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4 **IN THE COMPETITION**

5 **APPEAL TRIBUNAL**

Case No. 1424/5/7/21

6
7 Salisbury Square House
8 8 Salisbury Square
9 London EC4Y 8AP

10 Wednesday 26th July 2023

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15 Before:

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17 Justin Turner KC
18 (Chair)

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20 (Sitting as a Tribunal in England and Wales)

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23 BETWEEN:

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25 KELKOO.COM (UK) LTD AND OTHERS

Claimants

26
27
28 v

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30 GOOGLE UK LTD AND OTHERS

Defendants

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36 **A P P E A R A N C E S**

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38 Daniel Jowell KC and Allan Cerim (on behalf of Kelkoo.com Ltd and others)

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40 Conall Patton KC and Jack Williams (on behalf of Google UK Ltd and others)

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Wednesday, 26 July 2023

(10.30 am)

Case Management Conference

THE CHAIR: Some of you are joining us livestream on our website, so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Just give me a second, Mr Jowell, sorry.

All right, thank you. Apologies.

Submissions by MR JOWELL

MR JOWELL: Mr Chairman, I appear for the claimants, with Mr Cerim. Mr Patton appears with Mr Williams for the defendant.

There are, I think, five matters, essentially, on the agenda for today. The first is our application to re-amend the amended particulars of claim. I take these in no particular order, of course. The second is our application for specific disclosure which involves two, I think, matters still in dispute. Then there is the question of our search term disclosure which involves a number of different points.

Then, finally, there is the defendants' disclosure application.

One point I should mention in relation to the latter is that we have made a proposal in correspondence last night to try to resolve by agreement, the defendants' disclosure application. Understandably, the defendants have not yet had a chance fully, I think, to absorb that. It may be, I think, convenient for that reason to take that point last and

1 perhaps after at least some adjournment, so they have a chance to consider it.

2 Perhaps I could hand up a copy of the letter.

3 **THE CHAIR:** Yes, that would be helpful. Thank you. **(Handed)**

4 **MR JOWELL:** Subject to that, I am very much in your hands as to how the order in
5 which -- if there's an order -- you wish to take things.

6 **THE CHAIR:** I don't have a strong preference, Mr Jowell.

7 **MR JOWELL:** Well if I could start then, with our application to re-amend. Perhaps if
8 I could start -- you will have seen we deal with it in some detail in our skeleton
9 argument but if I could take you to the pleadings, perhaps, to start with. If we could
10 start, if I may, with the existing particulars of claim. You will see if you go to tab 1 of
11 volume 1 on page 10 that we address what we call the first abuse. You'll see in 3B(a)
12 we say that:

13 "Since at least 2006, Google deliberately demoted on its general search engine results
14 page --"

15 **THE CHAIR:** Sorry, I misheard. Could you give me the reference again?

16 **MR JOWELL:** Paragraph 3B(a).

17 **THE CHAIR:** Yes, sorry, I beg your pardon, yes.

18 **MR JOWELL:** We say:

19 "Since at least 2006, Google deliberately demoted on its general search engine results
20 page, other comparison shopping services that competed with its own, including
21 Kelkoo."

22 Then we say:

23 "In particular, as explained [in the various paragraphs below], such demotion was
24 effected by implementing algorithms to adjust the ranking of results in the SERP and
25 imposing manual penalties, according to which Google employees could relegate the
26 results of services of Google's competitors on the comparison shopping market within

1 Google's SERP."

2 We go on to plead in (iii) that:

3 "None of those algorithmic adjustments and/or manual penalties were ever applied to

4 Google's comparative shopping services."

5 If you go over the page, you see we continue at 3D:

6 "As regards the exclusionary strategy -- "

7 Well perhaps if you look at, forgive me, 3B(e) above, having pleaded various details,

8 we say:

9 "In the circumstances, through its pursuit of the exclusionary strategy and

10 subsequently, also the exclusive promotion, Google has, since at least 2006 (the

11 "Google Shopping infringement period") abusively leveraged its position on the

12 General Search Market in order to gain an unfair advantage, falling outside the scope

13 of competition on the merits in the Comparison Shopping Market."

14 We say that that was:

15 "... in contravention of the special responsibility imposed on dominant undertakings,

16 such as Google ..."

17 And we refer to it as the general search abuse. Then in 3D, you see we say:

18 "As regards the Exclusionary Strategy, Kelkoo avers that the internal documents

19 indicate that Google had begun, by the end of 2005, to strategise internally in relation

20 to the demotion of competitor CSSs; by April 2006, Google was using algorithmic

21 methods to demote competitor CSSs; and further demotions were being tested by

22 November 2006. By this time, Google had already introduced [one] algorithm."

23 And we say that:

24 "In the premises, it's reasonable to date the start of the Exclusionary Strategy at no

25 later than 2006."

26 If you then -- I am not, obviously, going to read the whole of the particulars of claim

1 but if you go forward to page 26, we go into more detail. You see in 49B, we say:
2 "First, Google devised and implemented a system of algorithmic adjustments intended
3 to demote rival CSSs. This was the exclusionary strategy. As noted above, Google's
4 general search algorithms are proprietary and, therefore, their precise mechanics are,
5 prior to disclosure, not known to Kelkoo. Kelkoo reserves the right to plead further in
6 respect of the algorithms, processes and methods employed by Google which served
7 to demote competing CSSs during the Google Shopping Infringement Period."
8 Then we say:
9 "By at least two dedicated algorithms, Google specifically targeted CSSs and demoted
10 their results in the SERP."
11 You see we then give some details of those, including -- and in 49F, I just en passant
12 because it may be relevant to a later point, again we say there:
13 "As well as algorithmic adjustments, Google implemented a strategy of 'manual
14 penalties'.
15 And you see in 49H, we say that:
16 "The limited contemporaneous documentary evidence which it obtained in the Specific
17 Disclosure Application, shows that Google was engaged in the formation and
18 execution of a strategy, specifically to target and demote rival CSSs."
19 Then we give particulars, without prejudice to our right to plead further.
20 One of these particulars we give, if you go over the page to page 29, if you look at (d),
21 you see we refer to an email chain. I won't read it out because it's --
22 **THE CHAIR:** Sorry to interrupt but -- so in this multi-coloured document, we have
23 some blue shading and some yellow shading. What do those signify?
24 **MR JOWELL:** These correspond to the different confidentiality ring --
25 **THE CHAIR:** Blue and yellow is confidential.
26 **MR JOWELL:** Exactly. I am going to avoid reading out loud, of course, those parts.

1 **THE CHAIR:** Yes.

2 **MR JOWELL:** But if you wish to read, for example, (d) on page 29, you see that --

3 **THE CHAIR:** Yes, I have read that. I see that.

4 **MR JOWELL:** We say this is the so-called Diversity algorithm which negatively affects

5 the CSSs.

6 **THE CHAIR:** Just out of curiosity, why aren't we allowed to mention the one in blue?

7 I appreciate the details may be confidential.

8 **MR JOWELL:** That's something you must ask Google.

9 **MR PATTON:** The reason, if I can put it very elliptically, is that if you were to know

10 the name of the algorithm that would tell you something about how it works.

11 **THE CHAIR:** I see.

12 **MR PATTON:** And so that's why the name -- so in the other case, Foundem, we've

13 been calling it Algorithm A, and everyone knows that that's a reference to this particular

14 algorithm.

15 **THE CHAIR:** I am sure we can come up with a better name than that.

16 **MR PATTON:** So the disclosure document has been stamped with Algorithm A.

17 **THE CHAIR:** Algorithm A, fine, thank you.

18 **MR JOWELL:** Then you see just above in 49K, you see we then go on to talk about

19 the Google CSS. You see we speak a bit from 2008 to the present.

20 And then perhaps if we can jump forward to paragraph 95A which you see on page 59.

21 We say --

22 **THE CHAIR:** Hold on, give me a second. 59?

23 **MR JOWELL:** 59 of the bundle. You see, 95A, we say:

24 "From at least 2006 onward, Google abused its dominance on the general search

25 market so as to prevent, restrict or distort competition on the comparison shopping

26 market, in breach of Article 102. In particular, Google pursued the Exclusionary

1 Strategy, i.e., It followed a deliberate strategy of progressively and systematically
2 demoting all rival CSSs, including Kelkoo, within its SERP, by algorithmic adjustments
3 for reasons other than the quality of such sites ... and/or in light of its plans for Google's
4 own CSS. Such algorithmic adjustments were made by Google in the full knowledge
5 that CSSs were being demoted. Indeed, Kelkoo in particular, was being or predictably
6 would in due course be [and then we quote from one of the contemporaneous emails]
7 'nuked'."

8 So it's very clear from -- and then, forgive me, then in 95C, we again refer to both the
9 algorithmic adjustments and the manual penalties and other processes. It's very clear,
10 in our submission, that the current pleading encompasses a plea of systematic
11 strategy of the demotion of rival CSSs, including Kelkoo, by a number of algorithms,
12 some of which are particularised and some of which it's left to be particularised in due
13 course and manual penalties and other processes.

14 That is the thrust of the current pleading.

15 **MR PATTON:** Would my learned friend permit me to interject to make this point?

16 **MR JOWELL:** Yes.

17 **MR PATTON:** So as you may have picked up, we are suggesting the amendment
18 application not be dealt with today, for reasons I will come to, but if I can make clear
19 because I apprehend what my learned friend is tilting at is a time-bar point and we are
20 not taking a time-bar point on the amendment.

21 **THE CHAIR:** No, I didn't see that in your skeleton.

22 **MR JOWELL:** I am grateful because it was taken in correspondence. In that case,
23 then I can take it, perhaps, a bit quicker than I was. I am grateful for that clarification.
24 When my learned friend says time-bar, I think what I take from that and correct me if
25 I am wrong, he's not suggesting that the amendment amounts to a new cause of
26 action. I see him nodding.

1 **MR PATTON:** Correct.

2 **MR JOWELL:** On that basis then, you will see the amendment. It's in 49H.a on
3 page 295 of tab 10.

4 **THE CHAIR:** Yes, so the bit in yellow here, you refer to Diversity elsewhere.

5 **MR JOWELL:** Yes.

6 **THE CHAIR:** The confidential bit is the last half of the clause?

7 **MR JOWELL:** Yes.

8 **THE CHAIR:** Okay.

9 **MR JOWELL:** Again, these are Google's confidentiality designations, not ours.
10 So I think you can see we give details. The reason for making this amendment in this
11 detail is that Google has resolutely refused in correspondence and in requests for
12 information, to accept that the Diversity algorithm is within the scope of the existing
13 pleading and, therefore, on that basis, refused to give any information regarding it.

14 **THE CHAIR:** So --

15 **MR JOWELL:** We think that's wrong but now we've introduced this --

16 **THE CHAIR:** Can I just go down a level or up a level --

17 **MR JOWELL:** Yes.

18 **THE CHAIR:** -- of overview because this is a complicated case and I have only just
19 come to it.

20 **MR JOWELL:** Yes.

21 **THE CHAIR:** Obviously, you have the aspects looked at by the Commission.

22 **MR JOWELL:** Yes.

23 **THE CHAIR:** You have -- at least part of your case is a follow-on case.

24 **MR JOWELL:** Yes, indeed.

25 **THE CHAIR:** And various algorithms were part of that Commission investigation.

26 **MR JOWELL:** Yes.

1 **THE CHAIR:** But you are saying Diversity wasn't picked up by the Commission, are
2 you?

3 **MR JOWELL:** Well Diversity wasn't specifically picked up by the Commission,
4 mentioned by the Commission.

5 **THE CHAIR:** Right.

6 **MR JOWELL:** But the Commission has various recitals that refer more
7 compendiously to Google's conduct.

8 **THE CHAIR:** I see.

9 **MR JOWELL:** What we are really focused on --

10 **THE CHAIR:** Just hold on. Let me just make my confusion clear, if that makes sense.

11 **MR JOWELL:** Yes.

12 **THE CHAIR:** So as I understand it, it's a follow-on action with respect to the abuse
13 between 2008 and 2017?

14 **MR JOWELL:** That's correct, yes.

15 **THE CHAIR:** You are concerned with -- you want to also go back to -- and there's
16 a little bit of confusion in my mind, from the pleadings, whether it's 2004 or 2006 but
17 I think it's 2006, with relevant factors arising between 2004 and 2006 but the abuse on
18 your current case is it starts in 2006; is that right?

19 **MR JOWELL:** Yes. So the issue is -- we pleaded the abuse as commencing in at
20 least 2006. It's been recognised in a number of judgments in competition cases that
21 because of the asymmetry of information, it's often not possible for a claimant to
22 specify precisely when unlawful conduct started.

23 Based upon the documents that we've seen, we have considered we are able to plead
24 that the abuse certainly commenced in the beginning of 2006. Whether we can go
25 earlier is a matter that we will have to see, based upon any further documents.

26 **THE CHAIR:** The importance of going back before 2008 to 2006 or perhaps a little bit

1 earlier, is just because it's another period of abuse or is there significance about it
2 beyond that? Because it's a very long time ago.

3 **MR JOWELL:** It's another period of abuse.

4 **THE CHAIR:** No, it's not --

5 **MR JOWELL:** Of course, that could potentially affect damages.

6 **THE CHAIR:** Yes, of course, of course. I appreciate that. But your introduction in
7 49H(a) --

8 **MR JOWELL:** Yes.

9 **THE CHAIR:** -- is not limited to the period before 2008, as I understand it?

10 **MR JOWELL:** No, that's correct. It may well have relevance beyond 2008 also.

11 **THE CHAIR:** So I mean, if this is a follow-on action, how will it matter beyond 2008?

12 **MR JOWELL:** It might not matter beyond 2008.

13 **THE CHAIR:** It might not.

14 **MR JOWELL:** That's quite fair because the existing Commission decision, as I said,
15 is compendious. It focuses on two particular algorithms but it doesn't limit itself to that.

16 **THE CHAIR:** Right.

17 **MR JOWELL:** This is actually a more general issue in a sense, in that the
18 Commission doesn't need to necessarily go into huge detail.

19 **THE CHAIR:** Right.

20 **MR JOWELL:** But what it has done is establish that demotion, by whatever forms it
21 took, is abusive. Of course, where it might come in or be relevant, even in the period
22 after 2008, is in relation to Kelkoo's damages because if it turns out, for example, that
23 one of these additional methods of demotion specifically affected Kelkoo and its
24 business, then of course that would be relevant to causation and quantum of loss.

25 **THE CHAIR:** So I understand that, theoretically, is possible.

26 **MR JOWELL:** Yes.

1 **THE CHAIR:** I mean are we going to be looking at causation bottom up in that way,
2 sort of starting square one with the algorithms the Commission has already poured
3 over for about eight years?

4 **MR JOWELL:** We don't know at the present time because we will have to see how
5 much granularity we get. It may not be possible. It may be though that, for example,
6 if we could suppose -- I mean what we are speaking about in this additional paragraph
7 is we mention, of course, Diversity itself and potentially having an effect --

8 **THE CHAIR:** Yes.

9 **MR JOWELL:** -- but the real thrust of this is on these other methods of demotion that
10 Google was using in this earlier period.

11 **THE CHAIR:** Right.

12 **MR JOWELL:** Crowding, clustering, classifiers and so on that had an equivalent affect
13 and so --

14 **THE CHAIR:** I want to come back to this -- sorry, just bear with me so I can
15 understand. Just while we are on causation, in board terms, how is causation going
16 to be demonstrated? What sort of evidence -- is it too early to say or have you an idea
17 of the shape of the case?

18 **MR JOWELL:** We will look at it, obviously, in various ways --

19 **THE CHAIR:** Yes.

20 **MR JOWELL:** -- and it may be necessary to use multiple methods, effectively, to
21 triangulate on a proper approach. But certainly one method we will be using will be
22 looking at Kelkoo's business in the prior period to the abuse and then seeing how that
23 was not nuked or knocked off -- decimated, effectively --

24 **THE CHAIR:** I have seen that --

25 **MR JOWELL:** -- by Google's conduct and then seeking to extrapolate forward, if, for
26 example, it had followed the trajectory of the growth of comparative shopping in that

1 period.

2 **THE CHAIR:** Yes.

3 **MR JOWELL:** We'll also be looking at how the profitability of Google's own
4 comparable shopping service progressed. That will be important because, of course,
5 if Google hadn't abused, then that market which it took entirely for itself, would have
6 been split by major players like Kelkoo.

7 **THE CHAIR:** Those are going to be challenging subjects for the economists to look
8 at.

9 **MR JOWELL:** They will but it's relevant, at least, to look and see which were Kelkoo's
10 sites affected by these algorithms and how.

11 Now we just have to see how granular we can get but --

12 **THE CHAIR:** It may depend to some extent on what points Google take on causation.

13 **MR JOWELL:** Absolutely and what information we can still obtain.

14 **THE CHAIR:** Right.

15 **MR JOWELL:** But certainly the court is, I think, going to be assisted at least, from, if
16 you like, a common sense point of view, in wanting to not necessarily just look at
17 extrapolations and modelling but also, perhaps, to look at more granularly, how --

18 **THE CHAIR:** You are saying there may not be sufficient granularity in the Commission
19 decision?

20 **MR JOWELL:** This is one of the problems, that the Commission, of course, is
21 a regulator --

22 **THE CHAIR:** Yes.

23 **MR JOWELL:** -- and they are looking at the market as a whole.

24 **THE CHAIR:** Yes.

25 **MR JOWELL:** They are not looking --

26 **THE CHAIR:** Of course, yes, yes, yes.

1 **MR JOWELL:** That's why we do need, I think, to probe a bit more deeply.

2 **THE CHAIR:** Right.

3 **MR JOWELL:** Also, this becomes relevant when it comes to disclosure of course.

4 **THE CHAIR:** Right. Then going back to this -- so it might be said, it is said I think,

5 that the second half of this clause in yellow is an answer to the Diversity algorithm.

6 **MR JOWELL:** Yes. Yes, that's right.

7 **THE CHAIR:** What do you say about that? Just looking at the Diversity algorithm, as

8 opposed to the -- I appreciate it was --

9 **MR JOWELL:** The answer is that it seems as though it did have -- even if it

10 wasn't -- this is difficult to do without going into --

11 **MR PATTON:** I think what's permissible to say in open court is that it wasn't

12 implemented in the EEA.

13 **THE CHAIR:** Yes.

14 **MR JOWELL:** It may, nevertheless, have had effects, foreseeable effects, within the

15 EEA.

16 **THE CHAIR:** You'll have to help me with that. I don't understand that.

17 **MR JOWELL:** Because although it wasn't -- well it was only -- this is very hard to

18 explain without making reference to what's in the -- we may need to go into camera if

19 you want an explanation because I am not sure I can do it without --

20 **THE CHAIR:** Call it continent B, okay, implemented in continent B.

21 **MR JOWELL:** The answer is that one can have effects in continent A, even if it only

22 directly applies to those things that are mentioned in continent B. But as I said, the

23 main -- and there are various ways in which that can occur.

24 **THE CHAIR:** Okay. That may well be right, Mr Jowell, but at the moment, I haven't

25 got any materials before me -- or I do understand from my general knowledge how

26 that might well be but I don't understand it at the moment.

1 **MR JOWELL:** If you wish for an explanation or particulars, we can provide them but
2 what we don't know is whether equivalent algorithms or measures very similar to
3 algorithms were implemented in the EEA and what we do know, however, from the
4 internal documents is that it appears that a number of these other methods that we
5 refer to here, these equivalent similar or complimentary measures --

6 **THE CHAIR:** But you plead other algorithms for the earlier -- elsewhere.

7 **MR JOWELL:** Yes.

8 **THE CHAIR:** I just wasn't sure whether they overlap -- so this rather vague wording
9 about equivalent, similar or complimentary --

10 **MR JOWELL:** Yes.

11 **THE CHAIR:** -- these are things that are not pleaded elsewhere?

12 **MR JOWELL:** No, we do talk about -- as I showed you, manual demotions and
13 processes and methods.

14 **THE CHAIR:** Yes.

15 **MR JOWELL:** And here, we are particularising those and you can see that we mention
16 crowding, clustering, classifiers and Anchor++ demotion.

17 **THE CHAIR:** Right, but are these things that you have pleaded elsewhere?

18 **MR JOWELL:** No, not specifically, we are particularising those.

19 **THE CHAIR:** And they --

20 **MR JOWELL:** Those are things that we have come to know about through -- the
21 methods of demotion that we have come to know about by reason of disclosure.

22 **THE CHAIR:** Right. I understand Google's position today is that -- not taking the
23 limitation point but they are just saying this is strikeable because it's not supported,
24 not sufficiently particularised and that's obviously a consideration when deciding
25 whether to admit it or not.

26 **MR JOWELL:** Well they do say that. They don't explain why it's strikeable or

1 insufficiently particularised. They haven't done that, they haven't --

2 **THE CHAIR:** No, I am just trying to identify why you say it's new material that has to
3 come in.

4 **MR JOWELL:** The reason it's come in is, unfortunately, because of a very narrow
5 way in which Google insist on reading our pleadings and I can show you that.

6 **THE CHAIR:** Yes.

7 **MR JOWELL:** That might be helpful.

8 **THE CHAIR:** Yes.

9 **MR JOWELL:** If you go to the defence, if we can start there --

10 **THE CHAIR:** Yes.

11 **MR JOWELL:** -- which you'll see in 2. And if you look at page 98 of the bundle at
12 32H --

13 **THE CHAIR:** Yes, I have highlighted this, yes.

