IN THE COMPETITION APPEAL TRIBUNAL

Case No:1408/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 1st March 2024

Before:

Bridget Lucas KC
Tim Frazer
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Elizabeth Coll

V

Defendants

Alphabet Inc. & Others

A P P E A R AN C E S

Tristan Jones & Matthew Kennedy (On behalf of Elizabeth Coll & Others)

Josh Holmes KC & Thomas Sebastian (On behalf of Alphabet Inc. & Others)

Digital Transcription by Epiq Europe Ltd
Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400

Friday, 1 March 2024

(10.30 am)

Case management conference

THE CHAIR: Good morning, everyone. Before we start, I'll read the normal announcement. Some of you are joining us by live stream on our website, I will start therefore with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings in breach of that provision. It is punishable as contempt of court.

So, yes, thank you for coming for what I think is now the fourth CMC in this case. I see there has been a degree of agreement over various things.

Before we start I did want to say a little something about bundles. I appreciate that I may be a little bit of a dinosaur on this one and that it is perfectly possible with a massive electronic bundle to find your way to a page with a correct reference. However, I still think it is appropriate and sensible to have the bundles prepared in accordance with the Tribunal Rules, and that they contain only the relevant documents, relevant to the hearing that is taking place.

I'm not quite sure if anyone else has this problem, but when one is faced, in a restaurant, with too much food on one's plate one struggles to get one's appetite up to eat it. I find the same problem with an enormous electronic bundle as well.

So, if we could, next time, please, make sure it's salient documents only, I would be very grateful.

Yes, Mr Jones.

MR JONES: Yes, madam, thank you. Good morning, members of the Tribunal. I am here with Mr Kennedy for the Class Representative. You will know Mr Holmes and Mr Sebastian appearing for Google.

Madam, I will just apologise briefly, but sincerely on the bundles. We discussed it last time. I'm sorry it's arisen again. It's not a dinosaur comment at all. It's probably one all of us on the call agree with, so we will absolutely take that away, and I do apologise. On the issues there has been a considerable narrowing. There is the draft order that you have seen. There are two outstanding disputes on the order. But, in addition to that, there are other points which we need to raise with you actually under each of the agenda items, each of the five agenda items, some simpler than others.

But what I was proposing to do was just go through the agenda in order, starting with what is actually the simplest one, point A on the agenda, if that's convenient, which is the Wildlife Studios point.

THE CHAIR: Yes.

MR JONES: You will know the background to this and I think I can be very brief, but I should just explain where we've come to. It relates to a Google document containing confidential information about a company called Wildlife Studios Limited. Google went through a process of approaching companies including Wildlife Studios to tell them it was proposing to disclose their confidential information. They had an opportunity to object. They did object. They wrote to the Tribunal. You asked for this to be on the agenda today.

The position is, I think, straightforward because, having considered this, Ms Coll is perfectly content for the information to be redacted and for a redacted version to be disclosed.

It's not addressed in the order. We don't think it needs to be. The position seems to be clear and it can just be disclosed on this agreed basis. But, equally, of course, if anyone wants it in the order, it would be easy enough to add something and I could suggest some wording. But at the moment it isn't. Madam, that, in a nutshell, is item 1.

THE CHAIR: Yes.

Mr Holmes, did you have anything to say about that?

MR HOLMES: No, madam. We agree with all that and we also agree that it needn't be on the face of the order.

THE CHAIR: Thank you. I think I probably should, having notified Wildlife Studios this matter would be dealt with today, just record on the transcript that in light of the stance taken by the parties it isn't now necessary for us to decide at this hearing whether or not Wildlife Studios would have been adequately protected by the existence of the confidentiality ring.

The parties have agreed a practical solution. The defendants have offered to redact Wildlife Studios' confidential information before production and the Class Representative has agreed to accept the slide deck in issue in the redacted form.

We will therefore order that the slide deck be produced in a redacted form and that can be reflected in the order. If once produced the Class Representative considers the redacted version is insufficient for its purposes and the issue needs to be revisited, the Class Representative has liberty to restore the matter, but that must be on notice to Wildlife Studios.

MR JONES: Thank you, madam. The next item, then, is amendments to the claim form.

The Class Representative seeks to make what are essentially a few minor amendments. They're not opposed by Google. The reason I want to address you on one of them in particular is that it relates to, as you will have seen, the Class definition which raises a few wider points which you will want to consider.

So I was going to show you that amendment as speedily as I can because I appreciate you will know the background, but just take you through what we are proposing, why we say that complies with the rules, and also to raise a point about your discretion under the rules to make other related orders, which I should flag.

The amendment itself can be seen in the salient documents volume 1. Tab 4 is where the amended, or re-amended, proposed re-amended claim form is. The one which I am addressing you on, and I think it's the only one I really need to address you on, madam, unless you wanted to go through the other proposed amendments. But the important one for these purposes is on page 189.

THE CHAIR: Yes.

MR JONES: Where you will see the definition of the Class is at paragraph 15, and it's:

"All GMS device users who, during the relevant period, used the UK version of the Play Store and made one or more relevant purchases."

Then in 16 is a definition of the relevant period. The bit which has been struck out is of course the original language that we're trying to change.

So, originally, it said:

"The period between 1 October 2015 and the date of final judgment or earlier settlement."

We're proposing amending that, so that it's between 1 October 2015 and 1 March 2024, in other words today.

The consequence will be that the Class will only include people who have made relevant purchases up until today and any individuals who make purchases for the first time after today will not be in the Class.

The reason for that is that the Tribunal has now said, on a couple of occasions, that collective proceedings can only encompass crystallised claims, not future claims. The point was made in Sony, as you will know, and that arose at the point of certification, so that the Class definition was not allowed to be open-ended in the way that it has been in these proceedings, and instead had to end at the date that certification was ordered.

There were several sets of proceedings, including this set of proceedings, which had adopted what I am calling an open-ended definition. So the Sony decision gave rise to the question of what to do.

In two of those that I am aware of, which is Le Patourel and Qualcomm, the Tribunal has accepted the solution of amending the Class definition up to the date of amendment because, of course, that then means we're including crystallised claims up to today, as we're proposing to do here.

So it seems to be an established approach.

It requires amendment of the claim form, but also a change to the CPO, the order itself. That's where I should highlight that that change to the original order is expressly envisaged by the Tribunal Rules. It's rule 85, subparagraph 4. I will just read it out, because I don't think that the full version of the rules -- you probably have them to hand, but I don't think they're in the authorities. I will just read out what that says. It says:

"If the Tribunal varies the collective proceedings order so as to alter the description or identification of Class members it may also make any other orders that it considers appropriate, including an order relating to the specified time for the purposes of rules 80 and 82."

Those final words about the specified time raise a possibility of changing the opt-out period. I'm going to come back to that in a moment because that's something which you will want to consider.

We do think some further orders are appropriate, and we have modelled those on what the Tribunal again did in Qualcomm. If you have the draft order to hand, it's in, I think, the -- it's in tab 12 of salient documents, which is the second volume of the salient documents.

The amendment to the claim form is dealt with at paragraph 1. Over the page, at 1A,

is the proposed amendment to the relevant period in the collective proceedings order. Underneath that, at 1B, is a proposal that you approve, a notice of amended Class definition.

Underneath that, at 1C, is that the Class Representative will publish that notice of amended Class definition and provide a copy to Class members who signed up for updates.

Now, those, B and C, are modelled on what happened in Qualcomm, where the Tribunal thought it appropriate to approve a notice, essentially telling people that the Class definition has been changed. We have put together a notice. It is in tab 29 of the same volume. It also appears earlier in this volume, but the one at 29 has some tracked changes suggested by Google which, on behalf of the Class Representative, I can agree to.

So that is an agreed notice, which, madam, essentially says why we're changing the Class definition and what the effect of it is.

THE CHAIR: Yes.

MR JONES: So we ask for that to be approved and for our proposed distribution of it to be approved. I just want to come back, finally, to the opt-out point.

You have a discretion, as I have mentioned, to require the Class Representative to allow for a new opt-out period. The reason that comes out is one of the reasons why the Tribunal in Sony felt that the sort of open-ended Class definition that was adopted in this case should not be adopted was that the consequence of this sort of open-ended definition, if I can put it that way, is that you give people who are in the Class at the time of certification an opportunity to opt-out, but the opt-out window then closes and people who join the Class later don't have the opportunity to opt-out.

So it is, perhaps, appropriate, when one makes this sort of amendment, to provide for another opt-out period. That is what was done, for example, in Le Patourel.

We were not suggesting that and I'll just explain why that is. The reason we're not suggesting it is Ms Coll intends to make a similar application to this one further amending the Class -- and amending the relevant period much closer to trial, probably at the PTR. At that stage, one can give another opportunity to opt-out. It seems to us, just in practical terms, it would be sensible for that to be open to any Class member, not just, as it were, new Class members.

That being so, we are concerned that giving another opportunity now might just serve to confuse people because we will be putting out repeated notices giving opportunities to opt-out. The exact same point was made in Qualcomm and I think, as I understand it, was accepted there. So I mentioned Le Patourel, they did have another opt-out period. Qualcomm they did not, essentially for the reason that I have just given, where they intended to make a similar application later on.

So that's the reason behind our approach. Could I also just mention for context that actually not a single person opted out first time round. It doesn't mean it is not going to be important to new Class members. But, just in terms of proportionality, we think, as I say, it would make more sense to leave it until later.

Madam --

THE CHAIR: So, as I understand it, because the Class is essentially becoming smaller, everyone who is currently in the Class has already had an opportunity to opt-out under the original notice?

MR JONES: No, that isn't quite right, madam. Sorry, I should clarify. Because the original notice was made in I think it was September 2022, and the opt-out period -- someone will correct me, but I think it was November 2022. Yes, I am getting nods.

So the opt-out period was November 2022. But what will have happened since November 2022 is that more people will have bought apps for the first time.

THE CHAIR: Yes.

MR JONES: This is speculation. But my speculation is that's mostly young people, so people who have become old enough to start buying apps, and there will be about a million of them a year. I'm not giving evidence, but just to give you a sort of ballpark of what we're talking about.

So those people have joined the Class and are in this newly defined Class, and actually have not been given, so far, an opportunity to opt-out. So that's the issue that I am --

THE CHAIR: It's opposite of what I assumed. So, yes, probably just as well to point that out. .

MR JONES: Yes. But, as I say, the intention is that they will be given an opportunity at the next amendment. None of this is set in stone, but I expect it would be at the PTR, at which point we will, again, amend the Class up until that point or at least we will apply to. We will also suggest extending the opt-out date at that point.

Also, just to be clear, of course, Mr Holmes may say that he might object to the amendment at that stage. Of course, he's entitled to. But, whether he objects or not, the opt-out period issue could be dealt with as a separate issue at that stage.

So that's our intention.

THE CHAIR: Thank you.

Mr Holmes.

MR HOLMES: Firstly, madam, in relation to the amendments to the claim form, we don't oppose those. We have indicated that we will have consequential amendments to make and we anticipate that we may have some additional amendments of our own. We propose to bring those forward as soon as they're ready, and we don't seek any directions about that today.

As regards the opt-out point, we do think that as a matter of principle it is important

that individuals within the Class should be given an opportunity to opt-out. Whether or not it is exercised in practice, they are, to the extent that they do not opt-out, bound by the outcome of this litigation and they should be given an opportunity to decide whether they wish to adhere to the Class or not. That was the logic behind, or an important part of the logic behind the Sony ruling, which requires the Class to be defined and ascertainable at the time of certification.

We don't object to Mr Jones's proposal of having a single opt-out period in due course, supplemental opt-out period in due course, covering the entire Class. As he fairly accepts, we of course reserve our position in relation to any further amendments, either to the claim form or to the Class definition. But that, I think, wouldn't prevent that subsequent opt-out period from operating in due course, even if such objections were raised and were accepted.

THE CHAIR: Yes, thank you.

Thank you very much.

I think we will -- so just on the defence; do you have any idea when it's going to be ready?

MR HOLMES: I don't, madam. We will obviously bring it forward as soon as we're able to do so.

We can do the consequential amendments in the usual way, within 28 days, but what we want to avoid is unnecessary rounds of amendment when there are other ones that are under consideration at the moment. But they will require, I think, a bit of discussion and further thought on our side. So, if the Tribunal is content, we propose to leave that and to deal with that on another occasion.

MR JONES: Madam, could I just -- sorry, I don't have easy access to a hand raising button, although I see one in the corner of my eye, so next time I won't jump in like this.

But, just to say, we share Mr Holmes's desire to avoid multiple rounds of amendments. We think that the consequential amendments -- I don't want to completely predict this -- are likely to be very minor because our amendment here are very minor. We are, therefore, not in a big rush to see their defence to the consequential amendments. We would prefer, as Mr Holmes indicated, to see everything in one go, when they're ready to provide a fully amended defence.

MR HOLMES: I'm grateful for that.

THE CHAIR: Right. Thank you. Then it may just be a concern on the part of the Tribunal as to whether there is any potential impact if that defence comes forward very late.

MR HOLMES: Well, madam, we have that well in mind and we will endeavour to get the document out as soon as practicable, in a way that doesn't disrupt preparation of evidence.

THE CHAIR: Thank you. Thank you for that assurance.

So, in order not to break up the hearing too much, I think we will go on to the next paragraphs of the order. Then, when we have gone through the entire order, we will come back and let you know what our position is in relation to the paragraphs we have just been discussing, otherwise we will be in and out of the retiring room a bit too much, I think.

MR JONES: Yes, madam. The next topic then is item C, which is orders for disclosure and information, not including the financial disclosure applications, which are item D. So, on item C, there are no disputes on the order itself, but this is one of those topics where I nonetheless have to raise an issue with you because, as was flagged in our skeleton argument, the process of making these applications has flushed out another issue, which is in some ways a more concerning issue, which does potentially have the potential to cause difficulties now in the run up to trial.

I need to talk you through that. It relates to US disclosure and the issue, in a nutshell, is whether there has been adequate disclosure of the documents which were produced by Google in the US proceedings. We had thought everything relevant had been disclosed as part of Repository 1, but it now appears that isn't the position.

There has been ongoing correspondence on this including late last night, so I will go through the background, I will show you where we've got to, and I will, at the end, explain what I am asking for today.

You will know one of the most important repositories of documents was the so-called Repository 1 documents, which were produced in the US proceedings. We need not turn it up. But, going right back to the start of this, in the respondent's electronic disclosure questionnaire, they said that there were approximately 3 million documents in Repository 1.

There were discussions about that and further details were given in a letter of 3 May 2023, which I should show you. It's in volume 2 of the salient documents bundle, tab 13, at page 467.

THE CHAIR: Yes.

MR JONES: Now, I am jumping in here to the annex, which actually starts at 466. So the annex to this letter describes the approach to discovery in the US proceedings.

THE CHAIR: Yes.

MR JONES: They were describing -- if one looks down, for example, to paragraph 7, they were describing in particular how they had identified 44 Google custodians. At this stage in the chronology, the idea was that Google and the Class Representative would try to agree to search terms and custodians to search against the US documents, so they were describing what the US documents were for that purpose.

So 7 is talking about the custodians. Then, 8, they talk about further search strings having been added. If you go down to paragraph 11, you will see they said:

"We understand that the process of collecting documents from the 44 Google custodians and a limited number of non-custodial repositories return documents as follows ..."

