IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,)
)
        Plaintiffs,   )
)   CV No. 20-3010
     vs.   )   Washington, D.C.
)   May 3, 2024
GOOGLE LLC,   )   9:00 a.m.
)
        Defendant.   )   Day 2
_____)   Morning Session

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

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

 2              COURTROOM DEPUTY:  All rise.  This Court is in

 3    session; the Honorable Amit P. Mehta presiding.

 4              THE COURT:  Good morning.  And please be seated,

 5    everyone.  Thank you.

 6              COURTROOM DEPUTY:  Good morning, Your Honor.

 7    This is Civil Action 20-3010, United States of America,

 8    et al., versus Google LLC.

 9              Kenneth Dintzer for the DOJ.

10              Jonathan Sallet and William Cavanaugh for

11    Plaintiff States.

12              John Schmidtlein on behalf of Google.

13              THE COURT:  Okay.  Good morning, everyone.

14              Sorry for the delay.  I was having a

15    non-Google-related tech issue.

16              All right.  So day 2, ads markets.

17              Mr. Dahlquist, unless there's anything

18    preliminarily, I'll turn the floor over to you.

19              MR. DAHLQUIST:  Nothing from the DOJ Plaintiffs,

20    Your Honor.

21              MR. SCHMIDTLEIN:  No, Your Honor.

22              MR. CAVANAUGH:  No, Your Honor.

23              THE COURT:  All right.  The floor is yours.

24              MR. DAHLQUIST:  Good morning, Your Honor.

25    David Dahlquist on behalf of the United States.
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1   Your Honor, advertising revenue is what drives

2   Google's monopoly power today. Without advertising revenue,

3   Google's feedback loop would stop spinning.

4   Without money, Google cannot pay the billions in

5   revenue share that you heard about yesterday.

6   Advertisers paid billions of dollars to advertise

7   on Google.

8   Google is not free for advertisers. They keep

9   paying Google, price increases and all, because they have no

10 viable alternatives.

11   Advertisers testified at trial that Google Search

12 ads, including text ads, are a mandatory or always-on

13 platform for digital advertising.

14   Ms. Tracy-Ann Lim from JPMorgan was here in this

15 court and testified to Your Honor that search ads is an

16 always-on channel, like an Evergreen Media channel, running

17 every day of every week of every month year-round.

18   I apologize, Your Honor, I forgot to hand you your

19 binders, because that's what we do, create more binders.

20   While other advertising campaigns may come and go,

21 Google Search ads are constant. Advertisers continue to use

22 Google Search ads and text ads and pay Google's monopoly

23 prices, because advertisers have no real choice.

24   Google knows this fact very well, so well, in

25 fact, that they boast in their own documents that they have

1 | no real market pressure.

2 | The trial record established that the Google of

3 | today does not even consider prices charged by its

4 | competitors. It doesn't need to.

5 | I asked Dr. Adam Juda, one of the architects of

6 | the search ads pricing auction when he was on the stand

7 | here, if he recalled anyone at Google ever doing any

8 | analysis of search ad pricing at Bing, and his response was,

9 | "Nothing immediately comes to mind."

10 | Since there's no meaningful competition, Google

11 | can manipulate advertising pricing through the search ads

12 | auction. Google intentionally chooses more revenue over

13 | improving quality in search ads.

14 | As one example, in 2014, Google launched a pricing

15 | update called squashing, which Your Honor heard about at

16 | trial and you'll hear more about today, perhaps more than

17 | you want to hear; and in Google's own words, it ranks ads

18 | suboptimally in exchange for more revenue. Only a

19 | monopolist can make a product worse and still make more

20 | money.

21 | Google manipulates pricing while also restricting

22 | the information it shares with advertisers. Google keeps

23 | advertisers in the dark as to how search ads really work and

24 | how their advertising dollars are spent.

25 | In response to Google's lack of transparency, one

1   advertiser, HomeAdvisor.com, also known as Angi, wrote in an

2   email that "Working with Google is like being in the ring

3   with a sumo wrestler with the lights turned off."

4   Google has used price increases, as well as many

5   other levers and tuning knobs, in order to manipulate the ad

6   auction, in order to fuel its massive growth which today has

7   exploded over $150 billion, and an increase of over

8   400 percent in less than ten years.

9   Today, Google's advertising machine exists to meet

10 its own revenue targets and to fund its monopoly payments to

11 search partners.

12   Mr. Jerry Dischler, Google's Vice President of

13 search ads, was here in court, and I asked him about an

14 email that he wrote in 2019, where he used the words

15 "Code Yellow," which is an all-hands-on-deck call to action,

16 in order to put his search ads team -- in order to

17 accelerate revenue launches, to extract even additional

18 revenue from advertisers to meet Wall Street earnings

19 forecasts.

20   The ability by Google to raise price whenever it

21 desires is the definition of a monopoly, according to the

22 Supreme Court.

23   Only monopolies can consistently raise price on

24 demand year over year without worrying at all what their

25 competitors will do in response.

1   Your Honor, the trial evidence demonstrated that

2   we believe Google violated Section 2 of the Sherman Act in

3   maintaining its monopoly power in search advertising, and we

4   seek assistance from this Court to end Google's monopoly

5   power over search ads.

6   So, Your Honor, I --

7   THE COURT: Mr. Dahlquist, I'm sorry, can I just

8   ask you a sort of big-picture, general-overview question in

9   terms of your thinking of the case.

10   The question of Google's ability to raise price,

11   in the analytical framework, I know it falls as evidence of

12   monopoly power, that's direct evidence of monopoly power,

13   are you also going to argue that it's also an actual

14   anti-competitive effect; that is, advertisers have been

15   paying super competitive prices to Google?

16   MR. DAHLQUIST: Your Honor, I think it falls in a

17   couple places.

18   First of all, we agree it is direct evidence of

19   monopoly power, and we intend to use it and we have used it

20   to show such.

21   Second, I believe it helps to define the markets

22   that we have here.

23   There's certainly a question that Google that has

24   raised as to, are we or are we not properly defining

25   markets, we believe we are, and I believe this evidence

1   directly helps to define the antitrust markets that we have.

2   However, to go to the Court's immediate question,

3   all of the pricing evidence that we have goes to advertiser

4   harm, right; that the advertisers who are an important piece

5   of this market, as I just explained it, is how Google funds

6   its entire general search engine, that those advertisers

7   have been harmed, and that's a price that they're paying,

8   and they are paying monopoly prices.

9   As to they're super competitive, Your Honor,

10   I submit, and I'll show you in some of the evidence today,

11   there's no boundary of competition, and that's where your

12   question on effects, I think, anti-competitive effects,

13   really goes to the competitive effect and what has happened

14   in competition with regard to search ads. And I think

15   that's caused by the contracts. The contracts have created

16   the environment, the ecosystem, if you will, whereby there's

17   no meaningful competition for search ads, and the prices are

18   the harm that is being caused to advertisers.

19   THE COURT: Okay.

20   Just to be clear, your contention is that, to put

21   it simply, in a more competitive environment, advertisers

22   would be paying less?

23   MR. DAHLQUIST: Yes, Your Honor.

24   THE COURT: Okay.

25   MR. DAHLQUIST: So, Your Honor, today I plan to

1 cover at least three topics: One, monopoly power and search

2 ads in text ads; two, the relevant product markets; three,

3 to the point we were just discussing, that advertisers had

4 been harmed and that's the direct-evidence piece; and then

5 finally, if time permits later this afternoon, about the

6 procompetitive justifications, if you will, that Google has

7 put forward. And while we don't think there are actual

8 procompetitive justifications, we'll -- we can talk about

9 this afternoon as to where they might fit into the Microsoft

10 analysis.

11   I had intended to begin with monopoly power, but

12 taking guidance from Your Honor yesterday, this is the

13 advantage of going second, we're going to flip it and jump

14 into relevant markets first, and we can come back and circle

15 back to monopoly power if time permits.

16   And, Your Honor, just in case we don't get there,

17 the monopoly power, the exercise of monopoly power here in

18 search ads is highly relevant to inform our market

19 definition, and so we do think that at least in search ads,

20 those two pieces of evidence should be viewed together.

21   THE COURT: And let me just say -- I should have

22 said this at the outset.

23   I mean, again, the schedule here reflects my

24 thinking of two-plus weeks ago, and now -- I do recognize

25 that the issue of pricing goes to the heart of the monopoly

1   power question, and to sort of subsume that in with market

2   definition in 45 minutes may be a little bit ambitious.

3   So if it needs to trickle into the next, you know, part of

4   this, then don't feel that you need to be sort of

5   hermetically sealed in these blocks of time.

6   MR. DAHLQUIST: I appreciate that, Your Honor.

7   And if there's any one section that might bleed

8   over, it's this one into the next one. But, nonetheless,

9   I want to be responsive to your questions, so that's where

10   we'll take our guidance.

11   Your Honor, starting with relevant market then, as

12   Your Honor knows, we have put forth, the DOJ Plaintiffs, two

13   proposed product markets: First, search ads; and, second, a

14   narrower market of text ads which is nested entirely within

15   our broader market of search ads.

16   And search ads, as you know, are search ads that

17   can appear anywhere, on a general search engine, on an SVP

18   or on other digital platforms. Text ads, the narrower

19   market, is focused only on general search engines.

20   And so if -- Mr. Penado, if we can go to Slide 40,

21   please, 4-0.

22   To talk about relevant market, you saw some of

23   this yesterday with Mr. Dintzer and so I don't intend to

24   repeat it, but I think a couple points are worth emphasis

25   here with respect to text ads -- or with respect to our ads

1   markets.

2   The goal, as is stated in *Brown Shoe*, in any

3   relevant market analysis is a factual approach, a pragmatic

4   factual approach and not a formulistic legal one. No

5   specific test is required in order to define a market.

6   The courts have obviously given us helpful

7   guidance as to what to look at. Our briefing laid out

8   extensively, as you saw, the *Brown Shoe* factors, and I think

9   we satisfied -- each of our markets satisfy those factors.

10   But it's important to note that the market

11   definition is merely a tool used to understand competition.

12   And it also, as Your Honor well knows from *Sysco*, that it

13   must be supported by ordinary-course documents. And that's

14   our charge and that's our goal here, and it must also be

15   consistent with the business realities.

16   If we can go to the next slide, please.

17   Let me take an example. And this is from

18   *United States versus Visa* and actually is a predicate

19   perhaps.

20   While the parties agree that the market definition

21   should be reasonable substitutes under the case law and a

22   willingness to substitute is the requirement, we have a

23   disagreement with Google as to what should be included in

24   that. Google believes that all digital text ads -- all

25   digital ads, text ads, search ads, display ads, social ads,

1   retargeting ads, a whole host of other types of ads should

2   be in this. We simply disagree.

3   While all digital advertising may have a broadly

4   similar purpose in that they're all trying to advertise to

5   consumers, they're all trying to actually make a sale. So

6   is TV advertising, billboard advertising, magazine

7   advertising. All of that is the same broad purpose. But

8   having a similar purpose does not make them reasonably

9   interchangeable, that does not make them substitutable.

10   And to go to this example from *U.S. v. Visa*,

11   in that case, the defendants argued that cash, checks, debit

12   cards, and credit cards were all the same relevant market.

13   The Court rejected this because, looking at -- because they

14   were not reasonable substitutes. While they all are forms

15   of payment in one sense or another, and the Court in *Visa*

16   even said that they may take share from each other, but that

17   doesn't actually mean they're reasonable substitutes, that

18   doesn't mean they're part of the same market. Looking at

19   what might happen with regard to checks or debit cards tells

20   you nothing about the credit card market.

21   Your Honor, the same is analogous to here.

22   THE COURT: Can I -- if I could --

23   MR. DAHLQUIST: Please.

24   THE COURT: I'm sorry.

25   Maybe I can move to the -- at least what

1   I understand to be the heart of the dispute between the

2   parties, and that is the issue of substitutability and how

3   one measures whether it's significant or not.

4   I understand Google to be saying, look, what is

5   driving advertisers' decisions is where they can get the

6   best return on their investment. That's been, you know,

7   their theme throughout: Return on investment, return on

8   investment.

9   We had advertisers come in, and I think all of

10 them said, yeah, maybe we can't calculate it to a

11 mathematical certainty, but we do rely on ROI and we

12 allocate our money where the ROI -- we will shift channels

13 if we think the ROI may be better somewhere else.

14   I guess a couple questions.

15   One is, do you dispute that advertisers' primary

16 consideration in determining where to spend ad dollars is

17 ROI?

18   MR. DAHLQUIST: We do not dispute that ROI isn't a

19 factor and that advertisers look at ROI. We absolutely

20 dispute that they use ROI in order to substitute across

21 channels. And I think that's what's borne out in the

22 document.

23   And we can go right to Slide 128, please.

24   Let's start with what Google says about this and

25 then I'll show you exactly what the advertisers said about

1 it.

2   In Slide 128, Google itself said that what's

3 important is ROI within a channel, not across a channel.

4   And this is a document from 2017, where they asked

5 this very question that the Court is asking. The document

6 is a macro ROI investigation.

7   They wanted to figure out, how do advertisers look

8 at ROI. And here you can see that cross-channel ROIs were

9 extremely difficult. They attempt, they make efforts at it,

10 but they simply couldn't do it with any precision or

11 accuracy.

12   However, within a channel, within a channel of

13 search ads or within a channel of text ads, or within a

14 separate channel of social ads or display ads, certainly you

15 can do an ROI analysis.

16   If we can go to Slide 132, please.

17   And that's what advertisers said.

18   Mr. Booth, who was here in front of Your Honor,

19 from Home Depot, said: "Do you shift ad spend frequently

20 between display and Google?

21   "No, because they're distinct and separate."

22   Next slide, please, at 133.

23   Ms. Tracy-Ann Lim asked the same thing: "Do you

24 shift your spend between text ads and digital display ads?

25   "No, because they're separate and distinct, they

1   are not fungible."

2   So while JPMorgan testified a lot about ROI,

3   I think she was the witness who coined the term,

4   "I'm obsessed about ROI." Yes, agreed, they're obsessed

5   about ROI, but within channel, and that's the distinction.

6   I think the best quote is perhaps on the next

7   slide, please, 134, which, from Mr. Lowcock, who you heard

8   about, IPG, advertising agency, where he said, "That means

9   in-channel optimization." He was asked that specific

10   question about ROI, in-channel, within search ads.

11   And Ms. Tracy-Ann Lim perhaps put it best. She

12   was asked the direct question: "If you learn that your ROI

13   on search text ads was greater on Bing than on Google, would

14   you switch?

15   "Answer: No, no. Our Bing spend maxes out and

16   there's nowhere else to go."

17   Submit, Your Honor, that that's the best evidence

18   to show if ROI was really most important in her mind, she'd

19   say, oh, yeah, we went to social ads, we went to display

20   ads. But, no, she's saying there's nowhere else to go

21   within channel.

22   THE COURT: So maybe it was the witness from

23   Home Depot, I thought.

24   MR. DAHLQUIST: Mr. Booth.

25   THE COURT: Mr. Booth -- let me back up.

1   It was my impression, as we were going back

2   through the evidence, that nearly all of the witnesses,

3   advertising witnesses, ad side witnesses, to one degree or

4   another, said not only, one, we follow ROI, it's an

5   important fact, but, two, that we do do some cross-channel

6   switching based on ROI. And, of course, now we also know

7   that there are tools that can do that automatically, do

8   cross-channel switching.

9   And what Google's theme was and its defense is

10   that is evidence of substitutability, that is evidence that

11   advertisers don't simply look at, you know, these artificial

12   distinctions between text ads and display ads, but what they

13   do is they put their money where it's most likely to result

14   in conversions.

15   Your response is, well, they're different. Part

16   of the reason they're different is this issue of expressed

17   intent versus display ads, which are more about creating

18   awareness.

19   I guess the question ultimately is, how am I

20   supposed to determine on this record, where we have no

21   quantitative analysis, whether the substitution is, in fact,

22   significant?

23   Because at the end of the day is the question:

24   Is there significant substitution?

25   Google seems to be saying, yes, there's

1   significant substitution; you all are saying, no, there's

2   not significant substitution.

3   Where would you have me look in the record to

4   determine that there is not significant substitution?

5   MR. DAHLQUIST: Certainly, Your Honor.

6   And I think I can -- if you bear with me,

7   a three-part answer, of course.

8   THE COURT: Sure.

9   MR. DAHLQUIST: First, let's look at Slide 135,

10   please.

11   Your Honor asked about these models. I think

12   they're called MMM models or -- they have other types of

13   names. I think Google has their own name for it.

14   Right here on Slide 135 is from Kohl's. This is

15   an example of them running that type of a model.

16   And what does it do? It changes and fluctuates

17   digital ads, it changes and fluctuates social ads, display

18   ads, taking them in and out based on whatever that model's

19   calculating. But what is constant is the blue line. Search

20   is constant.

21   We don't dispute that ROI might convince an

22   advertiser to pull or enter more money into search. Maybe

23   they got $100, they'll jump it to $200. Maybe $100, they'll

24   drop it to $50. But it's constant; they keep money in it at

25   all times. That is not true for other advertising channels.

1   Social ads may go up to a thousand but drop to

2   zero.

3   Digital ads, up to a thousand but drop to zero.

4   That is different, very distinct and different from search

5   ads.

6   But to go to Your Honor's other question, perhaps

7   back into the market definition discussion, I think we need

8   to be careful here, is what *Kodak* warns us about, of when

9   we're looking at pricing and when price increases or a

10   monopoly pricing is at play, even poor substitutes begin to

11   look reasonable, and I think that's what we have that's

12   occurring.

13   And so to Your Honor's question as to where to put

14   in the analysis, I disagree with Your Honor's question in

15   that you don't have to find an amount or level of

16   substitutability. We think you need to find that these

17   products, in the product market definition, doing a

18   hypothetical monopolist test definition, that these are not

19   reasonable substitutes for each other and that it does

20   not -- that there is not competition sufficient to constrain

21   a price increase. That is the ultimate question for

22   Your Honor.

23   And I think if we can turn to Slide 54, please,

24   when Mr. Dischler was here, we asked him: "Have you

25   increased price increases" -- "Have you had prices increase

1   by 5 percent?

2   "Yes, for the typical advertiser.

3   "And did that result in an increase in revenue?

4   "Answer: Yes."

5   And what he added there is, it not only resulted

6   in a 5 percent price increase, which Your Honor mentioned

7   yesterday a SSNIP test. This is a SSNIP test being done in

8   real life.

9   "Did it increase revenue?

10   "Yes."

11   And the additional transcript cite below this is:

12 "Did it result in fewer ads even being sold?

13   "Answer: Yes."

14   So advertisers may have purchased less ads but

15 they bought more ads at higher prices, ultimately Google

16 made more money. That is where this falls in the analysis.

17   It's not just a hypothetical monopolist test, it's

18 an actual monopolist test. It's an actual monopoly,

19 exercising their market power, increasing prices, and

20 finding out it is profitable.

21   And this isn't just an aberration.

22   If we can go to the next slide, please.

23   Dr. Whinston talked about how Google tested this,

24 they probed it over time. They came in and they said, well,

25 we're increasing prices, we're still making more money,

1 advertisers aren't going elsewhere, how far can we push

2 this?

3   They raised prices 5 percent, they tried 10, they

4 tried 15. They did a test on 20. All of them profitable.

5 And over time, durably profitable not just for an isolated

6 period in time.

7   THE COURT: So let me -- I thought we'd get to

8 this a little bit later, but we're on the topic now.

9   I understand Google's response to all of this to

10 be, look, I think -- it's twofold. One is, it's not

11 unlawful for a monopolist to increase price, right? I think

12 you'd agree with that.