14 **MR JOWELL:** You see the last sentence:
15 "Discussions concerning the Diversity algorithm, such as the documents pleaded in
16 subparagraphs (b) to (d), have no relevance to the pleaded claims [they assert], since
17 the Diversity algorithm was never implemented in the EEA."

18 **THE CHAIR:** Yes.

19 **MR JOWELL:** So we respond to that in the reply --

20 **THE CHAIR:** Yes.

21 **MR JOWELL:** -- which you see in the next tab --

22 **THE CHAIR:** Yes.

23 **MR JOWELL:** -- and you see on page 147.

24 **THE CHAIR:** Yes, which bit?

25 **MR JOWELL:** We say at 19.3:
26 "The final sentence is not understood. Kelkoo understands from Google's letter that

1 the basis for the averment that the Diversity algorithm was never implemented in the
2 EEA ... "

3 And then we see the bit in --

4 **THE CHAIR:** Let me just read that.

5 **MR JOWELL:** Then we say:

6 "Even if this is the case ..., Diversity may nevertheless have generated direct or
7 indirect effects on the national markets in the EEA, including impacts on the ranking
8 on the Google SERP of websites hosted in and/or with domains in the UK and the
9 EEA ..."

10 And then you see:

11 "... in cases where Google was unable to determine accurately the location of the
12 user".

13 Then it says:

14 "Further, or alternatively, even if the Diversity algorithm did not generate ill effects, it
15 does not mean that those documents are of no relevance. Kelkoo has asked
16 repeatedly whether, at any point during the relevant period, it designed, tested or
17 implemented an equivalent or similar algorithm process or method to Diversity,
18 howsoever named, in respect of EEA users. Google has, to date, declined to answer."

19 **THE CHAIR:** Right, but I thought -- sorry for being slow but this is what is confusing
20 me as to -- let's assume Diversity doesn't come in. I am not saying that's going to be
21 the result here because as you say, it's already pleaded but let's assume we park
22 Diversity.

23 **MR JOWELL:** Yes.

24 **THE CHAIR:** What have you pleaded in your original pleading or sorry, your one at
25 tab 1, that's an algorithm that's relevant? Or have you not pleaded any algorithms?
26 I thought you had, particularly in the pre-2008 period.

1 **MR JOWELL:** Yes, we have.

2 **THE CHAIR:** Just remind me where it is.

3 **MR JOWELL:** Yes. The first one is -- forgive me, I will find it. We have -- but --

4 **THE CHAIR:** Is it 49A?

5 **MR JOWELL:** Yes, I think that's correct. Yes, you see it in the two specific

6 algorithms --

7 **THE CHAIR:** "Product Universal" which was subject to the Commission decision.

8 **MR JOWELL:** Yes, if you look at the top of page 27.

9 **THE CHAIR:** Sorry, yes.

10 **MR JOWELL:** We --

11 **THE CHAIR:** We have those two.

12 **MR JOWELL:** Yes, the one you see --

13 **THE CHAIR:** The unmentionable one.

14 **MR JOWELL:** Algorithm A and you see the date.

15 **THE CHAIR:** Then you've also got "Product Universal" and "One box" which are --

16 **MR JOWELL:** "Product Universal" and "One box", those relate to the methods of

17 promotion rather than demotion.

18 **THE CHAIR:** I appreciate that.

19 **MR JOWELL:** But the two algorithms we know about are at the top of page 27.

20 **THE CHAIR:** So we are interested in -- there's a dispute about Diversity which is --

21 **MR JOWELL:** Yes.

22 **THE CHAIR:** -- already pleaded, at least in the reply. Then in your amendment, we

23 are now introducing potential algorithms which are different to the unmentionable one.

24 **MR JOWELL:** Yes, they may not be algorithms as such, they may be methods of

25 demotion more akin to manual penalties.

26 **THE CHAIR:** Right, but you've got manual penalties already pleaded at 49F.

1 **MR JOWELL:** Yes, indeed and we've mentioned already, I think I showed you we
2 mentioned at one point also, processes or methods.

3 **THE CHAIR:** So for the early period we've got 49F --

4 **MR JOWELL:** Yes.

5 **THE CHAIR:** -- we've got the algorithm mentioned in 49C.

6 **MR JOWELL:** Yes.

7 **THE CHAIR:** And now the question is, what are you adding in this amended
8 paragraph and is it clear what you are adding?

9 **MR JOWELL:** What we are clarifying, if you like, in or particularising in this paragraph,
10 are that we do indeed plead that Diversity and we also plead -- particularise certain
11 methods that were being used at the same time which may be more akin to algorithms
12 or may be more akin to manual penalties which we refer to there, crowding, clustering,
13 classifiers and Anchor++ demotion, all of which methods had the object or effect of the
14 demotion of CSSs in Google's search results.

15 **THE CHAIR:** Assuming I am the only person in the courtroom who doesn't understand
16 any of those words which is probably the case, that is essentially what you are trying
17 to get in, is it? An allegation --

18 **MR JOWELL:** Yes.

19 **THE CHAIR:** An allegation pre-2008 that these crowding, clustering, classifiers and
20 Anchor++ were being used?

21 **MR JOWELL:** Yes, exactly.

22 **THE CHAIR:** Okay.

23 **MR JOWELL:** And that they had an equivalent effect.

24 **THE CHAIR:** I think Google --

25 **MR PATTON:** Can I just check that answer. So your question was pre-2008 only?

26 **THE CHAIR:** It was at the moment.

1 **MR JOWELL:** We say they were used pre-2008 but we don't know whether they
2 continued to have effect after 2008 or not.

3 **THE CHAIR:** Right.

4 **MR JOWELL:** You know, we are in the dark. These were methods that were used,
5 we rely on them as part of the abuse. We know that they commenced in or about this
6 time and we can pick that up from the emails.

7 **THE CHAIR:** Your basis for these particular techniques come from a pleaded email
8 or an email -- just remind me of that.

9 **MR JOWELL:** They come from emails that we have identified in this -- two of which
10 we identify in this paragraph and two of which we've identified in subsequent
11 correspondence, in response to --

12 **THE CHAIR:** Where is the --

13 **MR JOWELL:** The subsequent correspondence --

14 **THE CHAIR:** I understand what's quoted here but I don't see using these terms --

15 **MR JOWELL:** No, that's correct, one needs to look at the documents themselves.

16 **THE CHAIR:** But you say you picked them up in emails --

17 **MR JOWELL:** We've picked them up in emails.

18 **THE CHAIR:** -- which haven't expressly been pleaded.

19 **MR JOWELL:** We don't need to plead -- we are criticised, in fact, for pleading too
20 much evidence.

21 **THE CHAIR:** So I understand Google's position to be that it wants to have a look at
22 this and have a think about this and that it hasn't --

23 **MR JOWELL:** Yes, and our answer to that is well, it's had this pleading now for some
24 time. If it wants to -- if it came to you and said: well there's this specific aspect that we
25 want to -- reason why we want to strike it out and we want to put in evidence and time
26 to put in evidence, then that could be done. But, of course, if they are serious about

1 that, then they will need to put in evidence from senior executives at the time, saying
2 that none of these -- or the relevant methods were not used and explain how they
3 intend to evidentially strike this out on a summary basis. But they don't do that. They
4 just say, effectively: well, we may want to strike this out.

5 Well our answer to that is very straightforward: we say: well, allow the pleading in but
6 in the normal way. If they want to apply to strike out in due course, they can do so but
7 that's not a reason not to allow the amendment today.

8 **THE CHAIR:** Maybe. But equivalent -- so Diversity -- terribly nervous about reading
9 things out -- and/or equivalent and/or similar and/or complimentary measures.

10 **MR JOWELL:** Yes.

11 **THE CHAIR:** The only methods at the moment, subject to what emerges in due course
12 in disclosure, the only methods you have in mind are the unmentionable algorithm
13 already pleaded --

14 **MR JOWELL:** Yes.

15 **THE CHAIR:** -- and these clustering classifiers.

16 **MR JOWELL:** Crowding, clustering and classifying.

17 **THE CHAIR:** Is there any reason why your pleading couldn't be limited to those two
18 things?

19 **MR JOWELL:** Well you mean why we then needed the detail that we put after --

20 **THE CHAIR:** Well at the moment, I think the term "equivalent, similar and/or
21 complimentary measures", taken at its broadest -- obviously, I will hear from Google
22 but I understand that's rather vague and all encompassing, rather than a specific
23 allegation, it's just a very broad based --

24 **MR JOWELL:** But you have to permit us as claimants, without knowledge of what
25 Google did, to be able to plead compendiously or else we could never plead because
26 all of this information is within Google's knowledge, not ours.

1 **THE CHAIR:** Well --

2 **MR JOWELL:** We don't know if there's some other method they use --

3 **THE CHAIR:** You have got a lot of disclosure.

4 **MR JOWELL:** With respect, we haven't got a lot of relevant disclosure and we've

5 asked them multiple times -- we've sought to cut through this by making requests for

6 information and saying: did you do -- for example, did you implement an algorithm in

7 the EEA, equivalent to Diversity? Did you use other methods? And they won't answer.

8 **THE CHAIR:** The unmentionable algorithm isn't equivalent to Diversity?

9 **MR JOWELL:** No, it's a different algorithm.

10 **THE CHAIR:** I appreciate it's different --

11 **MR JOWELL:** It may have had similar effects but it's not the same as Diversity.

12 **THE CHAIR:** What do you mean by equivalent?

13 **MR JOWELL:** One also had effects of demoting -- object and/or effect of demoting

14 comparative shopping.

15 **THE CHAIR:** So algorithms other than the unmentionable one which are not

16 Diversity?

17 **MR JOWELL:** Yes.

18 **THE CHAIR:** Any further algorithms.

19 **MR JOWELL:** Yes, or manual penalties or methods, such as the ones that we

20 mention: crowding, clustering, classifiers and Anchor++ demotion.

21 **THE CHAIR:** When did you ask those questions? Can you just show me.

22 **MR JOWELL:** Let me show you that. We asked it very early on, after we received

23 the defence and you will see that at 159. You see a request for --

24 **THE CHAIR:** 159, the same bundle?

25 **MR JOWELL:** Yes, indeed. Actually, perhaps I can just take it from the defendants'

26 response which is in tab 6.

1 **THE CHAIR:** Yes.

2 **MR JOWELL:** If you go to page 218, please. You see we refer to their assertion that
3 the discussions relating to Diversity --

4 **THE CHAIR:** Sorry, which response are you in?

5 **MR JOWELL:** If you see at the top of page 218.

6 **THE CHAIR:** Yes.

7 **MR JOWELL:** These are, first of all, the questions. If you see, we reference that part
8 of the pleading of 32H which I took you to earlier, where they assert the Diversity
9 algorithm has no relevance to the pleaded claim.

10 Then we make a series of requests:

11 "Is it Google's position that at no point during the period from 2002, did it implement or
12 expect to implement or test any algorithm processes or methods, however named,
13 that were equivalent or similar to the Diversity algorithm, in terms of their intended or
14 actual impact on the display of search results, on any SERP accessible to users in the
15 EEA?"

16 We say:

17 "If the answer is no, please clarify what other algorithms, processes or methods, when
18 they were implemented, in what part of the EEA."

19 And then we ask questions about what is meant by "never implemented in the EEA."

20 The answer you see over the page, is: "Not entitled. Kelkoo has not pleaded any case,
21 nor identified any basis for pleading, that Google implemented in the EEA any
22 algorithm equivalent to the Diversity algorithm. Further, even if it had been pleaded,
23 it would be irrelevant to the damages claim, whether they had merely expected to
24 implement or test it or – and the reference, they say, to the period from 2002 is
25 inapposite because we haven't pleaded prior to 2006." And then the remainder is
26 simply they say, effectively: "Not applicable, not entitled".

1 We persisted. We didn't just drop it there. We persisted and you can see that the
2 correspondence that followed -- perhaps just to take it quickly, if I could refer you to
3 the witness statement of Mr Hennah which you see in tab 8.

4 **THE CHAIR:** Yes.

5 **MR JOWELL:** If you go to page 251. Perhaps if I could just ask you to read from
6 paragraph 64 to 69. **(Pause)** Or perhaps to 70.

7 **THE CHAIR:** Right. Okay.

8 **MR JOWELL:** So, effectively, they are slamming the door shut. They say "We don't
9 regard this as part of the case. We are not responding to your queries." Then we
10 obtained the disclosure and as you see, we see numerous references. You see them
11 in paragraph 71.

12 **THE CHAIR:** Sorry 71 of?

13 **MR JOWELL:** Paragraph 71.

14 **THE CHAIR:** Of the pleading?

15 **MR JOWELL:** Forgive me, of Mr Hennah's statement. You some examples of the
16 sorts of -- for example, you see in 71.1 and 71.2 and 71.3, you see some examples
17 there of the sorts of emails that refer to these other methods of demotion that Google
18 was experimenting with.

19 **THE CHAIR:** Sorry, help me, where is that statement?

20 **MR JOWELL:** Forgive me, page 253.

21 **THE CHAIR:** Yes.

22 **MR JOWELL:** Paragraph 71.

23 **THE CHAIR:** Yes.

24 **MR JOWELL:** Mr Hennah explains that following the review of the documents on the
25 Commission file, the claimants and their solicitors identified various emails that
26 strongly showed or indicated that the defendants were developing and implementing

1 | measures with an equivalent, similar or complimentary effect to the Diversity algorithm.

2 | **THE CHAIR:** Right. Then he cites some examples.

3 | **MR JOWELL:** Then he cites some examples. It's on the basis of those internal emails

4 | that we then are able to make this pleading.

5 | **THE CHAIR:** I mean that doesn't quite map the language in your pleading.

6 | **MR JOWELL:** No, it doesn't. There's a further letter -- forgive me, I will try to

7 | get -- where we set out some further emails that does more closely map the language

8 | in the pleading and refers to the specific methods.

9 | **THE CHAIR:** I understand -- sorry, obviously, I have not heard from Google yet but

10 | I understand you say irrespective of how the world looked like when this request went

11 | in, you say it's clear why you need this information pursuant to the request -- sorry,

12 | why you need the request answered on page 218. Why is that not a more satisfactory

13 | way of going about things? You are being told what algorithms and methods were

14 | being used and then pleading in light of that response. Would you have any objection

15 | to that?

16 | **MR JOWELL:** No, we were simply taking things step-by-step.

17 | **THE CHAIR:** No, I understand.

18 | **MR JOWELL:** That's the first step we wanted to take, was to ensure that it was beyond

19 | doubt that these matters were on the pleading because we were being told --

20 | **THE CHAIR:** No, I fully understand that.

21 | **MR JOWELL:** Having put them on the pleading, absolutely our next step will be to

22 | say: now please answer these requests.

23 | **THE CHAIR:** I understand but irrespective of whether it's the right order, the pleading

24 | goes in first.

25 | **MR JOWELL:** Yes.

26 | **THE CHAIR:** I understand Google's position. I am going to be told in a minute they

1 need time to look into all this and if they were to look into all of this and then provide
2 the information you requested in these requests, that would be an appropriate way
3 forward and then you can plead in the light of those?

4 **MR JOWELL:** If they were to give fulsome and proper answers to the requests -- they
5 might come back with something very similar to this and say: you're not entitled to it
6 and then we get into a sort of loop of chicken and egg.

7 **THE CHAIR:** Yes, well --

8 **MR JOWELL:** This is why I think we might suggest that better to allow the pleading
9 in, so they can't wriggle out in that way and then absolutely make them answer the
10 requests, yes. Then perhaps we can improve on the pleading and take some out, add
11 some in, if they are candid.

12 So those are our submissions.

13

14 **Submissions by MR PATTON**

15 **MR PATTON:** Sir, as you know, our position is simply to ask for further time to look
16 at this plea and to decide whether it's sufficiently arguable that permission to amend
17 should be given, that being, as we put it in the skeleton, the other side of the coin of
18 the strike-out test. The idea of giving permission to amend, subject to a strike-out,
19 doesn't actually resolve anything, so that's simply putting off the day.

20 Before I just explain why that's our position, can I pick up two points that Mr Jowell
21 made in response to questions from you. The first question you asked was whether
22 the Commission, I think, had looked at Diversity. Can I just show you one document
23 about that, just so you are clear. It's in bundle 1, tab 17.

24 **THE CHAIR:** 1, 17?

25 **MR JOWELL:** Yes, tab 1, 17, page 487.

26 **THE CHAIR:** Bundle 1, tab 17.

1 **MR PATTON:** So the whole of this document -- the disclosure hasn't been highlighted
2 in the way the skeleton has but the whole of this --

3 **THE CHAIR:** Sorry, I am not sure I am in the right place.

4 **MR PATTON:** Page 487, response of Google Inc, tab 17.

5 **THE CHAIR:** My fault. 487. I have it, yes.

6 **MR PATTON:** So the disclosure, just to explain, has not been highlighted in yellow or
7 blue, so this document is in the ring at the moment. I won't read it out but would you
8 mind simply reading the first sentence, really, of the question in bold and then if you
9 could have a look at the answer, continuing over the page, please. **(Pause)**

10 **THE CHAIR:** Right.

11 **MR PATTON:** Then if you could just look at question 22 on page 489 as well, just to
12 complete the point.

13 **THE CHAIR:** Okay.

14 **MR PATTON:** So the Commission looked at this. It didn't ignore this point. It asked
15 questions about it and was provided with information about it. But what it didn't do in
16 its decision is to find it involved anything anti-competitive at all.

17 **THE CHAIR:** Right. I mean you mean in 2007, I presume, 2007?

18 **MR PATTON:** The investigation obviously didn't limit itself to any particular period in
19 time --

20 **THE CHAIR:** No.

21 **MR PATTON:** -- but the Commission didn't find anything anti-competitive about the
22 Diversity algorithm in the decision, where it made its findings of infringement in relation
23 to other matters. So in terms of whether it looked at it, it looked at it but it didn't find
24 anything to be anti-competitive about it.

25 **THE CHAIR:** Yes.

26 **MR PATTON:** The second point, in answer to -- again, I think, Mr Jowell suggests

1 that the Commission found in the decision that demotions were abusive and just to be
2 clear, we don't accept -- you won't find that statement anywhere in the decision.

3 **THE CHAIR:** You don't say -- demotions per se.

4 **MR PATTON:** Are not abusive.

5 **THE CHAIR:** You say it has to be in combination --

6 **MR PATTON:** In combination with the promotion, exactly, so that's obviously a debate
7 for the trial.

8 **MR JOWELL:** I accept that. In the decision, it's the combination of --

9 **THE CHAIR:** Yes.

10 **MR PATTON:** That's helpful, I'm grateful. The only question then is whether it's
11 appropriate for us to have a period of time to look at this plea and to investigate and
12 decide whether we have a basis for coming back to the Tribunal and saying: it's not
13 arguable and it shouldn't be permitted.

14 As I have made clear, we don't oppose it on limitation grounds. We are not taking that
15 point. We asked about it and that's been answered. The point we do make is whether
16 it's actually got any substance to it, in circumstances where the Commission obviously
17 didn't think it did have any substance to it, having looked into it and made no adverse
18 finding about it.

19 Now we've had almost no time at all to look into that question. When you asked
20 Mr Jowell when was this amendment put forward, he said some time ago. The answer,
21 as you know, is on 6 July. So less than three weeks ago was when we got this
22 amended plea for the very first time, without it having been heralded in prior
23 correspondence or anything of that kind.

24 **THE CHAIR:** He says you were pressed on this in the request and followed up in
25 correspondence from 6 December 2022.

26 **MR PATTON:** That's true. The point we took was that there wasn't a pleaded issue

1 about it and that wasn't taken any further. If they felt we were wrong about that, they
2 would have pursued, as you say, a Part 18 application because they would have
3 said: well it is pleaded and we are entitled to this information. They didn't pursue that.
4 They left it there, after the correspondence, and then the plea came forward, now
5 seeking to introduce these allegations into the case.

6 **THE CHAIR:** If we park that point about whether you plead first and then seek the
7 information or seek the information and then plead, if we park that for the moment, do
8 you have any objection to giving the information in these requests?

9 **MR PATTON:** The difficulty with the requests, if I can just go back to the requests,
10 is --

11 **THE CHAIR:** 218, I think, yes.

12 **MR PATTON:** -- is that if you look at the question -- it's page 218, yes:

13 "Is it Google's position that at no point during the period from 2002 did it implement
14 ...". That's one thing. That, one can see, is capable of a response. "Expect to
15 implement", what on earth does that really mean and what would be the relevance of
16 it in any event? "Or test"; again, what does it matter? I mean all sorts of things might
17 be tested from time to time but who cares? Testing something without implementing
18 it has no impact on Kelkoo.

19 "Any algorithms"; okay, one understand what that means, "processes or methods,
20 howsoever named"; it's a bit unclear what that means, "that were equivalent or similar";
21 very vague, "to the Diversity algorithm, in terms of their intended"; so that has to do
22 with what was in the mind of the person who did the testing or implementation, "or
23 actual impact on the display of search results on any SERP accessible to users in the
24 EEA."

25 So it's genuinely a very, very difficult question to answer, particularly in circumstances
26 where it's about establishing a negative and we are dealing with an organisation like

1 Google which is a very large organisation with many different teams.

2 **THE CHAIR:** Okay. But if we leave the Chancery analysis on one side for a moment
3 and focus on the gist. First of all, the "implement". There's no difficulty in saying -- and
4 "equivalent or similar", I think we know what we are talking about.