You will see, in A, B and C, there is a description of how they went through the documents. It's focused, really, on the custodial, so there are about 48.1 million from the custodians, search terms were applied to those and it yielded approximately 6.2 million. A team of approximately 400 document reviewers was engaged and, ultimately, about 3 million documents were produced in the US proceedings.

Just pausing there for a second, there is a reference there to non-custodial repositories at the top of 11, but it isn't expanded upon and it isn't given -- certainly not the emphasis that the custodial documents are given. It's described as a "limited number".

Down at 12, there is reference to two other repositories of documents from other cases. The so-called State AG materials and the Callsome Materials. Over the page at paragraph 13, picking up halfway through that paragraph, they said:

"Google doesn't propose to disclose the State AG Materials or Callsome Materials in the Play Proceedings because the State AG Materials are relevant to product areas (search and advertising) that are not relevant to these Play Proceedings and the Callsome Materials are relevant only to claims from the proposed US developer class and not relevant to these Play Proceedings."

There was then, as you may recall, a process which the parties tried to reach agreement on, custodians and search terms. The Class Representative found that extremely difficult because of the information asymmetry. What Google said at the end of that process was: we will just give you the non-custodial -- I apologise, the custodial documents.

So they just offer to provide all the custodial documents, and that is why -- that was

what the Class Representative accepted.

The common basis, when that was done, was that essentially that would do away with any arguments about non-disclosure or under inclusiveness.

Can I just show you how that was summarised in Google's skeleton argument for the last CMC? It's in the core bundle, I'm afraid. We need to go to the core bundle, at page 561, which is in tab -- if you're looking at the PDFs, it's in the first one, A.

THE CHAIR: Yes.

MR JONES: So, page 561, at paragraph 39:

"The parties failed to ..."

I apologise:

"The parties failed to agree additional search terms and custodians for Repository 1. In order to ensure the timetable to trial was maintained Google proposed to provide disclosure of all custodial documents from Repository 1, around 2 million documents. This removed any possibility for dispute as to under inclusiveness. The CR accepted this approach. The CR can of course interrogate the disclosure using the same automated search and review methods as are available to Google."

So the important point is that the reason why that was accepted by the Class Representative was precisely the reason that Google gave there, which was we had understood it was doing away with any scope for argument over under inclusiveness. The non-custodial documents had been described as limited in number and really not expanded on at all, and we had been told that the State AG and Callsome Materials were not going to be relevant.

If we then come forward to the last CMC, you will recall that one of the things which happened at that CMC was that the Class Representative was asking for disclosure of the expert reports in the US proceedings. There were several reasons for that, but one of the reasons was she had been given this batch of millions of documents and

was struggling to find, within those documents, the most relevant. One of the points which we made was: if we have the US expert reports, we will be able to look at what were the documents actually referred to in the US proceedings, because that would then give us an indication as to what are the most important documents.

So that was ordered and the US expert reports were disclosed. When I say that I should clarify it was only Google's reports which were disclosed, because they were protective orders, which were said to prevent the disclosure of other reports.

My solicitors then started the process that they said they were going to do, of trying to identify the documents referred to in those expert reports and cross-refer them to the millions that had been disclosed.

What they found was, that there were a lot of documents referred to in those reports which they could not locate. If we just pick up the correspondence on this, it starts in the first salient documents bundle, at page 98, please.

THE CHAIR: Yes.

MR JONES: So this was a letter on 12 January of this year. You will see there:

"We have reviewed the nine expert reports … We understand that the Google documents referred to in each of these nine reports should already be contained in Google's disclosure." However, we can't find them.

So my solicitors made clear there, on 12 January, that they thought that they should have been given all these documents, but couldn't find them. They attached an annex, which at that stage had just over 200 documents in it that they couldn't find. But they recorded that had they were still going through the expert reports and that it might expand.

RPC for Google responded. That's at page 105, please. So this is 24 January.

THE CHAIR: Yes.

MR JONES: They don't, on this occasion, correct my solicitors' understanding of the

position that all this should have been disclosed already. They don't address that point. They simply say, at 2:

"Please see, in Annex A, the numbers of the documents referenced in the US expert reports which have been produced."

Because they had found that some of them had been produced in the collective proceedings, so they'd highlighted those in green. Then:

"To the extent the documents have not been produced in these proceedings they're identified without colouring and Google will consider your requests as part of stage 2 disclosure."

Now, as I say, there's no explanation there of why the documents hadn't been disclosed. That led to further correspondence, SD/111, in which Hausfeld, again, at paragraph 2C, asked why those documents had been excluded the first time around. Attached to this letter, which is the letter of 30 January, is a revised spreadsheet, which contains the outstanding documents and some new documents, because my solicitors' research had continued. This annex is the most up-to-date annex of the documents which appear to us not to have been disclosed in these proceedings, but which are referred to in the US expert reports. There are around 700 documents. Just to put this in context, I am told that constitutes around half of all documents referred to in those US expert reports.

Now, at this stage, 30 January, we were getting towards the deadline to make applications for stage 2 disclosure. There was no response to this letter, so there was a follow-up letter sent, which is at page 127, on 7 February.

That was answered on the date, a week later, when applications were due, so SD/370, which is in tab 7.

THE CHAIR: Yes.

MR JONES: Where you will see there is a response, but not really an explanation, as

it were. 371, paragraph 5:

"Contrary to the position taken in your 30 January letter your client agreed that our client's Repository 1 disclosure would not consist of the entirety of their production in the US proceedings."

Which, just pausing there, of course is technically correct, in the sense that we knew it wasn't going to include, for example, the State AG and Callsome Materials, but it doesn't address the substantive point which is being made, which is we thought you were disclosing all the relevant US materials. That was the basis on which this entire exercise had progressed.

So it, of course, caused consternation.

I should just make clear those 700 -- I think it's something just short of 700 documents listed in the 30 January letter. Those will be disclosed, and Google has agreed to disclose those. They are in the order.

But the concern which has remained, and which is the reason why I am addressing you, is about how this happened and whether there are other documents, other similar documents, which have not been disclosed and, if so, why?

Because remember, firstly, these 700-odd documents are the documents which are significant enough to have been referred to in Google's reports, Google's documents in the US, and in addition to that we only have Google's expert reports in the US, so we can't even do the exercise of going through, for example, Epic's reports and finding those documents they have referred to which we may not have been given.

My solicitors for that reason have continued to try to follow up on this and to try to understand the position.

That is what culminated in two letters yesterday evening, which I should show you. They're, again, in the supplementary documents bundle. The first one is the RPC response, which has gone in at tab 31, if yours has been updated. So it's SD,

page 732.

THE CHAIR: I don't think mine will have been updated, but I think I have a hard copy of it. Yes. And we should just check the panel members also have it?

PROFESSOR WATERSON: No, I don't have it, I'm afraid.

THE CHAIR: I think the Tribunal may have emailed it. Can we just check whether an email has come through.

MR FRAZER: You may need to refresh the bundle that's on --

THE CHAIR: Is it in there?

MR FRAZER: I think it might be on there now.

THE CHAIR: We're being advised if we refresh our bundle it might be in the bundle because it may have been uploaded.

I have a copy of 31. Is there another document you will need to refer us to, which we will also need to have to hand?

MR JONES: Yes, there is the document at tab 30.

THE CHAIR: We have that. So it's just the one. We will try to deal with this, Mr Jones.

(Pause)

Can I ask Professor Waterson or Mr Frazer if you have them yet? Do you have tab 31?

PROFESSOR WATERSON: Unfortunately, I downloaded the salient documents bundle and I haven't -- so I haven't gone to it live.

MR HOLMES: Madam, if I could give you another reference in case that assists. I understand it's also in the correspondence bundle, which I hope may have been updated, at tab 131, page 1824.

THE CHAIR: The page number is looking promising, as I have pages going beyond that. 1824.

MR HOLMES: That's the bundle number. The PDF page number may be different.

THE CHAIR: Yes, 1827. Yes, letter of 29 February from RPC to Hausfeld.

MR HOLMES: That's the one, madam.

THE CHAIR: Yes.

Professor Waterson, Mr Frazer, do you have that in your correspondence bundles?

MR FRAZER: Mine is still downloading because it is very large, so I will let you know in just a couple of minutes.

I was trying to avoid this by having downloaded the bundle. One moment.

My correspondence bundle goes up to 1797.

THE CHAIR: Is it a substantial part of the letter, Mr Jones, you need to refer to or is it possible to read the relevant passage?

MR JONES: No, I think it's important to have the letter. I wonder whether it could be emailed? That might be -- because --

MR HOLMES: Madam, if it assists --

THE CHAIR: I put in a request for that, yes.

MR HOLMES: My solicitors have it just as a single, five-page PDF, which we could perhaps send to the registry to be sent on to Professor Waterson and Mr Frazer, if that assisted?

THE CHAIR: Yes, I'm sure your solicitors have probably already done it and it's a slight embarrassment at our end that we're having this technical issue to get it to Mr Frazer and Mr Waterson. If you could do that, that would be great.

MR HOLMES: I think we're sending it now. I'm seeing some nodding heads.

THE CHAIR: Shall we take a five-minute break and we will see if we can get this in the right hands?

MR HOLMES: I should say that the letter will be important for the submissions that -- the responsive submissions that I shall need to make to Mr Jones.

THE CHAIR: Okay, perfect. So we will take a five-minute break and get the letter to

the relevant recipients. Thank you.

MR JONES: Thank you.

(11.16 am)

(A short break)

(11.21 am)

THE CHAIR: Thank you. Just checking we're live.

MR HOLMES: We can hear you and see you, madam.

(Pause)

THE CHAIR: Bear with me.

Right, you will be delighted to hear -- and thank you very much to the parties for getting yet another copy of that over. We all have the relevant documents now. So please carry on, Mr Jones.

MR JONES: I'm very grateful for that, madam. I apologise.

If you have the letter in front of you, it was the answer to the question which had by this stage been asked several times, which is essentially: what was going on? And why had these 700 documents not been disclosed previously?

Just before we look at the letter, the sorts of questions which arise, obviously, are the following: how is it that these documents were not disclosed?

Secondly, were those 700 documents perhaps in the State AG or Callsome repositories, which we had been told were not relevant and were being excluded?

Thirdly, are they in the so-called non-custodial documents, which we had been told were limited and not relevant?

Fourthly, if they were from the non-custodial; how many other non-custodial documents are there which have not been disclosed?

That's obviously important, because if there is a large number of other documents potentially relevant, either from the State AG and Callsome or from the non-custodial

repositories, then that could have significant implications for the ongoing management of these proceedings.

So those are the background questions.

One then turns to the letter, which doesn't answer those questions, but I will show you what it does say.

At paragraph 2, they pick up on a comment that the Class Representative's solicitors had made that Google had confirmed it would disclose all documents disclosed in the US proceedings. The starting point is to say: well, that's wrong. There were things which we had explained were not going to be disclosed.

So, at paragraph 3, what is emphasised is that the State AG materials and Callsome materials were to be excluded.

So that's fine and we understand that, but you will see it doesn't say whether that's where the 700 documents were located. There is then a lengthy description of the background, at 4.

At 5, back on the Callsome and State AG, it is said that those documents amount to 800,000. But, again, it's not at this stage understandable what the relevance of those documents is; does that explain the 700?

At 6, there's reference to documents from the EC Android proceedings, which were indeed disclosed here in a separate repository.

At 7, there's a reference to what's said the balance of the US production consists of non-custodial discovery for the US proceedings and includes, for example, agreements, data and publicly available documents.

But those are just examples. There's no further description. As I showed you in the earlier correspondence, although this had been mentioned, it was mentioned very much in passing and with no detailed explanation of what these would concern.

There isn't here a description of how many documents fall within the non-custodial or

indeed whether the 700 came from the non-custodial.

8 is a reference to the other repositories from which disclosure was made.

Then, at 9, you will see that what is said is to allay any concerns that might remain Google proposes to disclose, again the expression, the "balance of non-custodial discovery" on a rolling basis and, in any event, by 15 April 2024.

So that's the suggestion which is made.

10 goes on to discuss the specific documents which were -- as I understand it, 10 is a reference to the 700 documents, so the annex documents referred to in the letter of 30 January, where essentially it is being said that that's already agreed, that they will be disclosed.

11 we have found a little difficult to unpick -- refers to a balance of 264 unique documents, which may or may not be a reference to 264 from among the 700 which have not yet been found by Google.

No, Mr Holmes is shaking his head.

MR HOLMES: Madam, the 700 boils down to 264 after de-duplication, so the number of documents we're actually discussing is 264 in toto.

MR JONES: I'm grateful for that.

THE CHAIR: Thank you.

MR JONES: So the position is that there is a number of documents which Google is offering to disclose by 15 April, but we don't know what number because we don't know how big the non-custodial document cache is. That gives rise to a concern because, of course, the Class Representative wants to receive all relevant documents. But, given the scale that we're talking about, we don't know at the moment whether that's 1,000, 10,000, 100,000 and, if that were a large number, that is going to cause difficulties going forward.

We, for example, no longer have the team of people employed to go through large

numbers of documents. We could put it back together, but we, of course, need to know what numbers we're talking about.

We also don't know, though, as I have said, whether the 700 or, as Mr Holmes has just put it, 264, however many it is, come from the non-custodial cache exclusively or whether they also come from the Callsome Materials and State AG materials, so we don't know whether disclosing the non-custodial documents will address the problem, in any event.

So my solicitors sent a letter in response last night, which is at tab 30, and which I hope in that adjournment our attempts to make sure that you all had this letter as well were successful. So if it's in the salient documents, it was at tab 30. It's the 29 February letter from Hausfeld.

THE CHAIR: Yes, it's in my bundle. Mr Frazer, Mr Waterson both have it, I think. Yes.

MR JONES: You will see, at paragraph 6, there is a request for absolute clarity on various points:

"The precise number of non-custodial documents" disclosed in the US proceedings;

"The precise number of non-custodial documents" disclosed in the US proceedings which have been withheld from disclosure in these Play Store Proceedings;

"Whether the answer to B is the same number [as what is called] the 'balance of the US production', referred to at paragraph 7 of your letter;"

"A summary of the categories of 'non-custodial documents' disclosed in the US Proceedings which have been withheld from disclosure in these Play Store Proceedings, including a breakdown of approximate number of document in each category;"

"Whether the 246 'unique' documents referred to in paragraph 11 of your letter form part of the 'non-custodial documents' disclosed in the US Proceedings which have

been withheld from disclosure in these Play Store proceedings ;”and

"Why your clients require a longstop date of 15 April 2024 to disclose the 246 ‘unique’ documents given the pre-existing nature of this repository."

Now, madam, one can see immediately that if Mr Holmes', interjection a moment ago was correct, which I am absolutely sure it will have been, a couple of these questions will fall away because F in particular wouldn't arise, because if the 246 documents are indeed, as it were, the annex A documents, as I mentioned earlier, Google has in fact agreed to disclose those by 15 March.

So one can see that some of these points, with further clarity, will be answered fairly quickly. But the important ones are the ones which seek to understand the bigger picture about the number of non-custodial documents we're talking about, about whether this is actually going to solve the problem that has been identified or not.