13   And, yes, we've increased price. We've also

14 increased ad quality. And what really matters is the

15 quality adjusted price of the advertising, and that at

16 least -- which is why I asked you to all help me understand

17 that one chart that we'll talk about at some point -- that

18 has essentially not only kept pace, those qualities kept

19 pace with pricing increase, Dr. Israel has testified that

20 quality adjusted pricing has actually gone down.

21   So I guess a question for you is: Do you disagree

22 with Dr. Israel that quality adjusted pricing has, in fact,

23 gone down?

24   MR. DAHLQUIST: We do disagree with Dr. Israel in

25 short.

1   And quality adjusted pricing is certainly a topic

2   I have a lot to say about. And I'm going to do it -- I was

3   planning to do it this afternoon, I can hit it now, but let

4   me give you a preview.

5   THE COURT: Give me the preview. Yeah, sure.

6   MR. DAHLQUIST: Here's the preview.

7   And maybe go to the next slide; it will help to

8   resonate with this a little bit more.

9   In Slide 56, and this is UPX36, Google asked,

10 "do we want to raise prices?"

11   The answer to that, they answered themselves was,

12 "yes, 10 percent is believed to be safe."

13   And the bottom comment is what I draw your

14 attention to. This is Dr. Juda. And he said, "How should

15 we price it? 1 penny less than the breaking point is the

16 right amount."

17   This is Google saying the right price in this

18 market is 1 penny below the breaking point, the difference

19 between an advertiser buying an ad with us or leaving the

20 market, not that it would go somewhere else but leaving us.

21   And so to your question, quality adjusted pricing,

22 pricing should be determined by competition. Competition

23 should set where that is, not Google's own internal

24 perception as to how much value or how much quality they may

25 be providing to a customer but what is the level of

1   competition.

2   This entire document from 2017 which related to

3   one of these ad experiments, Gamma Yellow, or GY here,

4   Gamma Yellow is an experiment they ran and they increased

5   prices for 20 percent on mobile on average, and it stuck.

6   As a result of that, that is them getting very confident

7   that they can price and that they don't have to worry about

8   what a competitor will do.

9   This entire document, which I ask you to read in

10   its entirety, maybe you already have, but there's no mention

11   of competition, there's no mention of what might Bing do,

12   what might Facebook do, what might anybody else do. It's

13   just their own perception. That's not competition,

14   Your Honor. That's a monopolist setting a price. And

15   that's where *Kodak* comes into play as to when are you

16   pricing.

17   And as *Kodak* talked about with the cellophane

18   fallacy, when you are pricing cellophane so high that people

19   have to start wrapping their food in newspaper or wax paper

20   or anything else, this is what's happening. This is a

21   real-life version of the cellophane fallacy occurring -- or

22   Google's argument is a real-life version of the cellophane

23   fallacy.

24   THE COURT: I guess I don't understand that.

25   And it didn't really come up yesterday, but as

1   I understand this notion of cellophane fallacy is that just

2   because there is substitution doesn't mean there isn't

3   monopoly power. And just because you're seeing

4   substitution, even to an inferior product, doesn't mean

5   there isn't -- you're seeing some substitution, even if it's

6   to an interior product, doesn't absolve the monopolist of

7   being a monopolist.

8   But this isn't like wrapping a sandwich in

9   newspaper, right? I mean, if you move your ad money from

10   Google to Amazon, you know, you're not wrapping your ad in

11   newspaper, you're wrapping your ad in a pretty good ad

12   platform.

13   TikTok, pretty good ad platform and growing.

14   Facebook, posting record revenues based upon its

15   newly redesigned ad platform.

16   So I don't quite understand how the cellophane

17   fallacy has anything to do with this case in the sense that

18   they're not substituting away to something that's inferior,

19   they're substituting away to something that they think can

20   be effective with their ad dollars.

21   MR. DAHLQUIST: Your Honor, we respectfully

22   disagree. It is absolutely substituting to an inferior

23   product.

24   Your Honor mentioned earlier "intent."

25   A search ad, the unique principle of search ad, it

1 has high intent. It is a user entering a query for whatever

2 that user wants to enter and an advertising being returned

3 in direct response to that query, in real-time, immediately.

4   If I'm looking for new shoes, I'll get an ad for

5 shoes. I'm looking for a Chicago Cubs baseball card, I'll

6 get that. Every other form of advertising as to why it's a

7 different market is on a much, much, much different and

8 lower level of intent.

9   We're in the realm of inferred intent or even

10 multiple steps removed of intent: Time-delayed intent. You

11 heard a lot about that from Professor Jerath and others as

12 to the value of intent and all of those types of display

13 ads, re-targeting ads, et cetera, is significantly less.

14   So we submit this is the cellophane fallacy if

15 you're including those within -- we believe it is a

16 cellophane concern, because you would be including very

17 inferior products.

18   THE COURT: How does that measure up with reality?

19   I mean, it can't be that Facebook's ad platform is

20 an inferior product and they're making billions of dollars,

21 right?

22   I mean, he didn't sell billions of dollars' worth

23 of the newspapers to wrap your sandwich. They are selling

24 billions of dollars of ads that advertisers are coming to

25 the platform and selling billions of dollars of ads and

1 somehow have figured out how to recover from whatever Apple

2 did to them.

3   And so I just don't see how -- okay, maybe that's

4 a slightly different product, but to say that's an inferior

5 product doesn't seem to me to line up with reality,

6 particularly given -- and we're talking about -- just look

7 at the revenues.

8   MR. DAHLQUIST: Sure.

9   THE COURT: These aren't people going to Facebook

10 out of desperation.

11   MR. DAHLQUIST: Sure.

12   Your Honor, "inferior" may be my argumentative

13 word, but it is certainly a different product, in the same

14 way that a debit card is different from a credit card, in

15 the same way that a check is different from cash. It is

16 significantly a different product.

17   Maybe it has the ultimate use of advertising, of

18 getting your product out there, being known. But I think

19 it's significant at a minimum that from Facebook,

20 Your Honor, Mr. Levy, and this is in designated testimony at

21 our P file 584, described how Facebook tried to enter the

22 search ads market multiple times and failed. They couldn't

23 make money in it.

24   They're a different product. They have display

25 ads, they have social ads. That's fine. They're very

1 profitable at it, but that's a different product and that's

2 a different product market.

3   THE COURT: So your point is the one you made

4 yesterday, which is that, okay, there may be some

5 substitution happening -- let's leave cellophane aside,

6 I don't think it's terribly useful, but there's some

7 substitution happening. But the fact that there's some

8 substitution doesn't mean it's significant substitution and

9 ultimately doesn't mean these other platforms provide

10 different -- are different markets, right?

11   I mean, just because there's some substitution,

12 there's some competition doesn't make these other platforms

13 substitutes?

14   MR. DAHLQUIST: Correct, Your Honor. That's our

15 argument.

16   Just because there's some substitution, and that,

17 we believe, is in *Visa*, *H&R Block*, *Sysco*, there was some

18 substitution. There was a larger market in which each of

19 those products operate in.

20   In *H&R Block*, it was do-it-yourself tax

21 preparation. Certainly a substitute for that is hiring an

22 accountant to do your taxes, but that wasn't the relevant

23 market here.

24   THE COURT: So how much of that construct depends

25 upon the marketing funnel?

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1            The marketing funnel that I've heard more about

2   than I ever thought that -- certainly more than I need to,

3   but I know a lot about the market funnel now, and I'm

4   finding myself circling down the drain of the marketing

5   funnel.

6            But how much of the marketing funnel and your

7   theory and the States' theory that these ad types correspond

8   with locations in the marketing funnel, how much of your

9   markets theory rests on that -- convincing me that that's

10  correct?

11           MR. DAHLQUIST:  Certainly, Your Honor.

12           And I want to be respectful of the States' time.

13  They've asked for 15 minutes in this, so I'm happy to answer

14  many other more, but I do want to respect their time.

15           But let's go to Slide 131.

16           131 is -- I figured this would come up at some

17  point today, Your Honor.  And, yes, I've learned more about

18  funnel than I wanted to.

19           But this is Google's document from 2019, UPX427.

20  They're here, they're criticizing the funnel, what we say

21  about the funnel.  They use the funnel, okay?  All that the

22  funnel shows is complementary of the various channels.  This

23  shows you the various levels of the funnel and how multiple

24  different advertisements, multiple different channels of

25  advertising can drive to a purchase, which, as I said, is --
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1   the ultimate goal is a purchase, getting a consumer to buy

2   something. They all complement in that way.

3   The same site Mr. Dintzer referenced yesterday,

4   peanut butter and jelly, the goal here is to have a

5   sandwich. But here, the goal here is to sell a product, and

6   search ads have a unique function in that funnel.

7   So in answer to your question, how much of that

8   does our arguments rely on? Nothing, except that it helps

9   to explain where everything fits within -- where the

10   different advertising channels fits within this realm, this

11   large universe of digital advertising, that's the largest

12   possible, but search ads and text ads are a unique product

13   within that large universe.

14   And I'm happy to cede time to Mr. Cavanaugh or

15   happy to answer.

16   THE COURT: We can hear from Mr. Cavanaugh.

17   You know, we actually thought last night as we

18   were doing this that we should have restructured our

19   morning, but let's sort of stick with the structure that we

20   have and we can cover territory that you clearly have not

21   been able to.

22   MR. DAHLQUIST: Sure.

23   THE COURT: Because this issue of monopoly power

24   is such a critical one.

25   MR. DAHLQUIST: I'm happy to talk about search ads

1   all day long, Your Honor, which I'm sure you're not.

2   THE COURT: Mr. Cavanaugh.

3   MR. CAVANAUGH: Your Honor, just to be clear, the

4   Plaintiff States believe search advertising is a cognizable

5   market. It's why we incorporated all the allegations of

6   DOJ's complaint into our complaint.

7   And like the United States, we think search text

8   advertising is a nested market within there. However, we

9   have a second nested market, general search advertising,

10 which, as I have up on the screen, it is the mirror image of

11 general search services.

12   And that was very deliberate on our part, because

13 that is how advertisers look at it. Who would go in on

14 general search engines? They have a certain level -- when

15 they're doing their queries, they have a certain level of

16 intent.

17   And as you see, Your Honor, it is our general

18 search advertising market, it's largely comprised,

19 significantly comprised, of text ads, because text ads

20 provide certain value to an advertiser, their ability to

21 create a message.

22   Now, nonetheless, advertisers will use both

23 shopping ads and search text ads to some degree for those

24 that can do that. Banks, law firms, they're not doing PLAs.

25   THE COURT: Mr. Cavanaugh, I guess I'll ask you a

1   quick question, I'm sorry, just so I have clarity in my

2   mind.

3   Your market, this general search ads market, does

4   it include more than PLAs? Does it include hotel

5   advertising? Airline advertising? And if the answer is

6   "no," is that because it doesn't fall immediately on the

7   SERP?

8   MR. CAVANAUGH: That's correct, Your Honor.

9   To the extent it's in an immersive, it would not be

10   included.

11   THE COURT: Got you.

12   MR. CAVANAUGH: Because that requires that second

13   step, much as going to Amazon or Tripadvisor would be.

14   Now, the reason they use both is they want to own

15   the SERP for those that can do it, that have a product that

16   lends itself to a PLA. But the goal is the same. It's that

17   user mindset. That's what they're looking for.

18   And they distinguish it from SVPs, because they're

19   closer to the point of purchase.

20   As we talked about a bit yesterday, Your Honor,

21   with an SVP, I can complete the purchase there. I'm not

22   only closer to the point of purchase, I can make the

23   purchase there. But they give me limited information in

24   response. They only give me the information that's within

25   my -- that's within their limited inventory.

1   And I can't navigate away from Amazon when I'm on

2   the Amazon website.

3   But for general search engines, the testimony is

4   roughly 12 percent of all queries are navigational queries.

5   Again, another fundamental difference between them.

6   Professor Amaldoss made the same point about that

7   point of purchase.

8   But general search ads -- and this goes back to

9   the questions Your Honor was asking Mr. Dahlquist about

10   general search ads and the substitutability. As Mr. Hurst

11   pointed out, they're essential.

12   And this also goes to the issue of monopoly power,

13   that the reason that they're quintessential is what

14   corresponds to their monopoly power that Google has within

15   general search ads.

16   Even though these companies have seen their

17   advertising costs rise and rise, because blue links have

18   been demoted and Google decided to monetize search, they've

19   seen their costs go up. But what do they still do? They

20   still go to Google and search ads.

21   THE COURT: Mr. Cavanaugh, can I ask you the

22   following, which is, we've cut this ad market up pretty

23   finely, and the difference between the general search text

24   ads market and the general search ads market is PLAs.

25   The question I have for you is, is there evidence

 1   that advertisers view those as distinct markets? They may

 2   view them as distinct advertisements, different forms of

 3   advertisements, but view them structurally as different

 4   markets, as different nested markets.

 5   Does Google view these as differently nested

 6   markets? That's the struggle I'm having in terms of these

 7   two -- this concept.

 8   MR. CAVANAUGH: Well, Your Honor, I think the

 9   difference -- there are meaningful differences between text

10   and PLAs.

11   The primary one, I would say, is there are vast

12   numbers of advertisers that can't use PLAs. It's not

13   available to them. Only texts are available to them.

14   THE COURT: Right.

15   MR. CAVANAUGH: The second point is that text

16   provides something PLAs can't. They give greater control to

17   the advertiser on the messaging.

18   On PLAs, you give the information to a general

19   search engine, creates -- they create the PLA, you don't

20   have that degree of control.

21   I think that's what -- that's why the

22   substitutability there is some -- is rather limited.

23   THE COURT: So I don't think there's any dispute

24   what you've just described as the differences between the

25   ads types; they're certainly different ad types.

1   I guess the more precise question I should have

2   asked you is this: Why is this one market instead of two

3   separate submarkets? You've got a separate -- you've got a

4   market for text ads, market for PLAs. Why is there a market

5   for both?

6   MR. CAVANAUGH: Because, I think, Your Honor, as I

7   showed a moment ago, there are advertisers that use both

8   within a general search -- within a general search ad

9   context.

10   And there is some degree of substitutability

11 within there such that we think general search advertising

12 comprised of those two.

13   And admittedly, it is largely comprised of text

14 ads. It's -- you have the -- the percentage is redacted

15 out, but Your Honor has it, what it is.

16   THE COURT: I recall Mr. Booth testifying,

17 I think, that in his view, there is substitutability between

18 the two, and I think that would -- that weighs in your favor

19 in terms of defining this market the way you have.

20   But doesn't it also cut the other way, that this

21 is a unified market, that there are large swaths of

22 advertisers that can't advertise in this market?

23   MR. CAVANAUGH: Well, the --

24   THE COURT: The credit card companies, service

25 industry providers, they can't advertise in PLAs, so I'm not

1　sure why this is the same market as opposed to, again, two

2　separate markets.

3　　　　　MR. CAVANAUGH: Your Honor, given the prevalence

4　of text ads within general search ads, we think it's

5　appropriate to consider it as one.

6　　　　　And we recognize that there is some degree of

7　substitutability by those advertisers that can utilize text

8　and PLAs. And we think, given that there is some degree of

9　substitutability there, whereas distinguish that from

10　general search ads to display ads, social media, there, we

11　go back to the essentiality of advertising in general

12　search, and that display and others don't provide that

13　essential need, because that's where, you know, as Mr. James

14　and Mr. Hurst, Mr. James from Amazon and Mr. Hurst

15　testified, that's where we get our new customers. That's

16　where -- they've expressed some intent, and that's where we

17　can go to get them.

18　　　　　THE COURT: But if there's some substitutability

19　between text ads and PLAs, is that enough to put them in the

20　same market?

21　　　　　Because, again, the substituting needs to be sort

22　of significant. In other words, such that if the ads, text

23　ad prices were increased, folks would go over into the PLA

24　market, and so that's the same market then, right?

25　　　　　Is there evidence of significant substitution

1 │ between the two?

2 │   MR. CAVANAUGH: I would say as to those

3 │ advertisers that are -- there is some. I wouldn't say that

4 │ there's overwhelming evidence that -- as to a clear

5 │ delineation.

6 │   You know, there is -- for those that can't use

7 │ PLAs, yeah, obviously there's a clear delineation.

8 │   THE COURT: Right.

9 │   MR. CAVANAUGH: For a Home Depot and others, they

10 │ utilize -- they utilize both.

11 │   And both -- in an effort to own the SERP, that's

12 │ the idea of using both of them within a general search ad.

13 │ It's that over -- it's the overall effect of the two ads

14 │ simultaneously appearing on the SERP; I now own the SERP.

15 │   Your Honor, let me just make one or two points on

16 │ monopoly power.

17 │   If we can go to Slide 19.

18 │   So there's no dispute that, as a result of the

19 │ monetization of search, that the utilization of blue links

20 │ have gone down.

21 │   Dr. Baker did an analysis of that, of the impact

22 │ of PLAs and text ads and how it reduces first clicking on a

23 │ blue link, which obviously advertisers weren't happy about,

24 │ and has forced them to spend more on advertising. And so

25 │ their customer acquisition costs have gone up. Vrbo,

1   Booking, Expedia, we provided the evidence as to that.

2   But we asked them, but you -- "You're SVPs, you

3   keep buying Google Ads.

4   Why?

5   "Well, there's not a replacement for a high-intent

6   traffic. We don't have a choice."

7   And why is that? It's two things.

8   One, the essentiality of general search ads, we

9   have to be there and we have to be there in a big way,

10   because that's where we get our new customers from. That's

11   where we get the high-intent customers.

12   And within there, Google's the only game in town.

13   That's -- you know, Mr. Dijk testified to that and Mr. Hurst

14   testified to that. Growing without Google from where we

15   start, I don't think it's mathematically possible.

16   Why?

17   Mr. Dijk gave the answer, it's what we talked

18   about yesterday, Your Honor, "Because the scale is kind of

19   too small. So even if Bing would be far cheaper, it really

20   wouldn't work for us."

21   That is the essence of monopoly power, Your Honor.

22   It's reflected in their market share. It's reflected in the

23   fact that, year after year, who are the biggest advertisers

24   on Google? Major SVPs.

25   And these are SVPs that they can't advertise on

1   other SVPs. Target and Walmart don't advertise on Amazon.

2   They compete against them. So there's only one place for

3   them to go for those high-intent customers.

4   And the other reason why they go to a general

5   search engine, many SVPs, is they want to own the customer

6   relationship, and general search ads allow them to do that,

7   and the SVPs take a percentage of the deal. Google doesn't.

8   Google make its money on the ads.

9   Thank you, Your Honor.

10   THE COURT: Thank you, Mr. Cavanaugh.

11   Okay. Mr. Schmidtlein.

12   MR. SCHMIDTLEIN: All right. Good morning,

13   Your Honor.

14   THE COURT: Good morning.

15   MR. SCHMIDTLEIN: I'm going to jump right in here.

16   Here are the markets we're obviously talking about

17   today, and how they divvy up, you know, between the various

18   plaintiff groups here.

19   You know, as I noted yesterday, if plaintiffs fail

20   to establish that the search distribution agreements are

21   exclusionary, then obviously this is all academic, because

22   their claim would fail whether it's a -- whatever the ads

23   market is. If the conduct is not exclusionary, we're not

24   there.

25   Your Honor has, I think, made reference to this,

1 and I know you've seen this and you heard evidence of this

2 during trial.

3 Over sort of this time period that the plaintiffs

4 have focused on in the case, we see varying, varying shifts

5 in total digital ad spend, we see enormous growth, as

6 Your Honor has observed, on the Facebook Meta -- or the

7 Instagram Meta side of things, enormous growth on Amazon,

8 enormous growth on TikTok. And sort of the question is,

9 what explains that?

10 They exclude sort of all of these developments,

11 and they seem to sort of suggest that these other various

12 firms don't have information, they don't have intent

13 information. They're somehow not able to convert or give

14 advertisers, you know, sort of a competitive place to win

15 customers, drive conversions, things like that.