5 **MR PATTON:** Yes, provided "similar" means similar in terms of what the Diversity
6 algorithm did, something that does similar to that. When you asked my learned friend
7 about these vague expressions, he gave a somewhat different answer to what has
8 been said in correspondence. He said: is it the object or effect of it, to do with
9 demotions. And once you get into the question: did you have an algorithm that might
10 have demoted a website in a particular way? That's what all the algorithms do.

11 **THE CHAIR:** It's very broad.

12 **MR PATTON:** It's very broad, exactly. So I can see that there would be a question
13 that could be tightened up which would be a simple factual question as to whether
14 an algorithm was implemented which had a particular approach. I can imagine that
15 must be doable.

16 **THE CHAIR:** Yes, how one tightens that language, it's not clear to me at the moment.

17 **MR PATTON:** That's the application that's been made.

18 **THE CHAIR:** Yes, I know --

19 **MR PATTON:** But I understand you are trying to find a solution.

20 **THE CHAIR:** Whether the pleading comes in or whether the pleading stays out, we'll
21 bear that in mind. We have to consider how to progress this issue.

22 **MR PATTON:** Yes.

23 **THE CHAIR:** Then what about the other methods which are specified?

24 **MR PATTON:** Do you mean in the pleading?

25 **THE CHAIR:** In the draft pleading.

26 **MR PATTON:** If I can just come to the pleading which you have in tab 10 at page 29 --

1 **THE CHAIR:** Crowding, clustering, classifiers to identify CSSs.

2 **MR PATTON:** Can I say first of all, it would be a mistake for you to assume you are
3 in a different position from us when we received this plea, that you might -- if your
4 assumption is those of us who have been working on this case and read the plea and
5 thought: "ah, we understand exactly what this is driving at", that would not be a correct
6 assumption to make.

7 I would suggest the debate between yourself and Mr Jowell does reveal that it's
8 actually quite a difficult plea to follow and that was the position which we found
9 ourselves in when it arrived on 6 July. That it's actually quite difficult to work out what
10 is being said because you start with a reference in the first line to the documents at
11 3C. That's all of the disclosure, that cross-reference. So that cross-reference doesn't
12 help you. In light of the documents referred to at 3C, if you follow through that
13 reference, it's just everything.

14 You then have reference to testing and implementing Diversity that one can
15 understand. Then there's the very vague expression about equivalent, similar or
16 complimentary and the reference to crowding, clustering and classifiers. That comes
17 out of the blue, it's not something that's been debated between the parties before this
18 amendment arrives. It's not something they explain by reference to any particular
19 document. They don't put forward a case as to what they say that means. So it's not
20 a self-contained plea in that sense. You don't see -- they've found some words but
21 they are not putting forward a case as to what it actually means, what effect that would
22 have.

23 They refer in the next line to Anchor++ demotion, again without any explanation as to
24 what that's said to consist of. We are told it's an expression they saw in a document
25 but what is their case as to what it means, why does it matter?

26 **THE CHAIR:** I suppose one of the issues -- take any of these techniques, whether it's

1 algorithms or crowding or clustering or anything like that, they can be used legitimately
2 and illegitimately on anyone's definition of what's legitimate and illegitimate.

3 **MR PATTON:** What you expect to see is "crowding means X and that's impermissible
4 because Y". And you simply don't get any of that out of the plea. You then have the
5 highlighted bit and then the next sentence is:

6 "Several equivalent, similar or complimentary measures were devised and/or
7 implemented outside the EEA and/or directly or indirectly affected CSSs that operated
8 in the EEA."

9 We are now told that's a reference back to the four different labels that are in the
10 previous few lines but I have to say, that's not self-evident on the face of the plea. In
11 terms of the allegation that they affected CSSs that operated in the EEA, it's
12 completely unexplained.

13 **THE CHAIR:** Can I ask Mr Jowell a question, sorry to interrupt you.

14 **MR PATTON:** Yes, of course.

15 **THE CHAIR:** Mr Jowell, how do you define when an -- assuming it an algorithm that
16 can be used legitimately or illegitimately, just assume for present purposes, how do
17 you define illegitimate use just for the purposes of the pleading? I am sure it's all over
18 this pleading --

19 **MR JOWELL:** (Inaudible due to overspeaking) abuse is one where it's known in
20 advance that its likely effect will be to demote comparative shopping services.

21 **THE CHAIR:** Kelkoo's --

22 **MR JOWELL:** Well, Kelkoo or other comparative shopping.

23 **THE CHAIR:** You are not concerned with other comparative shopping.

24 **MR JOWELL:** Well, yes, but it may not be possible to --

25 **THE CHAIR:** Say that again, illegitimately likely to affect?

26 **MR JOWELL:** One that's likely to have the effect, known or anticipated to be likely to

1 have the effect of demoting comparative shopping services in the search results.
2 If it would assist --

3 **THE CHAIR:** So sorry, just bear with me a minute. Sorry, I am just trying to -- so as
4 I understand, if your request was qualified by reference to the Diversity algorithm or
5 something -- or an algorithm.

6 **MR JOWELL:** Or measure, yes.

7 **THE CHAIR:** Or measure, including your list of things --

8 **MR JOWELL:** Yes.

9 **THE CHAIR:** -- for the purpose of known or anticipated -- demoting comparative
10 shopping services, subject to tightening up that language --

11 **MR JOWELL:** That would --

12 **THE CHAIR:** -- that would give the necessary information.

13 **MR JOWELL:** That would and if it would assist, we are perfectly content to provide
14 details of all the methods that we have -- indeed, all of the emails referring to those
15 methods that we have found from the Commission disclosure we've received to date
16 that appear to fall into that category. If that would assist Google, then we are happy
17 to do so and then they can tell us more about them.

18 **THE CHAIR:** Yes.

19 **MR JOWELL:** Because although, of course --

20 **THE CHAIR:** What I am minded, again subject -- I appreciate Google has not finished
21 their submissions --

22 **MR JOWELL:** Yes.

23 **THE CHAIR:** -- what I am minded to do is order an exchange of information --

24 **MR JOWELL:** Yes.

25 **THE CHAIR:** -- as a first step, before deciding whether the pleading comes in or not.
26 Subject to -- I think probably the language is now sufficiently tight that something can

1 | be drafted at least and if not, I can look at it on paper.

2 | **MR JOWELL:** Yes.

3 | **THE CHAIR:** Then you renew your application -- you may be able to specify

4 | algorithms you don't even know about at the moment or specify some methods you

5 | don't know about at the moment. But, at the moment, I am not comfortable the

6 | pleading is sufficiently tight, at least to allow an amendment in at this stage. I'm not

7 | saying that's your fault --

8 | **MR JOWELL:** We are perfectly content with that approach and we can, if you like,

9 | expand our list of methods and if necessary, give the cross-references to emails, to

10 | assist Google.

11 | **THE CHAIR:** Mr Patton, how do you feel about that?

12 | **MR PATTON:** Subject to seeing the precise wording written down and perhaps

13 | commenting on that if it gives rise to difficulties, then that seems like a sensible way

14 | through.

15 | **THE CHAIR:** Right. What about -- yes, timing?

16 | **MR PATTON:** Timing. Sotto voce. Yes, the timing point, obviously, was a point that

17 | would have arisen on our adjournment application --

18 | **THE CHAIR:** I see no reason why Mr Jowell can't get this to you pretty smartish.

19 | **MR PATTON:** Because they've presumably been thinking about all this.

20 | **THE CHAIR:** Seven days, Mr Jowell, to tighten that up?

21 | **MR JOWELL:** Seven days, yes.

22 | **THE CHAIR:** And then, obviously, you will be expected to put in a proper response,

23 | not a "This is not relevant", or "You don't need this information", sort of thing.

24 | **MR PATTON:** Yes.

25 | **THE CHAIR:** How long do you need for that?

26 | **MR PATTON:** Is that something I could take instructions on if we could break --

1 **THE CHAIR:** Yes.

2 **MR PATTON:** Shall we do that over the luncheon --

3 **THE CHAIR:** Yes, okay. The other thing to bear in mind is we are going to have
4 a substantive dispute as to whether this should come in as a merits question. It's just
5 a slight jurisdictional question as to whether I should be doing this on my own or
6 whether we should have a full Tribunal for that.

7 **MR PATTON:** Yes.

8 **THE CHAIR:** Fine. Mr Jowell, are you content to leave it on that basis at the moment
9 and then --

10 **MR JOWELL:** Yes.

11 **THE CHAIR:** -- we'll move on to the next subject and we can come back on timing
12 later.

13

14 **Submissions by MR JOWELL**

15 **MR JOWELL:** Yes, that's very happily short circuited what could have been a long
16 process.

17 I think it may be convenient next to deal with the two specific matters, I think, that are
18 specific documents that are still outstanding. The first of these relates to the
19 communications between Google and the Commission in relation to its remedy after
20 the Commission decision.

21 **THE CHAIR:** Yes.

22 **MR JOWELL:** Now I should just, before I get to that -- there's a suggestion in Google's
23 skeleton argument that in some way we have not pleaded that the abuse is ongoing
24 or postdates the Commission. That's a completely untenable reading.

25 **MR PATTON:** We don't say that.

26 **MR JOWELL:** We do accept --

1 **MR PATTON:** We say it's ongoing.

2 **MR JOWELL:** I am grateful. And, therefore, we don't accept that the remedy that
3 Google has instituted has cured the abuse. We consider that the discriminatory
4 self-preferencing has continued, notwithstanding its remedy.

5 **THE CHAIR:** It's being policed by the Commission.

6 **MR JOWELL:** It's being policed but their remedy -- there are two points to note on
7 that. One is the remedy has changed over time.

8 **THE CHAIR:** Right.

9 **MR JOWELL:** We assume in response to complaints from the Commission and
10 there's been an ongoing process in which a number of parties have made
11 representations to the Commission that say the remedy is insufficient. Of course, the
12 Commission is a body that operates on the basis of administrative priorities and it has
13 a new power which is shortly to come into force in the form of its Digital Markets Act
14 which no doubt gives it considerable additional powers in relation, specifically, to
15 self-preferencing by companies such as Google.

16 So it may well have just simply taken the view: "well, this isn't worth our bringing
17 infringement proceedings". It can't be assumed simply from the fact --

18 **THE CHAIR:** You are not saying the measures -- sorry, are you saying the measures
19 required by the Commission are not being implemented or are you saying they are
20 insufficient?

21 **MR JOWELL:** This is what's important. The measures -- Commission effectively gave
22 a cease and desist order, to the effect of: "you must cease self-preferencing your
23 comparative shopping service over others". It left it to Google as to how to do that
24 because, of course, it being the case that there are the two limbs of the abuse, as
25 conceded by the Commission. It could be done in various ways. Compliance could
26 be achieved in various different ways by Google.

1 So, understandably, the Commission left it to Google to achieve compliance.

2 Google then implemented a remedy and there has been a huge amount of back and
3 forth, I believe, between Google and the Commission and between the Commission
4 and other parties affected, as to whether that remedy has been sufficient or not.

5 **THE CHAIR:** I see.

6 **MR JOWELL:** Certainly we don't accept that merely the fact that the Commission has
7 not brought infringement proceedings, it can be assumed that the remedy has been
8 sufficient.

9 **THE CHAIR:** It's made no positive statement it's satisfied.

10 **MR JOWELL:** It's made no positive statement and it's wrong to infer that it takes that
11 view.

12 **THE CHAIR:** I understand.

13 **MR JOWELL:** Particularly in light of the new powers it's about to obtain. Now the
14 issue for present purposes is actually quite a narrow one because I think that Google
15 have agreed that they will give their communications to the Commission and they
16 assure us that they have given in the Foundem proceedings.

17 **THE CHAIR:** Yes.

18 **MR JOWELL:** And they assure us that those communications will include --

19 **THE CHAIR:** Just remind me where is that in Google's skeleton? There's quite a large
20 number of documents, as I recall.

21 **MR JOWELL:** I think it's 5,000.

22 **THE CHAIR:** Yes, 5,000 is the figure I had in mind.

23 **MR JOWELL:** They assured us in their evidence that that will include documents
24 going to the implementation of the remedy. It's not a narrow selection of documents.

25 It may be convenient, I think, to look at it in Mr Wisking's witness statement, if I can
26 find that.

1 **THE CHAIR:** Tab 13.

2 **MR JOWELL:** Yes, that is in tab 13 of the bundle.

3 **THE CHAIR:** Yes.

4 **MR JOWELL:** He deals with it in paragraph 63 on page 385.

5 **THE CHAIR:** Yes.

6 **MR JOWELL:** You see in 61, he notes the agreed remedy disclosure of 5,000
7 documents --

8 **THE CHAIR:** Yes.

9 **MR JOWELL:** -- in the Foundem proceedings. You see in 63.2, Mr Wisking assures
10 us that the documents concern both how Google proposed to bring the infringement
11 found in the Shopping Decision to an end and the subsequent implementation of that
12 remedy.

13 So on that basis, we are -- perhaps that can be embodied in a recital but we are
14 content to take that.

15 I think the only issue between us is this: that we say: "well, in order to fully understand
16 this dialogue, we need to know not just what you've said to the Commission but also
17 what the Commission has said to you". The answer to that is, in part: well, in
18 most -- you see it in 63.1 of Mr Wisking's statement. He says two things:

19 "I understand that only a small volume of material is affected by this and in any event,
20 in most cases the substantive information will, in any event, fall to be disclosed. For
21 example, where the Commission issued RFIs to Google, Google's response to the
22 Commission will embed the questions asked."

23 Well that's fine as far as it goes and, of course, if the answers are all embedded, then
24 we don't need to see the RFI, the original RFI. But I also take it from that that there
25 are some documents, there may be some documents, which are not embedded which
26 are not contained in and, therefore, we are assured that it's a small volume --

1 **THE CHAIR:** They may say: "we have the following concerns that this may not" --

2 **MR JOWELL:** Indeed, and we should see them.

3 **THE CHAIR:** Yes.

4 **MR JOWELL:** So we are content to take the agreed remedy disclosure, provided it's

5 also supplemented by any documents coming from the Commission to Google and

6 that can't be a burdensome request. Those are our submissions on that.

7 **MR PATTON:** Just on the suggestion that the Commission might have had concerns

8 that the remedy was non-compliant but didn't, as an administrative priority, pursue

9 Google about this. Can I just make sure that you have in mind page 366 of the bundle,

10 the evidence of Mr Wisking on this? It's tab 13, 366, just at the top of the page, which

11 is a quotation from the Commissioner there --

12 **THE CHAIR:** Sorry, that's a quotation. I see, yes.

13 **MR PATTON:** Yes.

14 "This means we do not have a non-compliance case."

15 But obviously, they kept monitoring. It's very unlikely that the Commission would have

16 said that if, in fact, the position was they thought it was non-compliant but they didn't

17 want to allocate resources to pursuing Google for not having complied with

18 a Commission decision.

19 **THE CHAIR:** Right.

20 **MR PATTON:** Having done a very long investigation, no doubt having allocated very

21 great resources to that and produced an extremely thick decision which you may have

22 seen and made findings of infringement, the notion that the Commission would then

23 not have bothered to pursue Google if it felt the remedy did not bring the difficulty to

24 an end, seems a very unlikely scenario.

25 **THE CHAIR:** Mm-hmm.

26 **MR PATTON:** Stepping back, just to explain what the remedy is, just so -- you may

1 have picked this up already.

2 **THE CHAIR:** Yes.

3 **MR PATTON:** Essentially, there is an auction process and CSSs are permitted to bid
4 for ads to appear in the boxes in the shopping units that appear on the Google search
5 page. So that's what the remedy is. And one of the CSSs which places bids and has
6 its ads appear in the shopping unit is Kelkoo, so Kelkoo is an active participant.

7 **THE CHAIR:** How often do these auctions take place? Are they continuous or?

8 **MR PATTON:** I believe they're continuous and I suspect in microseconds but anyway,
9 I won't -- so Kelkoo is an active participant in this auction process. It's putting in bids,
10 it's getting its ads placed and earning revenues from all of that. So Kelkoo knows how
11 this remedy works, it knows what the remedy is. It's obviously decided, at least for the
12 time being, that it's in its interest to participate in it and benefit from it. So that's the
13 background when you come to consider this part of the case and this request for
14 disclosure.

15 This is not a case where they are mystified as to what the remedy is or don't know
16 enough to be able to put forward a case, if they have one, as to why it's not good
17 enough.

18 Now insofar as what we have agreed to disclose, what we have agreed is to give the
19 disclosure, as you know, that Mr Justice Roth ordered in the Foundem case, after
20 hearing argument on this point and he made the order that he did and it's -- I don't
21 know if I should show you that.

22 **THE CHAIR:** Yes, it would be helpful.

23 **MR PATTON:** In bundle 3, tab 102. It's page 1506, the internal page 8. If you see
24 paragraph 18 at the foot of the page:

25 "Subject to the provisions set out below, the defendant shall disclose to the claimant
26 the documents provided by them to the European Commission on or after

1 27 June 2017 [that's the date of the Decision], concerning how the defendants
2 propose to bring the infringements to an end and the implementation of the remedy /
3 compliance mechanism. Such documents shall comprise all responses to
4 Commission queries and requests for information, as well as the quarterly monitoring
5 but not the weekly data reports the defendants have provided to the European
6 Commission."

7 You can see that the whole focus of his order is on what Google is giving to the
8 Commission and that's because any case about the remedy is going to have to be
9 focused on what Google were saying and what Google was doing and not on what the
10 Commission was doing.

11 **THE CHAIR:** So did Mr Justice Roth hear any argument on that?

12 **MR PATTON:** I don't think so. I don't think on that specific point. I don't think that
13 was argued, that it should be correspondence going the other way.

14 **THE CHAIR:** No.

15 **MR PATTON:** But he did hear argument about whether he should make any order
16 about the remedy at all. And my recollection is that this was something that he
17 crafted --

18 **THE CHAIR:** What's the objection to getting the correspondence from the
19 Commission?

20 **MR PATTON:** The objection is this is disclosure that's already been ordered. The
21 search has been done. It's resulted in a huge volume of documents, at least 5,000
22 documents that have been disclosed in the Foundem proceedings. As matters stand,
23 therefore, that's a set of production that can readily be handed over, subject to it being
24 given the right Bates numbers and so on, in this litigation, without any further search.
25 If you make an order that goes beyond --

26 **THE CHAIR:** It's 5,000 documents.

1 **MR PATTON:** Yes.

2 **THE CHAIR:** Just help me with that. Why would there be so many documents?

3 **MR PATTON:** It's partly, I think, because of monitoring because -- so the quarterly

4 reports have to be produced so the -- I don't know how many quarters since the date --

5 **THE CHAIR:** Not 5,000.

6 **MR PATTON:** Not 5,000. I can check that but I think it's -- for example, some of the

7 responses to the Commission will have attached data that will be relevant to what the

8 Commission is looking at, about those who are participating in the auction and what

9 the results --

10 **THE CHAIR:** You've been handed a note. I don't know if that will have the answer on

11 it.

12 **MR PATTON:** Yes, some of the responses to the Commission from Google have

13 a large number of annexes which contain --

14 **THE CHAIR:** That's what I was anticipating, so that doesn't mean 5,000 letters from

15 the Commission to Google or anything like it?

16 **MR PATTON:** No, that's true and I am not making that point.

17 **THE CHAIR:** In terms of identifying them, is it really burdensome in the context of the

18 litigation?

19 **MR PATTON:** The point is at the moment, we have a very large data set that can be

20 handed over pretty readily.

21 **THE CHAIR:** I understand that.

22 **MR PATTON:** What's the reason to require a new search to be conducted for

23 a different set of documents which they weren't looking for when Mr Justice Roth's

24 order was made --

25 **THE CHAIR:** Because hearing one side of a conversation can often not give the full

26 picture of what's --

1 **MR PATTON:** Conversation -- as Mr Wisking has said, you would expect the
2 questions to be -- I showed you the response from the investigation earlier, where you
3 see the question and answer set out from Google. The other question is really one of
4 relevance. I mean if one were taking a no stone unturned approach, of course you
5 would say: "why not just go and look for those as well?" But what's actually the
6 relevance of this? If you look at my learned friend's skeleton in terms of how he puts
7 it, what is he actually looking for? On page 15, paragraph 36.

8 **THE CHAIR:** Page 15.

9 **MR PATTON:** Paragraph 36.

10 **THE CHAIR:** Sorry to interrupt you but I think we ought to have a break for the
11 shorthand writer. Do we need a break for the shorthand writer? Yes, sorry to interrupt
12 you in full flow.

13 **MR PATTON:** Not at all. Of course, yes.

14 **THE CHAIR:** Just five minutes.

15 **(11.48 am)**

16 **(A short break)**

17 **(11.55 am)**

18 **THE CHAIR:** I am sorry, you were about to --

19 **MR PATTON:** Look at paragraph 36 of my learned friend's skeleton. It's (iii) which is
20 really the first explanation we've had as to why they want this material. They say it's
21 evidence on precisely how Google has supposedly sought to end the infringement.

22 That's exactly the question to which the material that we have disclosed in Foundem
23 and are going to re-disclose in this case, goes directly to that question.