We would like answers to these questions very quickly, and we would like answers to these questions before deciding whether it is indeed appropriate to accept, simply, disclosure of the non-custodial documents, because whilst it seems to us that that very much is likely to be appropriate, we don't want to find that there are hundreds of thousands of documents, some of which are clearly relevant, but many of which may not be, in circumstances where those documents haven't been described to us; we don't know whether there are different categories; some might be helpful, some might not.

So what I would like to suggest -- and because all this correspondence happened so late, I should say this is the first time that Mr Holmes will have heard this suggestion. But the suggestion is that there is a direction that this letter be answered by 4.00 pm, on Tuesday. Answers to the questions in paragraph 6 be given by 4.00 pm, on Tuesday, which we think gives enough time to provide answers, but is speedy enough to try to make sure that this doesn't derail trial.

THE CHAIR: Yes.

MR JONES: Madam, those are my submissions on this topic.

THE CHAIR: Thank you.

Mr Holmes.

MR HOLMES: Madam, you won't be surprised to hear that I have quite full submissions to make in response to Mr Jones's very full submissions on this topic.

I should say at the outset that it is not accepted by my client that there has been any lack of clarity as to the disclosure that would be given or that any obvious gap has been identified in the disclosure to be given.

To show why that's the case I will need to take you carefully through some of the correspondence that Mr Jones has already shown to you. At a high level and to offer an overview, the Tribunal will recall that Repository 1, which contains the US discovery materials, about 3 million documents, was one of a number of repositories that were identified for disclosure in the UK proceedings by Google.

Other repositories include, for example: the EC Android materials; documents from the contracts database; that's to say agreements and contracts; data from the financial database and from other central repositories of data that Google has. The result of that is that non-custodial disclosure proceeded on a separate and a different track from the non-custodial disclosure which was given in the US proceedings, with data cuts and contracts that were focused on the geography at issue in these proceedings.

So what the US discovery was focused upon was custodial materials, the documents collected from individuals at Google who had potentially relevant documents to offer. A very large number of documents were collected from those individuals, they were searched using search terms, and then they were subject to manual review. It was those documents which were disclosed in the UK proceedings, and that was, as we had apprehended, by agreement between the parties.

So that, in overview, is the position.

If one then turns to the US expert reports, they contain, of course, references to some non-custodial disclosure from the US proceedings, for example agreements and contracts and data.

It's not surprising that there is no direct analogue to be found in the UK disclosure from Repository 1 of those documents because, by agreement, they were not included in the disclosure which was drawn from the US discovery.

THE CHAIR: Yes.

MR HOLMES: So that's the overview.

Just to develop those submissions, if we could go back, please, to the letter from my solicitors of yesterday, which I think you all now have, I would like to go through that a little bit more carefully and slowly, if I may.

The first point that is made in the letter is that the US discovery which was given by way of disclosure here was the entire set of custodial documents; that's the point made in paragraph 3. Then that's developed by reference to all the various materials that Google supplied before CMC 2, whether (inaudible) the set, you will recall, madam, for disclosure and then post-CMC 2.

So, at 4A, you see that reference is made to Google's electronic disclosure questionnaire. This explains that the total repository size of Repository 1 was a pool of 3 million documents. Google's proposal was for selecting documents from Repository 1 for disclosure in the proceedings as set out in the italicised passage at the foot of the page and over page. You see at the top of the second page of the letter, this was proposed to be done by the identification of relevant custodians and the application of search terms.

Then, at B, Google set out further details in its letter of 3 May 2023. Again, before CMC 2. And, again, you see in the bold passage the proposal for identifying

appropriate custodians and the application of appropriate search terms.

You also see reference to excluding specific categories of irrelevant and/or disproportionate material from the US repository. The letter identified two such categories, discovery in the Callsome and State AG proceedings.

Hausfeld accepted, in its letter of 19 February, that this was agreed by the parties for exclusion. I will come back to what that amounts to in quantitative terms later.

I should perhaps go to the letter. I will return, if I may, to our letter of yesterday, but I would like to show you some further points from the annex to the 3 May letter to which Mr Jones took you. It's at SD -- so the salient documents bundle, at tab 13, and I would like to pick it up at page 466.

THE CHAIR: Yes.

MR HOLMES: Do you have that?

THE CHAIR: I do.

MR HOLMES: So Mr Jones, I think, emphasised the passage in paragraph 11. His point was that it referred to a -- the 44 Google custodians and a limited number of non-custodial repositories.

Now, to be clear, that's not saying a limited number of non-custodial documents; it's referring to a limited number of non-custodial repositories from which collections were made. That picks up a point, at paragraph 5 on the preceding page, which explains how the sources from which US discovery was drawn.

We see at paragraph 5:

"Rather than specific documents being produced in response to each individual RFP [that's a request for production] with all objections to RFPs being resolved or determined, the parties generally proceeded on an approach which involved identifying any relevant centralised repositories of documents from which particular categories of document sought could be identified and disclosed, eg particular

databases."

An example of that will be the contracts database, to which I referred earlier, or the financial database.

Then at B:

"Identifying relevant custodians and applying search terms to those custodians' document in order to identify material relevant to the RFPs issue."

So anyone who has been involved in UK disclosure exercises will similarly be familiar with the idea of central repositories and then of custodial repositories. The point is being made here that the US discovery contained both.

Then over page, at page 468, at paragraph 13, there is the reason for the exclusion of the State AG and Callsome Materials and you see it is explained that those materials are relevant to product areas, search and advertising that are not relevant to these Play proceedings and, in the case of the Callsome Materials, are relevant only to claims from the proposed US developer Class and not relevant to these Play Proceedings.

So that's the two categories which were agreed for disclosure, as Hausfeld has fairly accepted.

Now, returning to the letter of yesterday and picking it up at D, the point is made there that Hausfeld engaged with the process of agreeing search terms and custodians for the purposes of refining the disclosure to be provided from Repository 1. But, as Mr Jones has alluded to at E, the parties failed to agree custodians and appropriate search terms.

On 31 July 2023, Google offered a solution as a practical way through. You can see that from paragraph 11 of that letter:

"To avoid the inefficiencies and further delay from this iterative process Google will provide your client with the entire set of custodial documents from the 44 US

custodians in the US production. This amounts to approximately 2.2 million documents."

So it was already clear that this was a subset of the 3 million. At the time the total was thought to be 2.2 million. In fact, as it turned out, there were 2 million documents that were disclosed in the UK proceedings, drawn from the custodial part of the US production. That difference, I understand, is due to the fact that there were some custodial materials in the two excluded categories, the State AG and the Callsome Materials.

Then, at F, you see that proposal was accepted by Hausfeld. Paragraph 6, at the top of the following page:

"We are cognisant of the deadline for Google to provide disclosure of Repository 1 documents. As a result we are instructed to accept disclosure of the entire set of custodial documents from the 44 US custodians in the US proceedings."

You see, at G, that was then reflected in the terms of the order that was made after CMC 2, which, again, could not be clearer:

"Google shall disclose custodial documents from the 44 custodians set out in annex 2 of the 3 May letter from Repository 1 without the application of search terms or a prior relevance review."

Then, at paragraph 5, there is the point that, as Hausfeld accepts, the State AG and Callsome Materials are excluded. They amount to some 800,000 documents. So you have a total set of US discovery, the 3 million. You have the approximately 2 million which have been disclosed in these proceedings. You have 800,000 documents which were agreed for exclusion from the 3 million. That takes you to 2.8.

At paragraph 6, there is the point that the US production also contained 40,000 documents, approximately, from the EC Android proceedings.

You will recall that there was -- they were lifted from a separate non-custodial

repository for the purposes of disclosure in these proceedings, so that takes you up to 2.84 million of the 3 million documents.

Then, at 7, you see that the balance of the US production consists of non-custodial discovery from the US proceedings, including the agreements, data and publicly available documents.

Those analogous documents to those were included in the non-custodial disclosure from Repositories 3 to 12 in the UK proceedings; that's explained in paragraph 8, the various databases which Google identified in its EDQ which were then searched, and the subject of separate provision in the directions for disclosure.

At paragraph 9, Google makes the point that it has no problem disclosing the balance of non-custodial documents from the US proceedings. That's to say the remaining 160,000, which might sound like a lot, but you have to remember the scale of the US proceedings and US production, 160,000 is actually a small proportion. There was a universe of 45 million documents that were collated to be searched, and there were 3 million that were included in the relevant Repository 1, which was the US discovery. So it's a really -- it's not a substantial number of documents in the context of these proceedings, and we're offering them as belt and braces, really, to allay any concerns that there is any material out there that hasn't been provided.

Then, at 10, we come on to this point relating to the US expert reports. The first point that's made is that the number of documents identified has come down as various documents that were listed out in the annexes to Hausfeld's letters that Mr Jones showed you have been identified and as a result of de-duplication.

The 264 unique documents that you see referred to in paragraph 11 are the balance of unidentified documents after documents identified documents are excluded and after de-duplication has occurred.

So the relevant set isn't 700, as Mr Jones suggested; it's 264 --

THE CHAIR: Yes.

MR HOLMES: -- and those we are disclosing. We have agreed to disclose them by 15 March. So they are coming across. They have -- we have begun a process of analysis of those documents, to see what they are, to try to give reassurance that there's nothing missing here, there's nothing of concern.

That's been a slow and painstaking process. That's why there has been this late flurry of correspondence, because I'm afraid it required liaison with teams in the US and it wasn't straightforward.

The conclusion that we have so far been able to ascertain is that the large majority of those 264 documents comprise contracts, data sets and publicly available material. So contracts and data sets subject to their own disclosure process in the UK proceedings.

So we don't accept that this represents a cause for concern or a sign that something has been missed that is relevant and that is material, but we do want to set the Class Representative's mind to rest. We are happy to share these materials. They can be transferred, I think we have suggested on a rolling basis, because it's a fairly large production. They will enable the Class Representative to consult directly any materials referred to in the US reports, which should give some comfort. In any event, we will identify the 264 unique documents and supply them.

But really, you know, we have worked collaboratively on this ahead of the CMC. That's why there's so little substantive business today for to you deal with, in terms of applications for orders and, really, we don't accept a problem here.

As regards the requests in Mr Jones' letter, we will -- insofar as he feels that I haven't just addressed them in my submissions, and insofar as he feels that they're not addressed on further examination in this letter, which I accept came after business hours yesterday, then we're happy to try to assist him with the further enquiries.

The challenging aspect of those further enquiries is the process of pinning down exactly what the 264 unique documents comprise. That does take a bit of time and a bit of liaison with the US, so I'm afraid Tuesday isn't feasible for a response to his letter, but we will -- we're happy to do so within seven days of today's date and that, I hope, should provide some further reassurance to the Tribunal and to Mr Jones.

Subject to the Tribunal's questions, those are my submissions. I hope it's made clear how exactly this all fits together.

THE CHAIR: Yes, thank you, Mr Holmes.

Mr Jones, what do you say about that?

MR JONES: Well, madam, that was the first time, of course, that we had heard the number 160,000. Mr Holmes, understandably, sought to downplay that. But, on any view, if 160,000 documents are now disclosed that will be a very significant task at this stage in proceedings to try to get through.

I have to reserve our position, therefore, on whether we will want all that disclosed. We do want the answers given to the questions in the letter that I showed you.

On the history of this, could I just re-emphasise that what was said about these repositories was essentially no more than that there was a limited number and some examples were given, as Mr Holmes showed you, in one sentence about the sort of information which they contained. But we understandably proceeded on the basis that all relevant documents were being disclosed; that was what Google said expressly.

If one takes the data, for example, Mr Holmes explained to you that what he now says is the data was dealt with separately in these proceedings because there was a separate repository.

Of course that is right, there was a separate repository of data, but you will remember that we had to fight long and hard to get data out of Google. Whilst the transactional data is country-specific, the cost data is not country-specific, and it was never said in

the course of any of that: we have already disclosed a whole load of material, tens of thousands, perhaps hundreds of thousands of documents in the US which contains data.

That was never brought to our attention. So we do remain very unhappy about the way this has unfolded.

In terms, though, of next steps, we would, as I say, like answers to those questions. Madam, I have asked for it by Tuesday and I do maintain that position because we have been raising this in correspondence now for months.

Madam, I understand you want to take all these issues away and decide them in the round. So, unless I can help any further on that particular topic, that is the Class Representative's position as regards to the date to answer those questions.

MR HOLMES: Madam, if I may make two factual corrections in the light of what Mr Jones has just said. The first is there cannot possibly have been any doubt that we were not disclosing the full set of the US discovery. We were very clear in the 3 May letter that there were 3 million documents, and we were equally clear in the 31 July letter, which refers expressly to the entire set of custodial documents that that amounted to 2.2 million. So it has always been clear that there were a number of documents, and a reasonably large number of documents from the US discovery set, which were non-custodial in nature and that were not included within the disclosure.

That's, I think, an important point which bears emphasis.

The second point concerning financial disclosure is I'm afraid based on a separate confusion. The US proceedings did not include substantial financial disclosure. The reason for that is that, in the US, there is no equivalent of exploitative abuse, which is one of the forms of abuse which is alleged by the Class Representative in these proceedings. That's why financial disclosure is being made from Google's finance database, which was identified as a separate repository and is proceeding on its own

track in these proceedings.

THE CHAIR: Yes, thank you.

Yes, we will be considering this in the round. Mr Frazer, Mr Waterson, do you have any questions arising out of that?

MR FRAZER: No, thank you, that's clear.

PROFESSOR WATERSON: No, thank you.

THE CHAIR: Thank you.

Right, so what shall we look at next?

MR JONES: We turn next to financial disclosure, which is agenda item D.

This is paragraph 6 of the order. The order is in tab 12. If I could just ask you to look at that. It's the salient documents bundle, volume 2, the updated draft order is tab 12. I'm going to page 449. You will see there, at paragraph 6, that there are two subparagraphs. They both concern cost allocation. The experts will need to decide which common costs should be attributed to the Play Store when trying to model the costs of the Play Store. You will see that 6.1 is proposed by the Class Representative and opposed by Google, and 6.2 has competing text.

THE CHAIR: Yes.

MR HOLMES: Madam, there is some confusion. Just to clarify the position, our text is proposed as an alternative to 6.1 and 6.2 combined, so that's the position between the parties. Our proposal is in the blue, at the bottom, in place of 6.1 and 6.2. Whereas Mr Jones's proposal is 6.1 and 6.2.

THE CHAIR: Yes, that's how I had understood it, thank you.

MR JONES: I'm grateful.

6.1 deals with unallocated costs. I should say 6.1 of the Class Representative's drafting deals with unallocated costs. 6.2 deals with allocated costs.

I will go through both of those in turn, but it's helpful to start with Ms Kourakina's first

witness statement, which was served following the last CMC. If I could pick that up, please, in volume 1 of the salient documents bundle, at tab 3, page 84.

THE CHAIR: Yes.

MR JONES: You will see, there is a description, at paragraph 10, of Google's current policies and practices for cost allocation. Under these various headings there are in summary a description of the methodologies which are adopted for costs allocations. So, for instance, under "Employee benefits" you will see the methodology is there described:

"Determine benefit cost per employee and distribute employee benefit costs to the product area based on total headcount."

I just pick that out as an example of what's been described.

Over the page, on 86, page 86, at the end of paragraph 10, I just highlight the product agnostic --

MR HOLMES: So sorry to interrupt, Mr Jones. I understand this material should have been marked as confidential, and is marked as such in the updated bundle. I think there's a slip-up on the part of his solicitors, but it may be sensible if he directs to you the relevant material on the page and asks to you read it to yourselves.