16 You know, respectfully, Your Honor, we would

17 suggest you don't go from, you know, the size of these

18 platforms -- Meta today is over $60 billion in revenue.

19 Now, that tells us that Instagram, Facebook have got very,

20 very, very powerful intent signals.

21 And, you know, Mr. Dahlquist made reference to,

22 and -- to an exhibit that he put up on the screen. It's

23 UPX519. And he called out some language in that document

24 about pricing and about Google talking about only looking at

25 ROI within certain channels.

1   It was a 2017 document. And part of the document

2   was discussing challenges, certainly back in that time,

3   of -- and different types of advertisers trying to get at

4   that ROI, because different advertisers do it differently.

5   And there's not some easy -- or I should say singular way

6   that all advertisers look at ROI, because their advertising

7   goals may differ, and what counts as a conversion or a value

8   to them may differ.

9   But that very same document, that he quotes this

10   language about channels, says, "When it comes to ROI,

11   perception is what really matters today. Google and

12   Facebook seem to be at par." That's what the document says.

13   And when Mr. Dahlquist suggests that, well, when

14   we look in Google's documents and we asked witnesses at

15   Google, when you think about innovating or when you think

16   about sort of improving your advertising technology and

17   competing on the ad side of things, you know, do you look at

18   Bing? Is that sort of the primary place you look for

19   innovation? And people typically would say, well, not

20   really.

21   And the reason for that is clear. It's right

22   here. This is as big or a bigger threat to Google than Bing

23   is, and that's for a whole variety of reasons.

24   One, it's because they've got really, really good,

25   effective advertising technology, and they have an audience

1　that overlaps more with Google's audience.

2　　　　The same with Amazon. Amazon has grown to, by

3　2021, the evidence in the case was, a $25 billion

4　advertising platform.

5　　　　Does Google get valuable information from search

6　queries that helps it that they think is useful, and does

7　Google try to make the most of the information it has?

8　Absolutely.

9　　　　But let's not kid ourselves. Facebook, Instagram,

10　TikTok, Amazon, all of these companies have very, very

11　detailed and very useful information that allows them to

12　give advertisers lots and lots of different options to reach

13　the consumer groups they're most interested in.

14　　　　And, again, I think when you look at the rise of

15　this, of their technologies and success of their platforms,

16　it's hard to escape that. TikTok has gone from zero to a

17　multi-multibillion-dollar advertising platform.

18　　　　Yesterday I think I may have blown through on some

19　of the slides yesterday when we talked about general search.

20　You may recall some of the internal documents at Google

21　talking about the prevalence of Gen Z people now using

22　TikTok as a search engine. This has grown to such a concern

23　it was presented in a board deck to the Google Board, and it

24　talks about the percentage of people using these different

25　social media platforms for search and the types of

1 information they have.

2   When young adults are spending as much time as

3 they are on TikTok, and TikTok is a

4 multi-multibillion-dollar advertising platform, then

5 absolutely they're a competitor and somebody that Google is

6 thinking about.

7   And I think the internal documents reflect that.

8 I mean, the idea of Google doesn't -- they would suggest to

9 you, and I think Your Honor knows this just isn't true

10 because you've heard the testimony, you've seen the

11 documents, the notion that Google doesn't acknowledge or

12 believe internally that it faces competition in its search

13 ads business from all of these other massive growing

14 platforms is just not borne out by the evidence. That's

15 just fantasy.

16   THE COURT: So, Mr. Schmidtlein, can I ask you

17 to -- I think this was my first question out of the box to

18 you yesterday in terms of -- these ad platforms do have

19 differentiation. I mean, there's -- in many ways.

20   As I understand it, for example, Facebook's ad

21 platform, although dramatic and quite lucrative, a small

22 percentage of their ads are actually coming from search ads.

23   MR. SCHMIDTLEIN: Correct.

24   Certainly at the time that we were sort of

25 studying that, I think.

1   THE COURT: Right.

2   MR. SCHMIDTLEIN: Subsequent developments have

3   occurred. But at the time of the data that was submitted in

4   trial, that is true.

5   THE COURT: Yeah.

6   And I think the same is true for TikTok. Yes,

7   they've got some search capability. And I use TikTok to

8   search just to see how it works. And it's

9   extra-evidentiary-record stuff. Not that I have it on my

10   phone, just to be clear. These are -- they may be

11   lucrative, no questions, huge dollar amounts.

12   The question, I think is, are they competing in

13   the same market? And certainly Google is competing for

14   display ads. And their theory is that what is happening

15   over here is more comparable to display ads than what is

16   available on Google.

17   And for advertisers, there is really no comparable

18   substitute. We can spend billions of dollars on Facebook

19   and TikTok and Instagram to promote awareness, but it's only

20   Google where we can get that directly declared intent,

21   because at best on these other platforms, at best right now,

22   it's trying to divine intent from indirect signals or from

23   signals as opposed to the actual declared intent of the

24   user.

25   So why doesn't that make advertising on Google,

1   certainly in terms of text ads, different than all of these

2   other platforms?

3   MR. SCHMIDTLEIN: Because even if you're not

4   searching on, let's say, Instagram, which I think now is as

5   big a platform as Facebook is, or even if you're not

6   searching on TikTok, those social media sites are making

7   recommendations to you and feeding you content; you know,

8   you have your feeds on those. And what are they basing that

9   on? How are they constructing content to send to you that

10   is keeping you on these platforms for long stretches of

11   time? It's because they have lots of information about your

12   interests.

13   You may recall Mr. Sommer's golfing shirt

14   exploits.

15   THE COURT: I think it was his shorts.

16   MR. SCHMIDTLEIN: Shorts.

17   MR. SOMMERS: Thank you, Your Honor.

18   MR. SCHMIDTLEIN: These sites have lots of

19   information that, respectfully, I would say is as powerful.

20   THE COURT: Right.

21   And I guess the question is, do you think it makes

22   a difference how they use the information?

23   Google gets the information directly from a user.

24   I want golf shorts, punch into the search engine, and you

25   get ads for golf shorts. A stronger signal, at least some

1   would say, for a buyer's intent at that moment, buyer's

2   commercial intent.

3   On these social platforms, at least the argument

4   is, they are using signals, in some instances, sort of to

5   create intent. You don't know that, just because somebody

6   is looking at golf swings and golf highlights on TikTok or

7   videos on Instagram of golfers, that at that point in time,

8   they really want to buy something.

9   And the way those ads have been effective on those

10 channels is that they are showing ads that match interests

11 and, in a sense, sort of creating demands. They're the sort

12 of push versus pull, I think, Dr. Jerath talked about.

13   MR. SCHMIDTLEIN: And I think that's also true on

14 Google.

15   I mean, the notion -- I think you saw evidence of

16 this in the case in some of the internal documents from some

17 of the advertisers. And, again, the funnel types of

18 documents, you saw a number of different advertisers talking

19 about search ads being used up and down the funnel.

20   So the notion that, you know, they would like you

21 to believe that all search ads is about is at the bottom of

22 the funnel. And what I think the internal documents, if

23 we're going to -- if we're going to live with the funnel in

24 this case, I think what the funnel establishes is, there's

25 no singular, neatly delineated -- search ads are down here

1   and social media ads are up here. That's just not true.

2   THE COURT: I think that's right.

3   I mean, I don't know that anybody is going to

4   defend the sort of regimented --

5   MR. SCHMIDTLEIN: Well, I think that's what

6   Dr. Jerath, that's what their experts were trying to sell

7   you.

8   THE COURT: Well -- I think what they had said at

9   the end of the day is that the funnel comes in different

10   shapes and sizes and conceptions, but at the end of the day,

11   it's still about -- and it's not linear, it's not linear --

12   sort of the users' intent starting at awareness, interest in

13   purchasing, to actually purchasing. And, again, we can call

14   it a funnel, we can call it -- whatever you want to call it.

15   But, again, you know -- and it's true that

16   certainly there's testimony that -- or certainly documentary

17   evidence that Google can be used anywhere along that path in

18   search ads, not -- I mean, we're talking about Google's

19   display ads --

20   MR. SCHMIDTLEIN: Right.

21   THE COURT: -- but search ads.

22   I think the question is, at the end of the day for

23   me, is, these advertisers who came in and sort of

24   consistently said, is, look, we can't move away from search

25   ads, they are unique in that they are capturing somebody who

1   wants to look for a credit card, somebody who is looking to

2   purchase a wrench. That's where people are going.

3   And why does that not make it so unique that,

4   in fact, under the *Brown Shoe*s factors, that's what we're

5   talking about, because we have no SSNIP test here, at least

6   not one done by an expert --

7   MR. SCHMIDTLEIN: And that's really an important

8   concession.

9   THE COURT: I know.

10   And I meant to ask him but we'll talk about that

11 in a moment.

12   But why doesn't that -- isn't that sort of a

13 distinguishing feature, when we're just talking about

14 marketing realities under *Brown Shoe*, that make search ads

15 and text ads different?

16   MR. SCHMIDTLEIN: Well, you know, this case would

17 have looked a lot different and probably the discovery and

18 the expert analyses would have looked a lot different if the

19 alleged relevant market in this case was search advertising

20 for credit cards, or some narrow market where they came in

21 and said, okay, the market is just this sort of little

22 piece, and that's -- but that's not what their case is.

23   They have grabbed a small number, a small number

24 of advertisers, who've come in and said, yeah, if I'm

25 looking -- if I'm trying to sell a credit card or advertise

1 a credit card, yeah, there's various different places, but I

2 find search to be sort of the most effective.

3   Now, I'm not -- I don't think that somebody coming

4 in and saying, in the current market state, the fact that

5 search is performing really, really well doesn't mean that

6 if somehow search fell off a cliff and did poorly --

7 because, remember, I'm going to get to the ROI chart that

8 you flagged for us -- if the evidence in the case is Google

9 is constantly improving and improving ROI and doing all of

10 these things to stay competitive, the fact that people are

11 happy with Google and that they're getting that good ROI

12 doesn't mean necessarily that if somehow that changed, if

13 somehow Google degraded the product or did something,

14 because none of them came in and said, Google's terrible.

15   "Mr. Vandyke, did you always have good ROI?

16   "Absolutely."

17   What they came in and they complained about was

18 the fact that there was a lot of competition in their

19 industry, that Airbnb, Vrbo, all of these travel competitors

20 had come in and they were competing super hard for

21 advertising and they didn't like that.

22   THE COURT: Right.

23   MR. SCHMIDTLEIN: So I mean, Your Honor, to your

24 point, what's really remarkable about this case is, huge

25 data advertising market.

1   Where's the regression analysis? Where's the

2   marketwide assessment? Where's the -- what they've come in

3   with is a handful of anecdotal advertisers in some very

4   specific verticals -- and the great price document is the --

5   and, again, we've talked about return on investment, and

6   they all agree return on investment is key --

7   And Mr. Levy said, "Have you had conversations or

8   heard of advertisers depending on return on investment and

9   other factors that shift pend from Google to Facebook,

10   Facebook to Google?

11   "Yes."

12   So the fact that you've got this substitution, it

13   doesn't have to be 100 percent substitution. The fact that

14   you have this substitution is significant. But where is --

15   and you can look in the -- this is our funnel, you know,

16   things like this.

17   Where is the big analysis? Where is the big SSNIP

18   test? Where's the price effect? And they don't have it.

19   They have a single internal Google document about a CPC

20   index that doesn't take into effect -- or doesn't take into

21   account quality adjustment.

22   THE COURT: I think what Mr. Dahlquist would say

23   is, yes, we don't have an expert's regression analysis and

24   we don't need it, and the reason we don't need it is we've

25   got Google's live experiments, Google performing live

1   experiments in which it, with very creative names, increases

2   price at 5, in some cases, 15 percent, for weeks, and it's

3   demonstrated that advertisers not only don't -- well, I

4   shouldn't say that. What those, sort of uniformly, those

5   experiments showed is that Google was able to sustain

6   50 percent of its revenues even after increasing the price

7   by that percentage.

8   And so you're not seeing this sort of massive

9   fleeing of the market from Google based on these

10 experiments, that one would expect, if you're seeing

11 increases of 5, 10, 15 percent. It's just not happening.

12 At least 50 percent of the advertisers are still, weeks and

13 weeks later, still sticking with Google in those

14 experiments.

15   And so why isn't that, you know, a real life SSNIP

16 test that's equally as compelling evidence?

17   MR. SCHMIDTLEIN: So I think what's unique about

18 this case, and what's unique about search ads in a way, is

19 the fact that it is this auction. You know, Google isn't

20 setting the price. The price is determined by a very, very,

21 very complicated auction. I think we had witnesses here

22 who, I think, tried to present the most high level, kind of

23 simplified version, because that's all I could, frankly,

24 understand --

25   THE COURT: Right.

1   MR. SCHMIDTLEIN: -- and we wanted to present it

2   to you.

3   But the truth of the matter is, and I think the

4   internal documents say it is, when Google -- Google has a

5   hard time assessing what the value of their product is in

6   the market.

7   THE COURT: But you wouldn't dispute that, based

8   upon the evidence, Google -- I suppose this is true with any

9   advertiser, but it has the ability to sort of raise price

10   through various changes to the auction. I mean, that's been

11   shown. It can change the auction in certain ways. It can

12   either thicken the auction. It can sort of decrease the

13   distance between the first and top bidder in terms of how

14   the auction gets defined.

15   So, yes, it's a complicated, unique way than

16   simply identifying what the price is for the 30-second ad,

17   but Google still, at the end of the day, has these controls.

18   And I don't think that's in dispute. The question is, can

19   they use those controls in a way to sustain an increase in

20   price at a monopoly level without losing customers, and some

21   of the documentation suggests that that's exactly what they

22   can do.

23   MR. SCHMIDTLEIN: I think what the documentation

24   and the testimony that you heard at trial was a couple

25   different things. One, it's very difficult to -- for Google

1　to assess and understand the value that the winning bidder

2　is ascribing to an ad, because they're always paying --

3　they're not paying the price they bid, right, it's this

4　complicated formula.

5　　　　　　THE COURT: Right.

6　　　　　　MR. SCHMIDTLEIN: And if over time the same person

7　wins and wins and wins, their price is going to come down.

8　　　　　　So in other words, if Google is doing a better job

9　at sort of matching, their price is going to come down. And

10　so Google is trying to figure out ways, and I think this

11　is -- in most markets, Your Honor, if I've underpriced my

12　product, there's -- there are ways for -- and people do this

13　all the time in competitive markets, my price might be too

14　low and I'm going to try to see if, even in a competitive

15　market, if, in fact, people value my price -- my product

16　more that I can take a price increase.

17　　　　　　That happens all the time in markets. And that's

18　what you're seeing what happens inside of Google. Google is

19　trying to assess, are we actually getting the value that our

20　product provides to these advertisers? And in some cases,

21　after we've made a product improvement, that actually is

22　driving more value for them.

23　　　　　　And a lot of these auctions, and a lot of the

24　things that get introduced, it's not some uniform price

25　increase. You'll see some of these where actually prices go

1   down for a lot of advertisers and prices might go up for

2   others. It's a very complicated process, because the

3   advertisers are constantly reacting and evaluating their

4   bids.

5   THE COURT: So what's the answer to the question,

6   or the observation -- and this is, in fact, noted in

7   *Microsoft* you'll recall -- there really isn't any evidence

8   of Google looking at competitors when they are adjusting

9   these pricing knobs and trying to gain the headspace, right?

10   I don't think -- at least as my understanding of

11   the competition law, there's nothing necessarily unlawful

12   about Google trying to acquire as much of that headspace as

13   it can. If it improves the product, it should be able to

14   raise the price, right? I don't think there's anything

15   wrong with that per se.

16   I don't think the question is, is Google able to

17   raise the price to capture that headspace in a way that's --

18   it can do so now that it would not be able to do so in a

19   more competitive market?

20   And isn't evidence of that the fact that Google

21   doesn't -- when it makes these adjustments, it doesn't look

22   at, you know, well, what's the pricing over at Facebook?

23   What's the pricing over at Bing? What's the pricing over

24   somewhere else? There's no evidence that Google ever looks

25   at a competitor's pricing, to my knowledge, certainly not

1 often, in determining the impacts that these adjustments

2 would have on customer retention.

3   MR. SCHMIDTLEIN: Well, I think one of the answers

4 is, this is not like a Coca-Cola rep walking into a grocery

5 store and observing -- I can easily observe what the price

6 of Pepsi is, and say, well, let's see, if I move it up, you

7 know, a penny or two, what's going to happen? We don't have

8 insight into all of the auction and the pricing mechanisms

9 that are going on in these platforms.

10   I mean, they hear from advertisers. They

11 certainly understand from advertisers, and Mr. Dischler and

12 Mr. Raghavan testified to it, that when they go and talk to

13 advertisers, advertisers tell them, hey, I'm getting better

14 ROI over here, or you guys aren't doing so well, you know,

15 for these types of campaigns, you know, we're moving our

16 spend.

17   But Google doesn't have some easy way to observe,

18 oh, I know that for this type of ad, the price on Facebook

19 is X. So if we move our prices --

20   THE COURT: Right.

21   But in a competitive market a -- and let's say,

22 for sake of argument, yes, there isn't as much price

23 transparency as if you walked into a grocery store. I think

24 that's obvious.

25   But there doesn't seem to be, when pricing

1 adjustments are made, just any concern about losing

2 customers.

3   MR. SCHMIDTLEIN: I disagree.

4   THE COURT: Or losing advertisers -- actually I

5 shouldn't say that. That's not true. These experiments are

6 being done to see how many people you would lose as

7 advertisers.

8   And what they've consistently shown, again, is

9 that you're still able to maintain sort of 50 percent of the

10 revenue, all the various names of these experiments, but

11 that was sort of the consistent finding.

12   MR. SCHMIDTLEIN: As quality improvements are

13 being made.

14   THE COURT: Right.

15   MR. SCHMIDTLEIN: So, again, we're seeing quality

16 improvements, better value being provided to advertisers,

17 improvements in the auction, innovations occurring, and

18 they're trying to figure out how do we -- can and how do we

19 capture some of that?

20   And, respectfully, I would suggest that's just not

21 proof of monopoly power. That doesn't mean you don't have

22 competition from other people. The fact that you're making

23 the improvements, the fact that you're making the

24 innovations and that you're trying to capture some of that

25 increased value, that doesn't -- and that everybody -- you

1   know, and, again, most of these -- most of these launches

2   result in winners and losers. It's very, very complicated

3   to know in advance how something is going to perform.

4   And some of these -- you've heard testimony about,

5   like, format pricing. That's delivering obviously much

6   better, bigger value.

7   THE COURT: But doesn't what the economists say

8   that, yes, Google can capture -- has the right to capture

9   whatever additional value it's giving its advertisers.

10   I think the question is whether it would be able to capture

11   as much as it does in a more competitive market. And maybe

12   that's in some sense tautological, I don't know.

13   But if Google can capture 85 to 90 percent without

14   losing a large number of advertisers, is there not sort of

15   the economic theory that if there were, in fact, more direct

16   competitors, it would be only able to capture 25, 35,

17   40 percent?

18   MR. SCHMIDTLEIN: No, because, Your Honor, I think

19   if what you saw was Google not making any quality

20   improvement -- I mean, if Google is a monopolist, why are

21   they trying to improve anything? Just jack the price up.

22   That's not what the record in this case is. The record, as

23   Dr. Israel testified, we see quality outrunning even their

24   CPC, which we say isn't a valid measure. So the fact that

25   Google's able to do that and the fact that Google is

1 continuing to innovate is absolutely proof.

2   And let me just make one other quick point,

3 because I know you want to stay on schedule.