24 So if you consider this justification that's put forward, there isn't any pleaded case in
25 the particulars of claim, beyond the infringement is ongoing. There are no specific
26 points taken on the remedy in the particulars of claim, even though they are

1 participants in the remedy. They know exactly how it works. If they have a problem
2 with it, they are well able to tell us what it is and particularise that. There's just not
3 a reason to require some other search to be done, at least now. Obviously, if they
4 receive 5,000 documents and review them and they can't understand it because it's
5 only one side of the picture and they need to come back for more, that would be open
6 to them, we are not seeking to shut that out. What we are saying is giving the
7 disclosure that's already ready to go, without some further search needed to be
8 conducted, is the proportionate response at this stage.

9 **THE CHAIR:** You've not given any evidence how burdensome it would be to pull out
10 the letters from the Commission. It doesn't sound like an enormous task to me.

11 **MR PATTON:** It hasn't been done, so we don't know but it's not that sort of point, that
12 we are suggesting there's going to be huge numbers of additional documents. It's
13 really there is disclosure ready to go which will take them some time to review and
14 why shouldn't they accept that and then revisit this question at a later date?

15

16 **Order by The Chair**

17 **THE CHAIR:** I understand. I'm inclined to order this disclosure, just on the basis that
18 it's much easier to understand correspondence if you have both sides of the chain. So
19 I understand there's no other point of principle being raised, other than it's just
20 a burden of some sort to do it, so I am going to order that.

21

22 **Submissions by MR PATTON**

23 **MR PATTON:** Can I mention, as I did in the skeleton, that there is an acute point of
24 confidentiality that will arise in relation to this.

25 **THE CHAIR:** Yes. Yes.

26 **MR PATTON:** It is probably a very obvious point, in that this is recent information, it's

1 not information from 15 years ago.

2 **THE CHAIR:** Yes.

3 **MR PATTON:** It's about an auction process and it's an auction in which Kelkoo is an
4 active participant.

5 **THE CHAIR:** I understand that. I am very sensitive to that.

6 **MR PATTON:** Yes.

7 **THE CHAIR:** You have offered the 5,000 documents. On what terms have you offered
8 those?

9 **MR PATTON:** We've said in correspondence there is a confidentiality issue that
10 needs to be addressed in relation to that. There's been a lot going on in the last few
11 weeks. That point has not really been explored between the parties and I am not
12 suggesting we should make a decision now about that. But we have suggested in our
13 draft order that that disclosure be provided once a confidentiality ring is in place that's
14 satisfactory for this material.

15 **THE CHAIR:** A new confidentiality ring?

16 **MR PATTON:** The issue about the existing confidentiality ring is that some of the -- it's
17 called the 'External Advisers Only' ring and that's the blue highlighting, the higher level
18 of protection.

19 **THE CHAIR:** Yes.

20 **MR PATTON:** It's a bit of a misnomer because on both sides some of the in-house
21 lawyers are within that external ring, including Kelkoo's General Counsel and some
22 other in-house lawyers. So the question that will need to be explored, probably in
23 correspondence initially, is: how can that be squared with this material being about an
24 auction in which Kelkoo is a participant and with other third parties who are also
25 bidding in the auction against Kelkoo.

26 **THE CHAIR:** Yes.

1 **MR PATTON:** Given the General Counsel's role as an oversight of legal functions.

2 **THE CHAIR:** Right.

3 **MR PATTON:** We did footnote in the skeleton an authority on the approach to be
4 taken to in-house lawyers, where confidentiality issues of that kind arise. It's
5 sometimes dealt with by an undertaking of the in-house lawyers not to advise on the
6 relevant part of the business for a particular period and a run-off period after the end
7 of the litigation.

8 **THE CHAIR:** Right.

9 **MR PATTON:** The alternative is for the in-house lawyers not to be in this ring because
10 of its special nature.

11 **THE CHAIR:** There's no reason why it couldn't be disclosed in short order on a true
12 external lawyers only basis; is that right? And then while your negotiations are
13 ongoing, as to who should come into the confidentiality club?

14 **MR PATTON:** That's true. That's true, yes.

15 **THE CHAIR:** Mr Jowell, is that --

16

17 **Submissions by MR JOWELL**

18 **MR JOWELL:** We are a little concerned about this. The confidentiality regime in
19 these proceedings is, as you've seen, already somewhat of an impediment and we are
20 concerned about it effectively creating even greater complexity and it becoming even
21 more burdensome. We would have thought that, actually, it's sufficient to simply put
22 these documents in the inner ring, but if it were necessary to do something further,
23 then we would suggest that perhaps the appropriate way forward is for the -- first of
24 all, there's no reason why the documents shouldn't come in a redacted form,
25 immediately, to everyone which I understand they are in redacted form for the
26 Foundem proceedings already, so that shouldn't be a problem.

1 **MR PATTON:** I don't believe that's right. I am not sure what the basis of that is.

2 **THE CHAIR:** Sorry, obvious question, what basis have they been disclosed in other
3 proceedings?

4 **MR PATTON:** I can show you that. It's in the supplemental bundle, if you have it, at
5 tab 2.

6 **THE CHAIR:** Yes.

7 **MR PATTON:** This was a special order about confidentiality that Mr Justice Roth
8 made in the other case.

9 **THE CHAIR:** Yes.

10 **MR PATTON:** Can I just show you first of all, the second recital on the first page. So
11 the two individuals, Mr and Mrs Raff, who are the founders of Foundem, they gave an
12 undertaking not to be involved in a competing business with Google for a period of
13 five years following the end of the case, following the end of the proceedings. So that's
14 the background to it. They gave kind of a non-compete undertaking, effectively, for
15 five years after the litigation comes to an end. On that basis, they were admitted to
16 the confidentiality ring themselves but if you look at paragraph 1(a), you can see that
17 even then, even despite giving that undertaking, 1(a) says in the brackets on the
18 second line:
19 "... though they shall not be permitted to review any documents disclosed into the tier
20 of the Legal Eyes Confidentiality Club concerning the Remedy or Compliance
21 Mechanism and marked 'External Legal Eyes Only' by the defendants' solicitors prior
22 to production".
23 So there's a super-duper ring, as it were, created --

24 **THE CHAIR:** There is a true lawyers only club for this purpose in these proceedings.

25 **MR PATTON:** It may be experts as well.

26 **THE CHAIR:** Yes.

1 **MR PATTON:** So they were excluded from that special ring in relation to remedy
2 materials, precisely because Mr Justice Roth recognised that in comparison with
3 some of the other information, this is very recent and it's very sensitive. Foundem is
4 not participating in the remedy, it's not a bidder in the auction, so in fact the point that
5 arises in relation to Kelkoo didn't even arise and as you've seen, they've given those
6 non-compete --

7 **THE CHAIR:** You'd be content to give disclosure on that basis --

8 **MR PATTON:** Into a ring that excludes any in-house lawyers.

9 **THE CHAIR:** Mr Jowell, you can look at it and if you need to apply to have internal
10 people, you can grapple with it then.

11 **MR JOWELL:** The problem with that is it's de facto creating this inner ring.

12 **THE CHAIR:** It's not, it's just pro tem.

13 **MR JOWELL:** Pro tem.

14 **THE CHAIR:** On that basis.

15 **MR JOWELL:** We certainly will be happy to receive them into an inner ring on a pro
16 tem basis.

17 **THE CHAIR:** I appreciate I've not heard full argument on confidentiality and you will
18 be able to put those arguments better when you can say: "this document I need to" --

19 **MR JOWELL:** I understand that. One thing we would ask for though, is that many of
20 these documents, presumably, won't be third party confidential and, therefore, the
21 ones that are should be identified and we should be provided with the redacted version
22 that we can show.

23 **THE CHAIR:** I think, for today's purposes, it will be disclosed on this basis. Insofar
24 as they are confidential documents and not public documents, they won't be. Then
25 I will leave it to the parties to discuss opening up that ring as appropriate. But that is
26 pro tem and there's no presumption going forward as to what happens or otherwise

1 because I've not heard full argument on it and --

2 **MR JOWELL:** I mean one possibility would be, for example, to write to the relevant
3 third parties, as has been done in relation to --

4 **THE CHAIR:** Of course, third party documents, all that sort of thing, yes.

5 **MR JOWELL:** But what we are -- to put down a marker we are very concerned in this
6 litigation that the confidentiality ring is being used as a method, effectively, to prevent
7 people --

8 **THE CHAIR:** I understand but it may be you see these documents and decide there's
9 nothing in this period at all, Mr Jowell.

10 **MR JOWELL:** Maybe. I think that, Mr Chairman, that brings us then to the next
11 specific disclosure issue which relates to the penalty server disclosure and this
12 is -- I don't want to mischaracterise it but in very broad terms, this is a database of
13 some form that Google has that allows them, not comprehensively, but allows them to
14 identify at least some of the -- both algorithms and manual adjustments that have been
15 made to a particular website and also to go back historically.

16 It's not comprehensive. There may be algorithms affecting the site or manual penalties
17 that are missed but it will at least identify some. Data has been ordered on this in
18 a particular date range in relation to the Foundem proceedings.

19 **THE CHAIR:** 2009 to 2011.

20 **MR JOWELL:** That's correct. We seek it for a -- and Google is prepared to provide
21 the data for that same time period as that selected in Foundem. But it's only prepared
22 to do it for that narrow date range and for only two of Kelkoo's domains.

23 We seek it for a wider date range, from 1 January 2004 to two different dates in 2011
24 and then we also seek it for the full range of ten Kelkoo domains.

25 **THE CHAIR:** Why don't you need -- sorry, not that I am trying to encourage you
26 otherwise but why don't you need it after 2011?

1 **MR JOWELL:** The reason is we are trying -- we originally sought it for a later period
2 but those are the dates on which -- I think I'm allowed to say this -- the Panda algorithm
3 comes into effect and so, therefore, we know, effectively, what is the key period under
4 2011.

5 **THE CHAIR:** Right.

6 **MR JOWELL:** So we are trying to be proportionate but we do need it for the earlier
7 period. I think in correspondence and in the witness evidence, there have been three
8 bases for the objection. One was that the request was too vague and we've sought to
9 extend it also for databases underlying the penalty server. We are prepared to park
10 that request.

11 **THE CHAIR:** Yes, fine.

12 **MR JOWELL:** Park that request for the time being. We've also clarified the precise
13 domains. So I don't think there's any lack of clarity over the request.

14 The other basis is the somewhat strange suggestion that we haven't pleaded manual
15 penalties. I mean I can take you back, but we make repeated reference to manual
16 penalties in the pleading.

17 **THE CHAIR:** Yes.

18 **MR JOWELL:** Of course we can't specify when those were applied --

19 **THE CHAIR:** Mm-hmm.

20 **MR JOWELL:** -- but we believe they were applied. But when they were applied and
21 in what precise form is all information that's not in our possession, it's in Google's
22 possession.

23 The third reason that's put forward for refusing the wider disclosure is that it would be
24 overly burdensome.

25 **THE CHAIR:** Yes, that's Mr Kwok, isn't it? So it wasn't very overly burdensome. It's
26 a couple of weeks or something.

1 **MR JOWELL:** Two weeks for an engineer working half-time. This is important
2 information and we don't think that that, therefore, justifies the non-disclosure of these
3 documents.

4 **THE CHAIR:** Just remind me, what do you get out -- sorry, I have read it, I just --

5 **MR JOWELL:** This will provide us with details of the manual penalties and algorithms
6 that were effectively causing Kelkoo's site to be demoted.

7 **THE CHAIR:** Right. It's not comprehensive, it's a snapshot of different periods, yes.

8 **MR JOWELL:** It's at least helpful, so it's important information in relation to causation
9 and it should be, in our respectful submission --

10 **THE CHAIR:** Why does it need to go back as early as 2004?

11 **MR JOWELL:** Well as I said, we have put our complaint as being from at least -- we
12 know the abuse started in at least 2006 but we consider it may have started earlier
13 and, importantly, we need to see, effectively, how in that earlier period, Google's
14 strategy was implemented and evolved.

15 **THE CHAIR:** And changed, yes.

16 **MR JOWELL:** Now the suggestion that somehow, we should be confined to what
17 Foundem was granted, is misplaced.

18 **THE CHAIR:** Why was it 2009 in the Foundem proceedings?

19 **MR JOWELL:** It's difficult to know precisely but in the case of Foundem, Foundem
20 was a very different kind of company to start with. Foundem was, effectively, a start
21 up in 2008. Kelkoo was an established multinational.

22 **THE CHAIR:** So they may not have been interested.

23 **MR JOWELL:** They may not have been -- and they were aware there was
24 a process -- one can pick this up from the Foundem pleadings. They know much more
25 about the manual penalties that affected them because there seems to have been
26 a blacklisting and then a whitelisting period for Foundem. They were aware of it.

1 Therefore, they are able to target their request for a much narrower period, where it
2 affected them.

3 **THE CHAIR:** Right.

4 **MR JOWELL:** Indeed, from 2012, Foundem ceased operating certain parts of its
5 business altogether. So it's a different case. It's a smaller case and it's not appropriate
6 just to port over the same dates. Those are the reasons why we seek this slightly
7 wider period.

8 **THE CHAIR:** Mr Patton?

9 **MR PATTON:** Yes.

10 **THE CHAIR:** Once, in principle, one is giving this stuff, the fact it's going to take
11 another couple of weeks to do a period that Mr Jowell is interested in, just seems to
12 be not a strong starting point.

13 **MR PATTON:** That's a recipe for us not to make any further offers in this litigation
14 because then we are on a slippery slope.

15 **THE CHAIR:** No, but you are providing it in the other litigation.

16 **MR PATTON:** Yes. So the reason we were ordered to provide it in the other litigation
17 was because in that case, Foundem has actually advanced a particularised plea with
18 proper particulars, where it says that "we were whitelisted from Algorithm A in 2009,
19 so Algorithm A was disapplied from us in 2009". 2011, as my learned friend says, is
20 when Panda came into force and they've set out -- we've got it in the supplemental
21 bundle if you wouldn't mind, so I can just show you what it looks like. It's tab 1, page 3.
22 I won't go through the detail of it but you can see in paragraph 2, they say they've
23 identified evidence that once they were whitelisted from Algorithm A on
24 1 December 2009, their rankings didn't get restored to levels commensurate with full
25 lifting of penalties.

26 Then if you look over the page, effectively what they do is they -- you see the same

1 point in paragraph 7, that they think there was a marked discrepancy between their
2 rankings on Google and on Yahoo and Bing during that period and there's quite
3 a lengthy set of particulars, where they say, effectively, they looked at what was
4 happening to the traffic in that period, couldn't find an explanation that made sense
5 and, effectively, they inferred, therefore, there must have been some other algorithm
6 applied by Google that was impacting on their site during that period.

7 So that was actually the pleaded reason why the judge was prepared to order this
8 disclosure at all because it was very burdensome to give. Now you don't find anything
9 like that in the particulars of claim in this case. There was no allegation that the
10 performance of their site during any period of time is inexplicable, save as a result of
11 some other argument or --

12 **THE CHAIR:** We are not debating whether this goes forward to trial.

13 **MR PATTON:** No, of course.

14 **THE CHAIR:** The question is what disclosure needs to be given.

15 **MR PATTON:** Yes.

16 **THE CHAIR:** And, yes, I am not sure it's helpful to say it's not sufficiently
17 particularised, is it?

18 **MR PATTON:** My point is a slightly different one. If you were simply looking at the
19 pleaded case, you'd be asking why would they want the penalty server data at all?
20 They plead the case based on Algorithm A and Panda. As you saw, those were one
21 and two, 49A. They may add a case on Diversity, that's a matter for a later date. But
22 although I quite accept the words "manual demotions" appear dotted through the
23 pleading, essentially quoting the Commission decision which mentioned them, they
24 are not advancing a case that they suffered manual demotions which were
25 anti-competitive. So, as you know, manual demotions can be given because of
26 breaching the guidelines, graphic content. There are a whole host of reasons why

1 manual demotions might be applied. We've made that clear in correspondence.
2 We've said: "they did apply to you and these are the reasons they would have been
3 applied". They haven't come back and said: "we say you applied those in a way that
4 was a breach of competition law and which caused us loss".

5 So on the face of the pleading, this material actually isn't relevant at all to --

6 **THE CHAIR:** What material -- so assuming we are all working on the basis this 2004
7 to 2008 really, 2006 to 2008 if you prefer --

8 **MR PATTON:** Yes.

9 **THE CHAIR:** -- is a legitimate period for this trial to look at, what materials are you
10 envisaging will be examined to show one way or another whether there was an impact
11 on Kelkoo's ranking or illegitimate impact on Kelkoo's ranking in that period?

12 **MR PATTON:** So far as the question of whether there was an infringement in that
13 period, the point we've made is that the Commission file, about a third of that, 15,000
14 documents, relates to the period before 2008.

15 **THE CHAIR:** I understand that.

16 **MR PATTON:** So they have that material in relation to infringement. In relation to
17 whether they are actually impacted by anything during that period, it's their data that
18 will show us that. They know what was the traffic to their site. Did the traffic come
19 from Google, did it come from people typing "Kelkoo" into the web browser directly,
20 did it come from Yahoo, Bing or other search engines? That's the data they have and
21 which is the subject of our application which they've resisted and that will show what
22 actually happened in terms of traffic to their site.

23 So that's the material that goes to whether they can extend the Commission's finding
24 of infringement backwards in time, from 2008 to 2006. They have the material the
25 Commission looked at and obviously didn't think gave rise to a finding of an
26 infringement before 2008 and they have their own traffic data which we haven't seen

1 but which will tell us whether their traffic did suddenly drop in 2006, for example, or
2 what happened to it and whether it dropped in a way that was different, in terms of
3 traffic flowing from Google, as opposed to traffic flowing from Yahoo, for example,
4 which may be quite informative. So there will be disclosure on those points, absolutely.
5 I am not suggesting -- they have 15,000 documents in relation to that period. I am not
6 making the submission they won't get disclosure in respect of that two year period.
7 The narrower point I am making is if we hadn't already given this in Foundem -- for the
8 reason I explained, Foundem has this plea, it was affected by a different set of
9 algorithms for a two-year period when it was exempted from Algorithm A, we wouldn't
10 actually be looking at this material at all.
11 But we took the pragmatic view, we've disclosed it in Foundem -- the judge in
12 Foundem -- I am sorry, I was conscious I was talking at you.

13 **THE CHAIR:** No, carry on.

14 **MR PATTON:** The judge in Foundem, it was his idea that Kelkoo should specifically
15 be one of the other search terms in Foundem and he made the point, when he ordered
16 that, that that would create efficiencies for this case as well, so then one would have
17 the data. He limited that to two domains of Kelkoo which were then decided to be
18 .co.uk and .com. So, given that, we made the pragmatic decision to give that
19 disclosure to Kelkoo as well.

20 **THE CHAIR:** But is there any difference, whether it goes back to 2004 or 2006? Is
21 there any --

22 **MR PATTON:** Well, I mean there's just no justification for it going back beyond 2006,
23 if it's being ordered at all. They plead that that's the date of the infringement. That's
24 the infringement that caused them loss. One has to assume they have their own traffic
25 data.

26 If they had a case for saying: our site suffered in the period from 2004 to 2006, they

1 would be able to say: this is the data which demonstrates that that actually happened
2 and they haven't done that, one has to assume deliberately. So then it's purely fishing
3 if one goes back further than the pleaded date of the infringement. They've made a
4 deliberate decision to pin it, for the moment, to 2006. Presumably that's because they
5 cannot assert any adverse effect on themselves before that date.

6 So we suggest it would be wrong, in principle, for the disclosure to go back any further
7 than 2006.

8 I think those were the points I wanted to make on that.

9

10 **Order by The Chair**

11 **THE CHAIR:** Right, yes. Mr Jowell, I am inclined to order disclosure of -- disclosure
12 isn't the right word but order that this document be provided, going back to 2006, not
13 going back to 2004. Obviously, as things emerge and it's necessary to go back to
14 2004, that can be done subsequently.

15 **MR JOWELL:** Yes. Might I suggest perhaps it might be at least fair to go back a little
16 bit earlier to see when things were -- perhaps at least six months.

17 **THE CHAIR:** Okay, so six months before.

18 **MR PATTON:** It's just a pure fishing request, Sir.

19 **THE CHAIR:** It's comparing and contrasting, I think that's the point, rather than fishing
20 for --

21 **MR PATTON:** Comparing and contrasting what? The traffic data, obviously one can
22 see the comparing what happened to their traffic in the six months before 2006 and
23 after 2006. That may be informative because that may tell you whether there was
24 a drop in 2006 but that's their data.

25 **THE CHAIR:** I understand that but I don't know enough about what this document is
26 going to look like. But at the moment, I think going back an extra six months is justified.

1 | Is there anything else I need to decide on that?

2 | **MR PATTON:** We don't --

3 | **THE CHAIR:** We have time periods.

4 | **MR PATTON:** The time period and number of domains.

5 | **THE CHAIR:** Yes, number of domains.

6 | **MR PATTON:** Two domains was a proportionate approach and that's what he ordered

7 | in the other case.

8 | **THE CHAIR:** What evidence do I have on the domains you need?

9 | **MR JOWELL:** Yes, it's in the footnote to our skeleton argument. It's in footnote 12

10 | on page 16. I mean the fact is that Kelkoo was an international business. Its French

11 | and German businesses are particularly important. Foundem wasn't. They were

12 | a UK-only site.

13 | **THE CHAIR:** Sorry, I beg your pardon, which footnote?

14 | **MR JOWELL:** Footnote 12.