MR JONES: I understand. I will do that.

If one looks at the (i) before paragraph 11, at the top of page SD/86, you will see a particular category of expenditure which is not allocated to particular product areas. I am being shown a highlighted version and it looks as though everything is confidential, which makes this a little bit difficult. But, if one looks at 11, there's a description of what has been disclosed to the Class Representative. Not immediately clear why that would be confidential, but apparently it is. There are certain P&Ls which relate to certain products that have been disclosed.

There's a description of how direct costs are dealt with, at paragraph 13. There's

a description, then, from 14, of how allocated costs are dealt with.

THE CHAIR: Yes.

MR JONES: At 15, there's a heading, which you will see deals with some -- I think I can read the heading out, madam, "The Limitation of Management P&Ls".

THE CHAIR: Yes.

MR JONES: The important point for my purposes is that where there are unallocated costs, the costs which have not been allocated to Play Store, but which it might be said should be allocated to Play Store, if you were going to try to model the costs of Play Store, we clearly need to know what they are.

If you read, for instance, the last sentence of paragraph 15 and look back to that (i) above paragraph 11, you will see examples of that. You will see why it is that Mr Dudney wants to ensure that he has a full grasp of all unallocated costs.

He needs to have that in order to evaluate whether, for his purposes, they should properly be allocated to the Play Store. The reason that can't be done is that, although this is a helpful description here in this witness statement, it isn't, of course, the data. You can see the scope of the P&Ls which have been disclosed, back in paragraph 11, and you will see that they don't include, for example, the (i) above paragraph 11.

So there isn't data at the moment on unallocated costs, and that is what request 6.1 is intended to achieve.

If I could show you the response to that request, it's in Ms Kourakina's second witness statement, which is at page 377 of the same bundle.

THE CHAIR: Yes.

MR JONES: You will see at paragraph 12 -- I apologise, I should just check if this is confidential.

(Pause)

Yes, this has also been highlighted.

There's a reference in paragraph 12 to, firstly, the witness statement we were just looking at. There is then a reference to certain accounting policies, which, firstly, are policies rather than data.

But, secondly, you will see that they deal with Google Play P&L line items and are material to Google Play P&L. Of course, my point is it's the other unallocated costs which we're concerned with.

There is then, over the page, a reference to 10-K and 10-Q filings. Again, whilst it is true to say that those contain some high level numbers regarding unallocated costs, they don't break them down in any meaningful way, as one would see in ledgers or P&Ls.

Now, I will come back to 13 and 14 in a moment, because they appear, at least to me, to be more relevant to the second part of this request. So paragraph 6.2.

It may be that Mr Holmes will explain that they are also relevant to the first part, but, as I read them, they're relevant to the second.

On the first, it appears to us that the question really hasn't been answered. What Mr Dudney would like is to know which costs are not allocated and in what sums, and referring to policies doesn't assist with that. That's what 6.1 is directed at.

6.2 in the order is a different point. It's looking at allocated costs, and it's trying to work out where costs have been allocated to Play Store, how that was done, and in what amount. This is obviously also important for the same sort of reasons as I have just outlined.

The drafting of the order refers to "natural Play Store accounts". That is a term used by Google and which we understand refers to general ledger accounts, which may include some allocated costs.

THE CHAIR: Yes.

MR JONES: This request was responded to in a letter of 7 February, which I would

like to show you. It's in SD, page 76. So that's volume 1, tab 3, page 76. I am here, at the back of the letter.

THE CHAIR: Yes.

MR JONES: Actually, could I just show you the previous page, 75?

At F, there is actually an answer to what's become 6.1, which is the unallocated costs. That is essentially the answer which I just showed you in Ms Kourakina's second witness statement. So that's one reason why I had thought that was the answer, that was their answer to the 6.1 request, is that's how they deal with it in this letter.

THE CHAIR: Yes.

MR JONES: So that's the 6.1 unallocated.

Then, over the page at G, which is the one I was on, SD/76, is the response to the question regarding natural Play Store accounts. What is said is ...

Madam, it does make it difficult when so much is highlighted as confidential, which I understand the bit I was about to read is. Could I just ask you to read G to yourselves?

But I will just make this point, which is that the mapping key which is referred to is a document which is intended to enable you to map the general ledger accounts to the more aggregated profit and loss accounts. That's what that mapping key is supposed to do. So the answer which is given in G, I will leave you to read to yourselves.

(Pause)

THE CHAIR: Yes.

MR JONES: Mr Dudney's answer to that is given in Hausfeld's letter of application, so the salient documents bundle, tab 2. If we go to page 7, you will see the two requests at the bottom of the page. The first one is the unallocated requests, and the second one is allocated.

THE CHAIR: Yes.

MR JONES: Then, over the page at 8, there's a reference to the response that I have just shown you and -- to the mapping key. What is explained is Mr Dudney is unable to place reliance on the defendants' response, as he can't verify whether or how the mapping key identifies natural accounts. He's not aware how those particular P&L lines should be aggregated from the general ledger. It then says:

"He seeks examples from the defendants of how it considers the relevant documents can be used to identify natural accounts and inform the aggregation of the Play Store's general ledger accounts into the P&L lines above to inform his analysis."

Just to complete the picture on this, it's that statement there, I think, which has given rise to Google's proposed wording on the order because, if one looks back at the order and the blue texts, you will see that the offer to provide a worked example, which was made in Ms Kourakina's witness statement, has developed -- and this is helpful, I accept Google here have developed it in a helpful way to address the points which were made in that paragraph of the Hausfeld letter.

So the dispute, at least on 6.2, does appear to be reasonably narrow. But the reason why Ms Coll sticks with her original drafting, rather than accepting this alternative of a worked example is in essence because the original drafting gets straight to the point. What Mr Dudney wants to know is: which natural Play Store accounts contain allocated cost, which costs are allocated in what amounts and the method used. That's the text in 6.2.

I entirely accept, in principle, if the worked example which is offered is going to show Ms Coll and her team how to derive all that information from what's already been disclosed, then you might say: well, doesn't that just amount to the same thing?

Our concern is to avoid any scope for drawing this out further by having a worked example which is ambiguous or which we find hard to follow, and which then leads to further requests and further hearings. So that is why, although I see the offer which

has been made, we stick to the text of 6.2.

Madam, could I just pick up on the point which Mr Holmes helpfully interjected on regarding 6.1, as well?

Which is just to say this: if there is any suggestion that this blue wording would answer, essentially, the information in 6.1 and 6.2, I should just say, at the moment it's not clear to us why that worked example would tell us which costs are unallocated because we have not been given that information. So it isn't at all clear how a worked example could do that.

It may be that there is way of framing the order that ensures that a worked example does indeed provide answers to 6.1 and 6.2, and that if the worked example can't give answers to 6.1 and 6.2, then other documents should be disclosed or information given in order to give answer to say 6.1 or 6.2.

That's a suggestion that occurs to me now, thinking through Mr Holmes's interjection.

THE CHAIR: Yes.

MR JONES: It may be that we have been at slightly cross-purposes. But, as I say, at the moment it isn't clear to me how that example could even begin to answer 6.1.

So, madam, those are my submissions.

THE CHAIR: Yes, thank you.

Mr Holmes, do you have an answer -- the question 6.1 and 6.2.

MR HOLMES: Certainly, madam. So, just by way of context, this is one of many requests that have been raised and addressed in relation to the financial disclosure. That has been an iterative process. Google has provided witness evidence from Ms Kourakina, accompanied by a 1,200-page-exhibit, several rounds of financial disclosure, and answers to the various rounds of queries. The other requests have all been resolved cooperatively.

Now, this specific request was included in the third wave of supplementary requests

from Hausfeld received on 17 January 2024. I don't think you have been shown that, but I think it's worth going to it, to see what they really have in mind. It's in the correspondence bundle. It hasn't found its way into the salient documents bundle, but it's in the correspondence bundle at tab 79, page 608.

THE CHAIR: Yes.

MR HOLMES: The specific request we're concerned with is at paragraph -- well, if you look at paragraph 5, you see a request that the following additional non-exhaustive queries be addressed either by means of a further witness statement from Ms Kourakina or a without prejudice meeting with Ms Kourakina, or another suitable person.

Various requests are then made. The last of those, at C, is a request for confirmation for each year of the relevant period of which corporate overheads are unallocated and which natural Play Store accounts contain allocated costs.

Now, there are three points to note here about this framing of the request.

First, as we understood it, it's clearly a request for practical guidance. Hausfeld requested either a follow-up witness statement or simply a without-prejudice meeting with Ms Kourakina or someone else who was an appropriate person to help Mr Dudney navigate the accounts. We think that's a sensible and a practical way of approaching these issues.

Secondly, and in consequence, if you look at the request, it's not as hard-edged as one would expect for a formal information request. Clarification is requested only to the extent that the allocated costs are not -- is not -- the allocation methodology is not covered by the extensive accounting policies which Google had already provided.

Now, we don't criticise that lack of precision. It's normal and to be expected following disclosure of complex financial information that a party's expert will often need help to understand how the information fits together. But what it does call for is some

flexibility, in order to find a practical way through.

The third point is that there is a mismatch between the practical nature of the request, a without-prejudice meeting, for example, and the detailed substance of the request, which appears on its face to be a request for Google to undertake analysis, which is not pre-existing, of its accounts in order to work out for each year all the costs which are unallocated in circumstances where that is not something which Google has itself considered. Also to determine the allocations to various natural accounts to summarise those and to disclose those.

That is not a request for information; it's really a request for evidence and analysis of a kind that you would expect the experts to be doing once they understand how to manipulate the relevant databases.

Now, this slight mismatch is then reflected in the Class Representative's application. Mr Jones referred to it as a letter from Hausfeld, but it is, of course, the defining application. It's the application I am responding to today. It's at tab 2 of the salient documents bundle and you see, picking it up on page SD/7, you see the request, encompassing (i) and (ii). Then, over page, there's an explanation of it.

You see there that Mr Dudney -- Google has directed Mr Dudney to the P&L mapping key in which the defendants identify the natural accounts containing allocated costs. The mapping key is a document which shows how the general ledger accounts are aggregated into the lines of the P&L.

However, Mr Dudney is unable to place reliance upon the defendants' response, as he cannot verify whether or how the mapping key identifies natural accounts. Furthermore, he's not aware from the mapping key how the Play P&L lines should be aggregated from the general ledger.

So he's not -- no criticism of him, but he's struggling to understand how this all fit together.

Then the practical request. I do ask the Tribunal to look closely at the language that is proposed here in the application itself.

Mr Dudney seeks examples from the defendants of how it considers the relevant documents can be used to (a) identify natural accounts and (b) inform the aggregation of the Play Store's general ledger accounts into the P&L lines above, to inform his analysis.

Now, that language will be familiar to the Tribunal because it is the very language, in more or less identical terms, which is then incorporated into our proposal. It is what we had apprehended, from the application, was what Mr Dudney needed in practical terms and it's what we're offering to provide.

THE CHAIR: Yes.

MR HOLMES: So we really struggle to understand why our proposal is resisted.

Mr Jones suggests that we could simply answer the questions directly and that would be a neater way through, but you have my point about that. This is not pre-existing analysis; this is a substantial exercise in data analysis which Google is being asked to undertake of its own accounts, not a request for pre-existing information. That really is not the appropriate way forward.

Instead, what we have offered is to enable Mr Dudney to undertake the analysis that he is seeking to undertake.

We understand the examples that he sought to address both the question of allocated and unallocated costs, because they are two sides of the same coin. Once you've allocated to natural accounts you know what is unallocated, or you can ascertain what is unallocated. We say the appropriate course, really, is to give Mr Dudney what he says he needs. There's no other basis for understanding what Mr Dudney may need or what his difficulties may be, as there's no evidence from him before this Tribunal. There's only what's set out in the applications, which we have taken at their word.

On that basis, we say that the appropriate course is to order what is sought in the applications. We hope and expect that will be helpful. We think our proposal offers a practical way through. If Mr Dudney has further reasonable and proportionate queries, as we have indicated in correspondence, then we will try to assist with those, as well.

But, given what is said in the application, in my submission, the obvious course is to direct Google to give Mr Dudney what he seeks, and that's what Google's proposed text achieves.

THE CHAIR: Just one question. Your order is in terms of a worked example, singular. I may be being nitpicky, but Mr Dudney sought various examples in his request. From what you're telling me, there is very likely to be an iterative and cooperative process, so it may that be more than one example is necessary.

MR HOLMES: Indeed. We will take that under consideration.

As I understand it, what is in preparation is more in the nature of a guide which offers practical steps, then illustrated by way of workings, if you like, from the accounts. So I don't think one should read too much into the singular there, the worked example. But we will try to be helpful with this and we will engage cooperatively.

The Tribunal has my point that there already been several iterations, iterative rounds of engagement between the parties and this is the sum total of what is left on the table for the purposes of this CMC. So that rather suggests that the process is working effectively to date.

THE CHAIR: Thank you.

Mr Frazer, Mr Waterson, did you have any questions for Mr Holmes?

PROFESSOR WATERSON: No. Just so that I understand it, can I use an analogy which is -- it's a bit like, say, a lecturer goes through an example in a class of how to do something and then sets a problem for the student, which is to solve a very similar

exercise or, to a reasonable extent is similar. Then, maybe when there is a session to do with the class, a student who has been struggling will then come -- receive further help from someone to get to understand the nature of the issue.

MR HOLMES: Well, if I may say so, sir, I think that's a very apt analysis to capture what it is that we hope to achieve with this example. We think that is the appropriate way forward.

Mr Dudney will want to do his own analysis in respect of Google's accounting information, financial databases from which disclosure has been drawn, and this is to try to help him to understand how to navigate the accounts and to undertake analysis of that kind.

PROFESSOR WATERSON: Thank you.

THE CHAIR: So, Mr Jones, what do you say to that proposal?

MR JONES: Well, madam, can I focus in on 6.1? Because my overarching concern here is that there appears to have been a misunderstanding. I am not sure that the worked example is going to be capable of doing what Mr Holmes is confident that it will.

The reason for that is -- if I start with the wording of the order, which was a point Mr Holmes started with. The order essentially reflects, on 6.1 and 6.2, the exact wording that Hausfeld first used when it raised these issues in its letter of 17 January.

So 6.1 reflects what was said in that letter, which was:

"Confirmation for each year of the Relevant Period of which corporate overheads (.i.e. “common cost”) are unallocated in your client's general ledger and/or management reporting packs and in what amount."

So it maps what we have already asked for.

Mr Holmes made a point that that would not be easy because this is not pre-existing information. But, of course, I showed you Ms Kourakina's witness statement, where

she gave an overview -- which I said was helpful -- of which costs are not allocated. So we don't understand how that data cannot be existing.

She was explaining the categories of data which are kept, but, as you saw, only certain categories have been given to the Class Representative.

Now, Mr Holmes explained that his team had thought that the examples referred to in the application letter were intended to address both limbs of this application. I don't criticise him for that, because I entirely see that if you look at the application letter in isolation -- just to remind you of the pages, SD/7, bottom of the page, there's a (i), then a (ii), then a page break and a chunk of text. You could read it either way. If you just read that in isolation it might refer to (i) and (ii), or it might refer to (ii).