4   THE COURT: No, no, you've got time.

5   MR. SCHMIDTLEIN: The testimony in the case,

6 I think, was consistent -- and this is a point that,

7 I think, even -- if I can find it -- even Professor Whinston

8 agreed to -- is that there is -- I've lost it -- there is

9 this notion that you have separate audiences on Bing, in

10 other words.

11   THE COURT: Right, the overlap issue.

12   MR. SCHMIDTLEIN: Yeah.

13   I mean, people -- I don't know, maybe there's

14 somebody out there who does a search on Google; and if they

15 don't like the results, they immediately go -- every time,

16 they go and they're going back and forth between the two,

17 but that's not typical sort of behavior. The advertisers

18 know that.

19   There are people who prefer Bing and there are

20 people who prefer Google. So from an advertiser's

21 perspective -- and I think the data shows this and we have

22 some data on this, all the large advertisers are on both.

23   So in that -- when you have that dynamic, is

24 Google constrained more by Bing, or more by Facebook, TikTok

25 and all of these people? The evidence in the case was

1 uniform: Google is much more constrained by these other

2 people if for no other reason than the audience overlap.

3   That's where the same audience on Google -- and

4 it's true on Bing. Bing's constrained by them, too. Those

5 same audiences are more likely to be on these other social

6 media websites -- and I don't think anybody thinks -- every

7 time we go on the Internet, no matter where we are, we get

8 plenty of ads. The advertisers know where to find us and

9 they're gathering that information, and they view -- they

10 view the same audiences more with Google on these other

11 sites than they do Google versus Bing.

12   THE COURT: So can I ask this? Does your theory

13 of substitutability rest entirely on ROI? Or is there

14 other -- are there other metrics that you think establish

15 substitutability?

16   MR. SCHMIDTLEIN: Well, I mean --

17   THE COURT: Or demonstrate substitutability,

18 I should say?

19   MR. SCHMIDTLEIN: Well, I think ROI is obviously

20 the thing that advertisers are most interested in, so it's

21 certainly the metric that people look at.

22   And it also takes into account sort of different

23 costs. There may be different costs on these different --

24 and they may be priced somewhat differently, but if they're

25 getting a really good comparable ROI, they will switch.

1   THE COURT: So what about the following, which is

2   that what's more important in ROI is traffic volume. That

3   you can have the best ROI out there, but unless you've got

4   the traffic, the ad spend isn't going to shift. And I think

5   the evidence here has shown, at least it's been suggested,

6   that the ROI on Bing is actually better than Google in part

7   because there are fewer advertisers and less thicker

8   auctions over there.

9   But even if the ROI is better at Bing, it doesn't

10   mean advertisers are all going to flee to Bing and take

11   their money over there, and the reason is there aren't as

12   many users.

13   And there's a reason that the ad spend has

14   essentially -- essentially corresponds with the market share

15   for search. I think we've heard everybody say, our ad spend

16   on Bing sort of tops out at around 10 percent, and that's

17   because that's sort of the market shares in terms of where

18   the users are.

19   So if that's true, then while ROI is important,

20   it's not clear to me that it really is the primary

21   consideration for advertisers in terms of making

22   substitutability determinations.

23   MR. SCHMIDTLEIN: Well, and I think that the

24   question is, is there constraints?

25   I would say there are constraints.

1   But we absolutely agree that the even larger

2 constraints are from these other sites where the eyeballs

3 are. Absolutely, there are more people overlapping on

4 Google on -- probably on Amazon and Facebook and TikTok and

5 these other places than there are with Bing. And so our

6 position is, yeah, they could move some of their spend over

7 because the more spend, the more ROI. They're not sort of

8 advertisement constrained.

9   But absolutely, there's more for them to gain,

10 there's more competition, if you will, vis-à-vis these other

11 sites. And that is why Google is so focused on them as

12 they're making innovations and they're improving their

13 technologies over all this period, and I don't think can be

14 in dispute.

15   If Google was a fat, happy monopolist who didn't

16 have to worry about all these other people and it was --

17 they had everything locked up and Bing was just over here in

18 its channel, they would just be sitting back, no innovation,

19 and just raising price, and that's not what the record in

20 this case has established, Your Honor.

21   THE COURT: And how does that then square with --

22 I mean -- how does that square with what every case has

23 said, is that even the monopolist has an incentive to

24 innovate? It's a little unclear to me how that cuts, right?

25   If you have a market in which there's no

1 innovation, you're a monopolist. If there's a market in

2 which you're innovating, well, monopolists innovate too. So

3 I'm not quite sure how it cuts under the case law.

4   MR. SCHMIDTLEIN: I would submit, Your Honor, back

5 to Dr. Israel's chart, the 129, I think he testified based

6 on his observation of the ClicData, in other words, what

7 percentage of time were ads being clicked on, and I think

8 this is over a time period where there's certainly not an

9 increase in the overall ads, and you made a remark about

10 Bing having -- Bing actually shows more ads than Google

11 does.

12   THE COURT: Right.

13   MR. SCHMIDTLEIN: But over that time period,

14 I think he observed it went from a 10 percent ad click rate

15 to a 30 percent ad click rate. That's pretty impressive --

16 a pretty impressive proxy for improvement of ad quality.

17 There's been no testimony in the case that Google has fooled

18 people into clicking those ads or that advertisers haven't

19 been spending the price.

20   THE COURT: Do you think that's the best proxy we

21 have --

22   MR. SCHMIDTLEIN: That's the best --

23   THE COURT: -- the best proxy Google has? Because

24 you don't have transparency into whether those clicks result

25 in conversions or the degree they result in conversions

1 unless, for example, you're on SA360, for instance.

2   MR. SCHMIDTLEIN: Well, but even there we don't

3 have perfect marketwide ROI information.

4   I mean, we build a lot of tools, we provide

5 customers with lots of information to allow them to perform

6 their own ROI assessments, and, again, I think as you heard,

7 like, different customers do it differently. They may look

8 at the metrics and value things differently. So it's

9 very -- it's impossible for Google to say, marketwide, we

10 know, you know, ROI is going up by X.

11   But I think this is, to our mind, it's certainly a

12 very, very good indicator of customer reaction and

13 interaction, and you would expect that.

14   THE COURT: You would expect with more clicks,

15 there would be more conversions?

16   MR. SCHMIDTLEIN: You would expect, absent some

17 other people being fooled or deceived or something, you

18 would expect there to be a pretty good correlation between

19 ad clicks and ROI.

20   All right. I want to be respectful of what the

21 timing here is.

22   THE COURT: Okay.

23   MR. SCHMIDTLEIN: So if you don't have any other

24 questions, Your Honor...

25   THE COURT: I don't.

1   MR. SCHMIDTLEIN: Thank you.

2   THE COURT: Mr. Dahlquist.

3   MR. DAHLQUIST: A few points, Your Honor.

4   Let's, perhaps, start where we left off.

5   And Your Honor has it exactly right.

6   In the *Microsoft* case, this is at, I'm reading

7   from page 57, stated, "Moreover, because innovation can

8   increase an already dominant market share and further delay

9   of the emergence of competition, even monopolists have a

10   reason to invest." That's a direct quote from *Microsoft*.

11   Your Honor, Mr. Schmidtlein spent a lot of time

12   talking about the emergence of Facebook, TikTok, these other

13   platforms.

14   If we can go to Slide 26, please, Mr. Penado.

15   And, Your Honor, a lot of this is redacted from

16   the public, but I just need to focus on the public piece of

17   this.

18   This is Exhibit 7002A, which is a stipulated

19   financial statement for Search Plus, which is the majority

20   of Search Plus' search ads. That was what Dr. Raghavan

21   testified to.

22   If Facebook, TikTok, Instagram, if all of these

23   other companies are growing so much and eating Google's

24   lunch, why is their revenue increasing consistently,

25   dramatically, year over year over year over year?

1   And to the confidential portion that only

2   Your Honor can see, their margins, effectively constant,

3   their profit margins, effectively constant.

4   If Facebook, TikTok, if all these other companies

5   were actually competing for search ads and being a

6   constraint on search ads, we would see some change in those

7   numbers. We simply do not.

8   THE COURT: So your explanation for why these

9   other companies have been as successful as they have been is

10   just that the pie is getting bigger? Because they're not

11   acting as a constraint on Google, it's just a bigger pie

12   that everybody can take a bite of?

13   MR. DAHLQUIST: More people on the Internet, more

14   people using their phones, more people -- yes, correct,

15   Your Honor, the pie is getting bigger.

16   But that is not changing Google's share.

17   Mr. Schmidtlein put up one of his first slides,

18   I don't need to put it up, Your Honor, remember that it's a

19   Dr. Israel slide of the growing pie. It's all digital ads.

20   If you look at it, Google's piece is pretty

21   constant. And even if there's a shift in share at some

22   point, I'd submit that's exactly what *H&R Block* and *Visa* and

23   *Sysco* tell us. Yeah, there might be some minor impact on

24   share but it is pretty constant. The growth of Facebook,

25   TikTok, Instagram are coming at the expense of others.

1   On that same chart, the biggest part is a gray

2   part that's "other," and that's exactly what Facebook,

3   TikTok, Instagram are making.

4   Yes, they're making money. Yes, they have a

5   successful product, but it is a different product.

6   In order to look at that, all we have to do is

7   look at -- the advertiser testimony tells you that.

8   THE COURT: So, Mr. Dahlquist, what do we make of

9   Mr. Schmidtlein's argument that if one looks at Google's

10 business documents, there's not a lot of records that are

11 comparing ad quality between Bing and Google. When they're

12 looking over that at other places where ad dollars can be

13 spent, it's at Amazon, Facebook, Instagram. I mean, isn't

14 that fairly strong evidence of -- that Google believes it

15 has competitors in the market for advertising?

16   MR. DAHLQUIST: It shows you that Google wants to

17 make more money in different products.

18   Let's go to Slide 52, which I think is the direct

19 response to that, Your Honor.

20   Because Google saw that these other companies,

21 Facebook, Instagram are so profitable, they launched a new

22 product called Discovery Ads to compete directly with those

23 products. And we agree, this new product, and that's the

24 chart you show, the green is their brand-new product that

25 they launched in 2020, or approximately 2020, in order to

1   compete, in order to get some of these social buyers, and

2   some of those dollars in the social ads.

3   But if you look at this document, UPX33, it's a

4   different channel, it's different from Search, it's

5   different from Display. They themselves put these in

6   different categories. You don't need to believe -- take my

7   word for it, you can take Google's word for it. These are

8   distinctly different products. That is all we need to look

9   at, is the advertiser testimony.

10   And let's go to Slide 50, 5-0.

11   Mr. Lowcock himself: "I don't consider search and

12   display substitutable. Search ads are the one that's

13   mandatory."

14   Slide 51, Mr. Booth: "Search ads are unique."

15   Google had the opportunity to call advertisers.

16   They could have called Facebook, they could have called

17   Instagram to trial.

18   They had plenty of time. We were with you for ten

19   weeks, Your Honor. They didn't. They didn't call these

20   advertisers to say, yes, we're competing in search ads or,

21   yes, or any other advertisers to say, yes, we're switching.

22   These are substitutable. That evidence simply doesn't

23   exist.

24   Your Honor, we began some of this discussion

25   talking about case law, and I think there's just one case

1   that's a more recent case -- if we go to Slide 43 -- *IQVIA*,

2   *FTC versus IQVIA*, Mr. Schmidtlein referenced this yesterday

3   so I want to make sure we put it out there. This is a very

4   recent case from Judge Ramos from the Southern District of

5   New York, which found that search ads are not substitutable

6   for other types of advertising.

7   Directly on point, sure, this was programmatic

8   advertising for healthcare professionals, yes, but that is

9   what they found was the market.

10   A similar analysis here, Dr. Israel was the expert

11   in this same case and put forth the same theory, that social

12   ads, display ads, all these other types of ads should be in

13   that market, and Judge Ramos rejected that opinion because

14   they are not reasonably interchangeable for another.

15   Now, Your Honor asked a question, which I want to

16   be responsive to, and if we can go to Slide 16, asked, and

17   I'll ask the question of myself: Why didn't Dr. Whinston do

18   a SSNIP test?

19   The short answer is, he didn't have to. We have a

20   real-world SSNIP test here at Slide 16.

21   Google did it for us. Google and the testimony of

22   Jerry Dischler talking about a 5 percent increase.

23   Go to the next slide, please.

24   Slide 17, he talks about a 10, 15 percent

25   increase.

1   We didn't need to do a SSNIP test because we have

2   a real-world SSNIP test done by Google. This was the

3   predicate in all their additional experiments.

4   But even Professor Israel or Dr. Israel himself

5   stated, and this is at the transcript 8386, that "It's more

6   normal than not that an expert does not do a full

7   quantitative hypothetical monopolist test." Even Dr. Israel

8   agreed what Professor Whinston did was a qualitative test.

9   That's what's required under *Brown Shoe*. Looked

10   at the factors, the various *Brown Shoe* factors, in order to

11   determine, is this a market? And the answer was yes.

12   THE COURT: I mean, doesn't -- I mean, it's

13   certainly the case that you're not required to present a

14   qualitative analysis, you're not required to do a regression

15   analysis. But -- and you couldn't do one when it came to

16   search. But, in theory, you could have done one here.

17   And I guess the question is, why not? I mean,

18   I know you've got some of these documents that you want to

19   point to and have pointed to as substitutes for it, but,

20   I mean, shouldn't I have expected to see some kind of

21   regression analysis here from an expert?

22   MR. DAHLQUIST: I think, Your Honor, you're trying

23   to put a burden on plaintiffs that just doesn't exist,

24   candidly. The evidence, the direct evidence showed that

25   customers, advertisers are not switching in the light of

1   price increases. That is all this Court needs to find.

2   And if you want to talk about, since I know

3   Your Honor asked the question yesterday, about Dr. Israel's

4   analysis, 142 -- and I say Dr. Israel didn't do a regression

5   analysis, he didn't do an econometric analysis, and he

6   stated that as well. He didn't even put forth a market, nor

7   did Dr. Murphy. Neither of them actually opined. They have

8   this vague audience theory but they don't actually opine on

9   market.

10   But Your Honor asked about DX29.129. And the

11   short answer to Your Honor's question is, this shows

12   nothing. Dr. Israel's analysis shows nothing. He tries,

13   and he claims that he's doing some type of proxy analysis

14   for quality.

15   But what this is -- and let's start with the

16   baseline of what it is. This is -- starts with Google's

17   price -- search ads index, right. That's the blue line.

18   The blue and the green line are, that's data from Google,

19   mobile and desktop. As the price is going up, this, you

20   know, shows that prices have increased over 100 percent over

21   this time period.

22   And what he does is he layers on top of it this

23   orange line, which is just a trend line, and is it defined

24   as ratio of ad clicks to queries, returning ads, which

25   Your Honor asked an exact question of Dr. Israel about this.

1   "What does this show?

2   "This is text ads, this is search ads, this is

3   mobile ads, this is desktop. It's all combined in one."

4   It is not case adjusted, if you will.

5   Google's own analysis takes a basket of goods like

6   a CPI, right, some from healthcare, some from consumer

7   goods, and creates its own price index.

8   Dr. Israel doesn't attempt to do that. This

9   number could be going up for any multitude of reasons.

10   Because Google's putting more ads on a page. It could be

11   because there's more text ads being sold than search ads,

12   more mobile ads than Desktop ads. We simply don't know why.

13   I could very easily just take a trend line of

14   number of runs scored by the Chicago Cubs since the

15   beginning of the season and have a trend line going up in

16   the same way and overlay it on the same chart.

17   THE COURT: And this is the question I have --

18   and, Mr. Schmidtlein, obviously, you'll get an opportunity

19   to discuss this as well -- which is, I understood the blue

20   and the green line and I understood the axes in which they

21   appeared.

22   What I didn't understand was how a ratio of ad to

23   click line, ads to click, could be superimposed upon those

24   two lines when they aren't defined by either axis.

25   And so that was my confusion about this chart and

1   how Dr. Israel suggested that this evidence of click ratio

2   could sort of map on to this.

3   And maybe he's just saying, well, the trend lines

4   are the same, and maybe that's the end of the day. But

5   that's what I was confused about and that's the reason I

6   raised this particular --

7   MR. DAHLQUIST: And Your Honor is asking the right

8   question, and we don't think it shows anything.

9   He's attempting to create a correlation, or a

10   causation, perhaps, between clicks and quality, but even

11   Google says that's not right.

12   Let's go to the next slide, 143, please.

13   Google itself has said, the advertisers care in

14   the end about conversions, not clicks.

15   And even Mr. Jain, this was some designated

16   testimony, says, "We cannot draw a correlation on the

17   click."

18   So this evidence --

19   THE COURT: But isn't that a fair proxy?

20   I mean, this is what I just talked about with

21   Mr. Schmidtlein.

22   Google doesn't have full transparency into how

23   successful the ads are ultimately, at least that's my

24   understanding, and so why isn't the increased click rate a

25   fair proxy for improved ad quality?

1   In other words, why isn't it a fair inference that

2   if the clickthrough rate has increased from 10 percent to

3   30 percent, that the conversion rate would have gone up too,

4   or at a minimum, at a minimum, revenues would have gone up?

5   MR. DAHLQUIST: I'll start by, Your Honor, saying,

6   there's simply no record evidence to that.

7   Neither Dr. Israel performed any type of real

8   study to analyze that. Google itself didn't perform --

9   THE COURT: But it can't be that the increased

10 clickthrough rate is sort of -- I mean, increased click rate

11 is meaningless.

12   I mean, you're right it could be because there's

13 more ads. On the other hand, more ads is a good thing

14 maybe. The format ad pricing made certain ads more

15 desirable than just simply the single, you know, line. Now

16 you can add things like, we've got a sale, 30 percent off.

17 It provides more information and allows you to click in

18 different places.

19   And so I don't think anybody would dispute that

20 the format ads, for example, are better ads. Would you

21 disagree with that?

22   MR. DAHLQUIST: I think that's in the eye of the

23 beholder, Your Honor, whether the advertiser thinks it's

24 more valuable or not.

25   Mr. Schmidtlein talked about, it's really hard for

1 Google to figure out what the value. We agree because

2 there's not sufficient competition to determine that value.

3   If there was competition, Google would have a very

4 good answer, because -- I'm sorry.

5   THE COURT: But don't the plaintiffs bear some

6 burden here to establish that advertisers aren't getting

7 what they're paying for?

8   That advertisers are in what is purportedly a

9 noncompetitive market, they aren't getting what they're

10 paying for; that, in fact, ad quality has degraded, that the

11 conversion rate hasn't gone up, or that revenues haven't

12 gone up as a result of the clickthrough rate growing up.

13   You all haven't presented evidence of that either,

14 and I'm not sure it's Google's burden to do that.

15   MR. DAHLQUIST: But, Your Honor, I think, again,

16 you're imposing a burden on the plaintiffs that simply

17 doesn't exist.

18   Do we dispute that some of these launches, and

19 we're going -- in the next session, we're going to get into

20 detail in the various launches, do they have some incidental

21 occurrence of value or quality? Perhaps, perhaps. As

22 *Microsoft* said, even a monopolist has some incentive to

23 innovate and provide some additional value.

24   But that's not the question. The question is, can

25 competition restrain prices? And here the answer is

1   definitively no. Google has tested that time and time

2   again, and that is why we have prices that are monopoly

3   prices in this marketplace as opposed to competitive prices.

4   THE COURT: Yeah. There's more to talk about and

5   we'll do that in the next session, because I am curious why

6   you think ad quality has not gone up, but we can talk about

7   that.

8   Mr. Cavanaugh.

9   MR. DAHLQUIST: Thank you, Your Honor.

10   MR. CAVANAUGH: Very quickly, Your Honor.

11   Your Honor asked Mr. Schmidtlein about the direct

12   signal produced by queries on general search, and I think

13   that answers Your Honor's question to me about putting PLAs

14   and text in the same market.