15 | **THE CHAIR:** I am looking in the wrong ... bundle. Your skeleton, I apologise.

16 | **MR JOWELL:** Forgive me, it's on page 16 of our skeleton, footnote 12. **(Pause)**

17 | **THE CHAIR:** The extra two weeks covers all those domains, as I understand from the

18 | evidence?

19 | **MR JOWELL:** Certainly that's our (several inaudible words).

20 | **THE CHAIR:** I am going to order it for all those domains.

21 | **MR JOWELL:** Mr Chairman, I think that brings us then to the question of the search

22 | terms, what we've called the search term disclosure.

23 | **THE CHAIR:** Yes.

24 | **MR JOWELL:** And you will have seen that this is traversed in the witness evidence

25 | and the skeletons at some length, so I will try to be brief.

26 | But, effectively, the position is that there is a need in these proceedings for, obviously,

1 further disclosure from Google and what we have sought to do is to identify, in
2 particular, by way of -- we've started off by trying to identify search terms and relevant
3 custodians for Google and we've had two goes at this. The first resulted in a response
4 from Google saying: "well, that's likely to give rise to 7 million documents". So we
5 narrowed it considerably, in terms of the search strings and the custodians. They've
6 come back and said: "well, that gives rise to approximately 400,000 documents which
7 we would want to review for relevance, confidentiality and privilege".

8 For our part, we say that there are effectively two ways that one can go forward with
9 this or, indeed, both. One is to go forward with that proposal for the narrower set of
10 search terms and just get on with it, effectively. The other is that we need information
11 from Google that will enable us to make more targeted requests.

12 Now we seek that in the form of three things. First, we seek an EDQ from Google for
13 the period of the claim. Secondly, we seek an explanation from Google as to how it
14 obtained the documents or the searches it undertook to obtain the documents that it
15 provided to the Commission and formed part of the Commission file.

16 Finally, we also seek the hit rates that derive from the searches that we have asked to
17 date.

18 Google's response is: "we will provide you with none of those, neither the specific -- we
19 don't want to carry out the specific searches and we also won't give you any of those
20 documents we seek, other than perhaps an EDQ from the Foundem proceedings,
21 covering a much more limited period of time and topics".

22 **THE CHAIR:** Sorry, just backing up so I have the landscape.

23 **MR JOWELL:** Yes.

24 **THE CHAIR:** So, again, we are concerned, really, with the period before 2008.

25 **MR JOWELL:** Well we have sought to --

26 **THE CHAIR:** Limit it.

1 **MR JOWELL:** -- focus particularly on that period.

2 **THE CHAIR:** Yes, and at the moment -- I am paraphrasing you horribly,

3 Mr Jowell -- but you say: "we haven't got a clue what they did before 2008 because

4 they haven't told us and that's why I have a request out to find out what algorithms

5 they were using and what other manual techniques or alternative techniques they were

6 using".

7 **MR JOWELL:** Yes.

8 **THE CHAIR:** So at the moment, you are in the position you can't really or can't easily

9 identify classes of documents because you don't know enough about what Google are

10 up to.

11 **MR JOWELL:** That's correct.

12 **THE CHAIR:** And then the other point that seems to be floating around, you have an

13 awful lot of disclosure now. One appreciates a lot of it will be later but 15,000

14 documents in the period.

15 **MR JOWELL:** Yes.

16 **THE CHAIR:** As yet, you haven't really got on top of those, so I mean -- sorry, I am

17 just trying to get the parameters. So as I understand, there seems to be a case for

18 suggesting the broad based disclosure which is never particularly favoured by this

19 Tribunal is not appropriate, particularly at this stage, and you need to have a better

20 idea of what your case is and then articulate some classes of documents, Model C

21 type disclosure, that would be appropriate going forward.

22 That's the parameter of --

23 **MR JOWELL:** That's the summary of the debate but I did want to respond if I may --

24 **THE CHAIR:** Yes, of course.

25 **MR JOWELL:** -- on the point about the Commission file because they make the point,

26 they say: "well you've got the file and lots of the documents in there relate to the earlier

1 period".

2 **THE CHAIR:** Mm-hmm.

3 **MR JOWELL:** What we find -- and it's wrong for them to say that those documents
4 haven't been carefully reviewed. As you would expect from Linklaters, they have
5 carefully reviewed those documents on file and so have others. The conclusion that
6 they have -- or what's noticeable about those documents is that there seems to be
7 a particular dearth of documents revealing the strategic thinking of Google in relation
8 to -- particularly from high up executives, who were clearly involved in the decision to
9 demote comparative shopping, who don't --

10 **THE CHAIR:** There's no dispute that decision was made and there's no dispute that
11 happened.

12 **MR JOWELL:** There is a dispute, I think, in relation to -- (Overspeaking).

13 **THE CHAIR:** Perhaps -- whether it was deliberate or inappropriate.

14 **MR JOWELL:** There is a dispute, I think, in relation to this earlier period.

15 **THE CHAIR:** Right.

16 **MR JOWELL:** And so we know there is a distinct dearth of documents from these
17 higher executives.

18 **THE CHAIR:** Right.

19 **MR JOWELL:** That leads us to question: well how did these documents come -- how
20 did they arrive at on the Commission file? Google say: "well you can be sure that the
21 Commission did a thorough investigation and got everything relevant".

22 Now two important things to bear in mind on that. The way that the Commission
23 conducted its investigation was effectively by a series of piecemeal requests for
24 information --

25 **THE CHAIR:** Mm-hmm.

26 **MR JOWELL:** -- of Google and those requests for information were then responded

1 to by way of narrative answers from Google and annexed documents and data and
2 the like.

3 But what one can't tell from the Commission file is how Google arrived at those
4 selections of documents from those cases. What is particularly a bit concerning is it
5 seems that Google itself doesn't know. So if you turn, please, to Mr Wisking's witness
6 statement which you see in tab 13. If you go to page 389, paragraph 73.2. He's
7 talking about why it would be incredibly burdensome, he says, to reconstruct how they
8 came to provide the information that they provided to the Commission. He says at
9 73.2, the first sentence:

10 "Granular technical details as to how this information and documents were compiled
11 are not readily to hand."

12 So --

13 **THE CHAIR:** Sorry, you are talking about --

14 **MR JOWELL:** He's talking about our request for an explanation of how the Google --

15 **THE CHAIR:** Provided information to the Commission.

16 **MR JOWELL:** -- provided information to the Commission. So in simple terms, they
17 don't know.

18 **THE CHAIR:** Just say what's the basis of your case of pre-2008 abuse?

19 **MR JOWELL:** We say there was a deliberate strategy, in effect, of demotion of
20 comparative shopping sites and we say also that that was with a view to the future
21 promotion of their own comparative shopping sites.

22 **THE CHAIR:** Right, but the promotion of their comparative shopping --

23 **MR JOWELL:** It doesn't take effect fully until --

24 **THE CHAIR:** 2011.

25 **MR JOWELL:** -- 2008.

26 **THE CHAIR:** Sorry, 2008.

1 **MR JOWELL:** But we say these are effectively preparatory steps, where we are
2 clearing -- we are nuking the competition so that then we can march in and take over.

3 **THE CHAIR:** Right, but you were being demoted relative to who before 2008?

4 **MR JOWELL:** Relative to the results that would otherwise have been achieved on the
5 search results. So they are effectively saying: "we want to take out of our search
6 results" all of this what they call "aggressive commercialisation".

7 **THE CHAIR:** Right. So if I am selling handbags that I make in my home, it will come
8 up on the search. But if you are just routing people through to the manufacturers of
9 handbags, you get demoted. Is that the --

10 **MR JOWELL:** I think that's right. But also it may be that, in effect, what will come up
11 is a definition of a handbag.

12 **THE CHAIR:** Sure, sure, yes.

13 **MR JOWELL:** Rather than anything commercial. What one sees is emails referring
14 to this strategy from senior executives but very few documents from the executives
15 themselves.

16 **THE CHAIR:** There may well be a transition from neutral intention -- I am not going
17 to say good intention -- but neutral intention, or perhaps even trying to protect the
18 consumer, to when it became abusive, there may well be a transition.

19 **MR JOWELL:** There may well be.

20 **THE CHAIR:** So the fact executives are saying: "look, we need to stop these people
21 who are doing nothing more than just routing you through" --

22 **MR JOWELL:** Yes.

23 **THE CHAIR:** -- initially it may not necessarily, as I understand -- correct me if am
24 wrong -- have been abusive but it became abusive at some point.

25 **MR JOWELL:** I think it's Google's case that this was all good intentions.

26 **THE CHAIR:** Yes.

1 **MR JOWELL:** We don't accept their case.

2 **THE CHAIR:** No, I know you don't.

3 **MR JOWELL:** We need to look at the underlying documents in order to test it.

4 **THE CHAIR:** Right. Just having broad -- I mean this is, you know, good old-fashioned
5 broad disclosure. It just does not seem attractive.

6 **MR JOWELL:** No and that's why we are trying to be targeted.

7 **THE CHAIR:** Okay. So what are the issues you are targeting?

8 **MR JOWELL:** What we are targeting in particular are the strategy of particularly
9 Google's senior executives and others who are in connection with them in relation to
10 the demotion of these comparative shopping sites. That's the core issue and in
11 particular of course as regards Kelkoo, the effect on Kelkoo, but not only.
12 That's what we are trying to target. But in order to do that we have to have some
13 information about -- some further information. It's not enough just to say: "oh, well,
14 here are all these documents in the Commission file". You can try and chase up, you
15 know, this response to this email or that email. Because we think that there are
16 absences of whole types of document from senior individuals, in particular, and we
17 don't know and we (audio distortion) because those documents don't exist, but it may
18 also be, and we apprehend it is, is because those documents weren't thoroughly
19 searched.

20 **THE CHAIR:** But documents saying that we want to demote these
21 commercial -- I don't know what the right term would be.

22 **MR JOWELL:** Yes.

23 **THE CHAIR:** But they are not of itself -- that does not give rise to abuse necessarily,
24 does it? Demotion doesn't equal abuse.

25 **MR JOWELL:** It may or may not. It depends on --

26 **THE CHAIR:** It may or may not. So what is it, what sort of correspondence are you

1 getting from -- are you anticipating getting from executives?

2 **MR JOWELL:** For example, there might be, just to give a hypothetical example,
3 something from a senior executive saying: the real reason we have this strategy of
4 demoting comparative shopping sites is that we wish to promote our own shopping
5 comparator in the form of Google and in due course we wish to ensure that that gets
6 (inaudible).

7 **THE CHAIR:** Show me what you are asking for.

8 **MR JOWELL:** Well, the first -- what we want is the specific search terms, disclosure,
9 that we've asked most recently for is -- you will see it in the annex to our draft order.
10 Forgive me, it's in tab 9. You can see we have identified in different tiers, effectively
11 different seniority --

12 **THE CHAIR:** So just remind me the evidence of these custodians, who they are.

13 **MR JOWELL:** Eric Schmidt and Larry Page, in 304, are two of the founders of Google.
14 Marissa Mayer went on I think to run Yahoo, a senior executive as well. Mr Brougner
15 I believe worked closely with Mr Schmidt, as did Mr Singhal and Mr Cutts. They are
16 all senior executives that --

17 **MR PATTON:** I wasn't sure whether you were asking for actual -- for evidence in this
18 case?

19 **THE CHAIR:** I was actually, yes.

20 **MR JOWELL:** Forgive me.

21 **THE CHAIR:** Where's the evidence on who the custodians are in the --

22 **MR JOWELL:** I am so sorry, it's in tab 9 of volume 1, page 270.

23 **THE CHAIR:** Thank you.

24 **MR JOWELL:** Forgive me.

25 **THE CHAIR:** No, no. I am just going to -- Mr Jowell, I apologise, I am going to have
26 to rise a little early today at ten to one. We'll resume at ten to two. Is that okay? I am

1 very sorry.

2 Sorry, where were we going?

3 **MR JOWELL:** If one goes, please, to tab 9, page 270.

4 **THE CHAIR:** Yes. Yes, this is the list of the people.

5 **MR JOWELL:** Yes.

6 **THE CHAIR:** Where is the evidence in relation to why they are being targeted, who

7 they are and --

8 **MR JOWELL:** Well, I think I have sought to explain it in general terms. You'll see in

9 Mr Hennah's witness statement there is a high level explanation.

10 **THE CHAIR:** Let's have a look at that.

11 **MR JOWELL:** But I think that ... **(Pause)**

12 In particular, paragraph 23 of Mr Hennah's --

13 **THE CHAIR:** Mr Hennah is tab -- I am sorry, Mr Hennah is -- where is he? Okay.

14 Sorry, paragraph 23 you said?

15 **MR JOWELL:** Yes, page 247. We haven't sought to go into any detail.

16 **THE CHAIR:** No.

17 **MR JOWELL:** Which is partly of course it's privileged information as to what our

18 thinking is, but I have sought to outline it at a high level.

19 **THE CHAIR:** Yes, but it doesn't say, for example, that Mr Eustace is head of --

20 **MR JOWELL:** No --

21 **THE CHAIR:** -- algorithms or that --

22 **MR JOWELL:** -- it doesn't, I accept that.

23 **THE CHAIR:** Then in terms of the search terms.

24 **MR JOWELL:** Yes.

25 **THE CHAIR:** This is like -- these are incredibly broad, aren't they? They are not used

26 in combination, they are used individually.

1 **MR JOWELL:** Well, some of them are in combination and some are individual.

2 **THE CHAIR:** Right.

3 **MR JOWELL:** But it's the search strings that we are concerned with.

4 **THE CHAIR:** Then what documents are disclosable, everything that comes up on
5 their search?

6 **MR JOWELL:** It will depend I think on how many documents are responsive to these
7 search terms, and Google have said that there are approximately 400,000 of them. In
8 those circumstances, one can see that --

9 **THE CHAIR:** Let's say there are 10,000 of them. Which ones have to be disclosed?
10 Every document referring to Kelkoo or every document referring to Yahoo?

11 **MR JOWELL:** We would be content with that approach if Google were.

12 **THE CHAIR:** I think Google object. If they were content with that approach, I wouldn't
13 be having this discussion with you.

14 **MR JOWELL:** Yes. Well, if Google were to conduct a relevance review, one can see
15 that at least if there are large numbers --

16 **THE CHAIR:** Then it has to be relevant to an issue, doesn't it?

17 **MR JOWELL:** Yes, it does.

18 **THE CHAIR:** And that's complicated because, as I think is common ground, the fact
19 that you are concerned about rankings and demoting someone doesn't necessarily
20 mean it's relevant to this case.

21 **MR JOWELL:** No, that's true, although I think that it would be relevant perhaps to
22 Google's case if they were saying: "well, look, there were innocent explanations and
23 here are the reasons".

24 **THE CHAIR:** This is hopelessly broad at the moment, isn't it?

25 **MR JOWELL:** Very well. But in that case we need to effectively get the information
26 that allows us to be better targeted.

1 **THE CHAIR:** Yes.

2 **MR JOWELL:** That's really where one comes to the other documents that we seek,
3 which are an EDQ. Now we say that really an EDQ just should go without saying really
4 in a case like this. This is a high value case.

5 **THE CHAIR:** Just elaborate to me why you need an EDQ at this stage. What
6 information were you getting?

7 **MR JOWELL:** We need to understand what types of electronic documents and in
8 what form over the period Google maintained its --

9 **THE CHAIR:** I mean I can see that, but isn't the question precedent to that what
10 issues you are seeking disclosure on?

11 **MR JOWELL:** Well, typically EDQs don't proceed by reference to --

12 **THE CHAIR:** No, I know they don't. You often have the list of issues first and --

13 **MR JOWELL:** Yes. Well, I think --

14 **THE CHAIR:** For this period, it's very -- it's no criticism of your clients --

15 **MR JOWELL:** Yes.

16 **THE CHAIR:** -- or their advisers, but at the moment it's very broad based the
17 allegations, and tentative the allegations for this period. So ordering specific
18 disclosure at this stage is very difficult until the issues are better defined.

19 **MR JOWELL:** Yes.

20 **THE CHAIR:** And I expect that's why you are not seeking specific disclosure at this
21 stage.

22 **MR JOWELL:** Yes, but it's also somewhat chicken and egg because until we know
23 what is there we can't know what --

24 **THE CHAIR:** And also --

25 **MR JOWELL:** -- to target.

26 **THE CHAIR:** -- what your case is.

1 **MR JOWELL:** Well, yes. We know -- I think it's fair our case is clear in general terms
2 what our case is, but the first -- we do say that, first of all, we need to know how they
3 held these documents.

4 For example, let's take the senior executives that we mentioned, Mr Schmidt,
5 Mr Page, Ms Mayer and so on. What sorts of electronic devices did they use? We
6 need to know whether they used -- how they stored their data?

7 **THE CHAIR:** Well, in due course.

8 **MR JOWELL:** Yes.

9 **THE CHAIR:** But what are you -- there are questions like why are you seeking
10 documents from -- why are they relevant custodians --

11 **MR JOWELL:** Because --

12 **THE CHAIR:** And, secondly, what documents are disclosable? Just saying that you
13 have to disclose everything that mentions Kelkoo is hopeless.

14 **MR JOWELL:** No, I see that. We will try to be -- but, as I said, it's documents
15 that -- again coming back to the core issue, it's documents that show that there was
16 a strategy or an understanding that CSSs would be targeted, which may or may not
17 include Kelkoo, as a result of -- on the part of Google.

18 That is the heart of the case for the earlier period and the steps they took to conduct
19 that strategy. But in order for us to try to search for documents that have not already
20 been disclosed we need crucially to know two things. We need to know, first of all,
21 how they stored documents and, secondly -- on what types of devices they used and,
22 secondly, we need to know what the searches that have already been carried out for
23 the purposes of the investigation were.

24 If it transpires, for example, that there is a particular request by the Commission that
25 says: "please could we have all of these documents from senior executives relating to
26 any strategy for demotion of comparative shopping services", and we know that, for

1 | example -- again this is wholly hypothetical -- we say Mr Schmidt's emails were
2 | searched but his text messages were not, then we can say: "well, we need to see the
3 | text messages if that was the mode of communication".

4 | **THE CHAIR:** For what purpose? Coming back to what text messages have been --

5 | **MR JOWELL:** Well, in order to see whether there was this strategy or not. Because,
6 | as I said, at the moment what we see are fragments --

7 | **THE CHAIR:** You say you could define a class of -- already you say you know
8 | a strategy to -- I am not sure how you are going to put it.

9 | **MR JOWELL:** To demote CSSs at the time, yes.

10 | **THE CHAIR:** And that that would be your class. But that's not what has been
11 | developed before me. I can understand that but that's not what you are seeking at the
12 | moment. You are seeking either one of two things: very broad disclosure or
13 | alternatively you want an EDQ.

14 | **MR JOWELL:** We alternatively want an EDQ. We want to understand how they have
15 | arrived at the Commission file, so then we can target the gaps in the disclosure, the
16 | searches that have already been carried out.

17 | **THE CHAIR:** You have the documents from the Commission.

18 | **MR JOWELL:** Yes, but we don't know how they were arrived at, and nor do Google,
19 | that's the -- maybe Google do but their solicitors certainly don't.

20 | **THE CHAIR:** Yes, it's a long time ago, yes.

21 | **MR JOWELL:** Well, yes. But then if they are not prepared to provide us with what
22 | they did, then we have no option other than to simply risk duplication. Again, then the
23 | only way -- by asking for searches of things that may already -- searches that may
24 | already have been carried out.

25 | **THE CHAIR:** But it's particularly burdensome to seek broad based disclosure,
26 | particularly when it's so long ago.

1 **MR JOWELL:** Yes.

2 **THE CHAIR:** It becomes -- it's not --

3 **MR JOWELL:** It's not fair, with respect, to say that we are seeking broad based
4 disclosure. We are seeking disclosure of a limited number of custodians by reference
5 to particular search terms. We didn't know how many documents would be responsive
6 to those search terms and we still in a sense don't, because all we are given by Google
7 is the cumulative figure. So it may be, we just don't know, that actually of the 25 search
8 strings of the 400,000 documents that 380,000 of them are all one search string. We
9 simply don't know. We asked for that information and they declined to give it.

10 So we are trying to be proportionate, we are trying to target, but Google are simply
11 blocking us at every time. So we need to have a way to move forward so that we can
12 be more targeted. That's all we are seeking. The explanations that we are seeking,
13 the information we are seeking in the form of an EDQ, in the form of the hit rates from
14 these search strings, and in the form of an explanation of how the Shopping file was
15 arrived at, will all assist us in targeting much better. That's what we want to do. We
16 have no interest in over disclosure, but we have to have the information if we are to
17 do that.

18 Of course if Google says: well, "it's terribly difficult for us to provide an explanation of
19 how we arrived at this set of documents", or "it's impossible for us to provide hit rates
20 over this particular type of document", well, that would be somewhat surprising, given
21 that Google is such a large well resourced and technologically advanced company,
22 but if they say that they can put in a witness statement and explain that. But we
23 simply --

24 **THE CHAIR:** Shall we pick this up at ten to two?

25 **MR JOWELL:** Yes, thank you.

26 **(12.51 pm)**

1 **(The luncheon adjournment)**

2 **(1.50 pm)**

3 **MR JOWELL:** Mr Chairman, before I conclude my submissions on this category or
4 these categories of information and search terms, can I back up a bit --

5 **THE CHAIR:** Mm-hmm, of course.