But that was what I picked up when I was taking you through this, the history of this discussion, and in particular at SD/75, which is where the earlier discussion was addressed by Google, where the two were addressed in turn, and F was the unallocated and G was a point about allocated costs. When you see that in context, you see that that hanging paragraph, as it were, in the application letter, is clearly responding to what is said at G. So it's following that debate about the second part of the application.

The reason I am emphasising that is we do have a real concern that although I entirely accept that the offer which has been made has been made with good intentions, and I entirely see that the iterative process akin to a professor/student process can be helpful in these situations, we are concerned that if there has been that misunderstanding it could cause problems because we do also want 6.1 to be addressed.

I just return to a suggestion I made at the outset, which was it may be that the order should not be either of the proposals which have been put forwards, but should be some middle ground of ordering explanations and worked examples to be given but

which will explain to the Class Representative how the information at 6.1 and 6.2 can be derived from what's already been disclosed.

And one can well see that there may be further discussion after that. If in fact what Mr Dudney ends up needing is more disclosure and more data we may -- I hope this doesn't happen -- but we may have to come back to the Tribunal; one can see all of that.

But in terms of the next steps I think it's just important to make sure that whatever order is made moves things forwards under both of those headings and doesn't inadvertently only move forwards the second of those two subparagraphs.

MR HOLMES: Madam, in case it helps --

THE CHAIR: Yes, Mr Holmes.

MR HOLMES: -- may I just briefly -- it may be water under the bridge now and I don't wish to labour the point, but it's very difficult to read the applications letter and the request for examples as applying to anything other than both limbs 1 -- the proposed examples as applying to both limbs 1 and 2 of the application.

If that's not the case it's very difficult to see where 1 is addressed at all in the reasoning set out in the application letter. But, be that as it may, we're very happy to expand the language of our proposal to cover worked examples showing how the financial information provided by Google can be used by Mr Dudney to ascertain whether and which corporate overheads are allocated to identify natural accounts and to inform the aggregation of Google Play's general ledger accounts into the P&L which I think should, I hope, lay the matter to rest. The drafting might need a bit of tightening; I am making it without instruction, but I think we're very happy to improve on our original drafting to make absolutely clear that the worked examples cover both limbs addressed in the application.

THE CHAIR: Yes.

So, Mr Jones, it sounds like you're not that far apart.

MR JONES: No, I think that's right, madam, and I think we can maybe take that offline and have a discussion over the adjournment and see if we can agree on some wording of that, if that would be convenient.

THE CHAIR: Yes, that would be very helpful, thank you.

MR JONES: Madam the final --

THE CHAIR: Yes, where do we go from here --

MR JONES: Exactly. There are two options. We could plough on to the final topic now. It's going to take a good amount of time, I expect. The alternative, therefore, is to pause now, perhaps for an early adjournment, although it would be very early, but one could pause now and there are of course a couple of decisions for the Tribunal on the topics we have dealt with. We're in your hands.

The only slight point at our end is that I will have to swap seats with Mr Kennedy, who is going to be addressing you on this, but that will only take a couple of minutes so needn't drive the decision one way or another.

THE CHAIR: Yes. One thing I would like you to think about, Mr Jones, I think I will take the option of having an early break, but one thing I would like you to think about is, given the issues relating to the US disclosure and the answers you're going to get to your questions, will that affect the submissions you're going to make on the remaining?

MR JONES: Can I take that away and speak to Mr Kennedy about it rather than answer it now, madam?

THE CHAIR: Yes, thank you. Thank you, I would just like you to have a think about that.

MR JONES: Yes, I'm grateful.

THE CHAIR: So we will rise now and come back at 1.30, if that suits everyone.

MR JONES: Thank you.

THE CHAIR: Thank you.

MR HOLMES: Thank you.

(12.33 pm)

(The luncheon adjournment)

(1.30 pm)

THE CHAIR: Yes, thank you. Now, are you going to tell me we have a break-out of harmony on paragraph 6?

MR JONES: Almost, but not quite. There's a really small point which will need to go back to you for decision, madam.

The position is this: that on 6.1, as I indicated, we can agree to worked examples in light of the confusion which has arisen around that, and we are keen to take that forwards in a productive way. I will just read the text which I would propose, there, to replace 6.1. It's:

"Worked examples showing how the financial information provided by Google can be used by Mr Dudney to identify which corporate overheads are unallocated in the defendants' general ledger and/or management reporting packs and in what amounts."

THE CHAIR: Yes.

MR JONES: My proposal was then to leave to you the decision as regards to the wording on 6.2, which I addressed you on. You will recall that my point was that we would still prefer to have what I called the straightforward request, which is there in red. Albeit that I understand why the worked examples have been suggested, but we were inviting you to make a decision on that.

One can see, of course, that if you were to agree to the blue text, at 6.2, then you might say: well, this could be done in a more elegant way.

And Mr Holmes has a suggestion, which I will hand over to him in a moment to let him

explain, which essentially does it in a more elegant way and I think he would say is also better for other reasons. But I will let him explain that to you, but that's essentially the scope of the dispute and it hinges on what you decide ultimately, on 6.2.

THE CHAIR: Right. So, just so that I can understand it, so when you refer to worked examples, worked examples relates to 6.1; are you saying that doesn't relate to 6.2?

MR JONES: On --

THE CHAIR: That's not to be derived from a worked example on your proposal?

MR JONES: Yes, that's correct. But because -- just to make this absolutely clear, 6.2, what was -- the origin of that was us asking for what is in red, and there was then that discussion, in correspondence and in the witness statements, about whether that could be dealt with by way of worked examples. So that is what the discussion on the document is about, whether that could be dealt with by way of worked examples.

Our position on that is: of course, if it could be, we understand why that would be offered, but we are nervous because we, at the moment, have doubts about whether it in fact could be, and our experts have looked at the materials closely.

So it isn't a big dispute between us, but that's the scope of the 6.2 dispute.

6.1 is a little odd, in this sense: we were not asking for worked examples on 6.1, but I am now accepting and endorsing them because, as I said, there has clearly been confusion about 6.1. In light of the confusion, we accept we need a sensible way to take it forwards. So if they are able to give worked examples, we will then see whether it is true that they can address 6.1 through worked examples.

So that's why we're in the position that we're in; where I'm happy to accept worked examples on 6.1 as a novel suggestion.

On 6.2 we see the point, but we would still prefer our drafting on 6.2.

THE CHAIR: Right, okay. Thank you.

MR HOLMES: So, madam, I must admit that I am somewhat perplexed by this. You

will recall that the applications letter which Mr Jones submitted related to 6.2 asked for examples. So why the Class Representative is rowing back from that now I really do not understand. In my submission --

Yes.

THE CHAIR: Sorry, I was just going to say that's why I asked for clarification, because I had thought that the worked examples were considered feasible for 6.2, but not 6.1. As I understood it, as your submissions developed it was suggested that it would actually be feasible for both 6.1 and 6.2. Now Mr Jones says he will have worked examples for 6.1, but still want his wording on 6.2; is that a fair summary, Mr Jones, of where we're at?

MR JONES: Well, it's unfair, if I may, in this one respect, which is I did try to explain at the start of my submissions that whilst if you look at what we had said about worked examples we were always asking for the text, the red text in 6.2.

The concern around the worked examples is that it just is not at all clear to my experts that it will be possible through a worked example to address what is sought in 6.2. So I did try to emphasise that although it is true to say there has been discussion about what a worked example would need to cover, underlying that discussion is a scepticism on our part that that would in fact be possible, because looking at the documents it simply does not seem possible to undertake, for example, the mapping exercise which has been described.

That was some of the confidential material which I took you through.

So that's why we're in this position that we're in. But it is absolutely right to say that I now accept the proposal on 6.1.

THE CHAIR: Yes.

MR HOLMES: This has basically migrated -- the proposal for examples that came from the Class Representative has migrated from 6.2 to 6.1 as a result of my offer

during submissions.

We don't have any evidence before us about what Mr Dudney needs or wants. All that we can do is go from what is explained in the applications letter. That states in terms that Mr Dudney seeks examples from the defendants of how it considers the relevant documents can be used to (a) identify natural accounts and (b) inform the aggregation of the Play Store's general ledger accounts "into the P&L lines above to inform his analysis".

What matters is not what the Class Representative thinks she needs or wants, but what her expert is on record as needing or wanting, and that is set out in the applications notice, and that is what the Tribunal should order.

THE CHAIR: Thank you.

Right, well, I will obviously have to consult with the other panel members about that. So, apart from leaving aside paragraph 6 for now, we thought it might be helpful if we updated you on our thinking in relation to the other aspects that we discussed this morning.

It possibly won't come as a great surprise to say that the amendments in paragraph 1 we think are acceptable and make an order in those terms.

We will not require a further opt-out period at this stage, but that must be addressed in good time before any trial. And presumably there will be other CMCs and a PTR at least before then.

On disclosure, it seems that paragraphs 2 and 3 are now agreed and we don't need to do anything about that, except we have the overarching issue of the letter of 29 February from Hausfeld which raised various questions relating more generally to disclosure, which, Mr Holmes, your clients said -- I think you indicated your client were prepared to answer those.

MR HOLMES: Yes.

THE CHAIR: We heard your explanation, but they are prepared to answer those?

MR HOLMES: Yes.

THE CHAIR: We think you should. Mr Jones asked for by Tuesday. We would expect it to be done by Wednesday, but we are not intending to make an order to that effect. So we do expect your clients to respond to the letter. We expect it to be done by Wednesday, but this will not form part of our order.

MR HOLMES: Madam, I'm grateful for that indication. We will use our best endeavours to meet that deadline. If for any reason one or more of the requests simply cannot be addressed by then, what we propose to do is to answer the questions that we can answer by then and the others to follow. I think we can only do our best, madam, and it is a fiddly process mapping the US discovery on to the UK disclosure.

THE CHAIR: Thank you.

So we will leave paragraph 6 to one side.

So, Mr Jones, does that take us to paragraphs 4 and 5?

MR JONES: Yes, it does, madam. Just while we were looking at the order, just to be clear that 7 and 8, which were agreed have been addressed by submissions which have already been made and covered --

THE CHAIR: Yes, thank you.

MR JONES: -- fell under other agenda items.

So the outstanding issue, then, is known adverse documents. You asked me a question before the adjournment about that.

I'm going to hand over to Mr Kennedy because he's dealing with known adverse documents and he will answer, among other things, that question that's been posed to me. But we just need to swap seats, so I will just do that now.

(Pause)

MR KENNEDY: Madam, can I just check that you can hear me, and the members of

the Tribunal as well and Mr Holmes?

THE CHAIR: Yes, I can.

MR KENNEDY: If I can start by answering the question that you posed before we rose for the short adjournment, obviously we're awaiting answers to the questions that were raised in the February 29 letter, and those are coming on Wednesday per the direction you just made, madam.

But if we are to get the circa 160,000 documents from the non-custodial sources, as indicated by Mr Holmes in his submissions earlier, that may plug a gap, if I can put it that way -- and I don't mean that tendentiously, I just meant something that didn't previously fall within Repository 1, but which come now from broader US Repository 1 and fall into UK Repository 1, if I can put it that way.

It may fill that gap, but, in my submission, that doesn't obviate the need for the KAD order.

As I will come on to explain, madam, we say the need for the KAD order really arises from the terms of the earlier orders that you have made, and the particular approach that's been taken to this litigation, whereby disclosure is given from pre-existing repositories that were designed initially for other proceedings.

That's not necessarily true of each of the repositories, but certainly Repository 1 was first created for the purposes of the US proceeding.

We say that that particular form of order gives rise to this problem whereby there are unknown unknowns, if I can put it that way, or unknown gaps, which can't be addressed in the Stage 2 process. Therefore, we submit that there ought to be a further order that sweeps up those unknown gaps and provides the Class Representative with the adverse documents that are relevant to the matters in dispute in this case.

To put it simply, madam, the fact that we're getting an additional 160,000 documents

from US Repository 1 doesn't mean there are not other adverse documents that fall outside either broader Repository 1, UK Repository 1 or the other repositories, in respect of which orders have already been made by this Tribunal.

A more general point, if I may, madam. The four examples that we rely on in the skeleton argument -- the US documents, the new custodians, the behavioural data issue, and the project names issue -- we say are illustrative of the issue that arises from the nature of the orders made. So, even if the particular issue that arises in respect of each of these four is answered, we don't say that that means that the known adverse documents application falls away. We say that it's a broader problem and, in a sense, these four events have revealed the problem to us or confirmed our concerns about the existence and the nature of the problem.

So that's the basis on which we rely on those issues, not as being exhaustive of the gaps or the problems that we have identified.

Madam, perhaps I can start with the terms of the order sought. You may have it loose, but it's in salient documents bundle volume 2, tab 12.

THE CHAIR: Yes.

MR KENNEDY: Paragraphs 4 and 5. What we seek is:

"An order that the defendant shall provide disclosure and inspection of Known Adverse Documents and for the purpose of this paragraph Known Adverse Documents shall have the meaning set out in paragraph 2 of Practice Direction 57AD to the Civil Procedure Rules."

Paragraph 5, disclosure and inspection of the documents provided pursuant to it. It should be:

"Paragraph 4 above shall be given within ten working days of the date on which the Defendants (or any of them) become aware of the documents in question."

In the case of any Known Adverse Documents which the Defendants (or any of them)

are already aware prior to" today's date. "Disclosure … shall be made by 15 March", so two weeks' time.

THE CHAIR: Yes.

MR KENNEDY: Now, as you know, madam, Google oppose the order sought in its entirety and haven't made any particular submissions about the ten-day period provided for in paragraph 5. It may be that, if you're minded to make the order, they have some things additional to say about the ten-day period and I can address that further insofar as necessary.

But I would like to start, madam, if I may, with PD/57AD as it exists in the High Court Rules and the Civil Procedure Rules. The easiest place to find that, madam, is in the authorities bundle. It's tab 6, and it starts at page 322. You see there is actually an extract from the White Book.

THE CHAIR: Yes.

MR KENNEDY: You have then an editorial introduction which explains the reason for the introduction of PD/57AD, which was to make disclosure in the High Court more proportionate than the prevailing practice under Rule 31. So KAD orders and the extended search-based models are an integral part of that new and more proportionate approach to disclosure in the High Court, just by way of context.

But, if I could ask you to scroll down to page 324 and to focus in on the definitions at paragraphs 2.7, which provides:

" Disclosure extends to 'adverse' documents. A document is 'adverse' if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events or an issue in dispute, or supports the contention or a version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed Issues for Disclosure."

Madam, you may have seen in my skeleton argument, we propose those final words,

"Whether or not that issue is one of the agreed issues for disclosure", be omitted for these purposes because we don't have an agreed list of issues for disclosure.

THE CHAIR: Yes.

MR KENNEDY: But, otherwise, we say that's the definition that should be imported into this order, and it functions as the standard against which disclosability has to be assessed. Then paragraph 2.8:

"Known adverse documents are documents other than privileged documents that a party is actually aware (without undertaking any further search through documents than is already undertaken or has cause to be undertaken) both (a) are or were previously within its control and (b) are adverse."

Two points on that, madam.

First, we're dealing with actual awareness, actual knowledge on the part of a relevant person. We will come on to see who those people are in the next paragraph. But we're not talking about constructive knowledge, so someone somewhere, if I can put it this way, has to know something about a document before the obligation bites.