15   And it's the point that both of them are going

16   after that same mindset of the user, the intent expressed by

17   that direct signal, and that is what permits -- that is why

18   they should be in that same market, because that's the

19   demand subs -- that answers the demand substitution

20   question.

21   I'd also note, Your Honor, Mr. Booth, at 518182,

22   testified that Home Depot would look at --

23   THE COURT: Right.

24   MR. CAVANAUGH: -- reallocating between the two.

25   The second point very quickly, Your Honor.

1   If all of these -- if the Facebook display ads and

2   the TikTok display ads are actually in the same market, one

3   would expect that, over time, the ROIs would all equalize,

4   but we see different ROIs.

5   And the second point relating to that, Your Honor,

6   is that if the world really turned on ROIs, all the money

7   would move to the channel with the best ROI. But that isn't

8   the case, because they're different products with different

9   attributes with different advertiser objectives.

10   Thank you, Your Honor.

11   THE COURT: All right. Thank you, Mr. Cavanaugh.

12   All right. So let's take our morning break. Why

13   don't we plan to resume at about five of 11:00 so we can try

14   and stay on schedule.

15   Thanks, everyone.

16   COURTROOM DEPUTY: All rise.

17   This Court stands in recess.

18   (Recess from 10:43 a.m. to 10:56 a.m.)

19   COURTROOM DEPUTY: All rise. This Honorable Court

20   is again in session. Be seated and come to order.

21   THE COURT: Thank you, everyone. Please be

22   seated, everyone.

23   Mr. Dahlquist, ready when you are.

24   MR. DAHLQUIST: Great. Thank you, Your Honor.

25   Your Honor, the next section we're going to focus

1   on, advertiser harm.

2   And a Slide 74, please, Mr. Penado.

3   As Your Honor previewed in the very beginning of

4   this morning, or asked where this analysis fits in, this

5   next section, at least until Your Honor's questions draw me

6   otherwise, are going to be focused towards what Google

7   actually does and the efforts that it takes in order to

8   increase price.

9   And under the *American Tobacco* cite that's up

10   there, that the definition of a monopoly is a firm that can

11   raise prices when it desires to do so. And I believe that's

12   what this direct evidence shows, that Google does, in fact,

13   increase price when it desires to do so.

14   One of the keys to Google's price increases and in

15   revenue is the search ads auction.

16   And this Court heard a lot about the ad auction,

17   and we're going to focus on just a couple components. But

18   maybe it's best to take a step backwards for a minute.

19   And, Mr. Penado, if we can please go to Slide 23,

20   please.

21   Over time -- and let's --

22   It's the same deck.

23   MR. SCHMIDTLEIN: Thank you.

24   MR. DAHLQUIST: No problem.

25   In its early history, Google relied on query

1 growth for growing its volume, for growing its volume and

2 growing its revenue.

3   THE COURT: Sorry, relied on what?

4   MR. DAHLQUIST: Its query growth.

5   More people joining the Internet, more people

6 signing on, more people entering inquiries. Query growth

7 was the primary driver of Google's revenue. At some point

8 in time that changed, and Slide 23 shows a document

9 identifying that.

10   The graph's redacted, but that's irrelevant

11 because the graph just shows two points. One, the dotted

12 line is that Google's year-over-year target growth was at

13 that percentage of the dotted line, and they hit it, they

14 hit it year over year, and query growth was the primary

15 driver, until where the Number 1 shows, sometime in around

16 mid-2015, queries began to slow.

17   Google then needed some other tools in order to

18 monetize, in order to increase its revenue or to hit its

19 revenue goals.

20   And as the slide shows, monetization gains are now

21 driving the primary growth -- are driving the majority of

22 revenue growth at Google.

23   Now, let's jump back to where we were --

24   Thank you, Mr. Penado.

25   -- at 74 talking about why Google and how Google

1 started raising prices as they want to.

2   If we can go to text slide, please, 75.

3   In this similar time period, and all these

4 documents are related to similar topics, Your Honor, but

5 this was a summary of when Google said, we need more ways to

6 extract more value, since revenue growth as was -- since

7 query growth was no longer the driving force, we needed

8 other ways.

9   And they state here, "We need pricing mechanisms

10 with pricing knobs."

11   And there's a variety of ways that they do this.

12 They do this through the complexity of the ad auction --

13 through the complexity of the ad auction, and Google often

14 says, well, through the ad auction, we're always increasing

15 value, we're always increasing quality. That's what we're

16 doing, we're innovating.

17   If we can go to the next slide, 76, please.

18   Google's documents are very clear. Sometimes they

19 might be increasing value, sometimes there's a quality

20 component. But what are we tuning? Prices. That's what

21 their focus is.

22   Next slide, please.

23   In 2018, a Google document talked about sometimes

24 there are some launches that improve quality and have

25 touching on pricing, and they call that an incidental

1 occurrence of pricing. But at this time period, they were

2 looking for more intentional pricing knobs. What can we do

3 in order to intentionally increase our pricing? And they

4 identify here format pricing, squashing, and reserves.

5   THE COURT: Mr. Dahlquist, could I ask you a

6 question as a legal proposition?

7   Assume for me for a moment that ad quality has

8 improved. Just -- I know you disagree with that, but assume

9 ad quality has improved.

10   Is a monopolist permitted to increase the price of

11 its advertising commensurate with the quality improvements

12 in your view?

13   MR. DAHLQUIST: Your Honor, we are not taking a

14 position that price increases in and of themselves are

15 illegal, no, we're definitely not.

16   THE COURT: Okay.

17   MR. DAHLQUIST: However, price increases should be

18 bounded by competition. It should be the market that should

19 be deciding where those price increases are. That is what

20 Congress requires to do in the Sherman Act, saying that

21 competition is the best form as opposed to what we see here,

22 a firm trying to come up with intentional pricing and trying

23 to decide what it should be pricing, because it has no

24 boundary of competition.

25   If we can go to the next slide, please.

1   The three pricing knobs or pricing levers that we

2   talked about most at trial and are most featured in our

3   P file are format pricing, squashing, and rGSP.

4   Let's talk about format pricing. And I know

5   Your Honor asked about this, as to doesn't format pricing

6   increase some value?

7   But let's show what the documents show was

8   actually Google's focus.

9   First, Mr. Dischler agreed that format pricing

10   was, in fact, a pricing knob that he had available to him,

11   and the answer is "yes."

12   Next slide, please.

13   Now, format pricing was launched over a series of

14   different launches and updates to the ad auction. And this

15   one, called Momiji, which was one we featured at trial --

16   and Momiji, as Your Honor previewed, they have unique names,

17   is a traditional Japanese doll with a small space in the

18   bottom where secret messages can be hidden.

19   Google saw the opportunity of Momiji to make

20   billions more in format pricing. They expected a 10 percent

21   RPM increase just from this alone.

22   Google was very clear on this. Because of the

23   Gamma Yellow test that I referenced in the prior session,

24   they knew, they state here, "Prices could be higher, and we

25   think we would keep the money."

1   So this is them validating their own test, saying

2   they, we did the test, we know it will work, and, as they

3   say here in red, "Format pricing is our best knob to

4   engender large price increases."

5   And it worked. Google, in fact, did make

6   millions. For the typical -- made billions.

7   "For the typical advertiser, there was a price

8   increase.

9   "Answer: Correct. Yes, for the typical

10 advertiser."

11   This worked, their test borne out in reality. So

12 it wasn't just a hypothetical that they tested. The reality

13 is they launched it and it worked.

14   THE COURT: So let me ask you this: We've just

15 talked, and you've agreed, that pricing increases in and of

16 itself is not a Section 2 violation; however, price

17 increases in an anti -- excuse me, in a noncompetitive

18 market is.

19   And I guess the question is, is there any evidence

20 of what the competitive price would have been or an

21 estimation of what the competitive price would be, such that

22 I could sort of tangibly say, advertisers had been harmed to

23 the tune of X dollars?

24   MR. DAHLQUIST: No, Your Honor. In short, no.

25   And submit that that's not evidence that is

1 required or necessary.

2   The question shouldn't be how high could prices

3 go? The question should be, how low should prices have

4 been?

5   If there had been competition, if there had been a

6 constraint on Google, where should prices have gone?

7   So I think that's asking the wrong question.

8   Not, could we increase by 10, 15, 20 percent and

9 did we, in order to figure out what the price should be,

10 this is a scenario where prices could have, should have been

11 much lower as a result of competition.

12   But to add insult to the injury, Google keeps

13 talking about value that is added, but that's not what they

14 communicated to their advertisers, to their customers.

15   If these launches, such as format pricing or

16 others, were so value add, why didn't they talk to their

17 customers about it? Why didn't they tell their customers?

18 This one, they said, "There will be no proactive

19 communication of this change, and no comm doc or impact list

20 will be shared with sales."

21   Even people within Google were not supposed to

22 know about this change in 2017. Only monopolists need to

23 hide their price increases not just from their customers but

24 from their own employees. If this launch were really about

25 quality, they would have shouted it from the rooftops.

1   And this is what contributes to the idea that --

2   and the supported idea that Google Search ad auction is, in

3   fact, a black box. Advertisers do not know how this works,

4   and Google wants to keep it that way.

5   THE COURT: Does it matter to your case that

6   advertisers don't know how other ad platforms seem to work

7   either?

8   MR. DAHLQUIST: I'm sorry, Your Honor?

9   THE COURT: As I understand it, advertisers don't

10   necessarily know how these other ad platforms work either,

11   or at least there's not a lot of evidence that they do.

12   So how do we -- how do I view that fact? I mean,

13   do advertisers have greater insight into how Bing's ad

14   platform or pricing mechanisms work?

15   MR. DAHLQUIST: Your Honor, you're right, that's

16   the only other sample we have to look at, really, of a GSE

17   that is a far weaker, but a rival, certainly, to Google

18   here.

19   And I submit that Google's setting the market

20   here. They're setting the market price, they're setting the

21   market conditions, they're setting it as to how much

22   information is out there; and Bing is following along.

23   Now, that doesn't prove -- that doesn't prove

24   anything, to be perfectly honest. A monopolist is still

25   pricing and there's others that are free-riding along,

1   perhaps. But that doesn't tell us as to what a competitive

2   marketplace would actually create, a marketplace where there

3   is more transparency or there --

4   THE COURT: I'm sorry, how do I know that Bing has

5   been increasing its price? I mean, it's not clear to me --

6   how does Bing know what Google's pricing is?

7   Again, this is not a -- there's -- so far, it

8   doesn't seem like perfect -- far from perfect information in

9   the market. So say Google has increased its price for ads,

10   how does Bing know that that's happened and, therefore, can

11   follow suit?

12   MR. DAHLQUIST: I don't know that we have a lot of

13   evidence in the record as to how Bing prices or what they do

14   to price, Your Honor. And I don't think we need to, because

15   I think we've shown that the price increases that Google is

16   launching through format pricing and squashing, that Bing is

17   not a competitive constraint on it, and so Google is

18   proceeding ahead with these price increases.

19   I think Google -- I think most likely Bing is

20   doing its own process and figuring out where its market

21   pressure is, what it can do and can't do, until an

22   advertiser leaves it and perhaps goes to Google. That is a

23   substitute in that way.

24   But I don't think we have the reverse to show

25   where Google's pricing is so great and the advertiser leaves

1   to Bing.

2   Your Honor, moving on to squashing, and I think

3   squashing is helpful to show -- if we can go to the next

4   slide -- because, again, they use it to engender a more

5   broad price increase, again, this is another intentional

6   pricing knob by Google.

7   And now, what is squashing? It's the concept is

8   very -- or, well, the implication of it is complex, but the

9   concept is, at least in theory, simple.

10   When Google engages in squashing, it manipulates

11 one specific input to the ad auction, which affects two

12 ways. One, it affects which ad will actually win; and, two,

13 how much the winner pays.

14   So the result is that squashing may at times show

15 a lower quality ad, quality in the terms of how Google's

16 measuring it under their LTV calculation, or, on average, it

17 has a price increase. It increases that price by squishing

18 the first and the second, the winner and the runner-up.

19   Now, while the precise effect of squashing is

20 different in every auction, Google knew that it would

21 increase price, and that's really the focus.

22   Professor Whinston testified about squashing and

23 its impact and his conclusion is that, at the end, it would

24 "raise the price against the highest bidder."

25   Now, we've often questioned as to whether these

1   launches are increasing quality or not, but here is one

2   launch which was very focused as to what it was doing. "The

3   goal is to recover lost revenue from launches which create

4   for our users and advertisers -- create value for our users

5   and advertisers but reduced revenue for Google."

6   That was their very clear goal. Some other

7   launches that they did may have created some value, and they

8   didn't charge enough for them. And so here with this

9   launch, they're trying to come back and recover all lost

10   revenue.

11   There's no mention of competition. There's no

12   mention about what a competitor might do in response, just,

13   we deserve more money, and let's recover the revenue here.

14   This is how a monopolist talks.

15   Again, squashing worked. It made more money.

16   "On average, the winner paid more?

17   "Yes."

18   Now, if we're looking at the quality story, what

19   Professor Whinston explained with -- specifically with

20   squashing, and with other implementations, but specifically

21   with squashing, Google traded inefficiency for higher price.

22   And Professor Whinston identified that and said

23   that this thing, they made the auction more inefficient in

24   order to raise revenue.

25   But you don't just have to take

1   Professor Whinston's word for it. Google's documents in

2   2017 showed that this launch, squashing, had "a negative

3   user experience and a negative impact on the long-term

4   incentives for advertisers to improve quality."

5   This is Google making a deliberate determination

6   to make their product worse, to make the ad auction worse in

7   order to make more revenue.

8   But Google is willing to do it, because it brought

9   in more revenue, and they needed that additional revenue to

10   hit their targets.

11   They were even clearer. And I previewed this in

12   my introduction. "They did this revenue efficiency tradeoff

13   and they ranked ads suboptimally in exchange for more

14   revenue."

15   And so while we can sit here and listen to Google

16   argue, well, we've created all this quality, there might

17   have been a quality increase, but this was a direct price

18   increase, a direct effort in order to increase prices and

19   make the product worse.

20   Final launch that we're going to discuss,

21   Your Honor, is rGSP or randomized generalized second-price

22   auction.

23   In 2019, Google introduced another intentional

24   pricing knob called rGSP.

25   rGSP was introduced through a launch called

1   Polyjuice. And in case you haven't read the *Harry Potter*

2   books, my kids have informed me that Polyjuice is a magic

3   potion designed to make you look like someone else. And as

4   you will see, the name is very appropriate.

5   In short, rGSP manipulates the search ads

6   auction in order to make lower bidders look like higher

7   bidders. Again, the details of rGSP are very complex, but

8   the concept is simple.

9   Google will randomly swap the top two bidders in a

10   search ads auction. And even if that swapping doesn't

11   actually occur, the rGSP function increases the price that

12   is paid by the winner.

13   In short, rGSP does two things. One, it shows a

14   lower quality ad, similar to squashing, different mechanism

15   but similar result; and, two, charges the winning bidder

16   more. Again, same effect, very different tool but same

17   effect.

18   THE COURT: And is there evidence the extent to

19   which -- I mean, as I understood the explanation for this,

20   it was to ensure that smaller retailers, for example, could

21   win auctions from time to time against Amazon. And is there

22   evidence in the record as to how -- whether that, in fact,

23   happened? In other words, does the evidence actually

24   support the idea that, in fact, this sort of elevating of

25   smaller retailers was, in fact, happening?

1   MR. DAHLQUIST: I've seen that in the record as

2   well, Your Honor. There's certainly some statements that

3   that is one of the effects, or perhaps one of the goals.

4   But I submit where I started, that this is -- they

5   describe this as an intentional pricing knob, an intentional

6   pricing knob in order to increase price.

7   The rGSP launch replaced format pricing, and the

8   issue with format pricing was that advertisers could

9   actually opt out.

10   You asked a question earlier, Your Honor, as to

11   whether advertisers -- everybody would agree that format

12   pricing was better. No, not everybody. An advertiser had

13   that ability to choose. Do I want my ad to have format

14   pricing and have these additional components or not? And

15   format pricing made, as you saw, Google billions of dollars.

16   Here, they decided that rGSP was a better

17   pricing knob. And why? Because they couldn't opt out of

18   it. This would be implemented over -- across every single

19   auction.

20   That's what they said, they found it's a better

21   pricing knob than format pricing and would replace it.

22   And let's jump a couple slides ahead.

23   I'm sorry, I can't find the slide.

24   Here we go.

25   Dr. Adam Juda was asked the direct question:

1   "If they enter into a launch, are they subject to rGSP?

2   "Yes, it's how the auction works today."

3   There's no ability to opt out of this. Whether

4   the advertiser likes it or not, it's happening behind the

5   scenes and they're subject to this random swapping and price

6   increase.

7   Professor Jerath explained this, and Your Honor

8   had some discussion with him, and this slide, just for your

9   purposes to examine later, therein is the detailed

10   explanation as to how it happens and exactly how the

11   mechanism works.

12   But the summary is that Google artificially

13   inflates the ad rank of the runner-up, the winning ad may

14   lose, and the winning ad gets a price increase.

15   And what was the effect?

16   THE COURT: I'm sorry, can you just --

17   MR. DAHLQUIST: Please.

18   THE COURT: -- help me understand that one more

19   time.

20   So Google flips the first and second place

21   winner -- excuse me, the first and second place bidders, and

22   that increases the price how?

23   MR. DAHLQUIST: Certainly.

24   As Your Honor recalls, Google runs what's called a

25   second-price auction.

1   THE COURT: Right.

2   MR. DAHLQUIST: And so the price of the winner is

3   set by the runner-up.

4   THE COURT: Right.

5   MR. DAHLQUIST: Here, in rGSP, Google

6   artificially inflates the second place winner. So inflates

7   its LTV to get closer up to the winner.

8   That increases what that second price bid is

9   ultimately, and what the winner may ultimately pay. Now it

10   might swap it, and where it artificially increases, it

11   display as lower quality ad. But even if it doesn't, it

12   increases the price that that winner ultimately bids.

13   THE COURT: Because the second bidder's price is

14   artificially inflated. And the reason it's artificially

15   inflated is to, what, create a smaller delta between the

16   first and second ad so that in some instances they would

17   flip?

18   MR. DAHLQUIST: Correct, Your Honor.

19   And this is where Your Honor's explanation or the

20   rationales, one rationale of Google is to prevent runaway

21   auctions, where the winning bidder is always the highest,

22   and maybe we should inflate someone else to get there.

23   But the problem is, as Professor Israel identified

24   here, it incentivizes advertisers to bid higher. If you

25   don't want to get randomly flipped, if you don't want to get

1 randomly switched, you need to bid even higher, and this

2 pushed up all the auction prices, on average, of course.

3   Now, to go back to our discussions about this

4 quality tradeoff -- please.

5   THE COURT: I'm sorry to ask.

6   Can I -- what's your understanding of how

7 advertisers -- if they didn't know about Google doing this,

8 how it is that they responded by the first bidder, say

9 Amazon, increasing its ad bids -- I mean, what metric were

10 they looking at to determine that they were, I guess, losing

11 more auctions than they had in the past?

12   MR. DAHLQUIST: Sure.

13   THE COURT: And then reacting and saying, well, if

14 we're losing more auctions, we need to increase our bid

15 price. Is that the chain of events that you believe

16 occurred?

17   MR. DAHLQUIST: In part, yes, Your Honor.

18   And something is, that we'll address a little more

19 this afternoon, but Google provides search query reports or

20 SQR reports --

21   THE COURT: Right.

22   MR. DAHLQUIST: -- to everybody that tells you,

23 here's what you won on, here's what you lost on. Here are

24 the queries that returned your ads.

25   And that's the primary method that advertisers

1   used in order to figure out where they were winning and

2   losing bids. So that was at least one tool.