6 **MR JOWELL:** -- and try and put some things in perspective. First of all, I should just
7 address what are the, in general terms, at a high level, the issues on which we
8 anticipate that we are going to need further disclosure from Google?

9 The first, in general terms, is one that has already been identified and that is the
10 existence of the abuse in the 2006 to 2008 period, where it has not been found by the
11 Commission. The second which we have not touched on, does relate to also the
12 period of the abuse as found by the Commission. The issue is, what is the proper
13 counterfactual in terms of what would Google have done, had it not behaved
14 abusively?

15 The reason that that is an issue is because Google doesn't accept in its pleaded case
16 that it would not have demoted for the entire period of the decision. It claims to have
17 a split period of counterfactual; a split counterfactual effectively. There is a period up
18 to 2013 where it says it would have demoted comparative shopping servers --

19 **THE CHAIR:** For what it would say is legitimate reasons.

20 **MR JOWELL:** Well for what it says are legitimate reasons but also, it accepts that it
21 would not have been able to promote its own --

22 **THE CHAIR:** Yes.

23 **MR JOWELL:** Then it says from 2013, it claims it would have done what it has done
24 under the remedy. So there is an issue there as to what Google would have done in
25 the non-abusive counterfactual.

26 **THE CHAIR:** What's the significance of 2013?

1 **MR JOWELL:** They say, and I don't want to get their case wrong for them, in essence,
2 it was only at that point that they had the technological sophistication to do something
3 that would be akin to the remedy.

4 **THE CHAIR:** I see.

5 **MR JOWELL:** So that's an issue that's going to have to be (audio distortion) the
6 Commission was concerned with because it was not concerned with --

7 **THE CHAIR:** With the counterfactual.

8 **MR JOWELL:** -- the counterfactual. The third main area of further disclosure is
9 disclosure from Google relating to quantum because we will need to see information
10 about revenue and hit rates -- that may be the wrong expression -- but traffic data from
11 Google's comparative shopping server, in order to know, effectively, how the market
12 did develop and how much, effectively, Google poached from the --

13 **THE CHAIR:** How much trade it lost to Google.

14 **MR JOWELL:** Exactly.

15 **THE CHAIR:** Are you only concerned with trade loss to Google or trade loss to other
16 parties as well?

17 **MR JOWELL:** It's largely trade loss to Google.

18 **THE CHAIR:** Right.

19 **MR JOWELL:** Because, effectively, almost all comparative shopping servers,
20 independent of Google, were obliterated.

21 Those are the three main areas.

22 Now it's no answer to say to any of those areas: "well, you've got the documents on
23 the Commission file". It's not an answer for the early period because, of course, it's
24 fair to say there are a number of documents in the file that are dated between 2006
25 and 2008, but we simply don't know how seriously the Commission investigated that
26 area. The Commission, as we know, is an administrative body, it operates on the body

1 of administrative priorities. We don't know at what point it decided it would focus its
2 finding of abuse on the period from 2008 but at some point in its investigation it would
3 have homed in on that period. At that point, it would have left out of account any deep
4 dive into that earlier period.

5 So it's simply no answer, it's clearly no answer, it's also no answer in relation to the
6 precise counterfactual.

7 **THE CHAIR:** But these are areas you are interested in getting disclosure in but they
8 are not categories of documents.

9 **MR JOWELL:** They are not categories of documents. Now the way that we have
10 sought to approach this is to try to find targeted search terms and specific custodians
11 because otherwise it's very difficult to see how disclosure exercises could really start.
12 We accept that once you have a universe of documents that's reasonably sized and
13 is responsive to certain relevant search terms, it may at that point then be necessary
14 for Google and Kelkoo to liaise and seek to agree, effectively, issues, disclosure
15 issues, to which those are relevant. I think we don't shy away from that. That's actually
16 going to be rather important because we particularly apprehend from a number of
17 Google's submissions and correspondence that they take an unduly narrow view of
18 many of the issues in the case and so we would want that ironed out in advance of
19 any relevance review by them.

20 So we have no problem with that. But where we are at the moment is simply, really,
21 principally trying to obtain the building blocks that will allow us to, in due course, make
22 more targeted searches.

23 **THE CHAIR:** One normally starts, as I recall, with a list of issues and then the type of
24 disclosure you are seeking in relation to those issues and an EDQ, I can't remember
25 quite what order it happens if necessary but I thought the EDQ possibly comes after
26 the list of issues has been defined.

1 **MR JOWELL:** In the CAT, the CAT rules stipulate that, actually, at the first CMC, the
2 CAT will ordinarily consider whether an EDQ is required. Then, at the second, order
3 the EDQ if it is to be produced.

4 **THE CHAIR:** Right.

5 **MR JOWELL:** So I think -- now we have skipped over that stage because we have
6 a Commission decision and we are prepared to accept the unredacted version of the
7 Commission decision and the Commission file first of all.

8 **THE CHAIR:** Right.

9 **MR JOWELL:** But we now do need to move forward and there is going to need to be
10 further disclosure and, therefore, we do need as a building block, a comprehensive
11 EDQ from Google. This is a claim, as Google itself points out, for 1 billion, in excess
12 of 1 billion euros.

13 **THE CHAIR:** But I mean isn't the EDQ to some extent because the custodians, to
14 some extent, are dependent on the type of documents you are after and the issues
15 that you are interrogating? And so it might be one person, if that's going to be an issue
16 for disclosure and another person, if that's going to be an issue for disclosure.

17 **MR JOWELL:** Yes. I mean the difficulty is that, and we can identify the issues, we
18 can try and identify and agree a list of issues but without the EDQ, we simply don't
19 know what electronic documents Google has. So we say, at the very least, there
20 should be an EDQ of the documents in relation to the documents of the custodians we
21 have identified to date.

22 **THE CHAIR:** Okay.

23 **MR JOWELL:** Then we do seek -- as I said, it would be extremely helpful, in order to
24 avoid duplication from the Commission file, to have an explanation of how the
25 documents on the file were arrived at.

26 Now we can see that that may involve a certain degree of legal archaeology.

1 **THE CHAIR:** But this is the documents prior to 2008?

2 **MR JOWELL:** Well, no. This is -- what we seek is an explanation of how
3 Google -- what searches and what custodians Google did over the course of the
4 investigation to arrive at the documents that it provided to the Commission. So did it,
5 for example -- which custodians did it search, which categories of documents of those
6 custodians, which search terms did it run, in order to arrive at the documents that the
7 Commission have?

8 **THE CHAIR:** The 48,000?

9 **MR JOWELL:** The 48,000, yes. But what did it do to arrive at those?

10 Now, of course, to the extent they say that's just too difficult in some cases to recreate,
11 then they can say that. But where they do know what searches they've run, that would
12 be extremely helpful to everyone, wouldn't it, we suggest, because then we could know
13 we don't need to run those searches again? So we suggest that is a reasonable and
14 proportionate request.

15 Then finally, we do seek the hit rates in relation to the search strings and the
16 custodians that we already have identified.

17 **THE CHAIR:** Sorry, just elaborate on that a bit. So the hit rates on?

18 **MR JOWELL:** Effectively, you saw we identified -- well we've tried -- we've had two
19 goes at identifying custodians and search word strings.

20 **THE CHAIR:** Mm-hmm.

21 **MR JOWELL:** And the first one, Google has said: well that brings back over 7 million
22 documents. The second one, they've said it brings back around 400,000 documents.
23 But as you saw, we have no way of knowing --

24 **THE CHAIR:** Okay.

25 **MR JOWELL:** -- which strings and which custodians are responsive for those
26 particular hits. This is a normal, as I am sure you will know, Mr Chairman, a normal

1 process of back and forth --

2 **THE CHAIR:** Um.

3 **MR JOWELL:** -- interrogating what search terms give rise, effectively, to
4 disproportionate numbers of hits and then it's necessary to go back and refine the
5 search terms or strings rather or possibly to drop certain custodians and so on.

6 But, again, we can't target it more accurately until we have that information. We
7 understand from our eDisclosure providers that that isn't a difficult task, provided the
8 documents are in a suitable form and on an eDisclosure platform. It can be possibly
9 provided within days.

10 Now, of course, to the extent that it's not, then we can receive a witness statement
11 explaining why it's not. But, again, it would be extremely helpful for us to be able to
12 target further to have that information. So those are essentially our submissions,
13 unless you have any questions.

14 **THE CHAIR:** Okay. Thank you.

15

16 **Submissions by MR PATTON**

17 **MR PATTON:** Sir, as you clearly picked up from our skeleton, we say that the whole
18 approach that's been taken here is wrong in principle, in that this is being approached
19 as if we are starting with a blank sheet of paper and looking at disclosure in that way,
20 rather than starting from the fact that the full administrative file of the Commission that
21 we have, has been disclosed to the claimant, so that they have 48,000 documents,
22 not just in the period where the Commission has found there to be an infringement but
23 a third of that in the period where the Commission didn't find there was an infringement
24 predating that. One would expect, as in many competition cases, the Commission file
25 is going to be the heart of the disclosure in relation to the question of infringement,
26 given the powers of the Commission to demand documents, given the obligations

1 Google has to provide accurate answers and to comply with those requests under pain
2 of severe penalties, given the Commission's great experience in investigating
3 competition matters. That is going to be the meat of the case in relation to disclosure.
4 So one does not then just start from the way we might have done things 10 years ago
5 and say: "okay, let's have an EDQ, let's come up with custodians, let's come up with
6 search terms and proceed from there". What's expected is that the claimant, given
7 that it wanted that material, it will read it carefully, do so in a systematic way and work
8 out what are the issues that are not covered by this disclosure, where the gaps -- are
9 the references to other documents that would be of interest, are certain areas not
10 covered by that material, and make targeted requests by reference to what are the
11 issues in the case that the material goes to, what's the category of documents that that
12 suggests should be looked for and why is this actually important, given the issues in
13 the case.

14 That's really how it should have been done. In fairness to Foundem, when we had the
15 CMC in that case in March, despite all the criticisms we made of their disclosure
16 request at the time, the way it worked is they had something like 30 or 40 categories
17 of disclosure and we went through them one by one and it was extremely tedious --

18 **THE CHAIR:** Have you got EDQs out of it?

19 **MR PATTON:** On the EDQ, it was agreed between the parties we would give an EDQ
20 in relation to two points that were not covered by the file and those were the other
21 penalties plea that I mentioned a bit earlier -- they said there was another penalty
22 between 2009 and 2011 -- and quantum, which we accepted would not be covered by
23 the file. So we gave an EDQ limited to those two issues.

24 That information we have provided and I am going to show you we have provided to
25 Kelkoo as well. We've also told Kelkoo that although we've not done a full exercise
26 on it, we think that information is likely to be, effectively, the same across the board.

1 And Mr Justice Roth asked me, and I can show you in the transcript, at the Foundem
2 CMC: "has there been an EDQ in relation to the other points?" I said: "no, because of
3 the Commission file point and that was that and there wasn't any suggestion we ought
4 to give a full EDQ."
5 So, Sir --
6 **THE CHAIR:** So taking the three points.
7 **MR PATTON:** Yes.
8 **THE CHAIR:** So you have the fact that the Commission may not have investigated
9 thoroughly pre-2008, and I appreciate you don't accept that.
10 **MR PATTON:** No.
11 **THE CHAIR:** But let's assume for a moment that is the case.
12 **MR PATTON:** Right.
13 **THE CHAIR:** Just for present purposes.
14 **MR PATTON:** Yes.
15 **THE CHAIR:** How one should approach disclosure for that period. Secondly, the
16 point on the counterfactual, how one approaches disclosure on the counterfactual. So
17 up to 2013, as I understand it, it is being said you say you would have demoted
18 anyway, so the disclosure relating to that from 2013, you would have behaved
19 according to the remedies that are now in place.
20 **MR PATTON:** Yes. So just to be clear, if you look at the application that is before us
21 at the hearing today, if you look at the witness evidence in support of it, the application
22 has not been devised in that way and it's not been framed in that way.
23 **THE CHAIR:** No, I appreciate that.
24 **MR PATTON:** Yes.
25 **THE CHAIR:** But on the basis we want to take things forward rather than just --
26 **MR PATTON:** If I can just give an example of why that's true. I understand you are

1 being very practical and that make sense but, obviously, over lunch, Mr Jowell has
2 made a further thought about what might be suitable topics for discussion. Quantum,
3 for example, it's common ground that's Kelkoo is not seeking any quantum disclosure
4 from us at this CMC. The relief they are seeking is not directed at quantum at all.
5 That's a point they throw at us because they say we shouldn't get it either and it should
6 be reciprocal. But the application today has nothing to do with quantum.

7 **THE CHAIR:** Okay.

8 **MR PATTON:** So of the three points, that's clearly off the table. Counterfactual we've
9 had because this has only been raised in the last 10 minutes. We've had no
10 explanation at all as to how what is being asked for has anything to do with the
11 counterfactual. The counterfactual is about things that didn't happen in the real world.
12 Normally, that's something that the experts are very involved in giving evidence about
13 but certainly there has been no discussion between the parties, as far as I know, about
14 how to give disclosure in relation to the counterfactual.
15 So we simply haven't had that debate. I am not saying they should be shut out from
16 having that debate at a future hearing --

17 **THE CHAIR:** No, sure.

18 **MR PATTON:** -- but that's never been raised, as far as I am aware. The first one, the
19 material before 2008, we have made the point that there were 15,000 documents in
20 the file which pre-date 2008. Now what you might expect if this was a properly
21 constituted application is that someone from Linklaters would say: "we've identified the
22 15,000 documents, someone has read them and what we find is they fall within the
23 following categories".

24 **THE CHAIR:** Yes.

25 **MR PATTON:** They deal with this but they don't deal with that.

26 **THE CHAIR:** There's no evidence on this; is that right?

1 **MR PATTON:** There's no evidence on this at all. Despite that threefold classification
2 that we've just had, Mr Jowell actually put the application on a different basis before
3 lunch and what he said was they were particularly interested in was the goings on in
4 the upper echelons of the company and he said that that wasn't really dealt with in the
5 file.

6 Now, again, as far as I know, that point has never been made in the evidence, by
7 reference to what's in the file or what's not in the file. If you have a disclosure
8 application, that's disclosure 101: tell the court what are the documents you've looked
9 at, what is there and what isn't there. I mean it's as simple as that.

10 What's pretty remarkable about that explanation, that it's the senior echelons that is of
11 interest, is if I can just show you the order that was made in the Foundem case for
12 disclosure. We went through each of the categories -- sorry, in bundle 3, tab 102,
13 page 1509. So this is in the list of the targeted material we were ordered to disclose.
14 If you can see letter O which is towards the top of the page.

15 **THE CHAIR:** Yes.

16 **MR PATTON:** "All quarterly board letters and that's to the Google executive
17 management group".

18 Now that's something that was sought in Foundem and was ordered but this is
19 something that's never even been asked for by Kelkoo in this case.

20 **THE CHAIR:** Right.

21 **MR PATTON:** Which is a pretty remarkable omission.

22 **THE CHAIR:** Quarterly board letters are what exactly? As a matter of interest.

23 **MR PATTON:** As I understand, it's reporting from executive management to the
24 board.

25 **THE CHAIR:** To the board.

26 **MR PATTON:** I hope that's right. So, you know, if the application had been put, for

1 example, on the basis that it was put before lunch, that that was what they were
2 interested in, one of the first things we'd have said is: "well in Foundem, that point was
3 raised and we've been ordered to disclose this and we're perfectly happy to give it to
4 you". Indeed, we are still perfectly happy to give it to Kelkoo today but it's never even
5 been asked for. It's just an illustration, it's not the basis on which the application has
6 been mounted.

7 **THE CHAIR:** What do you say about -- so in practice, how is this going to go forward?
8 Let's assume there are potential gaps. I appreciate one has to formulate categories --

9 **MR PATTON:** Yes.

10 **THE CHAIR:** -- in the light of the disclosure that's been given so far.

11 **MR PATTON:** Yes.

12 **THE CHAIR:** There may be some toing and froing of types of documents you might
13 have.

14 **MR PATTON:** Absolutely.

15 **THE CHAIR:** At what point would you anticipate providing an EDQ and -- yes.

16 **MR PATTON:** In relation to the EDQ, can I just show you what we have provided and
17 what we are going to provide.

18 **THE CHAIR:** Yes.

19 **MR PATTON:** Because the impression you have been given is we have simply said
20 "no" and provided nothing, so if I can begin at bundle 2, tab 81.

21 **THE CHAIR:** Bundle 2, tab 81. Yes.

22 **MR PATTON:** So this is Herbert Smith's letter on 9 June. If you go to the second
23 page at paragraph 4, it says:

24 "Google now provides in this schedule, information and responses to certain questions
25 that have been asked. These responses are based on information provided in the
26 Foundem EDQ [the one I mentioned]. Relevant supplementary information was also

1 | extracted from the disclosure report in Foundem and from a witness statement served
2 | in Foundem."

3 | Then if you go to page 1059, the schedule to this letter, you can see, if you look from
4 | paragraph 4 onwards, that it's essentially in the form of an EDQ. It deals with each of
5 | the questions that we were asked by Kelkoo.

6 | **THE CHAIR:** Mm-hmm.

7 | **MR PATTON:** Then if you go, for example, to 1061, you can see information is given
8 | about the standard document retention policy and at 1062, about the legal holds and
9 | so on. So it's the sort of information -- it's equivalent information to an EDQ. It was
10 | made clear that that was sourced from the EDQ in Foundem that was focused on
11 | those two particular issues.

12 | Now following that, if I could just show you next --

13 | **THE CHAIR:** So leaving aside -- you have no objection to providing this sort of
14 | information.

15 | **MR PATTON:** We've given it. Yes, exactly. Then if we go to tab 84 at page 1095,
16 | I mentioned the witness statement that we'd served in Foundem in relation to some of
17 | these issues. So we've served that on Kelkoo as well. Again, that deals -- they've
18 | actually got witness evidence, which is more than you would normally have. Again,
19 | that deals with questions like the standard document retention policy, what happened
20 | in relation to instant messaging, backups, that's at 1098 and so on, and legal holds.

21 | So they have all of that. Then final thing I wanted to show you is at tab 87. If you
22 | could go to page 1148. At paragraph 25(a), they say:

23 | "While the information provided focuses on the period 2009 to 2011, we can confirm
24 | that it's broadly reflective of the majority of the period covered by the pleaded claim
25 | but given the length and the change in practices, Google isn't able to confirm that it's
26 | comprehensive for the entire period without significant work."

1 But you would be happy to get that sort of level of confirmation in most EDQs, I would
2 suspect, in litigation covering a broad period of time. Perhaps more importantly in (b),
3 an assurance is given, as you can see in the second line:

4 "Insofar as Google is aware of or identifies any document preservation issues affecting
5 any disclosure it's agreeing to give or will give, it will identify and explain such issues
6 as appropriate, when giving the disclosure."

7 That assurance, as you may have seen, is repeated in Mr Wisking's witness statement
8 at paragraph 84.

9 The other point that he makes in the witness statement is that:

10 "Google will consider any focused request for further information about retention,
11 storage and preservation."

12 Now the other thing that we've agreed to give is something that was ordered in the
13 Foundem case and if I can just take you back to the order in Foundem at bundle 3,
14 tab 102.

15 **THE CHAIR:** Yes.

16 **MR PATTON:** It's 1505. So would you just read, Sir, paragraph 14. **(Pause)**

17 **THE CHAIR:** Mm-hmm.

18 **MR PATTON:** So the background to this was actually an idea of Mr Justice Roth
19 during the other hearing and he thought that in terms of taking disclosure forward, the
20 most useful thing to have would be a statement which explains the structure, the
21 operational structure within Google in relation to the algorithms that are at issue in the
22 case.

23 **THE CHAIR:** Mm-hmm.

24 **MR PATTON:** And my understanding is that these -- at least there were going to be
25 at least five statements, to give the full picture in relation to what we've been ordered
26 to provide under paragraph 14. So we have agreed that that should also go to Kelkoo,

1 so they will have that information.

2 **THE CHAIR:** This is over what period?

3 **MR PATTON:** I think it's basically during the period relevant to the pleadings and in
4 Foundem, that is also from 2006 until the present day.

5 **THE CHAIR:** Right.

6 **MR PATTON:** So it's the same period of time. So that is extremely useful information
7 that they will be receiving and that we've agreed to provide in this case. For example,
8 when you asked my learned friend: "well what's the evidence about why this custodian
9 is relevant or that custodian is relevant?", and there's no evidence about that before
10 you, but they will have statements from Google, identifying what the operational
11 structure is in relation to the matters at issue in the claim.

12 So both in terms of what we've already given, that I've showed you, and what we are
13 due to give, effectively pursuant to the order of Mr Justice Roth, there's a lot of
14 information which is actually a lot more valuable than an EDQ. I don't know if you've
15 seen their EDQ. It looks a lot like any EDQ you might have seen elsewhere. It's
16 bundle 2, tab 82.

17 It starts at page 1067. This is presumably the gold standard. It's a six page document
18 and as you can see, it's -- well no more informative, I would suggest, than the
19 information that Google has already provided.

20 Sir, in relation to an EDQ, we say given what we have provided and are going to
21 provide, it's certainly not necessary at this stage. If one was looking at the question of
22 an EDQ again, if it's a point that is revived, one would want to do it against the
23 background of knowing what are the issues, having digested the disclosure, that they
24 have actually focused on as not being sufficiently covered by the disclosure they have
25 and potentially either an EDQ or targeted questions about particular custodians or
26 particular teams or about particular storage --

1 **THE CHAIR:** But do you have any objection to responding to targeted questions at
2 this stage?