I will come back to this when I am addressing the proportionality concerns that have been raised by Google in correspondence and in their skeleton argument. But it appears to be that the predicate of some of those objections is that someone has to sit and review document and make a document by document call on whether or not it meets their -- Mr Holmes is shaking his head to suggest, I think, that's not the position. So I don't need to take that any further.

But we say that it's important to realise that process isn't pre-supposed, either by Mr Holmes or by PD/57AD. That's not part of the exercise. So, of course, one might imagine that whether something meets the definition of adverse on a document by document basis may involve fine questions of judgment. That's not actually what's required in the circumstances either of PD/57AD generally or, we say, if it's imported

into these proceedings.

Second -- and this bares emphasis -- there's no requirement for a party subject to a KAD order to carry out further searches. So we're absolutely not talking about Google being sent away to gather lots of documents and sift through those in the manner of an ordinary disclosure review exercise that you might see where you have an order for standard disclosure or something similar. So we're not talking about reinventing the wheel and going behind what's already been done.

Over the page, madam, 2.9:

"For this purpose a company or an organisation is 'aware' if any person with accountability or responsibility within the company or organisation for the events or the circumstances ... subject of the case or for the conduct of the proceedings is aware. For this purpose it's also necessary to take reasonable steps to check the position of any person who has had such accountability or responsibility who has since left the company or organisation."

Just on that final sentence, madam, it's clarified in the judgment of Mr Justice Stuart-Smith in the Castle Water case that the reasonable checks apply not only to people who have left the company, but to people who remain in the company.

THE CHAIR: Yes.

MR KENNEDY: What Mr Justice Stuart-Smith also makes clear in that judgment is that reasonable checks are not to be conflated with additional searches. It remains the case that no additional searches are required. You have to make enquiries of the relevant people, and if they think that they do know of an adverse document, but they're not sure where it is, they need to go and look for it.

This is the left-hand drawer, right-hand drawer example that's given in the judgment. So you do have to go and look for something, but only if someone has the relevant knowledge of the existence of a document that meets the definition of adversity.

Madam, if we could stay in the Practice Direction, I think it's helpful to look at how it operates in the High Court to show that it's not sort of wrenched from its context in the High Court and transplanted here unthinkingly. If we could stay on page 325 of the bundle, but go about halfway down, we see a heading, 3:

"Duties in relation to disclosure."

3.1:

"A person who knows that it is or may become a party to proceedings that have been commenced or who knows that it may become a party to proceedings that may be commenced is under the following duties to the court."

Then (ii):

"By no later than the time set out in paragraphs 9.1 to 9.3 to disclose known adverse documents unless they are privileged. This duty exists regardless of whether or not any order for disclosure is made."

Then we see page 333, so a few pages further down in the bundle, madam. Model C is about halfway down. This is one of the extended models, whereby searches are carried out by the disclosing party. If we just look at (iii):

"For the avoidance of doubt a party giving Model C Disclosure must still comply with the duty under paragraph 3.1(2) [which is what I just showed you] above the disclosed known adverse documents; these will include any arising from the search directed by the court."

Right at the bottom of the page, under the heading "Model D", which is an additional, more inclusive search-based model. Again:

"For the avoidance of doubt a party giving Model D Disclosure must still comply with the duty under 3.1(2)."

Then, finally, over the page, under "Model E", which is the widest of the possible search orders, (5):

"For the avoidance of doubt a party giving Model E Disclosure must still comply with the duty under 3.1(2)."

One further point, just on the search-based models, I showed you the definition in 2.7, madam, and the words that we propose excising. But, if we just focus on those words for present purposes, whether or not that issue is one of the agreed issues for disclosure, and the agreed issues of disclosure, as I'm sure you know, madam, is the list drawn up exclusively for the purposes of disclosure under the model-based regime. Nonetheless, the KAD order bites.

THE CHAIR: Yes.

MR KENNEDY: So two points to emphasise about the role of KAD orders within the scheme under the High Court rules, madam. First, at a minimum, parties are expected to disclose KAD documents. So it's made clear: whether or not any other order is made you disclose KAD.

Secondly, even if the parties do have a list of issues for disclosure, and even if they're carrying out bespoke searches in respect of those list of issues, the KAD obligation goes beyond that list of issues in order to sweep up documents that might be missed via the issues.

So it's both from the starting point and it kind of has a sweeping effect to catch things that might fall through the cracks as a result of the parties endeavouring to be proportionate and adopt an issues-based approach.

Now, Google say, madam, in paragraph 12 of their skeleton, that this is not a case in which standard disclosure was ordered, and is not a case in which PD/57AD applies directly. But we say this is actually a point in our favour, madam, and I'll develop this in a moment.

But we say it is precisely because no order for standard disclosure was made, and precisely because no order that resembles one of these issues based orders that is

made in the High Court under the Practice Direction that a KAD order is all the more necessary in this case, because we need that sweeping function to catch things that have not been captured by the existing orders in which we otherwise won't get.

Madam, with that introduction to the scheme under the High Court rules, I propose to address the question of necessity, first, and then propose the issues of proportionality that have arisen in the response in correspondence and in Google's skeleton argument.

Madam, you will recall that this is the second incarnation of this application and at the last CMC it was referred to as the ongoing disclosure application. There is a suggestion in Google's skeleton argument this is a point against us. But, as I will come to show you, the concerns that motivated the original application have been realised since the third CMC. We undertook to go away and do our homework, and we have endeavoured to do that and we have renewed the application today accordingly.

It might be helpful, just very, very briefly, just to turn up the old application, just so we can compare and contrast. It's in volume 1 of the salient documents bundle, behind tab 3, and it's page 132 of the bundle, the SD/132. You see that it's a letter from Hausfeld to the registrar, dated 23 October 2023, paragraph 2:

"This letter summarises the states of the various matters and contains the CR's applications" for the third CMC.

If we go to page SD/136, just one paragraph down, you will see a heading, "Ongoing disclosure direction".

THE CHAIR: Yes.

MR KENNEDY: You see there:

"The CR seeks an order that Google shall disclose any relevant document that is provided or shown to Google's solicitors in these proceedings where it would not otherwise fall within a category of documents that has been ordered to be disclosed

and therefore be subject to an ongoing duty of disclosure. The CR seeks that such disclosure be provided in ten business days of the defendants' solicitors first being provided or shown the document in question."

So that was, in a nutshell, the application last time.

The thinking behind it at the time, madam, was that it sought only to capture relevant documents in respect of which there was no existing disclosure obligation. So it was directed at the gaps, or the gap, in the existing disclosure order. It only applied to documents that were shown to RPC, so did not require Google to go away and search for anything, but rather sought disclosure only of those documents insofar as they came to RPC's attention.

So the order sought was intended to be targeted and proportionate.

THE CHAIR: Yes.

MR KENNEDY: Madam, Google say in their skeleton argument -- this is paragraph 13 -- that the Tribunal expressed concerns at the last CMC about the form of that order. We don't shrink from that, madam.

On the contrary, paragraph 37 of our application -- there's no need to turn it up -- we expressly refer to those concerns. We pick up the point about the concerns, particularly that you had, madam, about the definition of relevance. We refer to those expressly, at paragraph 50(c).

THE CHAIR: Yes.

MR KENNEDY: Madam, if you don't mind, I think it's quite useful to go back and just very briefly see the exchange you had with Mr Jones at the last CMC. It's in the salient documents bundle, volume 2, and it's behind tab 24. It's the transcript, and if we pick it up at page 620, so SD/620.

THE CHAIR: Yes.

MR KENNEDY: Then you will see line 2, Mr Jones:

"Then I turn to the final disclosure application and it's the third one. It's in the salient documents bundle ..."

And so on.

If I could ask you just to pick it up at line 23, so near the bottom, and you will see that Mr Jones said:

"What we're concerned about is what will happen ..."

If I can ask you just to read over to line 23 on the following page. I think it can be skimmed, madam, but it's just useful to get the context.

THE CHAIR: Yes.

(Pause)

Yes.

MR KENNEDY: Then, just over the page, madam, if you may, starting at line 5 and then continuing to line 11, on page 623. This is just where you articulate your concerns, madam, with the form of order.

THE CHAIR: Yes.

Yes.

MR KENNEDY: Then, just finally, madam, line 4, on page 624 to line 11, on page 625. This is the final sort of passage between you and Mr Jones in which you're discussing the problem and the proffered solution at that time.

(Pause)

THE CHAIR: Yes, thank you.

MR KENNEDY: So, madam, that's how the problem was articulated to you last time. The concern is that there might be relevant documents that are not caught by the existing orders which come to light in Google's hands, if I can put it this way, in the course of these proceedings, but which are not disclosed because they don't fall within the scope of those existing orders.

Madam, as I understand the position articulated by the Tribunal last time, you understood and appreciated the nature of the problem, and it was the nature of the solution that you had concerns about.

I'm not dodging the question of how we sought to dodge -- not how we sought to dodge, how we sought to solve the question of relevance. I would like to focus just for a moment on the nature of the existing orders and how we say that gives rise to a problem. Then, if I may, I will come to the question of the solution.

We can pick up the existing orders in volume 1 of the salient documents bundle, tab 7. This is the exhibit to Mr Ross's witness statement. It's at page 312. This is the Tribunal's order of 15 September 2023.

THE CHAIR: Yes.

MR KENNEDY: If we pick it up at paragraph 8, this sets out the various orders for the disclosure that were made by the Tribunal after the second CMC. So 8.1:

"Google shall disclose custodial documents for the 44 custodians set out in the annex to Google's letter from Repository 1 without the application of search terms or a prior relevance review."

8.2(a):

“Google shall apply the 13 custodians set out in the schedule to Google’s EDQ” and the search terms to Repository 2 and disclose responsive documents, subject to a relevance and privilege review.

So that’s Repository 2.

Over the page, 8.3:

“Google shall disclose the responsive documents from Repository 4.” Insofar as they are responsive to certain search terms and subject to a prior relevance and privilege review.

8.4:

"Google shall conduct a relevance review of the documents from Repositories 3, and 5 to 7."

Then 8.5:

"As to Repositories 8 to 11." (b) "Google shall provide disclosure of relevant documents from Repositories 8 to 11 by ..."

A particular date.

Then 8.6 sets out the stage 2 process, whereby the CR was entitled to make further requests based on her review of the materials disclosed in response to the prior paragraphs.

So we see in respect of 8.1 through 8.5 that in each case the obligation is defined by reference to a specific repository or specific repositories of information, to a specific pre-defined finite universe of documents. But one of the effects that has, madam, we say, is to really cut down the extent to which the ongoing disclosure obligation arising under rule 60 of the Tribunal Rules bites in practice in these proceedings.

If we could take an example, madam, let's say that in the course of proofing a witness who is one of the 44 custodians Google identifies a document which is relevant to these proceedings, adverse to Google's case, so falls within the scope of the order I am seeking now and which is not in Repository 1, we say there's no ongoing duty of disclosure on Google to disclose that. Google is under no obligation under the existing order to provide disclosure of that to the CR, and would be doing nothing wrong.

This is a point we made in the skeleton argument that bears emphasis now. We're not criticising Google for the approaches taken to date. We're saying that the problem arises out of the limited scope and the specific nature of the orders that have been made whereby Google is not under an obligation to disclose documents of this sort.

So realistically, as we see it, the only circumstance in which the ongoing duty of disclosure would bite in the present case is if for some reason a document that falls

within one of the repositories, 1 through 11, has been wrongly identified as being irrelevant and for some reason later on is identified as being relevant, then would fall for a disclosure insofar as there is an obligation to disclose relevant documents falling within, for example, Repository 4.

THE CHAIR: Yes.

MR KENNEDY: So that's the sort of -- it's the only kind of inadvertent miscoding during the review process that we say gives rise to an ongoing duty of disclosure whereby we get that document. But the proofing witness example doesn't give rise to any obligation for disclosure.

By contrast, madam, in a case in which there is an order for standard disclosure, or an order that's defined by reference to issues, in circumstances where you're proofing a witness and they say, "Well, I have this document and it falls within the scope of the issues based order", that does fall for disclosure because it's relevant to that issue.

So that's the concern.

The concern is that there are gaps in the disclosure that we don't know about and that we can't remedy, or rather are not remedied by falling within the scope of an ongoing duty of disclosure arising out of the existing orders in combination with rule 60.

Madam, we accepted, quite frankly, at the last CMC that our concerns were principally based on reports from the United States and in that respect our concerns were sort of anticipatory. However, since the last CMC those concerns have crystallised in relation to events that have arisen in these proceedings. In the skeleton argument, we identify four issues which we say justify the concerns we articulated at the last CMC and justify the need for the order we're seeking today.

Now, Google's position, in a nutshell, is that actually the four examples that I rely on show the disclosure process working as intended and that this is stage 2 catching gaps that exist in stage 1 and it's all perfectly -- in a sense, these are the mechanics

being worked through as intended by the Tribunal on the 15 September order.

Madam, we say that's a superficially attractive submission. So what I intend to do is take you through each of the four examples, just to show you why stage 2 is not an answer, and why the order that we seek now is an answer and would provide us with something that we currently don't have.

THE CHAIR: Yes.

MR KENNEDY: Madam, the first issue is what I will call the missing US documents. I just say again: I don't mean missing tendentiously; I just mean the ones that haven't been disclosed to date and which are now going to be disclosed. Mr Jones has addressed you on the history of that quite extensively, as has Mr Holmes, so I will take it briefly.

But, in a nutshell, certain custodial -- non-custodial documents that were disclosed in the US proceedings were not disclosed in these proceedings. My solicitors have been reviewing the expert reports filed in the US proceedings in order to identify documents which are potentially relevant to these proceedings by essentially going through the footnotes of those expert reports and, in that regard, it bears emphasis that as Mr Jones made this point in his submissions: we pushed for disclosure of those expert reports in order to give us a way to get through the 2 million documents and to enable to us identify these gaps. These are not gaps that are sort of visible on the face of the existing documentary disclosure. We don't see an email from so-and-so and say, "Well, actually, the reply is missing", or, "We don't have Q3 monthly report, even though we have Q1, Q2 and Q4". So it's a different gap identifying exercise, if I can put it that way, and represents a huge amount of effort on my solicitors' part.

But that's what's given rise to the delta in that case.

In fairness to Mr Holmes, this is not the matter we relied on in the application. We only made this point in the skeleton argument, that this example justified the KAD order.

But I anticipate he will say this is another example of the disclosure process working as intended. We have spotted a gap, we have asked for a disclosure of the additional documents and these documents are now being provided.

But, madam, we say that this is not evidence of the disclosure process working as intended for two reasons.

The first reason is one I have already anticipated. The process by which these gaps were identified were not reviewing the primary documentation, but rather by reviewing the expert reports. Now, that works insofar as there are documents that we have not seen which are referred to in the expert reports, but it's a trite point, madam. It doesn't work if there are documents which we haven't seen which are not referred to in the expert reports. So it's not a universal solution to identifying gaps within the Stage 1 disclosure.

Secondly, and more importantly, again a point that Mr Jones made, what we have received in disclosure are Google's expert reports in the US proceedings. We have been able to identify publicly certain of the claimant's expert reports, but they're heavily redacted and so we have not been able to do that cross-referencing exercise by reference to the claimant's expert reports. Of course, it's the claimant's expert reports which are most likely to identify adverse documents.

So insofar as what we're seeking is the documents that help us most, if I can put it that way, that process isn't effective for trying to reach that outcome.