3   The other one is just seeing how their ad spend

4   worked, where they were determining ads.

5   I think Mr. Schmidtlein will probably come up and

6   say that's ROI, and that's where they're trying to figure

7   out and measure what they were doing.

8   Sure, within this channel, within search ads as to

9   how they were making, where they were making money or where

10   they were most profitable with their ads.

11   But to go to Your Honor's question as to what

12   advertisers knew or didn't know, Google was very worried

13   about that, as to how to explain to the advertisers how this

14   actually works.

15   And in Slide 97, they had a whole discussion about

16   this, a whole memo of how do we explain this to our

17   advertisers, and they came up with some explanations, they

18   had talking points.

19   But the last bullet point, "We don't want to have

20   to say that we randomized, that will have perception

21   problems." They were very worried about telling their

22   advertisers the truth about how this actually worked.

23   We've had a lot of discussions about quality, and

24   I think this next point is important.

25   Mr. Penado, can we go to 101, please.

1   rGSP, they asked, "Is there any component of

2   this launch, this rGSP launch, quality?"

3   The answer: "Does not directly touch quality.

4   "Does the exploration lead to better quality?

5   "Haven't seen that it does."

6   An intentional pricing launch focused on prices,

7   and this is direct rebuttal to Google's claim that all these

8   launches, all these innovations were an improvement of

9   quality. The record simply doesn't support that,

10   Your Honor.

11   Your Honor, those were the three points I wanted

12   to cover with respect to advertiser harm and the ad auction.

13   Happy to answer additional questions.

14   THE COURT: Can I ask you, in terms of the

15   framework again, we are at a point, just in terms of how

16   we've been discussing this, where, let's assume I agree with

17   market definition and that Google has monopoly power in

18   these ad markets and the anti-competitive conduct here is

19   not what you've just described. It's the contracts, the

20   exclusive agreements.

21   So does not *Microsoft* still require me to look at

22   foreclosure, market foreclosure in these markets as an

23   initial step before I even consider some of the evidence

24   that you've identified as the anti-competitive effects? And

25   if that's the case, what's the evidence of market

1   foreclosure?

2   MR. DAHLQUIST: Certainly, Your Honor.

3   And the short answer is yes.

4   Everything we just went through is put forward as

5   harm evidence to the advertisers.

6   The actual anti-competitive effect comes from the

7   contracts, from the loss of competition related to the

8   contracts.

9   Professor Whinston, and we put forth foreclosure

10   numbers not just for the GSE but also for the search ads

11   markets, it's detailed in our P file, I can get you the

12   detailed P file cites in a moment.

13   But the foreclosure numbers are similar but a

14   little bit less because our markets are different. That

15   makes sense. Here we're focused on different products than

16   the GSE, but we do certainly present foreclosure numbers,

17   and they're escaping me at the moment.

18   THE COURT: So just my notes, our notes indicate

19   36 percent for search ads, and 45 percent for -- in the text

20   ads market, as your foreclosure numbers.

21   MR. DAHLQUIST: That sounds right.

22   If that's direct from your P file, we agree with

23   that, Your Honor.

24   THE COURT: Okay.

25   And that number, those percentages are --

1 represent the ad revenue of all search ads, including

2 Amazon, for example, of all search ads that go through the

3 default.

4   MR. DAHLQUIST: Correct.

5   Our foreclosure numbers, the coverage numbers that

6 we did for the search ads markets were based on revenue,

7 yes.

8   THE COURT: Okay.

9   And just to return to a question that I had a

10 conversation with Mr. Dintzer yesterday, in terms of the

11 role of foreclosure.

12   And I asked him yesterday, well, if you establish

13 foreclosure, is that sort of the end of the -- you don't

14 have -- do you have to -- you don't have to do anything

15 more? Or is there more you need to do?

16   And I think his answer was, No, once we've

17 established foreclosure, the burden then shifts.

18   Is that right?

19   MR. DAHLQUIST: Yes, certainly agree with that.

20   THE COURT: Okay.

21   MR. DAHLQUIST: And I think that's what this

22 evidence shows.

23   I think Mr. Schmidtlein got up in his last session

24 and said, all of this is academic. We certainly disagree,

25 Your Honor. Charging advertisers monopoly prices is not

1 academic, it's real world.

2   So we present this evidence in order to show the

3 harm that is being -- that is occurring.

4   THE COURT: Right.

5   MR. DAHLQUIST: And so while I completely agree

6 once we show the foreclosure numbers, you can stop there,

7 we've done more. We've shown additional evidence as to the

8 actual harm that's occurring in the search ads market.

9   THE COURT: Let me just read the following from

10 the Eleventh Circuit's opinion in *McWane*. This is on

11 page 835. They write, "The difference between the

12 traditional rule of reason and the rule of reason for

13 exclusive dealing is that in the exclusive dealing context,

14 courts are bound by *Tampa Electric's* requirement to consider

15 'substantial foreclosure,' but foreclosure is usually no

16 longer sufficient by itself. Rather, it serves a useful

17 screening function as a proxy for anti-competitive harm.

18 Thus, foreclosure is one of several factors we now examine

19 in determining whether the conduct harmed competition. We

20 also look for direct evidence that the challenged conduct

21 has affected price or output, along with other indirect

22 evidence such as the degree of rivals' exclusion, the

23 duration of the exclusive deals, and the existence of

24 alternative channels of distribution."

25   So I read *McWane*, and it cites *Microsoft*.

1 And maybe it's putting a gloss on *Microsoft*, but do you

2 agree with the *McWane*'s court's framing of foreclosure,

3 which is slightly different than the question and answer

4 that I just got from you, which is that, foreclosure doesn't

5 end your burden, it's just the door you need to walk through

6 to present evidence, other evidence to satisfy your burden.

7   MR. DAHLQUIST: And I think, Your Honor, we'd say

8 that we agree with the *Microsoft* ruling, the D.C. Circuit's

9 ruling in *Microsoft* is how they formulate the foreclosure

10 analysis, which *McWane* is obviously relying on.

11   But with that, we agree with *McWane* in the fact

12 that you can present additional direct evidence of price

13 increase, and that's exactly what this is.

14   So we're consistent with that, aligned with that,

15 but I think we read foreclosure analysis --

16   THE COURT: I think the question is, sort of, is

17 foreclosure, it's necessary in *McWane*'s world, it's not

18 sufficient, but you're suggesting it is sufficient?

19   MR. DAHLQUIST: Understood, Your Honor.

20   And I think I'd say, if you did a foreclosure

21 screen, and I think as *McWane* is describing, and you found

22 foreclosure of 5 percent, you would need a lot more, you

23 would have to show a lot more in order to actually show --

24   THE COURT: If you are only going to show

25 5 percent, there's kind of a safe harbor and you don't even

1 need to go further.

2   MR. DAHLQUIST: Here, where you have foreclosure

3 at 50 percent on the general search engine and here where

4 you have similar numbers slightly lower on the search ad

5 side, I think the analysis can end there; however, we don't

6 end there, we present additional evidence in both general

7 search and in search ads in order to demonstrate even

8 further that Google not only has monopoly power but to

9 *McWane*, using price as -- and exercising that monopoly power

10 through increases in price.

11   THE COURT: Okay. Right. Okay.

12   All right. Well, that's sort just of a legal

13 construct I've been wrestling and I wanted to get your

14 opinion on it and I think I understand what your view is.

15   MR. DAHLQUIST: Thank you, Your Honor.

16   With that, I'll cede time to the States.

17   MR. CAVANAUGH: Just a few points, Your Honor, on

18 the issue of harm.

19   In Findings of Fact 83, we quote testimony from

20 Mr. Dijk and Mr. Hurst as to what the effect has been of the

21 lack of scale, which is attributable to the exclusionary

22 conduct.

23   And what they say is, "Google has made us pay far

24 more for the same traffic." This is Mr. Dijk: "The reality

25 that we have to pay more, more, and more to get more or less

1 | the same results or be able to grow our business."

2 | Mr. Hurst, in a similar vein, said, "We had spent

3 | a heck of a lot of money on Google for no incremental

4 | business value." That's what the people in the market are

5 | saying.

6 | THE COURT: So what's the answer to Google's

7 | response, which is: The reason Mr. Hurst's return on

8 | investment on his advertising dollars is not as great as it

9 | used to be is because of competition?

10 | Airbnb has come into the market, it's been

11 | extremely successful, and so as a result, in order to

12 | achieve greater customer acquisition, they have had to spend

13 | more, and they get less return because some of their

14 | customers that they otherwise like to get are going over to

15 | Airbnb.

16 | MR. CAVANAUGH: There's no doubt that they have

17 | faced a more competitive environment. But what they

18 | attributed the increased cost of Google to is they have

19 | nowhere else to turn. It's Mr. Hurst's point about it's

20 | mathematically impossible to achieve the results that

21 | they're looking for through another competitive general

22 | search engine.

23 | And, Your Honor, all of this ultimately -- I mean,

24 | it all goes back to scale. As Mr. Parakhin said, "Once your

25 | relative scale is larger, your quality is better, so people

1   are more likely to prefer your results, and advertisers are

2   more willing to come to you so you have more revenue and you

3   have more money to invest."

4   I mean, it's -- when we talk about the ad market,

5   it's just -- it's the same feedback loop that we see and

6   that we talked about at length yesterday.

7   And SVPs are the largest advertisers. So to the

8   extent the plaintiffs collectively have demonstrated harm to

9   advertisers, it's the SVPs in particular who are bearing the

10   brunt of this.

11   And they can't avoid these effects. You know,

12   that's what Mr. Dijk is talking about on Slide 4.

13   You know, you can't stop the reliance on Google,

14   because you don't have good alternatives.

15   THE COURT: And is your view -- I remember --

16   I went back and I looked at this testimony. Mr. Hurst, for

17   example, was cross-examined quite sort of aggressively about

18   alternative efforts not to acquire new customers but to

19   retain customers they already have, loyalty programs, you

20   know, that are freestanding, that they're standalone

21   applications which actually don't require folks to come

22   through Google.

23   In your view, in your estimation, that's still not

24   enough? In other words, they're still relying heavily on

25   search ads?

1   MR. CAVANAUGH: And it goes to the point I made

2   yesterday in citing some of Mr. Hurst's testimony -- I think

3   I may have also earlier this morning -- new customers.

4   That's -- they need new customers.

5   Mr. James made the same point for Amazon. We need

6   new customers. That's why SVPs, these are -- Your Honor,

7   you made the point yesterday. These are large,

8   sophisticated companies. And if they had a better way to do

9   this, you know, they wouldn't be spending the numbers

10   reflected on the chart I had up a moment ago on Google. But

11   they don't, because general search gets them to those

12   high-intent customers and the new customers. That's the

13   lifeblood of their business. And they don't have an

14   alternative. That's the point Mr. Hurst made, it's what

15   everyone, all the advertisers said.

16   You know, Mr. Lowcock said, on the slide I had

17   from this morning, that there are no substitutes for Google

18   Amazon, running ads on Amazon isn't a substitute. No

19   witness, no advertising witness in this case testified that

20   they viewed running ads on SVPs as a substitute for a

21   general search engine. And when we say general search

22   engines, Your Honor, we're talking about Google.

23   Thank you, Your Honor.

24   THE COURT: All right. Thank you, Mr. Cavanaugh.

25   Oh, one question for you.

1   MR. CAVANAUGH: Sure.

2   THE COURT: Foreclosure, we've got numbers for

3   search ads, text ads. Is there a foreclosure number for

4   general search ads?

5   MR. CAVANAUGH: Your Honor, what we would rely on

6   is the number for text ads, given the fact that text ads is

7   the percent I showed you this morning of general search ads.

8   That's what we would rely upon.

9   THE COURT: Okay.

10   I guess what -- it could be a little lower,

11   because why, you'd have some product listing ads on Bing

12   that are not reflected on it?

13   MR. CAVANAUGH: Yeah, if you did the math, you'd

14   take our percentage, the text ads constitutes the general

15   search, and you take that percentage, it's X percent of

16   45 percent.

17   THE COURT: I'm sorry, say that again?

18   MR. CAVANAUGH: I think the way you could do the

19   math is you would say, text ads are X percent of our general

20   search ad market.

21   The other is PLAs essentially.

22   THE COURT: Right.

23   MR. CAVANAUGH: And so you could take that

24   45 percent, and I think you would, if I'm doing the math

25   right, Mr. Sallet will correct me if I'm doing it wrong,

1   I think you would take it down.

2   MR. SALLET: To about 37 percent.

3   MR. CAVANAUGH: To about 37 percent.

4   THE COURT: Okay.

5   And you'd take it down because there are PLAs on

6   Bing?

7   MR. CAVANAUGH: Yes.

8   THE COURT: Right. Okay.

9   Right, because, say there were no PLAs on Bing,

10 your number would actually go up.

11   MR. CAVANAUGH: Right.

12   THE COURT: Right.

13   MR. CAVANAUGH: Okay? Thank you.

14   THE COURT: Thank you.

15   MR. SCHMIDTLEIN: Your Honor, I just want to

16 respond to a point that Mr. Cavanaugh just made, and I want

17 to go back to a slide that was on the set of slides we gave

18 you this morning, and it's Slide 22.

19   And this is -- this is red-boxed for Your Honor,

20 because this is sort of confidential, third-party data that

21 we have used.

22   So it's Slide 22. I think it's the last slide in

23 that binder. Just let me know when you're there.

24   THE COURT: Okay. I'm with you.

25   MR. SCHMIDTLEIN: What this shows, contrary to

1   Mr. Cavanaugh's statement that Expedia and various of the

2   other folks who came in and testified, they have -- they're

3   beholden to Google, they just can't get customers to come to

4   their sites. And I think as you mentioned yesterday, these

5   are billion-dollar companies, so customers are coming to

6   their sites.

7   But what this study demonstrates is that, for all

8   of these folks, and Expedia is right in here with them, the

9   overwhelming majority of their traffic comes from sources

10   other than Google Search ads. When somebody goes into their

11   browser and types Expedia.com, they're directed to Expedia.

12   And what you heard, I think you were -- you did

13   channel my response to this, which is, what you heard over

14   time is not that Google was doing something, exercising

15   monopoly power or doing something wrong, what Mr. Hurst was

16   complaining about, and what others were complaining about,

17   was competition. They were complaining about the fact that,

18   over time, several things were happening.

19   One, as Mr. Holden, I think, walked you through,

20   Google was competing in this space. So Google was making a

21   very, very valuable and useful immersive around traffic, and

22   people were going there.

23   The other thing that was happening was there were

24   a lot more people in this space, and so they weren't getting

25   as many of those free organic clicks, because people were

1   preferring to go elsewhere. And so they found themselves

2   having to compete more in all sorts of different ways,

3   including for search advertising. That's competition.

4   That's not a lack of competition.

5   And, again, I didn't get to this this morning, but

6   I wanted to reference this slide.

7   THE COURT: Can I ask why this slide is helpful?

8   And the reason is, what this shows is that, you know, a

9   number of these SVPs are getting traffic directly from Maps,

10   for example. But that's not part of any ad market, right?

11   So this is ways of getting there without even --

12   MR. SCHMIDTLEIN: Well --

13   THE COURT: -- without even needing to advertise.

14   And so the question is a narrow one, which is,

15   when SVPs are using ad dollars to -- when they're using ad

16   dollars, where that is going, not how the traffic is getting

17   there.

18   Now, there may be some correlation, but the fact

19   that, you know, for example there's -- those large

20   percentages are coming from direct apps, I don't know how

21   that tells me very much in terms of competition within the

22   market --

23   MR. SCHMIDTLEIN: No.

24   THE COURT: -- the ad markets.

25   MR. SCHMIDTLEIN: But what it, I think, does

1   suggest is, to the extent that they are successful in

2   advertising -- and they all do advertise all over the

3   Internet and all over television. You certainly see no

4   shortage of Booking.com commercials and Expedia

5   commercials and everything else. They are very, very

6   successful at driving people and getting brand awareness and

7   getting traffic. And they're not just getting traffic from

8   Google. They're originating traffic from all sorts of

9   different places.

10   So, again, the notion that when they come in here

11   and say, oh, woe is me, I only can -- I can only advertise

12   on Google, that's the only way that people come to me and I

13   get discovery and everything else. The data completely

14   undercuts that. That's not what -- that's not what's going

15   on in the market. And to the extent they're unhappy,

16   they're unhappy about competition, not a lack of

17   competition.

18   I want to turn --

19   THE COURT: So, I'm sorry, could I just ask a

20   quick question about the chart?

21   Direct web, is that sort of search engine

22   optimization traffic?

23   MR. SCHMIDTLEIN: No. That's literally people

24   going and sort of navigating when -- there's a reason why

25   Expedia named itself .com. When people start to type in

1   Expedia.com, the browser --

2   THE COURT: Right.

3   MR. SCHMIDTLEIN: -- directs them right to their

4   website. It's not even -- they don't even -- it's not even

5   a navigational search.

6   THE COURT: Right, these are direct .com.

7   MR. SCHMIDTLEIN: Exactly.

8   THE COURT: Okay.

9   MR. SCHMIDTLEIN: To the point, Booking.com,

10   same situation.

11   Now, I want to talk about -- I apologize,

12   Your Honor. I want to do one minor piece of housekeeping

13   from this morning.

14   Mr. Dahlquist showed you a slide about a launch of

15   a Kohl's ad campaign, where he showed that -- he thought

16   what he showed was the search ads sort of being flat and

17   different other types of ads.

18   I just want to hand up to Your Honor a slide with

19   the testimony from Ms. Christine Raymond that she gave, and

20   this was submitted, she was deposed in the case, and what

21   she gave.

22   THE COURT: Is it possible to just -- this is,

23   there's nothing confidential -- is this confidential?

24   MR. SCHMIDTLEIN: Well, this was designated

25   confidential way back -- this had not been submitted to

1   Your Honor for screening, and so --

2   THE COURT: Yeah, I don't know that -- if you

3   would just put it up. I don't know if there's anything in

4   here I need to be particularly sensitive about.

5   Okay. Great. Thank you.

6   MR. SCHMIDTLEIN: Okay.

7   So this is what she said in her sworn testimony.

8   "So I would shift money. If I saw Google not

9   performing because they got too expensive, or whatever,

10   I will look across all of our lower funnel tactics to see

11   where I would shift.

12   So I would move money to affiliate. I would move

13   money to retargeting, to some of our social dynamics ads,

14   those feeds, all I talked about, and I would move money to

15   Bing. It's still a lot of money to move, so, for sure. But

16   that's how I would look at it, yeah."

17   So, again, I think what Mr. Dahlquist has

18   suggested based on that snippet of a document, that somehow

19   Kohl's is locked into search ads, I think the testimony

20   undercuts that.

21   So now I want to talk a little bit about the prima

22   facie case, and I want to come back to a question that

23   Your Honor was just asking counsel about, because I want to

24   make sure that we're laser-focused on this multi steps and

25   sort of where these different questions enter in.

1   And I'm certainly not going to sit here and review

2   all of the evidence from yesterday regarding exclusionary

3   conduct. But, again, just to sort of reset ourselves, the

4   conduct at issue, we have browser defaults, search engine

5   agreements, we have Android search distribution agreements.

6   And then we've got SA360 conduct, that is a --

7   that is conduct that only the Colorado Plaintiffs have

8   alleged. That's not part of the DOJ's case. So not related

9   at all to any of their advertising markets, and we'll talk

10   about SA360 later this afternoon.

11   The point here is, and, again, just a level set on

12   a couple of principles.

13   Even a monopolist, it's not unlawful for a

14   monopolist to raise prices; in other words, a monopolist

15   raising price by itself. That price increase is not

16   exclusionary conduct.

17   I think the plaintiffs would agree with that.

18   They've never come in here and said the exclusionary conduct

19   is a price increase.