3 **MR PATTON:** I think we have made clear we are happy to respond to targeted
4 questions. We just have not received any. So we should just be ordered to produce
5 an EDQ. As I say, Mr Justice Roth didn't think an EDQ going over the whole set of
6 issues was necessary.

7 The other point that's raised is the witness statement in relation to the Commission
8 production.

9 **THE CHAIR:** Yes.

10 **MR PATTON:** The starting point is they've got the file. They've got what's in the file
11 and they can see for themselves what's there and they can see what isn't there that
12 they would expect to be there, in the same way as in any other piece of litigation.

13 So we suggest it's not necessary to have this sort of statement. But the key point is
14 really the burden that it would involve in producing such a statement now and I think
15 from some of the points you were putting, you are alert to what we say about this.

16 I mean if we were talking about a set of disclosure given in some previous set of
17 litigation, where you get an order for disclosure and a disclosure statement is produced
18 and it says: "we've searched these repositories, we've carried out the following key
19 word searches", a sort of one off exercise, one could understand why you might think
20 a witness statement would be a relatively straightforward thing to do. But that's simply
21 not how this investigation unfolded. As you know, it was an eight year long
22 investigation from 2009 to 2017. That also means it's a long time ago since it started
23 and what it involved was a succession of requests for information and documents from
24 the Commission and I briefly showed you one of them earlier. There were, in fact, 21
25 formal requests for information and that may not cover any informal requests that
26 might have been made in between.

1 When you look at any single one of those 21, it's a whole series of questions or
2 requests for documents. Now I could do it by reference to the documents but perhaps
3 I can just do it more simply. If you took one of the RFIs, you might be able to identify
4 a series of different requests for documents. Some of them might be on a particular
5 topic and general. Some of them might be in relation to particular individuals and more
6 focused. But a whole series of different requests made for documents and those are
7 being complied with on a rolling basis. So you might get a request for category A of
8 documents in 2010. 2013, you'd then get some different category. You might get four
9 different categories in 2010. It's a rolling exercise of that kind.

10 There's no obligation to produce anything like a disclosure statement to the
11 Commission when you do that. Obviously, you must comply truthfully and honestly
12 with what the Commission has asked you to do.

13 **THE CHAIR:** You don't say how you've gone about searching?

14 **MR PATTON:** No, and there's nothing -- if that was in the responses, they'd have that
15 already. There's some information. When you look at some of the responses, they
16 may say: we've searched the emails of Joe Bloggs and that's what we've done but that
17 they've got already.

18 **THE CHAIR:** Sure.

19 **MR PATTON:** So we didn't produce disclosure statements during the investigation
20 process. So what's now being suggested is, as my learned friend put it, a sort of
21 exercise of archaeology of going back to 2009, going back 14 years, and trying to
22 recreate or reconstruct how each of these successive requests was dealt with at the
23 time by the firm that was involved, which was clearly not my instructing solicitors, and
24 by Google.

25 They have not said, for example -- I mean Kelkoo know what the requests are.
26 They've got the requests and they've got the answers and they've got the documents

1 that went on the file. They haven't said: "here is one request which is very important
2 and we are focusing in on that". They have not counted up how many requests in
3 total. They've just said: "we want a witness statement". Every time any document
4 was produced, please go back to -- maybe it was an associate at Cleary 14 years ago.
5 Maybe that associate isn't there anymore, hopefully moved on to bigger and better
6 things. How does one go about -- does one try and get the email archives of the
7 associate who worked on the case and start doing searches on their email to see what
8 their thought process was when they received a document request and whom they
9 contacted? One can see that it is, as Mr Wisking says and he's not prone to over
10 statement, incredibly burdensome to produce this kind of statement now.

11 It's going to be difficult and expensive and at the end of the day, all it will be, will be
12 a sort of -- as best it can be put together, an archaeology of a process that happened
13 over eight years. The idea that that is going to be really useful in relation to taking this
14 case forward and making targeted requests for disclosure by reference to the issues
15 in the cases, is unrealistic.

16 **THE CHAIR:** So are you anticipating that it will be appropriate to have targeted
17 disclosure in due course under these three heads or at least under the first two?
18 Maybe under the second, I think is your position. You don't know. But with regards to
19 2006, 2008 --

20 **MR PATTON:** Maybe. I certainly am not seeking to rule it out and not inviting you to
21 decide today it won't happen. Almost certainly it will happen. We've never suggested
22 there would be a difficulty about that.

23 **THE CHAIR:** You say you should start by identifying the issues, in light of whatever
24 has been disclosed and it may be necessary to have a more formal EDQ or a
25 supplementary EDQ at that stage.

26 **MR PATTON:** It may be.

1 **THE CHAIR:** You are not committing yourself.

2 **MR PATTON:** It's possible, if it serves a real purpose and is worthwhile but all that's
3 being done is despite wanting this 48,000 set of documents, effectively, if you look at
4 the witness statement, there's no discussion of what that material shows, that's put on
5 one side and then new requests are made, as if that material really wasn't there. It's
6 not focused on the three points we got after lunch. It's not focused on the point before
7 lunch as, shown by the fact they didn't even want what we had given in the Foundem
8 case about letters to the board. So it just has not been done -- it simply has not been
9 taken forward in the way you'd normally expect and the way it ought to have been
10 done in accordance with the *Ryder* guidance.

11 **THE CHAIR:** What do you say about hit rates?

12 **MR PATTON:** That, on the face of it, you might think sounds relatively innocuous.
13 The first difficulty is why those custodians, why those search terms? That's the same
14 problem. That's the endemic problem with the whole approach.

15 We say there were 300,000 hits for that custodian. How does that advance anything?
16 I mean it tells you what the numbers are but because it has not been done by reference
17 to a focused identification of who are the custodians who are missing from the
18 Shopping file, what are the issues in relation to those custodians that may require
19 further documentation? Essentially, you take 68 people, come up with a list of any
20 search term you can think about, including search terms at the heart of the
21 Commission investigation, Algorithm A, and so on, and you apply all of those search
22 terms to all 68 people and you come up with hit rates.

23 Now it's just a completely unfocused exercise. Now that might not be a complete
24 answer if it were something you could do on the press of a button. But it's not. We
25 have calculated -- what they're asking for is how many hits for each custodian, for each
26 of 44 strings of search terms, and for each year and it's a 20-year period, and I suspect

1 you are the best mathematician in the room but we have calculated that that involves
2 telling them a number of hits for 59,840 different parameters.

3 Now that cannot be done by us in an automated way, it has to be done by running the
4 searches each time. So the idea of some poor person having to run 59,000 different
5 searches is grotesque. And we have estimated, as best we can, that that would
6 involve someone spending about 3,000 hours continually running search terms, based
7 on how the Google system works. In a sense, that plays back into the fact it's
8 essentially an arbitrary list of 68 people whose selection has not been explained,
9 arbitrary list of search terms. You don't get any bit of the witness statement that
10 says: "we've chosen this word for this reason or that reason", so it serves no purpose
11 but it results in a wholly disproportionate exercise. Obviously, if they come back with
12 a particular explanation, particular custodian, particular keywords, within
13 a manageable number of parameters, I am sure we would be happy to look at that.

14 Unless I can ...

15
16 **Submissions by MR JOWELL**

17 **MR JOWELL:** Yes. First of all, my learned friend says that he's taken by surprise by
18 the issues that I identified. In fact, we identified the issues in our skeleton argument
19 at paragraph 36. So it wasn't something that I made up over lunch. In paragraph 36,
20 we say that there are three overarching issues in relation to --

21 **THE CHAIR:** I am sorry, the skeleton. Yes, sorry.

22 **MR JOWELL:** Forgive me -- there are significant gaps in Google's disclosure to date.
23 I note that we note in the footnote it's not an exhaustive list and they are: its conduct
24 in relation to CSSs in the stand-alone period before 2008, including strategic reasons
25 for that conduct. Two, evidence that's informative as to what Google would have done
26 in a realistic counterfactual without the abusive conduct and finally, the post-Shopping

1 Decision evidence on precisely how Google has supposedly sought to end the
2 infringement.

3 Now I did not mention quantum and that's absolutely right. We do not seek at this
4 stage, disclosure as to quantum. But that's not to say that the information we are
5 seeking, such as the EDQ, would not be helpful in that regard.

6 So they have been on notice of what we regard as the main issues on which we seek
7 disclosure.

8 As to the EDQ, well my learned friend showed you the information they've given us
9 from the Foundem EDQ which relates to a very small window of time, just two years
10 in the abuse and he took you to page 1148 at tab 87, after where we asked further
11 information about that small EDQ.

12 Perhaps I could just read back what they say there. They say:

13 "The information --"

14 **THE CHAIR:** Sorry, whereabouts are you?

15 **MR JOWELL:** Forgive me, tab 87.

16 **THE CHAIR:** Yes, I have 1148. Which paragraph?

17 **MR JOWELL:** They say "The information provided in --"

18 **THE CHAIR:** Sorry, which paragraph?

19 **MR JOWELL:** Paragraph 25:

20 "The information provided in paragraphs 4 to 8 of the schedule focuses on the period
21 2009 to 2011. We can confirm that it is broadly reflective of the majority of the period
22 covered by Kelkoo's pleaded claim."

23 So qualified in two ways. First of all, by the fact it's only broadly reflective and,
24 secondly, it's only even broadly reflective for the majority of the period of the claim.

25 Then they say basically:

26 "However, given the length of the period and the change in Google's practices over

1 time, including the introduction of new document creation and storage software and
2 solutions, Google is unable to confirm that it is comprehensive for that entire period
3 without significant work."

4 So now my learned friend suggested that would be as good as you would get in an
5 ordinary EDQ. Let's try to imagine, let's suppose Kelkoo's EDQ, which he thought is
6 equivalent to the EDQ, had said: "these were our document storage rules for 2009 to
7 2011. As for the rest, well they are broadly reflective of the majority of the rest of the
8 period". I think the howls of protest from Google would have been extremely loud. We
9 say it may be some significant work. It's not unreasonable work. It's an essential
10 platform for future disclosure requests and it should be provided.

11 As for the statement of the nature of the searches that have been carried out to arrive
12 at the Commission file, well, I sought to make clear that we don't seek to put them to
13 enormous effort. If it transpires that they simply can't reconstruct part of how they
14 came up with particular documents, then they can simply say so. We accept that there
15 must be a caveat in any order that says "insofar as it's reasonable and proportionate
16 to do so."

17 But that does not mean limiting it in that way would not mean that this is not a useful
18 piece of information for everyone. Because let's suppose that even if we are only
19 told: "well, we know that we carried out these searches on these custodians, using
20 these search terms", that's already very useful information because we can then
21 ensure that we don't duplicate such searches.

22 So it's not so much that it needs to be complete and comprehensive, it's simply that
23 any information about the types of search is likely to be helpful and aid more
24 proportionate subsequent enquiries and will ensure against duplication.

25 So we say it's a reasonable request to make.

26 Finally, as regards the hit rates, we find the figures that my learned friend gave were

1 | just unreal. We simply don't recognise that this level of effort should be required. Of
2 | course, if it were the case that it did require 3,000 man hours to provide these hit terms,
3 | then of course we don't seek it. But we do say that at least in relation to some of these
4 | custodians for some groups of documents, it must be very straightforward for
5 | a company like Google and we are talking about Google, after all, to provide hit rates.
6 | How else have they come up with their estimates of 7 million and 400,000? I don't
7 | understand how they've come up with those estimates if they can't disaggregate them.
8 | It's all very well to say: "this involves X thousand data points", but if you are simply
9 | running an eDisclosure platform, you can get enormous amounts of data of this nature
10 | really relatively quickly, we understand.

11 | So if they are to say again that the hit rates genuinely can't be provided at all, then we
12 | would want a witness statement to say that because at the moment -- it actually calls
13 | into question whether they even have an eDisclosure platform on the go which they
14 | clearly should have and they should be loading these documents on to it, so then hit
15 | rates can be run.

16 | So those are our submissions. We say that these are all perfectly reasonable requests
17 | that will enable matters to be taken forward and we are entirely content to seek to do
18 | that in conjunction with identifying relevant issues but there's no reason why one needs
19 | to wait for the other. Those are our submissions.

20 | **THE CHAIR:** All right. So, Mr Jowell, I am not with you, I'm afraid, at the moment.
21 | It's not that I am ruling that disclosure won't be appropriate at an appropriate stage --

22 | **MR JOWELL:** Yes.

23 | **THE CHAIR:** -- but I am with Google, that I think the appropriate course is to start with
24 | the identification of the issues in relation -- I don't mean the broad, broad areas, I mean
25 | issues in relation to which disclosure should take place and categories of documents
26 | and that should be arrived at in the light of the further information you are going to get

1 in the request we've discussed, which is obviously going to be important for the period
2 pre-2008 and the documents provided to date.

3 Although you say that, and I am sure it's right, Linklaters have been working hard to
4 consider those documents, nevertheless the evidence isn't before me today as to
5 where the gaps are and what will need to be doing. So I think we need to be much
6 more targeted. As regards to EDQs, I am not satisfied that until there has been
7 narrowing down to those issues, that EDQs are appropriate, although I note that
8 Google are, and I am pleased to hear, are willing to respond further to targeted
9 questions and you should take advantage of that if you feel it's appropriate. And,
10 similarly, I see limited value at this stage, if at all, of looking at the way that disclosure
11 took place over that extended period, in light of the Commission's requests. I think
12 that would be unduly burdensome, to try and reconstruct that history. Hit rates can
13 really only arise once one has nailed down the categories of documents that are going
14 to be in issue.

15 I am not in any way shutting you out, Mr Jowell, from appropriate disclosure.

16 **MR JOWELL:** Sure.

17 **THE CHAIR:** But that's the way I would like to proceed.

18 **MR JOWELL:** In due course.

19 **THE CHAIR:** In due course.

20 **MR JOWELL:** I accept that.

21 **THE CHAIR:** With much clearer evidence as to what you need and why you need it.

22 **MR JOWELL:** Very well. On one (audio distortion) we would gratefully take up
23 Google's kind offer to receive various minutes they've provided to Foundem.

24 **MR PATTON:** The quarterly letters, yes, we are happy to do that.

25 **THE CHAIR:** Those could be done relatively promptly, presumably?

26 **MR PATTON:** Once they have been disclosed in Foundem, then we'll have them. We

1 need a couple of weeks to prepare them for production but I don't imagine that will be
2 a difficulty.

3 **THE CHAIR:** Anything else, Mr Jowell, on that?

4

5 **Submissions by MR PATTON**

6 **MR PATTON:** No. Great.

7 So this is my application for disclosure from Kelkoo.

8 **THE CHAIR:** Yes.

9 **MR PATTON:** Can I just take you to our draft order, just so you can see what is in
10 dispute. It's section 2 of the draft order.

11 **THE CHAIR:** Schedule, section, paragraph numbers ...

12 **MR PATTON:** It's numbered on my version page 4, headed "Section 2, categories of
13 documents --"

14 **THE CHAIR:** I think I've got ... I am not in a schedule.

15 **MR PATTON:** Yes, you are in the schedule, I am sorry, so if you start on the schedule.

16 **THE CHAIR:** I see, there are new numbers when one gets to the schedule, so
17 "Categories of documents and/or data relating to Kelkoo's traffic and financial
18 position."

19 **MR PATTON:** Exactly. So section 1 of the schedule is not controversial but section 2
20 is. Very simply, as you can see, the two items we are asking for --

21 **THE CHAIR:** You've identified the pleaded issue.

22 **MR PATTON:** In which case I won't, at the moment, take you to that.

23 **THE CHAIR:** Yes.

24 **MR PATTON:** It's traffic data and management accounts and that's relevant to
25 causation. What effect was had on --

26 **THE CHAIR:** You had better remind me where it is.

1 **MR PATTON:** In the pleadings.

2 **THE CHAIR:** In the pleadings, yes.

3 **MR PATTON:** Yes, certainly. It's obviously bundle 1, tab 1.

4 **THE CHAIR:** Yes.

5 **MR PATTON:** Start at page 65.

6 **THE CHAIR:** Yes.

7 **MR PATTON:** This may be a reference we didn't have in the pleading but

8 paragraph 98:

9 "Google's ...(reading to the words)... abuses have had anti-competitive effects on the

10 Comparison Shopping Market."

11 And then it says (a):

12 "User traffic and traffic quality are of fundamental importance to the commercial

13 success of a CSS."

14 (b):

15 "The promotion of Google Shopping at the expense of rivals, including Kelkoo, has,

16 over the relevant period, reduced traffic to Kelkoo's websites."

17 **THE CHAIR:** Yes.

18 **MR PATTON:** Then (c):

19 "The reduction of traffic has, in turn, reduced its attractiveness to merchants and this

20 is likely to have reduced the number of offers on the site" and therefore had financial

21 impacts.

22 **THE CHAIR:** Yes.

23 **MR PATTON:** So that's the first reference. Then 109A on page 74 --

24 **THE CHAIR:** Yes.

25 **MR PATTON:** 109A, just above the second hole punch:

26 "That aforesaid breach has caused a substantial loss to Kelkoo and continues to do

1 so."

2 "(a) ... "

3 And then --

4 **THE CHAIR:** (b) and (c) is --

5 **MR PATTON:** Exactly. Further knock-on effects and (d) and (e) over the page:

6 "All of Kelkoo's streams of revenue have been affected."

7 **THE CHAIR:** Yes.

8 **MR PATTON:** Then finally, 109D which is on page 77, you've got the heads of loss,

9 loss of profit, lower volumes of traffic, decline in --

10 **THE CHAIR:** Yes, I have that.

11 **MR PATTON:** All of those, loss of a chance and then it's slightly confusing but can

12 you see at the foot of 78, some further heads (c) and (d):

13 "Loss arising from the decrease in the value of Kelkoo's business" and "higher costs

14 and/or lower profits associated with mitigation."

15 They are still in the plea, they have not been struck out.

16 Then over the page, diminution in the value of shareholdings.

17 **THE CHAIR:** Okay.

18 **MR PATTON:** So these are absolutely fundamental parts of Kelkoo's case. As you

19 know, in these sorts of cases disclosure from the claimant is essentially on the

20 questions of causation and loss.

21 So this goes to the heart of whether they can prove causation and loss. Did their traffic

22 go down from Google, from other sources and did their revenues go down, did their

23 costs go up and so on, what you would get from the management accounts?

24 Now there is a suggestion in the skeleton that this stuff is of questionable relevance.

25 I will leave Mr Jowell to develop that point because it's absolutely centrally relevant,

26 we would say, based on the plea I've shown you.

1 It may not really matter because it would be required anyway but we have made
2 a detailed request for further information, going through these paragraphs, because
3 you can see there are no figures given and there's no detail given. It's all very
4 conclusory, so we made a request for further information, we went through it line by
5 line and got a nil return, effectively. They said: "it's all a matter for disclosure and
6 evidence". Well now we'd like the disclosure.

7 There's just one, if I may, forensic point which is if you look at my learned friend's
8 skeleton --

9 **THE CHAIR:** Sorry, so it's relevant, you say, to causation and quantum.

10 **MR PATTON:** Yes.

11 **THE CHAIR:** And then presumably for the pre-2008 period, is it relevant to --

12 **MR PATTON:** Well that's causation really. Was there actually a depression in their
13 traffic in the pre-2008 period, relative to --

14 **THE CHAIR:** Causation or abuse.

15 **MR PATTON:** Exactly.

16 **THE CHAIR:** You then have to prove abuse.

17 **MR PATTON:** It might be relevant to abuse. If the traffic remains exactly the same,
18 then one wonders why are they saying there's been an abuse between 2006 and
19 2008? So it certainly could reflect the absence of an abuse.

20 Another way of looking at that is if there wasn't an abuse that caused them any loss,
21 it may in theory have caused someone else some loss but not them.

22 In my learned friend's skeleton at page 15, at paragraph 37, this is actually him
23 addressing his application for disclosure from us, but one of the reasons he said they
24 need that disclosure is in (iii):

25 "Understand how the evolution of Google's strategy correlates with Kelkoo's traffic
26 volumes and profits."

1 We would say, in a sense, absolutely right. That is extremely important. That's
2 currently something they are able to do because they've got their own traffic volumes
3 and profits figures and they can assess our disclosure against that. It's something that
4 we are deprived of the ability to do and so there is an inequality of arms, as a result of
5 the position they are taking.

6 The other suggestion made in the skeleton is: "well there might be a split trial". They
7 are not asking for one. There might or might not be. But on any view, this disclosure
8 is fundamental causation and loss. We want to have it to decide whether there should
9 be a split trial, if anyone is asking for one. We want to have it to decide, what are the
10 proportionate case management steps going forward? Is this a £1 billion claim or is it
11 a fraction of that? If there's any possibility of settlement discussions, one needs to
12 have some idea of what the real quantum of this is.

13 It's not being suggested it would be disproportionate, that's not a point taken or
14 certainly there's no evidence to suggest it would be disproportionate. It's obviously
15 going to have to be given. So those are really our points, I think you will already have
16 picked up.

17 Can I deal briefly with the letter of last night which was handed up to you?

18 **THE CHAIR:** Yes, I've not read this yet.