So that's why we say that the KAD order does plug a gap, because it would specifically seek to target and identify that body of documents that we're currently not able to identify.

Now, I accept that category of documents, adverse documents referred to in the claimant's expert evidence in the US proceedings, might fall within the 160,000. So we might have plugged that gap as a result of the undertakings that were given today,

but there may be gaps outside of Repository 1, whether we're talking about narrow Repository 1 or wider Repository 1, of a similar nature which we don't know about and which aren't plugged by the provision of that 160,000 documents.

So that's why we say that the examples are illustrative, madam, rather than being exhaustive of the nature of the issue.

THE CHAIR: Is one of the ways round that -- and you will probably tell me it's not possible, or someone will tell me it's not possible -- to say: well, you can't see the claimant's expert reports in the US proceedings, but to the extent that there are documents referred to in those reports those document should be disclosed?

MR KENNEDY: Madam, as I understand it, those documents will be disclosed, potentially, in the 160,000.

Madam, if the proposal is that those documents --

MR HOLMES: Madam, I hesitate to interrupt. But Mr Kennedy seems to be working on the presupposition that the documents in the claimant's expert reports haven't already been disclosed, and he has no basis for that contention.

It was decided by his solicitors not to press for the claimant's expert reports. They expressly decided in correspondence that they weren't going to do that, and that is why there's no application or other business before you relating to the claimant's expert reports today.

If there's a problem resulting from an alleged gap as a result of the claimant's expert reports they haven't sought, the thing for Hausfeld to do is to seek those claimant's expert reports. I find this an extraordinary submission on the part of Mr Kennedy.

THE CHAIR: Thank you, Mr Holmes.

MR KENNEDY: Madam -- after you, madam.

THE CHAIR: Mr Holmes will have his turn in due course, Mr Kennedy, but he has made his point.

MR KENNEDY: Madam, if I may pick up that point quickly.

The complaint is not about the absence of the claimant's reports. The point about the claimant's reports and our inability to use those in the same way that we have used Google's expert reports is about the challenges that we face in seeking to identify the most relevant and the most relevant adverse documents in the circa 2 million documents that have been disclosed to us.

The purpose of the application last time was to enable us to find different ways through that morass of documents in order to try to identify the most relevant documents. The order we now seek serves as an allied purpose, if you like, madam, in that it seeks to capture additional documents that fall outside the ones we have already received and which we -- like the 160 that we hadn't received until -- we still haven't received, and ensure those are caught.

So we're not making a complaint about the absence of the claimant expert evidence per se. We're just saying it illustrates the nature of the problems that we face, and it raises concerns about documents that we don't know -- that we don't know exist, if I can put it that way, madam.

So we're not trying to row back on the position that was agreed in the correspondence and criticise Google for not having given us those reports. It's to illustrate the nature of the problem that we face, madam.

If I could turn, madam, to the question of the new custodians. If we could just start back with the -- you may still have it open, madam, the salient documents bundle volume 1, tab 7, page 312, which is the Tribunal's order of 15 September 2023. If I could just ask you to read again 6.2A and 6.2B, which is the Repository 2 process which was envisaged by that order.

THE CHAIR: Yes.

MR KENNEDY: Madam, Mr Jones took you through the relevant correspondence at

the last CMC, I don't propose to do that again. But the short point is that the CR made various proposals for additional search strings, various proposals for additional custodians, those were largely not agreed by Google. One additional custodian, Mr Cramer, was agreed and three additional search strings. That's explained in our application for the last CMC. There's no need to turn it up, but if we could go, then, to Hausfeld's letter to RPC of 13 October 2023, which is SD/1, same tab, 7, but 316, so four pages on.

THE CHAIR: Yes.

MR KENNEDY: Can I ask you to read paragraphs 2 through 4? So the main body of the text, madam.

(Pause)

THE CHAIR: Yes.

MR KENNEDY: So, madam, the concern that's articulated there is that we had sought confirmation that Google's factual evidence would be advanced by references to documents that have been disclosed to the CR. That's paragraph 2.

That confirmation was not forthcoming. That's the final sentence of paragraph 2: "Your clients refused to provide that confirmation."

Then, paragraph 3, the CR was concerned that Google would therefore call factual witnesses who have not been identified as custodians.

Now, Google agreed to provide that list in their letter of 20 October, which is -- we don't need to turn it up -- it's the same tab, page 319. But, if we could go to the letter in which they actually identify those custodians, it's not in the salient documents bundle, it's in the correspondence bundle. It's tab 43 and the page is 399, which is not 399 in the -- it's 402 in the PDF, madam.

THE CHAIR: Thank you.

MR KENNEDY: What we see, madam, is paragraph 2. They refer to their letter of

20 October. It was identified the following additional individuals are potentially factual witnesses as of today's date, in the Play Store Proceedings and it's Mr Rawles and Mr Byers. Then Google says Google has collected the custodial material of Mr Rawles and Mr Byers and will disclose it subject to a relevance and privilege review and in so far as it's responsive to Google's revised search terms, which were the search terms that they proposed as part of their Repository 2 process.

The three additional search strings, which are the ones I referred to a moment ago, madam, and the search strings on project names set out at paragraph 30 of Mr Maikish's witness statement. So that was the -- the undertaking that was given then was to provide disclosure of those materials voluntarily. Then that disclosure was subsequently provided. I think it's about 1,000/1,200 documents in total were provided.

Now, madam, I have shown you that a specific concern that was articulated by Mr Jones at the last CMC was that witnesses would be identified in due course who had not been identified as custodians. That concern is then articulated by Hausfeld, in their letter of 13 October, where they requested the list of witnesses.

Then what we see by the 11 December letter is that concern was realised. Two additional people were identified as factual witnesses who had not been identified as custodians as part of the Repository 1 process and the Repository 2 process, and Google indicated, as at that date, they were intending to rely on them as factual witnesses.

So we say this clearly justifies the CR's concerns as clearly not evidence of the disclosure process working as intended.

THE CHAIR: Could I just ask you: were there any documents in the disclosure that was provided that were completely new and had not been obtained through the previous searches on the other repositories?

MR KENNEDY: I am being told the answer is yes, madam. To anticipate a point I was going to make: we also didn't identify Mr Rawles and Mr Byers from the Stage 1 disclosure, so they weren't on our radar, if I can put it that way. Because one of the points made by Google is: if we were interested in their documents, we could have asked for them as part of Stage 2. We hadn't identified them at all through our Stage 1 review process, so we couldn't have asked for them. Theoretically, we could have, but we hadn't identified them. So, in practice, we couldn't have used Stage 2 to remedy the fact that we didn't know that they were potentially relevant.

That's the second point that Google makes in response to the application, madam.

The first is that they say that the fact that Mr Rawles and Mr Byers have been identified as potential factual witnesses does not mean that they should have been identified as custodians because they are not the persons who are most likely to possess relevant documents.

Now, we say it's pretty surprising that there is a mismatch between the people who are best placed to give evidence of fact at trial and the people who have the most relevant documents. Ordinarily, you might expect that those people the same people, and the people who are best placed to speak to the relevant documents are people who are being called as witnesses.

But, even if that's not correct, madam, the fact that Mr Rawles and Mr Byers are being called as witnesses, and were intended to be called as witnesses, means that they should have been identified as custodians, such that disclosure was given of whatever documents they did have, insofar as they might be relevant to matters of cross-examination or otherwise.

Now, Google might say that this is a case of no harm, no foul and that because Mr Rawles and Mr Byers had been identified and their documents have been disclosed there's sort of nothing to see here, but we say that that's not right, madam.

As matters stand, the disclosure that's been provided by Google for Mr Rawles and Mr Byers has been provided voluntarily. There is no order for disclosure from them and there is, therefore, no ongoing disclosure obligation in respect of Mr Rawles and Mr Byers.

If could I pick up my proofing example, if, in the course of proofing Mr Rawles and Mr Byers, Google comes across a document or documents that are adverse to them there is currently no obligation to disclose those documents in addition to the documents that have already been provided. We don't say that there is any intention on Google's part to do that, but it identifies the nature of the risk and the nature of the gap that we see in the existing scheme of orders that have been made in respect of disclosure.

So we say in respect of the identification of Mr Rawles and Mr Byers, like the missing US documents issue, justifies not only an order to fill the gaps, but also the KAD order that's sought specifically targets the issue that we're most concerned about, which is non-disclosure of adverse documents that currently fall outside the disclosure order scheme.

I have addressed the point that this could not have been solved through the Stage 2 process.

THE CHAIR: Yes, I mean, I just want to go back to the documents that were disclosed and your client has now had the opportunity to review. I think you said there were about 1,000 documents and there were documents that were not duplicative of documents produced from other sources; were they particularly relevant to these proceedings?

MR KENNEDY: Madam, could I just take instructions for one moment on that question?

THE CHAIR: Yes.

(Pause)

MR KENNEDY: Madam, the answer is that they are relevant documents. We can't say that there's any smoking guns or anything like that in them and that they're sort of of a piece with other things we have seen in terms of the level of relevance, if I can put it that way. The precise number is 1,180 in total for the two custodians.

THE CHAIR: Yes. To be fair, it was an unfair question because they had been reviewed for relevance, so they have a measure of relevance, but you are right to identify that I was interested in whether there was a smoking gun.

MR KENNEDY: Yes. That's the case, madam. I can't say there is a smoking gun, but they are of a piece with other things that we have seen, if I can put it like that.

THE CHAIR: Thank you.

MR KENNEDY: Madam, that takes us to the behavioural issues data. You may recall those issues from the last CMC. I don't know if it would be helpful to turn up the list of issues or whether we can take that as read, madam?

There are four issues, issues 15 to 18, and they concern matters such as side loading and things of that nature.

THE CHAIR: If you have a quick reference I might as well look at it. I'm afraid I haven't carried it in my head.

MR KENNEDY: It's salient documents bundle 1. It's tab 3, which is the exhibit to my application, and it's page 157. It's landscape rather than portrait, so it's slightly awkward if you're working on hard copy.

THE CHAIR: Yes, I have them here.

MR KENNEDY: On the left-hand side, you will see, near the bottom, "Behavioural issues" and it's 15:

"Where Google Play is pre-installed on an Android device what proportion of users side-load an alternative app store?"

Over the page, 16:

"Where Google Play is pre-installed on an Android device what proportion of users un-install the app store, delete the icon or otherwise disable that app? What proportion of users use an alternative app store once it has been installed?

"17. What proportion of users single home on one particular app store and multihome on more than one as far as can be judged?"

And 18:

"What is the effect of the following individually and together on the proportion of users attempting to side load an alternative app store or app onto the Android device, failure to complete installation due to apparent lack of technical knowledge, requirement to change default settings, partial completion relating to the triggering of security warnings? More generally, what proportion of users start the process of side loading, but stop before completion?"

THE CHAIR: Yes.

MR KENNEDY: The Tribunal's reasons in respect of those issues is provided in the right-hand column, and the Tribunal said:

"The Tribunal considers the conjunction of user and likelihood to be too uncertain ... considers any response is likely to be speculative. The Tribunal does however accept [this is over the page] that some expert evidence from an expert competition economist on this issue will be necessary, but it should be by reference to objective data."

So that's where the Tribunal came out on that; not discrete expert issues and not issues for someone other than the competition economist, but issues in respect of which data would be required in order to allow the economist to opine on those issues.

Madam, you may also recall that Google opposed the inclusion of those issues in the expert list of issues at the last CMC, but accepted that the issues relating to, for example, the prevalence of side loading were issues that arose in the case and in

respect of which disclosure would be required.

THE CHAIR: Yes.

MR KENNEDY: I don't think we need to turn it up, but it's page 115 of the transcript, lines 15 to 16. The reference for that is salient documents bundle 2, tab 24, page 658. What Mr Draper, for Google, said was:

"Just to give some comfort perhaps to my learned friend and those behind him, Google does anticipate disclosing a lot of data that goes to those issues."

"These issues" being the behavioural issue.

THE CHAIR: Yes.

MR KENNEDY: Just pausing there, it's worth emphasising that what Mr Draper said was that Google anticipated disclosing a lot of data that goes to these issues, not that Google had disclosed already a lot of data that goes to these issues.

So, the statement made by Mr Draper was entirely forward-looking.

In light of those comments, my solicitors wrote to RPC, on 16 November 2023, that's salient documents bundle 1, tab 3. So we're back in the exhibit to my application, madam. It's page 171 of the bundle.

THE CHAIR: Yes.

MR KENNEDY: What we see, at paragraph 2, madam, is a summary or a quotation from Mr Draper's exchange with yourself, madam, at the CMC.

Then paragraph 3:

"We note that this is the first time your clients indicated that they hold data relating to the prevalence of side loading among GMS users and that it has not yet been disclosed to our client. Our client is concerned by your client's failure to notify us of this data and to disclose it previously in circumstances where the disclosure appears to be a category of materials highly relevant to the Play Store's Proceedings; indeed, it would have been obvious to your clients that the data was necessary following, at

the very least, when our client applied for permission to adduce evidence from behavioural scientists at the second CMC."

Then final sentence:

"This failure to disclose is exactly the concern that our client sought to address when she made her ongoing disclosure direction application at the third CMC."

That's the old application.

THE CHAIR: Yes.

MR KENNEDY: We can see Google's response at tab 7 of that bundle, so SD1, tab 7, page 320. This is Google's letter to Hausfeld, RPC's letter to Hausfeld of 23 November 2023. We see paragraph 2:

"The suggestion that there's been a failure to disclose data relating to the prevalence of side loading among GMS device users is simply wrong. Google has already disclosed various datasets relating to the prevalence of side loading among GMS device users and it is concerning that your client is apparently unaware of such disclosure. This only serves to exacerbate Google's broader concerns previously expressed around your client not properly reviewing the disclosure that has been provided."

Then, paragraph 3 identifies four documents that have been disclosed. Then, paragraph 4, what we see is:

"Google has previously indicated in its disclosure report, filed on 20 February 2023, that there may be disclosure of additional repositories of data once the number of experts, field of expertise, a list of issues for the experts has been identified and agreed. In addition, we previously explained in our letter of 28 September 23 that Google anticipates that it may disclose further datasets under Repository 12 and that it may in due course refresh data sets it has already disclosed ..."

And so on.

So the point made there, madam, is that Google anticipated maybe disclosing further information in respect of these issues.

THE CHAIR: Yes.

MR KENNEDY: And paragraph 5:

"Now that the parameters of expert evidence to be adduced in these proceedings has broadly been set by the Tribunal ..."

So this is after, madam, the Tribunal had sent the finalised list of issues:

"... Google anticipates that further data sets may be required, as previously explained, and will provide a further update."

Then a further letter, sent on 26 January of this year, which is in the same tab, at page 362.

THE CHAIR: Yes.

MR KENNEDY: What we see there is, at paragraph 2, a summary of documents that Google has to date disclosed in the proceedings. Then nine documents are identified in the footnote, madam, which include the four previously identified in the previous letter, so nine in total.

Then, over the page, madam, 3:

"In addition Google has been investigating what further data is available in relation to behavioural issues. We confirm that Google anticipates disclosing further datasets which address the following matters ..."

A through E.

Then 4:

"Google anticipates being in a position to disclose some of those matters in advance of CMC 4."