20   Because we know, I mean, even in competitive

21   markets, we see price increases.

22   What you have to be able to do to establish

23   anti-competitive effects in a case like this, is you have to

24   connect the price increases. If you say that's the evidence

25   of conduct, that's the anti-competitive effect, you have to

1 | connect those to the conduct.

2 | So they spent a lot of time talking about the

3 | conduct. They've spent precious little time trying to

4 | connect that conduct to any sort of -- I'm sorry, connect

5 | the effect to the actual conduct.

6 | So I just want to make sure --

7 | THE COURT: Right.

8 | MR. SCHMIDTLEIN: -- that we're keeping all of

9 | that straight, because they can't substitute what they claim

10 | is an effect for exclusionary conduct. Obviously that's a

11 | very, very important line to keep straight.

12 | THE COURT: But, again, the bridge is what you

13 | said, it's causation, and I think that standard is set forth

14 | in *Microsoft*.

15 | MR. SCHMIDTLEIN: Well, and -- well, this comes

16 | back to your foreclosure question.

17 | I mean, they have -- this is why you have the

18 | screen. This is why you have all of those layers, and you

19 | are absolutely correct that it is foreclosure plus a showing

20 | of anti-competitive effects.

21 | If the foreclosure is low, game over, because --

22 | THE COURT: Right.

23 | MR. SCHMIDTLEIN: -- we have a presumption that

24 | low foreclosure, no effect.

25 | If we have higher foreclosure, you know, you have

1 to look more, you have to look at -- look at things in

2 addition to that.

3   But, nonetheless, you have to sort of connect

4 these two if you're going to be able to demonstrate that

5 second step beyond foreclosure. And, you know, I would

6 submit they haven't -- they actually haven't done that.

7   So let's jump in here, and we'll talk a little bit

8 about their allegations of anti-competitive effect, again,

9 keeping that separate from exclusionary conduct.

10   If we have demonstrated that none of the conduct,

11 the browser agreements, the Android agreements, are

12 exclusionary, then --

13   THE COURT: Right.

14   MR. SCHMIDTLEIN: -- whatever is going on in ad

15 pricing is irrelevant. It could be, as according to them,

16 it could be monopoly pricing, we dispute that, but it could

17 be monopoly pricing, but it's not unlawful.

18   So let me jump right in and talk about some of the

19 evidence or lack of evidence in the case.

20   There was a reference made to the *IQVIA* case,

21 I just want to say a couple things about that. I'm

22 obviously happy to answer questions about it.

23   Preliminary injunction case. They said that the

24 judge, Judge Ramos, in that case, rejected Dr. Israel.

25 He didn't reject Dr. Israel in the sense of he found that

1   the plaintiffs had at least created enough of a substantial

2   issue that he would grant a preliminary injunction pending

3   them having to litigate on the merits before the agency.

4   This was not what Your Honor had. You know,

5   oftentimes, and it depends on what the agencies are doing,

6   sometimes they will just bring the case -- when it's the

7   DOJ, they have to bring the case in court.

8   THE COURT: Right.

9   MR. SCHMIDTLEIN: When it's the FTC, you're never

10   100 percent sure where they're going. They can go to court

11   or they can try to do it at the agency.

12   And if they try to do it at the agency, what they

13   sometimes have to do is run into federal court and get a TRO

14   or a PI pending the resolution of the agency.

15   THE COURT: That's what happened in *Sysco* too.

16   MR. SCHMIDTLEIN: Right.

17   But what happened there, and obviously you know

18   better than I do, oftentimes what happens in the DOJ cases,

19   in my experience, is the parties agree to sort of an

20   expedited combo PI on the merits.

21   THE COURT: Right. That's what we did.

22   MR. SCHMIDTLEIN: So you don't have to do it

23   twice.

24   My point is simply this. That's not what

25   Judge Ramos did. That wasn't the standard he was applying,

1 because he -- unlike you, you were asked to enter a

2 permanent injunction. He was asked for a preliminary

3 injunction. So you can go through and see how he analyzed

4 it, and he admits what the standard is.

5   The second point that I'd ask you to consider when

6 you're reviewing that case is, and, again, it was a PI case,

7 so like right out of the box, early days, look at the

8 mountain of evidence, the economic evidence that's

9 referenced by Judge Ramos in that case compared with what we

10 have here.

11   There was all sorts of pricing analyses and

12 effects and everything else. There were all sorts of very

13 detailed studies done by the expert in that case about

14 impacts on pricing that are completely absent in this case.

15 It's quite shocking that after years and years, we are at

16 the merits end of the road, and they don't have any -- they

17 don't have even a fraction of what the FTC tried to put

18 forth at a PI standard in that case.

19   So let's talk a little bit about what they've

20 produced and what they haven't produced here.

21   So, you know, Google has introduced lots and lots

22 of different ad launches over the years. And the plaintiffs

23 haven't done any analysis, any empirical analysis that shows

24 that the implementation of any particular ad launch, in

25 fact, resulted in higher CPCs.

1   In other words, they've tried to snippet out

2   little individual pieces of people talking, Google talking

3   about what might happen or, you know, might it go up for

4   some and go down for others, but they actually haven't done

5   an empirical analysis that demonstrates what actually

6   happened on these implementations.

7   And, again, here you can see, there's lots of

8   different ad launches happening over lots of different time

9   periods, and they haven't even attempted to isolate on any

10   of those.

11   We've talked a little bit about what Professor --

12   or Dr. Israel did. Let me see if I can try to answer

13   Your Honor's question.

14   What he tried to do, and, again, the left side

15   here is kind of -- is an index.

16   THE COURT: It's a pricing index, right?

17   MR. SCHMIDTLEIN: Right.

18   And what he did was, he took the click rates over

19   time and imposed that on a relative kind of a percentage

20   basis to try to correspond with the percentage of the price

21   increase.

22   So what he did was match, sort of match them.

23   Even though they're measuring different things, what he did

24   was show on a relative basis, how the two were comparable.

25   So that you can look over time -- because, again, this

1   index, these aren't -- these aren't measuring actual

2   price -- real dollars on the left side. It's an index.

3   THE COURT: Right.

4   MR. SCHMIDTLEIN: It's all relational.

5   And what he did was, he looked at the ClicData and

6   he translated into that same sort of relative relational

7   concept.

8   THE COURT: So how does -- I mean, is there any

9   meaning to -- did the Y axis there, does it provide any

10   information in terms of what is going on with his ratio? Or

11   is he just simply superimposing his relative determination

12   onto this to show that, look, this is essentially tracking,

13   in his estimation?

14   MR. SCHMIDTLEIN: Tracking and a little bit

15   exceeding. That's exactly right, Your Honor.

16   I mean, what he's trying to do, again, is look at

17   the same sort of high level that they are. They're sort of

18   looking at high level -- they're not looking at individual

19   prices for any individual auction. This is an index which

20   looks at some fraction of auctions. It's not a perfect --

21   but it's an index.

22   And what he's doing is saying, okay, you've given

23   me this sort of generalized trend line. What do I see if I

24   look at that same generalized trend line for click

25   percentages?

1   And what he's seeing is something that tracks

2   very, very favorably, if not and -- and exceeds those same

3   lines, and that was the point is to show that we at least

4   have some indicia here that quality is increasing at or

5   higher than the level of the relative pricing.

6   And, you know, again, the idea that a firm

7   improves the quality of its product and captures some

8   additional price for that product is not proof of monopoly

9   power in my view.

10   I mean, if I -- there are any number of products

11   on the market that if you come out with a new -- if I come

12   out with a really cool, you know, Internet-capable screen in

13   my car, chances are my car dealer is probably going to

14   charge me an add-on for that, they're going to expect to

15   make some additional money by implementing that. That's not

16   evidence that the local car dealer has monopoly power.

17   THE COURT: So I think the -- but the point that

18   Mr. Dahlquist is making by walking through these various

19   launches and the sort of memos associated with them that he

20   put up on the screen, is that Google's able to capture this

21   quality improvement and increase price; and, again, there's

22   nothing inherently unlawful about doing that, but Google is

23   doing it in a way that doesn't factor in competition; in

24   other words, Google is able to decide on what that margin

25   that they are going to acquire is, and that's why they're

1   running experiments to ask, well, if we up it by 15 percent,

2   how much are we going to lose in revenue? If we up it by

3   5 percent, how long can we sustain revenue?

4   I mean, that's only something a monopolist can do.

5   MR. SCHMIDTLEIN: I absolutely disagree,

6   Your Honor.

7   THE COURT: How else could somebody just say,

8   look, let's do some pricing exercises, and if it sticks,

9   without having to even look about what the consequences are

10   going to be in terms of what competitors will do or what

11   will happen if advertisers leave?

12   MR. SCHMIDTLEIN: Any number of firms in the

13   market can have some degree of market power.

14   And what's -- as we talked a little bit about this

15   morning, what's unique about this market is, it's very, very

16   hard for any of these firms -- frankly, when you're dealing

17   with these complicated auction mechanisms, it's very, very

18   difficult for firms to be able to figure out what is

19   actually the true value of my product; in other words, how

20   are my customers valuing it and how do I experiment with

21   pricing to try to figure out whether I am, in fact, you

22   know, sort of priced at the right competitive price? Am I

23   priced too low vis-à-vis sort of what the competitive market

24   would permit?

25   There's all -- again, I think there's all sorts of

1   industries where people experiment or even raise prices

2   because they believe I've underpriced my product or

3   services, and I can do that even though I'm not a

4   monopolist.

5   And what's -- what I want to talk a little bit

6   about here is what's oftentimes going on here is this is

7   happening in connection with something that will, either in

8   the short run or the long run, Google believes, actually

9   improve the auction, improve the quality of the auction and

10   deal with this issue of runaway winners, which I'm happy to

11   talk about, but I sense you have a question for me.

12   THE COURT: Yeah, I'm just, you know, look, you

13   know, take, for example, the squashing example and, you

14   know, the Kumamon study, which actually reports back

15   negative user experience consequences, negative impact on

16   the long-term incentives for advertisers to improve quality,

17   but yet, as I understand it, you know, that Google continued

18   to do that, continued to use squashing and maybe even does

19   so today.

20   How do I square that with what you're saying,

21   which is that you don't lack monopoly power, and that is,

22   you know, you're able to tune these prices in a way that may

23   not even result in improved ad quality and still proceed

24   with the price increases?

25   MR. SCHMIDTLEIN: So I'm not sure, are you looking

1 at UPX1045, is that the --

2   THE COURT: It's UPX16 -- I'm sorry, PSX161, it's

3 slide 92 from --

4   MR. SCHMIDTLEIN: I don't have that one in front

5 of me.

6   But I've got -- there's certainly other

7 documents --

8   THE COURT: There are a number of these documents.

9   MR. SCHMIDTLEIN: -- that deal with these issues.

10   And oftentimes, and I think squashing, there are

11 certainly documents around squashing that do reflect a

12 concern about this winner-takes-all result, and let me see

13 if I can explain sort of what the concern there is and how

14 that, in fact, does impact long-term auction sort of

15 dynamics.

16   What squashing -- and just a couple of things

17 about squashing.

18   I mean, squashing has been an auction technique

19 that has been discussed in the literature for many, many

20 years. Professor Whinston acknowledged Microsoft uses it.

21 This isn't some, you know, notion or something that Google

22 just kind of, I think, invented out of the blue. I mean,

23 I think there's academic literature around this.

24   And it didn't increase in CPCs uniformly over

25 time.

1   But what it does do is that it tries to

2   compress -- it compresses the long-term value scores between

3   the auction participants, and doing that has a couple of

4   effects.

5   Advertisers with the lower PCTRs, in other words,

6   the predicted clickthrough rates, will have their auction

7   time PCTRs pulled up closer to the advertiser with the

8   highest one.

9   And as a result, that may prevent runaway winners,

10   because what the lower advertiser now sees is, hey, you know

11   what, if I improve my ad quality or if I improve my bid, I

12   might actually -- I can now try to win this auction, because

13   if the same firm -- this is -- it's a variation on rGSP,

14   which is, if they're already really close together, Google

15   might in some instances flip them.

16   THE COURT: Right.

17   MR. SCHMIDTLEIN: So that they can get discovery

18   about, hey, how would the person who's second actually

19   perform? Because if, you know, particular advertisers,

20   really, really large advertisers are always winning, they're

21   sort of dominating particular auctions, then -- and they're

22   dominating because Google has improved the technology over

23   time. Then the little guy never gets to win the top ad

24   slot, and that has at least the potential to

25   disincentivize -- if the top person knows, I can always win,

1 they actually have an incentive to decrease the quality of

2 their advertising.

3   THE COURT: Right.

4   MR. SCHMIDTLEIN: Decrease the quality of what

5 they're sort of putting out there, and that decreases

6 Google's search results page.

7   THE COURT: If I can -- it's a little bit

8 challenging to do this, I think, but let me just at least

9 try with one of these launches, because there have been so

10 many.

11   And so the Momiji launch. I'm looking at UPX456.

12   MR. SCHMIDTLEIN: By the way, Momiji is a Japanese

13 maple tree. I think Mr. Dahlquist's reference was a little

14 bit off there, but go ahead, Your Honor.

15   THE COURT: And on one of the -- you know, one of

16 the descriptions of the outcome of the launch, I think, is

17 how it reads, is that for lower positions, generally aimed

18 to tie the cost of formats to the cost of going up a

19 position in the aggregate.

20   Do you want to grab it?

21   MR. SCHMIDTLEIN: I don't have a hard copy of it

22 with me but --

23   THE COURT: Okay.

24   What it says is that, "However, the vast majority

25 of the potential gains from format pricing" -- this is about

1   format pricing -- "are in the very top position. And in

2   this position, there's no clear principle for how to set

3   format prices. We believe that advertisers get

4   disproportionate value from formats in the top slot, and we

5   recommend tuning format pricing to better reflect the added

6   value."

7   Am I reading that wrong? Is it basically Google

8   is saying, look, this isn't -- format pricing really isn't

9   about elevating second, third, fourth place bidders. The

10   value is coming from the top bidder with format pricing, and

11   what we're trying to figure out is how we can get the most

12   bang for our buck from that increase.

13   And if that's the philosophy, I guess I'm not

14   clear on how something like format pricing is actually

15   improving quality across the board as opposed to, for

16   example, just the top-ranked winner?

17   MR. SCHMIDTLEIN: So what format pricing was was

18   a, I think, a Google innovation that I think others have now

19   tried to -- have copied, which allows for not just that

20   singular text ad --

21   THE COURT: Right.

22   MR. SCHMIDTLEIN: -- line, but it also allows the

23   advertiser to sort of put in a whole variety of other web

24   pages below that and different information that might

25   actually be -- I think in some instances it might actually

1   be data that Google gets on a feed, because it might be --

2   it could be like when the hours of your store are open, you

3   know, things like that that really add real value for the

4   advertiser.

5   So Google has innovated. It's obviously a lot

6   more complicated to serve format pricing and a lot more

7   complicated for Google to evaluate, because now you're just

8   not just evaluating a single line web page, now that

9   auction, in a nanosecond, has to evaluate all of these

10 different format pricing competitors, if you will, if

11 advertisers choose to submit a format price for that, and

12 now Google has got to do the auction evaluation of those

13 formats versus non-formats and then serve that -- serve all

14 of that information in the blink of an eye.

15   THE COURT: Right.

16   MR. SCHMIDTLEIN: So -- and that information --

17 and if Google believes that that format pricing information

18 is the best fit, I would submit to Your Honor that that is

19 an improved user experience, it's an improved advertiser

20 experience, and it is going to lead to higher clickthroughs.

21 And all of that is -- that's increasing value for everyone.

22   So the idea that Google having done that and

23 innovated on that would consider how do we also increase the

24 price for this new ad format, that is much more complicated

25 for us to serve, I don't think that, by itself, that's not

1   demonstration of monopoly power. That's actually

2   demonstration of an innovation that we believe and hope will

3   actually lead more advertisers to want to advertise on

4   Google. I think it's just as consistent with that as some

5   notion that Google has monopoly power.

6   THE COURT: So another one of these is Iron Pot.

7   And I'm just looking at UPX737, I know you don't have these

8   in front of you. It was sort of a lowdown -- not a lowdown,

9   a report on squashing.

10   From what I understand, the sort of report

11 basically says, look, squashing doesn't actually change the

12 ads shown very much, and it sort of generates the same ads

13 on probably 95 percent of queries.

14   And so it doesn't really -- it's not as effective

15 as you've suggested in terms of actually improving the

16 second bidder's position, and that, really, this is sort of

17 leaving the ads in essentially the same order that they were

18 before.

19   MR. SCHMIDTLEIN: In the short -- maybe in the

20 short run, but, yes.

21   THE COURT: And so I mean, isn't that -- again,

22 this is an example of a launch in which the quality actually

23 isn't following the price.

24   Again, I know this is -- it's a little -- these

25 are hard because these are individual launches, but I mean,

1 that's the takeaway I took from this one, for example, this

2 Iron Pot study, that there wasn't a correlation between

3 quality improvements and the price going up.

4   MR. SCHMIDTLEIN: I think what you see with

5 squashing -- and, again, this sometimes is -- it is applied

6 with -- in connection with other launches.

7   So we've got a couple of different things that are

8 going on at the same time, and this is a -- this is a

9 mechanism that has, in part, allowed Google to try to price

10 test a little bit.

11   But there's going to be some price effect; and to

12 measure and value whether that price test, particularly when

13 it is oftentimes occurring with another value-increasing

14 launch.

15   But I think over time what you can see, and,

16 again, this is in some of the documents, too, depending on

17 which ones you look at, it is looking at this

18 winner-takes-all, it is -- we are worrying about a couple of

19 different things. The person at top always winning, and so

20 they now have an incentive to lower their ad quality. They

21 also will -- they will also start lowering their price. But

22 they will lower their ad quality because they can win both

23 of those.

24   The other thing that happens is the people below

25 who are also continually bidding in these auctions, they're

1   never winning. So they lower or don't work or try to

2   innovate as hard to try to win as well.

3   And we do want to keep that dynamic of the

4   advertisers continually wanting to help improve, because the

5   predicted clickthrough rate is some on Google, but it's also

6   dependent upon them also improving their technology,

7   improving their ads, and those things together is what makes

8   Google a great platform.

9   THE COURT: I'll just give you another example.

10   There was a set of perception interviews done in

11   2018 and 2019 in which advertisers were interviewed about ad

12   spend on Google. Essentially they recognized that ad prices

13   had gone up, but they sort of attributed the ad shifts to

14   themselves, competition and seasonality in 85 percent of the

15   cases and not Google. Again, I know you don't have this in

16   front of you.

17   MR. SCHMIDTLEIN: Which one is this, I'm sorry?

18   THE COURT: This was called "ROI perception

19   interviews."

20   This is paragraph 698 of the Findings of Fact for

21   the States, I believe, for the States or for -- in any

22   event.

23   So, again, I mean, if that's -- if that's the

24   case, there's a study in which Google is taking a survey of

25   advertisers, and the advertisers, even when they're noticing

 1 a price increase, are not thinking, well, this is Google

 2 changing the price, this is either something that I've done,

 3 competition or seasonality.

 4   I mean, isn't that sort of yet further evidence

 5 that Google is able to change prices in the background, and

 6 advertisers are none the wiser? In fact, they kind of say,

 7 look, it's me, not you?

 8   MR. SCHMIDTLEIN: Well, again, I think what

 9 they're focused on is the ROI. I mean, if their ROI is

10 going down, I don't believe they were perceiving or the

11 findings were that ROI was --

12   THE COURT: That may not be, but it's certainly

13 that the prices were increasing, I believe.