19 **MR PATTON:** No, not at all. I will just walk through it unless you wanted to read it
20 first. I can identify the key points.

21 **THE CHAIR:** Yes, why don't you do that.

22 **MR PATTON:** In 2.1, they say that they're "willing to provide statutory accounts for
23 the following claimant entities for every year between --"

24 **THE CHAIR:** Sorry, have I got the right letter. Yes, 25 July -- so 2.1.

25 **MR PATTON:** 2.1 --

26 **THE CHAIR:** The three relevant --

1 **MR PATTON:** I think maybe you've been given the wrong letter. Is that possible?
2 There were two letters last night. I don't know if you may have been given the wrong
3 one.

4 **THE CHAIR:** This is summary of paragraph 7 of the re-designation letter.

5 **MR PATTON:** Yes, that has to do with the third party confidentiality, so there is
6 another letter. **(Handed)** Two copies.

7 **THE CHAIR:** Thank you.

8 **MR PATTON:** So 2.1. So they say that "willing to provide the statutory accounts for
9 each of the following claimant entities." I just note that's ten of the 11 claimants but
10 not the 11th one and it's not explained why. Then "only from 2008 to 2017", even
11 though the claim period is 2006 to present day.

12 Now quite apart from the fact it's not comprehensive of all the claimants and it's for the
13 wrong period, the statutory accounts are simply not going to be good enough.

14 **THE CHAIR:** No, no.

15 **MR PATTON:** So that's that point. So we need the management accounts to actually
16 understand what was happening in the business. There's then a point made in 2.2,
17 that there is a spreadsheet they've disclosed which provides some traffic data for
18 a particular period, 2011 to 2014. They then say that they would provide equivalent
19 data for the rest of the period up to 2017 but not up until present day.

20 Then if you can find just the fourth line of 2.3, they say:

21 "This largely satisfies Google's first request in section 2 and partially satisfies the
22 second request."

23 We got this, I think, about 10 o'clock last night. We don't understand why they say it
24 only largely satisfies it but if it only largely satisfies it, then it's not good enough
25 because everything we've requested in (1) and (2) is essential and if what they are
26 trying to seek to do here is to give something less than that, then there's no reason

1 why that should be the case.

2 **THE CHAIR:** So just show me your categories again --

3 **MR PATTON:** Yes, in the schedule to the draft order at page 4.

4 **THE CHAIR:** Sorry. I will just do a tidy up.

5 **MR PATTON:** (1) is:

6 "Traffic [so Kelkoo's monthly traffic] split by source or lead [so how does the traffic end
7 up coming to Kelkoo], including but not limited to spontaneous leads [so that's where
8 the user just goes straight there], SEO leads [that means search engine optimisation
9 leads, so from Google and others, like Bing, so does it come up on a search on those
10 search engines, then], SEM leads [that's search engine marketing and that's
11 advertising on Google or on a search engine, so sort of organic search results or
12 advertising search results, then], publisher leads [that means where Kelkoo has
13 advertised on someone else's web page]" --

14 **THE CHAIR:** There's no evidence that can't be produced.

15 **MR PATTON:** No.

16 **THE CHAIR:** Management accounts, so it's going to be period prepared, monthly,
17 quarterly or annually. So what's the difference between what's being offered and what
18 you are asking there?

19 **MR PATTON:** They are only offering statutory accounts.

20 **THE CHAIR:** Right. Okay, so what is going to be the material difference?

21 **MR PATTON:** Between management accounts and statutory accounts?

22 **THE CHAIR:** Yes.

23 **MR PATTON:** Statutory accounts, as we know, give an extremely high level, bland
24 state of the union kind of an explanation; the management accounts will show you
25 what's actually happening in the business and you certainly won't get monthly -- if they
26 were prepared monthly, why should we not get them monthly? The statutory accounts

1 will only be yearly. They are presumably public documents, so it's not really giving us
2 anything we couldn't get off the internet, presumably.

3 Then we say:

4 "On the following data, to the extent not covered by the management accounts ..."

5 But one would expect these points would be covered in the management accounts
6 because if you are running that kind of business, these are the key metrics by which
7 the managers will be monitoring what's happening in their business.

8 **THE CHAIR:** Okay.

9 **MR PATTON:** I am grateful.

10 **THE CHAIR:** Mr Jowell.

11

12 **Submissions by MR JOWELL**

13 **MR JOWELL:** I wish to start by just making clear that it's not the case that Kelkoo is
14 not providing disclosure of a good deal of information relating to quantum. It is and it
15 has agreed to. What my learned friend perhaps doesn't take you to are the various
16 agreed categories of disclosure that we've already offered to give and which are now
17 being supplemented by further additional information we are providing, in relation to
18 the letter that you've seen.

19 To give you just one example, the first of the categories of agreed disclosure that we
20 have agreed to give are Kelkoo's forecasts for traffic to its CSS and growth of such
21 traffic, and analysis of the traffic growth over a 17-year period, from 1 January 2006 to
22 date.

23 We also have given -- and incidentally, the definition of relevant documents in relation
24 to those requests includes a large number of different documents: board meeting
25 minutes, investor meeting minutes, senior management documents, business plans,
26 emails, financial accounts or forecasts. In addition, as you see from the letter, they

1 already have a large amount of the key traffic data that they've requested. They've
2 got all of this information from January 2011 to December 2014.

3 We've offered to try and fill in the holes insofar as we reasonably can and can
4 proportionately do so, in 2.3 of the letter. The proportionate way forward here, given
5 the stage that these proceedings are at, is for them to take that information on traffic
6 data and if there are holes, further holes or further information, then to make requests
7 in due course. But not to give a shopping list of every single piece of information they
8 might possibly want in relation to data and expect us to provide it, in circumstances
9 where we are still at an early stage in these proceedings, where we haven't sought
10 any quantum disclosure from Google, and where we don't know what the shape of the
11 trial will be.

12 As regards the financial data, it would be burdensome to provide monthly management
13 accounts for 11 entities across a 17-year period, plus P&L reports and balance sheets.
14 Then on top of that, they are asking for specific revenue costs and profit data for those
15 11 entities, again on a monthly basis, over a period of 17 years. That may well
16 require --

17 **THE CHAIR:** Do you prepare them monthly or quarterly?

18 **MR JOWELL:** It's monthly for the entire business but for different entities underneath
19 that, it's different.

20 **THE CHAIR:** Okay.

21 **MR JOWELL:** So we are not averse to providing proportionate information on our
22 financial position.

23 **THE CHAIR:** When you say monthly for the entire business, you said?

24 **MR JOWELL:** What we are talking about --

25 **THE CHAIR:** What's the entire business?

26 **MR JOWELL:** There are 11 different entities over 17 years. They want monthly

1 management reports, plus P&L, profit and loss, reports and balance sheets, and
2 specific revenue costs, and profit data.

3 **THE CHAIR:** Yes.

4 **MR JOWELL:** All, again, on a monthly basis over 17 years. Now it's obviously
5 burdensome to provide, extremely burdensome to provide that and it's just -- similarly,
6 their request for revenue data is very granular. Again, they want revenue data,
7 monthly, across 17 years, broken down into five specific subcategories and those
8 subcategories are then broken down further. They want:

9 "Revenue data broken down by CPC or RPL, split by source or leads, including but
10 not limited to spontaneous leads, SEO leads, SEM leads and publisher leads."

11 I have instructions this is a very burdensome request to comply with. We are seeking
12 to cooperate and seeking to --

13 **THE CHAIR:** There's no evidence on how burdensome.

14 **MR JOWELL:** Those are my instructions.

15 **THE CHAIR:** Are you able to flesh out those instructions even?

16 **MR JOWELL:** So I mean those, I am told, would be burdensome to provide. It
17 appears to me to be self-evidently the case, given the timescale and the number of
18 entities, that it would be.

19 So we are prepared to provide information on our financial position. We were seeking
20 to do that in the letter. We are perfectly happy to go further, but in a manner that's
21 proportionate for the stages that the proceedings have been reached, and this sort of
22 extremely granular wish list is not appropriate in circumstances where they are not
23 offering any mutual disclosure and where we don't know what the shape of the trial is
24 going to be.

25 So we are very much in your hands but it does seem, given that Google has been let
26 off the hook from a wide disclosure request itself, it would seem that to put the

1 claimants to this sort of --

2 **THE CHAIR:** I am not going to decide it on that basis.

3 **MR JOWELL:** No, no.

4

5 **Order by The Chair**

6 **THE CHAIR:** Okay. I am inclined to order this. I'm afraid, Mr Jowell, I think the traffic
7 data is absolutely central to the claim, as is apparent from your pleading, and I am
8 attracted to the fact that, not only from the point of view of starting to have a view of
9 quantum, but also the need to have some idea of the value of the claim from Google's
10 position, it's advantageous to have that now rather than later, and I am going to order
11 those two categories.

12 **MR JOWELL:** Might I ask that at least there is some sort of caveat that if, for example,
13 the information requires the restoration of back-up tapes or consideration of hard copy
14 archives that are difficult to access, that we might be permitted to, at least in the first
15 instance, say that it wouldn't be proportionate to provide that?

16 **THE CHAIR:** Okay. Well I will make that order with liberty to apply to vary it, if there
17 are any unforeseen complications.

18 **MR JOWELL:** Very good.

19 **MR PATTON:** So I am clear, that's liberty to apply if they have complications, it's not
20 a pre-emptive carve-out of particular documents?

21 **THE CHAIR:** No.

22 **MR PATTON:** I am grateful. There are just, I think, a few other matters to finish off,
23 if we may.

24 **THE CHAIR:** Yes, we have some time period -- we haven't really been talking about
25 time periods.

26 **MR PATTON:** Dates, exactly. I was going to make some offers on dates. That,

1 | logically, might be the next place to go.

2 | **THE CHAIR:** Yes, okay.

3 | **MR PATTON:** I think, if I correctly noted it down, we are to respond to the RFI. As
4 | I understand it, Mr Jowell is going to formulate the information that he wants from us
5 | within seven days of today.

6 | **THE CHAIR:** Yes, that's --

7 | **MR PATTON:** If there's a dispute about that, then we'll have to raise it, perhaps, on
8 | the papers with the Tribunal.

9 | Then we were going to propose that the date for our response be 27 October 2023.

10 | That, effectively, reflects the dates we were proposing to put in a defence on this point
11 | if the amendments had gone in, if there had been consent to the amendments and the
12 | amendments had gone in. Obviously, August is the immediate problem and,
13 | realistically, many of us will be not working during August and that will be the same
14 | within the organisation. We then need to speak to people and it's a request that covers
15 | quite a long period of time. We need to identify who are the people we should be
16 | speaking to and speak to them before we can give a proper answer with a statement
17 | of truth. So that's why we ask for that period of time. There's no crushing urgency for
18 | that point to be resolved, it's fair to say, it's only just been raised at this hearing. So
19 | that was my first suggestion.

20 | For the existing Shopping remedy materials we've already disclosed in Foundem, we
21 | were going to propose that that be disclosed by us within five working days --

22 | **THE CHAIR:** I have gone blank, which --

23 | **MR PATTON:** This is the 5,000 documents we have already been ordered to produce
24 | and I think have produced in Foundem.

25 | **THE CHAIR:** Yes.

26 | **MR PATTON:** The only wrinkle on that is we need an order from the Tribunal for this

1 super-duper confidentiality ring that should be -- because there isn't such a ring at the
2 moment, so we will just need an order that identifies there's a ring which is genuinely
3 external only. I don't imagine that will be difficult to do.

4 **THE CHAIR:** No.

5 **MR PATTON:** But once that's in place, we would --

6 **MR JOWELL:** Forgive me, I thought it was understood this was on a pro tem basis,
7 it's not a separate ring.

8 **MR PATTON:** Absolutely. I won't be taking any point on it being an order other than
9 pro tem because the Tribunal has made that very clear, but we do actually need some
10 legal basis for the existence of such a pro tem ring. So as soon as that is in place and
11 that ought to be very simple, one would think, because we have an order and it just
12 has to have slightly different membership, we would disclose that material within five
13 working days of the order being in place.

14 **THE CHAIR:** Okay.

15 **MR PATTON:** There's then the other side of the debate, as it were, the material
16 emanating from the Commission in relation to the remedy which you have ordered
17 today which we haven't previously had to search for. So for that, we are proposing
18 22 September, so relatively soon after the summer break.

19 **THE CHAIR:** Sorry, this was which material?

20 **MR PATTON:** Things from the Commission to Google in relation to the remedy.

21 **THE CHAIR:** Yes.

22 **MR PATTON:** So we will have disclosed within five working days from Google to the
23 Commission and now it's the Commission to Google.

24 **THE CHAIR:** Okay, because that's -- yes, I see, I am with you. So you are suggesting
25 what?

26 **MR PATTON:** 22 September, fairly soon after the summer.

1 **THE CHAIR:** Okay.

2 **MR PATTON:** Then the final point is the additional penalty server data, so that's the
3 data with the extra seven years and the extra ten, I think, or nine domains, beyond
4 what we've already agreed to give in Foundem.

5 **THE CHAIR:** Yes.

6 **MR PATTON:** We would suggest, given the evidence is that will take about an extra
7 two weeks to do, that we give that two weeks after we give the disclosure in Foundem.

8 **THE CHAIR:** Yes, have you got a date for that?

9 **MR PATTON:** Let me check. I think it's in ... I think it's in October.

10 **THE CHAIR:** Some time in October, is it?

11 **MR PATTON:** The data penalty server ... it's 5 October. I am sorry, 5 October, so
12 two weeks after that, so 19 October.

13 **THE CHAIR:** Okay.

14 **MR PATTON:** I see then for Kelkoo's disclosure, we have previously
15 suggested -- I am sorry, so in terms of the disclosure we've not troubled you with that
16 we are agreeing to provide, they seem to, I think, be suggesting that we should have
17 to give that at the end of August which is obviously not very appealing. We propose
18 22 September. I would hope there wouldn't really be a dispute about that.

19 **MR JOWELL:** Would you forgive me?

20 **THE CHAIR:** Yes, of course, of course.

21 **MR JOWELL:** We have no difficulty with the dates my learned friend has proposed.
22 We propose to provide the management accounts by 19 October, the same date as
23 the data penalty server.

24 **THE CHAIR:** The traffic data?

25 **MR JOWELL:** Yes, that includes the traffic data.

26 **THE CHAIR:** So 19 October.

1 **MR JOWELL:** 19 October.

2 **THE CHAIR:** That seems satisfactory.

3 **MR PATTON:** There are two other points I just wanted to raise with you. The first is

4 just to update you on the third party confidentiality process that you --

5 **THE CHAIR:** I gather no one's objected, you're waiting to hear from one person?

6 **MR PATTON:** That's true. There's one further point which is in our letter, we identified

7 three people who said something along the lines of: it may not really be up to us

8 anymore, we've sold this business to someone else or whatever it might be.

9 **THE CHAIR:** Right.

10 **MR PATTON:** The other letter that you were, I think, mistakenly handed, was a

11 proposal we got last night from Linklaters, that we seek to get in touch with those

12 people and give them 42 days to see whether they object. And we are content --

13 **THE CHAIR:** People who are now assignees?

14 **MR PATTON:** Assignees or whatever it might be.

15 **THE CHAIR:** Yes.

16 **MR PATTON:** We are content with that.

17 **THE CHAIR:** It seems very sensible, thank you.

18 **MR PATTON:** If that's acceptable. Then just the last point. I think you'll have seen

19 at the end of our skeleton, we had floated the question of whether the next CMC in

20 this case ought to take place concurrently with the Foundem case.

21 **THE CHAIR:** Yes.

22 **MR PATTON:** On the basis that was something Mr Justice Roth had raised as an

23 issue, we felt the Tribunal --

24 **THE CHAIR:** It seems an attractive idea. What would be happening at the next CMC?

25 Are we looking at directions through to trial?

26 **MR PATTON:** The truth is I don't know. There will probably be some further -- one

1 | imagines there will be some further disclosure requests from Kelkoo. There has not
2 | been a trial set in either case, obviously, so I don't know whether it will be thought -- the
3 | thing that is impeding the setting of the trial date at the moment or one of the things,
4 | is that the CJEU appeal has not yet been heard. That's due to be heard in September.
5 | It's now been listed.

6 | I think Mr Justice Roth had, I think, estimated we would get judgment maybe in
7 | November next year, so about a year or a bit more for the judgment. It's not the
8 | 3-month rule in the CJEU.

9 | **THE CHAIR:** No, I appreciate that. We are still waiting for the General Court --

10 | **MR PATTON:** In the AdSense appeal. Yes, exactly.

11 | **THE CHAIR:** That was heard on 22 May.

12 | **MR PATTON:** Yes, last year.

13 | **THE CHAIR:** 2022, yes.

14 | **MR PATTON:** And whether that will be --

15 | **THE CHAIR:** Any ideas when we are going to get that?

16 | **MR PATTON:** No. Not, I think, anything worth mentioning to you. Obviously, that's
17 | still at the General Court level. Obviously, depending on what they decide, one doesn't
18 | know whether there might be a further appeal, so I can't say for sure --

19 | **THE CHAIR:** So there's no point pressing ahead with this at an extraordinary speed.
20 | I don't know what Mr Jowell says.

21 | **MR JOWELL:** Well, yes, certainly my learned friend apprehends correctly that we will
22 | have further disclosure requests, not least in light of today's order.

23 | **THE CHAIR:** Yes.

24 | **MR JOWELL:** Disclosure of reciprocal quantum material from Google.

25 | **THE CHAIR:** Yes.

26 | **MR JOWELL:** But, yes, we have no objections to Foundem appearing, although

1 obviously without prejudice, I think, on all sides, to whether it will be sensible to hear
2 the claims together.

3 **THE CHAIR:** We need everyone together to find out whether they should be case
4 managed together.

5 **MR JOWELL:** Yes, there's one further point we should draw to your attention which
6 is there's another claim by Ciao which is another comparative shopping service and
7 a large one that has been issued and --

8 **THE CHAIR:** Issued here?

9 **MR JOWELL:** Ciao is not here, except there is --

10 **THE CHAIR:** High Court.

11 **MR JOWELL:** -- related ownership between Ciao and Kelkoo and so they have the
12 same --

13 **MR PATTON:** Do you mean issued in the Tribunal?

14 **MR JOWELL:** Forgive me, are they here now today?

15 **THE CHAIR:** No.

16 **MR JOWELL:** Forgive me, yes, it's been issued in the Tribunal and it's a pure
17 follow-on claim, that claim, other than for the post --

18 **THE CHAIR:** That's Ciao, spelt?

19 **MR JOWELL:** C-I-A-O, as in the Italian.

20 **THE CHAIR:** As opposed to --

21 **MR JOWELL:** It's a follow-on claim, plus a claim for the period since the infringement,
22 represented by the same solicitors and with related ownership. But the issue, really,
23 is whether that claim should also be present, as it were. If decisions are going to be
24 made about joint case management, it does probably make sense for all three parties
25 to be -- all three claimants --

26 **THE CHAIR:** And separate counsel?

1 **MR JOWELL:** Currently overlapping counsel. That may or may not change.

2 **THE CHAIR:** Right. Okay.

3 **MR JOWELL:** So --

4 **THE CHAIR:** So if you could make sure you bring that for the next case management
5 conference, assuming -- if you could remind the Tribunal of that, that there is a third
6 claim. I know the Tribunal has in mind there are two claims but if you can bring to our
7 attention in good time that there is a third claim.

8 **MR JOWELL:** We will do so.

9 **THE CHAIR:** We need to actively consider whether that should be invited along.

10 **MR JOWELL:** Would it be sensible to give an indicative time of when the next case
11 management conference would be?

12 **THE CHAIR:** I probably ought to speak to Mr Justice Roth about that, I expect, and it
13 may be dictated by where you get to on disclosure and things.

14 **MR JOWELL:** Yes.

15 **THE CHAIR:** I don't know -- do you know when the next case management
16 conference is in the other action?

17 **MR PATTON:** So far as I know, it hadn't been listed since the transfer to the Tribunal.

18 **THE CHAIR:** Right. Okay.

19 **MR PATTON:** The Ciao case, it's actually called the Whitewater, something, Capital
20 case and it has not yet been served. It's due to be served, I think, in September.
21 We've seen a copy by way of information.

22 **THE CHAIR:** To be served in?

23 **MR PATTON:** Served in September, I think.

24 **MR JOWELL:** By agreement between the parties.

25 **MR PATTON:** By agreement but it has not yet been formally served. Yes.

26 **MR JOWELL:** It has been issued.

1 **THE CHAIR:** Do you have a view when the next CMC should be at the moment?

2 **MR PATTON:** May I take instructions?

3 **MR JOWELL:** We would propose February next year would be a suitable time.

4 **MR PATTON:** Obviously, we ought to -- we will need to consult with Foundem in
5 particular about that, I think, if it's going to be a joint case management --

6 **THE CHAIR:** Yes.

7 **MR PATTON:** But I think that's the sort of timescale we had in mind --

8 **THE CHAIR:** You are not saying there needs to be something before Christmas?

9 **MR PATTON:** No.

10 **THE CHAIR:** You are not saying that. Okay.

11 Thank you very much. Am I allowed to give you some bundles back? You are looking
12 at me as if that's a bad idea. No, I will keep the core bundle in case anything arises.
13 I think I probably won't need to hang on to the others.

14 **(3.11 pm)**

15 **(The hearing adjourned)**

16

17