIN: The other thing, I guess, just
9 to remind you, we do have a very, very live *Daubert* motion.

10 THE COURT: No, I know.

11 MR. SCHMIDTLEIN: On every aspect --

12 THE COURT: Which I need to go back and
13 refamiliarize myself with. I was able to re-read what was
14 recently filed, but in light of this, I do need to go back
15 and look at their *Daubert* motions because I guess until a
16 few days ago, I didn't even know it was going to be an
17 issue.

18 MS. ONYEMA: Your Honor, if I may, just to note,
19 we certainly don't want to rehash our *Daubert* opposition
20 right now, unless the Court would like to us to, but
21 Mr. Davies has 30 years of experience, he has worked with
22 numerous smartphone vendors. We're happy to talk about the
23 *Daubert*, but we believe it should be denied.

24 And I also just want to sort of, again, reiterate
25 the point that we make in our brief that Google's motion is

1 untimely. It's waived, in our view, because they have known
2 since the fifth day of trial that DOJ Plaintiffs intended to
3 not call Mr. Davies in their affirmative case and to save
4 him for any possible rebuttal. And so if they truly
5 believed that he was properly brought in our affirmative
6 case-in-chief, they should have raised it at a time when our
7 affirmative case-in-chief was not yet concluded. So that is
8 prejudicial to the Justice Department.

9 THE COURT: As I think I've ruled at least on the
10 timing issue, I'm not --

11 MS. ONYEMA: Understood.

12 THE COURT: -- I don't think that's the issue for
13 me.

14 The ultimate issue is going to be twofold: One is
15 whether he's actually going to come in and offer testimony
16 that is actually truly rebuttal testimony, one; and, two,
17 and I suppose the pre -- you know, the precursor question is
18 whether he's qualified to do that. But we'll just have to
19 wait and see what Professor Murphy says and whether there's
20 a basis to have him rebutted.

21 I guess that means, in terms of your sequencing,
22 I'd like to have Professor -- excuse me, Mr. Davies, if he
23 testifies, be the last of your three rebuttal witnesses.

24 MR. DINTZER: That won't be a problem, Your Honor.
25 Then what we'll do is we'll bring Professor Oard on

1 Wednesday, Professor Whinston on Thursday, and if he flops
2 over to Friday, to Friday, and then immediately after that,
3 Mr. Davies.

4 THE COURT: Okay.

5 MR. DINTZER: Thank you, Your Honor.

6 THE COURT: Mr. Schmidtlein.

7 MR. SCHMIDTLEIN: I don't know why
8 Professor Whinston is not taking the stand on Wednesday.

9 THE COURT: I thought you said he would take the
10 stand on Wednesday.

11 MR. DINTZER: No, Professor Whinston Thursday,
12 Professor Oard Wednesday.

13 THE COURT: Okay. All right.

14 Is Professor Whinston not available on Wednesday?

15 MR. DINTZER: Since Professor -- what counsel is
16 trying to do is they're trying to create a situation where
17 Professor Murphy finishes and 12 hours later
18 Professor Whinston has to take the stand without having the
19 chance to digest what Professor Murphy says.

20 In the same way that if -- I mean, it's really
21 amazing that counsel is raising this since they could have
22 called Professor Murphy today to start today and we could
23 have started him, and we have raised no issue about that,
24 and could have had him for the rest -- or started this
25 morning or instead of videotape.

1 We've been very, very cooperative with them with
2 respect to playing tape as opposed to actually bringing live
3 witnesses. And to deny us the order and the starting time
4 that we've asked to accommodate our witnesses and to make
5 sure we're prepared for court is really remarkable,
6 Your Honor, but that is what we are asking. Wednesday for
7 Professor Oard, Thursday for Professor Whinston. And to the
8 extent he needs to go Friday morning, which we're hoping he
9 doesn't, then Mr. Davies directly after that.

10 THE COURT: Okay.

11 MR. DINTZER: Thank you, Your Honor.

12 THE COURT: We'll work it out. You all don't need
13 to wait.

14 That's fine, we can start Professor Murphy --
15 excuse me, Professor Whinston, excuse me, on Thursday.
16 I'm just trying to figure out whether we can move something
17 that we have on Friday to give us a little extra time, which
18 it looks like we may need, particularly if Mr. Davies
19 testifies.

20 MR. DINTZER: We appreciate that, Your Honor.

21 THE COURT: Alternatively, it may just -- well, if
22 you're only expecting -- you're expecting two and a half
23 hours for Professor Whinston on direct?

24 MR. DINTZER: That is correct, Your Honor.

25 THE COURT: All right. So we ought to be able to

1 finish his examination on Thursday.

2 All right. So let's see where we are, okay?

3 Thank you, everyone we'll see you on Monday. Have
4 a nice long weekend. See everybody Monday. Thank you.
5 Don't wait for me, please.

6 COURTROOM DEPUTY: The Court stands in recess.

7 THE COURT: I would ask however if we could get
8 one more housekeeping with respect to these binders.
9 Thank you.

10 (Proceedings adjourned at 1:30 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: November 9, 2023



William P. Zaremba, RMR, CRR

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