14   MR. SCHMIDTLEIN: Right.

15   THE COURT: Right.

16   MR. SCHMIDTLEIN: And if prices are increasing at

17 the same time that ROI is increasing due to improvements --

18 I mean, one of the things I think that is difficult is,

19 Google's innovations, Google's technology innovations, all

20 of the work that goes on behind the scenes to make sort of

21 the magic work, Google's really not in a position to go out

22 and "advertise" all of its technological, its trade secrets,

23 all of the things that it's doing to help improve what it

24 does know or what it does hope that these things are going

25 to do is improve ROI. That's what they care about.

1   So, yeah, we're not running around advertising all

2   of the improvements that we're making so that Bing can then

3   go and try to copy them or Facebook can copy them or other

4   people can try to copy them. What we're sort of trying to

5   do over time is, you know, do all of these things.

6   They don't necessarily even understand or credit

7   Google for all of the innovation that it's doing behind the

8   scenes. But what I think they do credit and what they do

9   recognize is Google is getting them a really, really good

10   ROI.

11   As I think, to paraphrase Your Honor, they're

12   getting what they pay for, and we would say more. That's

13   why it's been so successful over the years.

14   THE COURT: Okay.

15   MR. SCHMIDTLEIN: I mean, we do see, for example,

16   you know, internal documents. I mean, there's a lot --

17   there's a lot of documents in this case and you can quote

18   different snippets and slices as the plaintiffs do, and we

19   can quote them as well.

20   You know, this is an rGSP document. It enables

21   a better discovery of ads' performance in various positions,

22   avoiding winner-takes-all scenario. So there's lots of

23   different evidence.

24   But what's actually missing is, and, again, it's a

25   little surprising, is, where was -- we produced an

1 incredible amount of data in this case, and, again, when you

2 read *IQVIA*, it's quite shocking at the PI standard how much

3 very, very complex economic data was presented in that case.

4   Interestingly, in that case, they actually found

5 search ads were not in this very, very narrow healthcare

6 professional programmatic ad market, because Google actually

7 doesn't target for very, very specific types of

8 healthcare-related products and things.

9   THE COURT: Right.

10   MR. SCHMIDTLEIN: And what was interesting about

11 that cases is unlike this case, they say, all search ads,

12 what they did in that case was they took a very, very, very

13 narrow market definition.

14   They haven't come in here and said, we have a

15 relevant market for travel advertising. They didn't --

16 that's not the case they've brought.

17   THE COURT: I seem to also recall that the judge

18 was confronted with the question of ROI, or at least the

19 argument that ROI shifts actually -- or that ROI is what the

20 driving force is, and because there's evidence that

21 advertisers move some channels across -- you know, based on

22 ROI.

23   And my recollection is what he basically said is

24 that the fact that there's some shifting based on ROI

25 doesn't necessarily establish these other channels as

1 substitutes. What really matters is larger ad budgets and

2 whether we're seeing large shifts in ad budgets based upon

3 price shifts.

4   Yes, he had a little bit more econometric evidence

5 in that case, but the opinion also relies a fair amount on

6 testimonial evidence and business records and the like.

7   MR. SCHMIDTLEIN: Right.

8   And what you have in that case was a situation

9 where, because of kind of the peculiar nature of advertising

10 to healthcare professionals, I mean, doctors, nurses, how do

11 drug companies or pharmaceutical firms, you know, how do we

12 get access to them?

13   And there was, I believe, in that case, very, very

14 specific evidence of peculiar data that only these sort of

15 specialized kind of programmatic DSPs had about healthcare

16 professionals; in other words, there was almost like a

17 market for going out and acquiring data and information

18 about doctors.

19   THE COURT: About doctors and others, right.

20   MR. SCHMIDTLEIN: And all those people, right.

21   And so it's almost like, these folks had really,

22 really detailed, and it was almost -- it was an industry

23 unto itself.

24   We have gone out and acquired all of this and we

25 are laser focused at only on providing kind of the best

1   matches for those people. We have something that's very,

2   very unique and different.

3   Again, I think that's very, very different than

4   what we have here, which is, again, our view is, Facebook,

5   Amazon, TikTok, you know, all are these other people, yes,

6   Google has valuable information, they have the search query,

7   but that's not the only valuable information. We don't have

8   on a search-ads-wide market the critical piece of

9   information that nobody else across all search ads can

10   compete with. That's our position. We think that case is

11   very, very different.

12   THE COURT: Can I ask you to address one other

13   ad-related issue in terms of Google's choices that it's

14   offering advertisers. It's the question of the negative

15   keywords.

16   We heard testimony that once upon a time,

17   advertisers could opt out of sort of the exact -- and the

18   various matching, exact match, phrase match, broad match,

19   I think there's sort of three different categories of

20   matching, and they were able to actually just say, we don't

21   want to be part of that. We want to be part of any auction

22   in which the exact keyword that we've identified is the one

23   that is -- we want to enter those auctions, not if there's a

24   synonym, for example.

25   And Google no longer allows advertisers to do

1   that, and I gather some 30 percent did so beforehand.

2   And one of the results of this is that there are

3   now more bidders in the auctions, the auctions are getting

4   thicker, there are more participants, results in higher

5   prices. More competition is a higher price for ads.

6   Can I ask why Google did that and why it isn't

7   indicative of essentially of monopolistic behavior when a

8   firm can basically say, look, we know 30 percent of you

9   wished this functionality, but no longer? We're not going

10 to let you do that anymore. You can use negative keywords

11 but those are much harder and more cumbersome to manage.

12   MR. SCHMIDTLEIN: So I believe, and I can get the

13 record cite, I believe the evidence we've submitted on that

14 point is the following.

15   Over time what Google found actually was that

16 offering everybody all of these various different

17 combinations actually made it more confusing, particularly

18 for smaller advertisers, versus what Facebook and other

19 social media companies were doing, which was a much more

20 simplified advertising options. I mean, there are

21 documents, I believe, in testimony we've submitted on that.

22   So what Google did was, this was designed to help

23 the small-to-medium-sized advertisers who frankly don't have

24 all of the expertise and the technology to get at all of

25 these broader keywords.

1   THE COURT: But --

2   MR. SCHMIDTLEIN: And for the --

3   THE COURT: But weren't they the ones who were

4   ultimately hurt by this? In other words, it was more likely

5   the case that the small and medium-sized advertisers would

6   opt out.

7   MR. SCHMIDTLEIN: No. I think it was -- I think

8   the people who -- as I understood that they were complaining

9   about, the people who were complaining were the larger

10   advertisers, but the larger advertisers are the ones who

11   absolutely know how to use negative keywords.

12   THE COURT: Right, exactly, which is why I would

13   have thought this would have benefited the small and medium

14   folks.

15   MR. SCHMIDTLEIN: The purpose of this was to

16   actually improve things and make it easier for them to buy

17   versus -- because we knew they were compete -- we were

18   competing with Facebook and we were getting feedback back

19   from the market saying, yours is too complicated for us, we

20   want something more simple, simplified and straightforward,

21   like Facebook has, and that's our response to that. And

22   I can get you the specific findings but we've -- I think

23   we've got a piece on that in our submissions.

24   THE COURT: Okay.

25   All right. I sort of hit the time,

1   Mr. Schmidtlein. If there's anything else you'd like to

2   add; otherwise, I'll turn the floor back over to

3   Mr. Dahlquist for rebuttal and Mr. Cavanaugh.

4   MR. SCHMIDTLEIN: No, Your Honor, I think we've

5   addressed the issues we wanted to address in response to

6   your questions and in response to plaintiffs' submission.

7   Thank you.

8   MR. DAHLQUIST: Thank you, Your Honor.

9   A couple responsive points.

10   I guess let's start with *IQVIA*. Mr. Schmidtlein

11 said that it was only a preliminary injunction, in some ways

12 like it's less important or less binding.

13   Mr. Schmidtlein knows, he's tried these cases,

14 I've tried these cases. That is the only trial that occurs

15 in most of those cases. The PI is the trial, and if the

16 party doesn't prove it, the party's abandoned, as is what

17 happened in *IQVIA*.

18   So it's odd to say that it somehow wasn't a real

19 trial, but then also say there was these mountains of data,

20 which, understood, there's mountains of data because there

21 had been an investigation for a while they produced at the

22 PI.

23   But the whole question in a PI, any PI is, what is

24 the future going to look like? They're trying to predict

25 what will happen after that merger, after that transaction.

1   Here we have real evidence. We don't need to

2   predict. We have direct evidence of what actually happened.

3   Google ran tests and implemented price increases.

4   So we submit that *IQVIA* is certainly a relevant

5   precedent for Your Honor to review, and we submit that it

6   supports here both the market, as well as the fact that the

7   direct evidence that we've submitted here.

8   Second, if I could ask to put up our document

9   page 49, please, Mr. Penado, of our deck.

10   Mr. Schmidtlein handed the Court an excerpt of a

11   Kohl's witness in order to try to impeach something that

12   we're saying here, which is our theme is search ads are

13   constant.

14   And I think it's important to look at a difference

15   between a hypothetical world and a real world. The exhibit

16   that we have here, that we've shown, Your Honor, at DX412 is

17   the real world of what Kohl's actually did.

18   The witness, it's hard to go back and ask -- she

19   was asked a hypothetical. "If you could switch all of your

20   sales away from Google to Bing," if you could switch away

21   from Google to Bing, "what would you do?"

22   And this was her answer. All the things that she

23   would do.

24   And the point I'd like to make, "It's a lot of

25   money to move."

1   So she was given a hypothetical of what she might

2   do, could do in this hypothetical world, and, sure, look for

3   less -- or look for different alternatives if she couldn't

4   go to Google. So we still think that the Kohl's example

5   where it shows search ads is constant as the best example.

6   Mr. Schmidtlein spent a while talking about rGSP

7   and its effort to stop runaway winners. Let's return to

8   that for a minute.

9   Mr. Penado, at slide 81, please.

10   This is from the Momiji deck.

11   And Momiji might be a Japanese tree as well, but

12   Google's the one that put the character of the Japanese doll

13   on their document, so I'm just stating what they do.

14   But if rGSP was really intended to stop runaway

15   winners, then think about it. Google thinks that the

16   runaway winner, that ad quality under LTV ratio is so much

17   better, how they calculate LTV, which incorporates the bid

18   price, the quality, all the components of an LTV, it is so

19   much better, but yet they need to swap, they need to make a

20   less -- I'll call it a less quality ad, and flip it above is

21   squashing, same. They need to manipulate it in order to

22   bring someone else, make them better? And what that does,

23   Your Honor, is it increases the auction pressure and

24   increases price.

25   Let's go to Slide 14.

1   THE COURT: Mr. Dahlquist, can I ask you a

2   question?

3   MR. DAHLQUIST: Please.

4   THE COURT: In thinking through all of this, there

5   is -- you've sort of mined what Google has done with respect

6   to different pricing knobs, et cetera.

7   Google has, I think in each instance, come forward

8   with some reason procompetitive that they have done this, or

9   let me ask you this: Do you think that their explanations,

10   for example, that we have -- we've swapped in order to

11   promote smaller advertisers and to adjust the incentives, as

12   Mr. Schmidtlein said, in your view, is that a procompetitive

13   benefit that ultimately needs to be weighed, or is it

14   something else?

15   MR. DAHLQUIST: Your Honor, we submit it's a

16   pretextual explanation for their price increases, trying to

17   justify as to, although they harmed the advertiser market,

18   trying to justify that in some way, shape, or form.

19   And I think I'd go back to where we think, we

20   submit the Sherman Act requires, Congress requires us to

21   have that be enforced by competition, not by a single firm

22   trying to decide where they think prices should be. And

23   so it's really competition that should be setting the market

24   rate, yes.

25   THE COURT: So I mean, just help me understand

1   what you want. If you were writing this opinion, would you

2   say, all right, this is what Momiji did, it increased

3   prices. Google, however, has said that there's this other

4   reason for doing Momiji.

5   The Court then does what, says, nah, Google is

6   full of it, it's total pretext. The only reason they did

7   this was to increase price. And if I disagree with that,

8   I say, no, it's not pretextual, there's some there there, am

9   I then, in terms of competitive, balancing on each of these

10   different ad launches?

11   MR. DAHLQUIST: So I'd say each of these are not

12   really procompetitive justifications, I think, and that's in

13   the next session so I'll preview what I'll say there is,

14   these explanations if you will or justifications for the

15   price increases do not relate to the contracts.

16   I think if we're saying the contracts are where

17   you show the anti-competitive conduct, the anti-competitive

18   effect is the reduction of competition as a result of those

19   contracts. So we have a void of competition in the search

20   ads market and we've established direct evidence of harm.

21   These are not really, therefore, rebuttals to the contracts.

22   THE COURT: Fair enough.

23   MR. DAHLQUIST: They're attempts to show --

24   they're attempts to show or explain why these price

25   increases are not as bad.

1   THE COURT: Right.

2   So those aren't -- that's helpful.

3   These aren't procompetitive justifications for the

4   contracts, but, rather, you're saying these are consequences

5   of it, it's the power Google has. Ultimately it's going to

6   be my decision whether what Google's justification is makes

7   sense.

8   MR. DAHLQUIST: Correct, Your Honor.

9   And I think this is information you can use as

10 direct evidence of monopoly power, as direct evidence of our

11 relevant markets, and you could use it as intent as well.

12 All of that bleeds together, I think, as part of your

13 analysis.

14   THE COURT: Okay.

15   MR. DAHLQUIST: I guess a final point, Your Honor,

16 that we may get into a little bit more in the next session,

17 but on the slide in front of you, we have this question

18 of -- Mr. Schmidtlein says it's really hard for Google to

19 figure out how to price these things. And yes. And here

20 Dr. Juda himself says, "We try to come up with more fair

21 places where these new prices are higher than the previous

22 ones." And the reason for that is because of the ad

23 auction. They run this ad auction.

24   And we agree there's nothing inherently wrong with

25 increasing price. There's nothing inherently wrong with

1   using an ad auction. But to claim that the ad auction is

2   creating fair prices is wrong. The ad auction creates

3   pressure between advertisers. So advertisers are bidding

4   against each other for the ad slot that is driving up the

5   price, but it is setting the highest price possible for the

6   seller.

7   No one is in competition with Google for running

8   the ad auction. That's where we lack competition. We lack

9   an alternative for the advertiser to be able to say, I don't

10   want to get into the Google ad auction, I'm going to go

11   elsewhere. They have nowhere else to go.

12   THE COURT: So the -- one of the -- I mean sort of

13   the nub of this, it seems to me, is this question of quality

14   adjusted price. You know, is what Google is doing

15   non-monopolistic behavior because it's simply raising price

16   because of better ad quality, or are you suggesting or your

17   position is that this isn't about ad quality, this is a way

18   to increase price?

19   Help me, if that's your position, that this is not

20   about ad quality, in fact, the ad quality has not improved,

21   Google has said it has, because we've got this proxy

22   increased percentage of CPCs -- excuse me, the CPC rate has

23   gone up, what is the evidence that you would rely on to say,

24   no, in fact, the ad quality has gone down or has not

25   improved in a manner that is commensurate with price

1   increases?

2   MR. DAHLQUIST: Your Honor, first of all, I think

3   it's setting up a strawman that we don't need to knock down.

4   To ask, has ad quality gone up or can the plaintiffs

5   disprove that ad quality has gone up is trying to implement

6   a burden that doesn't exist.

7   THE COURT: Can I ask why, though? And I'll

8   let -- I'm sorry to interrupt.

9   MR. DAHLQUIST: Sure.

10   THE COURT: Because let's take this out of ads.

11   Ads is a little bit more, it's less tangible; but, you know,

12   take a car. If in model year 2004, the car costs 50

13   grand -- I'm sorry, the car has a V4 -- a V4 engine, the

14   next year's model has a V6 engine. It's a strong -- it's a

15   faster, better car. You would assume that the price would

16   go up for the car. It's a better product.

17   And so I don't -- it's hard for me to understand

18   how you have no obligation to show that the pricing isn't,

19   in some way, consistent with ad quality, that the two can be

20   separated from one another.

21   I don't know -- maybe you're right that Google is

22   still acting as a monopolist because its ability to raise

23   that price is not the product of competition, but it's hard

24   for me to think that you can simply divorce quality from the

25   pricing, because there can be, and the cases recognize that

1   there is a relationship.

2   MR. DAHLQUIST: And I guess to go with your

3   current example is that competition will help determine

4   that. If the V4 engine costs 50 grand and they went out to

5   market with the V6 engine at 75 grand, the competition will

6   determine, if no one buys that car, because their competitor

7   down the street released the same V6 car for 55 grand, then

8   no one will buy it. They have an option. They have a

9   reasonable substitute to deviate from and go buy that

10 alternative car.

11   Here, Google may have created that V6 engine and

12 is charging more for it. But here I take your example and

13 say that's a world where there's only one car dealer and one

14 car manufacturer and they're the only ones. Customers have

15 to come and buy that car, whether they want it or not, to

16 pay 75 grand for that V6 engine because they don't have

17 substitutable options to go to.

18   And the quality question, I understand why the

19 Court is grappling with it. And I can turn to quality

20 adjusted pricing, that's really the focus of my -- the final

21 session that we are going to spend today.

22   THE COURT: Okay. That's fine. We can wait.

23   MR. DAHLQUIST: And we can get into it.

24   But the long and short of it is quality is the

25 wrong measurement in order to determine what the competitive

1   pricing is here. Competition should be the measurement of

2   pricing. That's the overall theme that we have.

3   But I'll even preview further is that Google

4   itself can't decide how much quality it's giving. It

5   doesn't know. It can't calculate it. And nobody has been

6   able to actually approximate it.

7   THE COURT: Well -- okay. We'll talk this

8   after -- I guess -- you're right, it's -- in the sense that

9   there's no perfect metric, it doesn't seem to me to, how

10 good is an ad, right? How good is an ad? It's not just

11 limited to digital advertising, we could take it to

12 television. How good is an ad? We don't know. Some ads

13 are going to drive more than others.

14   And what Google has done, at least with respect to

15 digital ads is say, well, one way we're going to measure

16 whether the ad is better, more people are clicking on the

17 ads, right?

18   You know, just as a car manufacturer would say,

19 all right, well, we ran this ad campaign and we saw more

20 foot traffic into our dealers. Maybe they don't have

21 perfect information that the ad caused sales to go up, or

22 put it this way, that -- yeah, they may have that, I guess

23 they would have some information, but it doesn't seem to me

24 that the fact that there's not perfect information defeats

25 the fact that there's some proxy that's a fair estimate of

1 whether the ad is better or not. I mean, I think that seems

2 is to be an issue with any product.

3   MR. DAHLQUIST: And I think maybe what the Court

4 is struggling with is there may be a correlation, but

5 I don't think you can infer causation between those two

6 things. And I don't think Google -- Google has tried this.

7 Google, remember, has, what was their number, 15,000 Ph.D.s,

8 and their very smart people have been unable to figure this

9 out, despite trying, and I think that's the point.

10   So it's if you want to look at quality, that's

11 fine, we can look at it as a component of it. To rely on it

12 entirely we think is flawed because it's not seemingly set

13 by competition. You're not determining what is the

14 advertiser actually willing to pay or should pay because of

15 other options. You're looking at a monopolist firm deciding

16 for the world, deciding for all advertisers what it believes

17 the value is, what it believes the quality is.

18   And we think the record here shows that many, many

19 times good enough is enough, and that's the problem that we

20 have with it, Your Honor.

21   THE COURT: Okay.

22   All right. Mr. Cavanaugh, I'll give you few

23 minutes.

24   MR. CAVANAUGH: Nothing further, Your Honor.

25   THE COURT: Okay, terrific.

1   Thank you, everyone. So we'll take our lunch

2   break now. We will resume at 1:35. We'll see everybody

3   then.

4   COURTROOM DEPUTY: All rise. This Court stands in

5   recess.

6   (Recess from 12:35 p.m. to 1:35 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:__May 3, 2024_____   _____

William P. Zaremba, RMR, CRR

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