So in advance of today's hearing. Those documents were sent yesterday, madam, so that's 3A, B, D and E arrived yesterday. Then paragraph 6 goes on to explain that

there's certain categories of data that Google thinks it won't have and won't be in a position to disclose.

THE CHAIR: Yes.

MR KENNEDY: Madam, three points in respect of Google's position on this issue. First, Google has said in correspondence in their skeleton that there's been no failure to disclose, but, madam, we say that's precisely the point. We don't say, and we never have said, that there's material relating to the behavioural issues that falls within the scope of the orders for disclosure that have been made to date and that have not been disclosed by Google. There is a suggestion in Mr Ross's statement that is the suggestion made by the CR, but it's not. There is no allegation that there has been a failure to disclose at Stage 1.

What we inferred from what was said by Mr Draper, at the CMC, and that was confirmed in correspondence by Google, is that there's material that does not fall within the scope of those orders which is relevant to these materials and which has not yet been disclosed, or was only disclosed yesterday, which is relevant to these issues.

This is not criticism of Mr Draper, but it bears emphasis that the remarks made by Mr Draper were only in response to the question from the chair as to his position on a certain matter. They didn't form an integral part of his submissions at the CMC. So, once again, it's luck not design that revealed the existence of potentially relevant documents that fall outside the scope of the existing disclosure orders.

It's the review of the US expert reports that led to the identification of the 160,000 document that haven't fallen in Repository 1. It's my solicitors pressing for identification in advance of the service of witness statement for identification of any witnesses who have not been identified as custodians, and it's Mr Draper's remarks at the CMC that revealed the existence of the further additional behavioural issues data.

THE CHAIR: Yes.

MR KENNEDY: Now, madam, I have shown in the correspondence that Google places some reliance on the fact that they always intended, potentially, to disclose further material in this regard, and that may well be the case, madam, but it's no answer to the application that we make now because any such further disclosure is entirely in Google's gift. Whether or not they made that disclosure, it didn't fall within the existing scope of the order. It would be entirely voluntarily.

So it's not the case that these documents -- as far as we understand it, it's not the case that these documents fall within an ongoing disclosure obligation because they fall within the scope of when the order is already made. We understand that not to be the case, and Mr Holmes will correct me if I am wrong.

So, once again, that's why we say that we need an order that sweeps up things that fall outside of the scope of those orders and, we say, the target and the proportionate way of doing so is to identify the adverse documents that are relevant to the issues in this case.

Just sweeping up one point, there appears to be a related suggestion that the reason Google didn't disclose these data sets earlier is because it was waiting for the expert issues to be settled. But, madam, that explanation, too, comes up short.

At the last CMC, Google accepted unequivocally that the issues to which the data are relevant are issues that arise on the pleadings. We say that insofar as the issues were clear on the pleadings, disclosure was always going to be required in respect of them and that disclosure should have been forthcoming before it was identified by Mr Draper in the course of his submissions.

Finally, madam, I just want to address the suggestion that this issue could have been addressed to the stage 2 process. We say that's entirely unrealistic.

Firstly, we're talking about nine documents out of a total of 2 million. The phrase "needle in a haystack" is often used in the Tribunal, but I think it can quite fairly be

used today for nine documents out of 2 million.

As my solicitors have made clear in correspondence, they have been using technology to try to whittle down that 2 million to identify the documents that are most relevant. I don't want to give evidence from the Bar, madam, but I am told that technology is not well placed to identify documents of this nature because they may not have key words, they may be in Excel format, so they're just not captured by that process or not captured as well.

If I could just show you one of the documents, madam, I think it was emailed by my solicitors earlier to the Tribunal. I understand it was also emailed to RPC, so I hope Mr Holmes has had a chance to look at it. It's one of the nine documents identified in correspondence. It has the file name "GOOG-COLL-2" and then it ends with 2566. I don't know if you do have access to that?

THE CHAIR: I have a list of numbers on the left-hand side and the first one is unknown source.

MR KENNEDY: It's confidential, madam, so I'm just reluctant -- I could probably give you the column heading, which is "Date" and "Source installed"; do you have that, madam? The six-page PDF.

THE CHAIR: I have a six-page PDF, but I don't have any columns on it. We just have a list of numbers on the list. My first line is "Unknown source". That's the information that I have.

So I don't have your headings, I think. I think, perhaps it's been --

MR KENNEDY: I don't think my first one is "Unknown source", but I think I can read out the first number on the left-hand side, can I, without compromising the confidentiality? Mr Holmes is nodding.

THE CHAIR: Yes.

MR KENNEDY: I have 43647 -- is the first number I can see on the left-hand side; is

that the same number that you have, madam?

MR FRAZER: I think the first line is UK raw --

THE CHAIR: Oh.

MR FRAZER: -- is it not?

MR KENNEDY: That's correct. I'm grateful.

THE CHAIR: It's been stapled together back to front. That's why I haven't found it. Your first line is different to mine because I'm looking at the last page and you're looking at the first.

MR KENNEDY: Madam, I can assure that you it makes no difference to the intelligibility of the document whether you read it backwards or forward, or upside down, which is precisely the submission I wish to make.

It's confidential, so I won't describe is beyond what we have already done. But this is a document in which the Class Representative could identify gaps in the disclosure by reference to documents of this nature. This is just one of the nine documents, but they're all pretty similar, madam. We say it's just entirely unrealistic.

To make that good, my solicitors wrote a letter to RPC -- it's at CR/597. I don't think we need to turn it up. It's all confidential anyway -- in which they went through the various letters and numbers and columns, and asked for an explanation of what it all meant. So there's no world in which realistically we're going to find these nine documents and, even if we did, that we were going to be in a position to make targeted additional disclosure requests on the basis of these nine documents in Stage 2.

So we say that sort of puts paid to the idea that Stage 2 is a solution to this particular problem, but that's without prejudice to my general submission, which is that these problems are illustrative not exhaustive.

One final point madam in the skeleton, Google say they don't understand how the order sought would solve any question of delay in providing documents relating to

behavioural issues.

Madam, it's right that the order won't retroactively result in these documents being disclosed earlier, but had the KAD order been in place previously, and if these documents are adverse to Google, then it would have been caught by that order, notwithstanding the fact that they didn't fall, as is the assumption we have made, within one of the existing repositories. So we say this is another example where the KAD order might bite. I can't say it would, as I don't know whether the document are adverse or not. But it's a good example of where the KAD order might bite and might have additional utility.

THE CHAIR: Yes.

MR KENNEDY: That brings us to item 4 which is the project names issue. If we just pick up our application, which is first volume of the salient documents bundle, tab 2 and it's page 12.

THE CHAIR: Yes.

MR KENNEDY: If I could ask you to read paragraph 44, you will see that there's some highlighting because the terms in question and the explanations are confidential.

THE CHAIR: Yes.

MR KENNEDY: So we identify two project names there. These are just examples, madam. You may have seen the extensive correspondence on the project names issue, and there are further project names that my solicitors have identified in the course of their review that think are relevant, and which additional disclosure has been provided in respect of, and additional enquiries are being made in respect of.

It's a short point, madam, but it's clear the project names that we identify in that paragraph, these particular two, if they had been used as part of a search string, may return documents that are relevant to issues in this case. But they were not included in the search strings proposed by Google following the second CMC, in June 2023.

Now, madam, Google say this is simply evidence of disclosure process working as intended, but, in my submission, madam, it's not really the same thing as the CR identifying further primary documentation, which she wants based on her review of the disclosed documents. To go back to my example of a missing monthly report, whereby we have September, we have December, but we don't have October and November.

The meaning of projects names, as is intended by the use of code names, is entirely within Google's knowledge. When my solicitors see project X or project Y, they have no idea whether those words are relevant to the case or not. So what they're required to do is precisely what they have done, which is they write to Google, they say: we have identified project A through F. What are these about?

They get a response. If they seem relevant, they ask Google to run a search across and they give a repository and ask for a number of hits. If it's proportionate, they ask for disclosure of those documents.

Just quickly, madam, just to make good the point about the un-intelligibility of some of these project names. If you have a quick look in salient documents 1, tab 7, page 306, this is one of the letters between my solicitors and RPC in respect of project names.

THE CHAIR: Yes.

MR KENNEDY: If we look at paragraph 3, what RPC say is:

"Without the appropriate context for the acronym [I am not sure whether it's confidential, so I will omit that, and the project name, and I will omit that] ... Google is unable to confirm the meaning."

So this is Google's solicitors and they don't know what some of these things mean outside of the context in which they're used.

So you can see that the difficulty for my solicitors is an order of magnitude greater in circumstances where they're not their clients' documents, so that's the problem that

we face.

So we say, once again, that it's not really what the Stage 2 disclosure process was intended to achieve. This is not the sort of gap that it was intended to remedy. However, had Google been under a KAD obligation, and had any documents that were responsive to the unidentified project names and which were adverse to Google been in existence, then they would have been disclosed earlier on and not only as a result of this extended and protracted correspondence between my solicitors and RPC.

Madam, on the question of necessity I just have one final point to sweep up, if you like, which is a point that's made in Google's skeleton argument, at paragraph 14. Google says:

"The key issues arising in these proceeding involve objective economic assessment measures taken by Google. The focus at trial is likely to be on the economic value that Google adds as well as the economic effects of Google's measures."

And, madam, we say this is really just a bad point. There are myriad issues in this case which will be decided by reference to contemporaneous internal documents produced by Google.

To just take two examples, market definition will inevitably involve consideration of such documents. Objective justification will inevitably involve consideration of such documents. This is not a follow on damages case arising out of a cartel where we're just looking at data and producing regression analysis. It's not a case of that nature.

So we say that insofar as that's a point that's said to go to necessity, we say it doesn't take them anywhere.

I infer that it also goes to the question of proportionality and the workability of the wording that's sought, and that's matter that I am going to come on to address now, madam.

THE CHAIR: Yes, thank you.

MR KENNEDY: Madam, we say the order sought is targeted and proportionate. We say that it provides a clear definition of what is to be disclosed. There's an express definition of the meaning of "adverse" that's expressed in ordinary language. It's not the same as "relevance" where there's no express definition and which might be open to subjective interpretation in the same way.

There's an express definition of whose knowledge is relevant, who are the relevant people who must know of the existence of the adverse documents in question. It's relevant people with responsible or accountability for the matters in question.

There's a clear definition -- we have already touched on this, madam -- of what knowledge is required. It's actual knowledge of the existence of a document, that it's within the parties' control, and its adversity.

But we're not talking about constructive knowledge and it makes clear what does not need to be done, and that's the point about no new searches.

So, madam, we say this is absolutely not standard disclosure by the back door. It's a point I made at the start of my submissions. We're not seeking to reinvent the wheel, and we're not seeking to impose search obligations on Google.

Now, madam, Google's position, as I understand it, is three-fold.

First, they say that the order sought would be disproportionate because it would apply to a considerable number of people.

Second, they say that there will be difficulties in applying the definition of "adverse" and, third, Google say they would be required to take bespoke steps in respect of each of the different people who are subject to the orders, so the relevant people with responsibility and accountability.

Madam, I will deal with each of those three points in turn, but one preliminary remark is that proportionality doesn't mean cheap and easy. It's proportionate to -- in the context of these proceedings. It's inevitable that, in a company of Google's size, the

number of people to whom a KAD order might attach will be greater than in the case of a smaller company. The steps that might need to be taken, given the complexities of the issues that arise might be more onerous than in a smaller and more straightforward case.

But we say that in itself is no answer to the application. Google is an extremely large company. These are large proceedings, worth a lot of money. It's inevitable that some of the disclosure obligations imposed on Google will be onerous.

We say, viewed in the round, Google's disclosure obligations in these proceedings have been lighter than they might have been, given that the 2 million documents that form the large majority of the documents disclosed were a pre-existing set of documents. No further searches were carried out over Repository 1, no further relevance review. They were just transferred from RPC to Hausfeld. We say that that forms part of the overall context in which proportionality has to be assessed.

Turning then to the three points, madam.

First, number of people who would be captured by the order. This was raised by Google in correspondence and it was a point that we responded to in the application. We said that the matter was entirely unparticularised. Google makes the point again in its skeleton argument, but it remains unparticularised. Google don't say: we estimate we need to speak to ten people or 100 people, or 1,000 people.

Doubtless there are reasons for not saying what the estimated number of people is. But, without some indication of even the order of magnitude we're dealing with, it's very hard for the Tribunal to take a view on proportionality. We just don't know.

The numbers that we do know, we know that there are 46 custodians in total. That's the 44 plus Mr Rawles and Mr Byers. But, even if all of them fell within the scope of the KAD order, we say that wouldn't be disproportionate in the context of these proceedings.

Now, madam, just on the question of who it applies to. There's a complaint made in paragraph 21 of the skeleton that at the last CMC the order sought attached to RPC and now the order sought attaches to Google. But one of the reasons the order was opposed last time was for -- amongst other reasons, that it attached to RPC and it was said that there wasn't a principled reason to attach to Google's solicitors. So, we say they can't have it both ways. It can't be objectionable that it attaches to RPC last time and objectionable that it applies to Google this time.

Now, madam, turning then to the second point, which is the difficulty in applying the test for adversity. It's said that it would be difficult, if not impossible, for business people to apply tests for adversity.

I have touched on this before, madam. But we say that the concept of adversity is clearly different from the concept of relevance in that an express definition is provided in PD/57A. I have said this before, it's expressed in ordinary language that it's readily intelligible to the sort of people at Google who are going to have to turn their minds to the question of whether they have any knowledge of the existence of adverse documents.

Again, I touched on this in opening, but we accept that if you sat with 1,000 documents and you asked someone who is not a lawyer, or even who is a lawyer, whether each document was adverse within the meaning of PD/57A, that may give rise to a different question. But that's not what's required by the order that's sought.

What's required is that enquiries have to be made of the relevant people and they have to have the relevant issues explained to them, the concept of adversity explained to them and shown to them, and they have to be asked if they know of the existence of any documents within Google's control that meet that definition.

So it's not a review exercise that gives rise to acute difficulties in looking at a spreadsheet when the example given, I think in Mr Ross's statement, was: you're

looking at a complex financial spreadsheet, it's difficult to know whether it's adverse or not. That's not -- that circumstance doesn't arise out of the nature of the order that's sought.

Further, madam, PD/57A expressly envisages that the definition of adversity may be applied by lay people. The fact that lay people may be less good on objective measure identifying adverse documents is sort of nothing to the point. It's not what's required. It's not that all adverse documents have to be identified. Relevant people have to be asked if they know of the existence of any adverse documents and, as far as they do know of those documents, those ought to be disclosed.

Mistakes may be made, madam. We say that the risk of false negatives is much higher than the risk of false positives. So the risk of mistakes being made much more likely negatively affects my clients than Mr Holmes' clients. We may not get documents that are adverse because someone doesn't remember that they exist or they mistakenly think that they're not adverse. That may well happen. That's not a reason not to make the order, madam.

Madam, just finally on the question of whether a bespoke process is required for each person, we say that overstates the point.

Inevitably enquiries will have to be made of each person, but we don't envisage that RPC and Google have to reinvent the wheel each time in creating a description of what the issues are that arise in the case and a description of what adverse document are. It's very likely that a document can be created that summarises the nature of the issues in the case in an appropriate way and enquiries can be made by reference to that document and the enquiries can be more targeted. If there is a relevant individual who knows something about market definition, but nothing about excess pricing, then they could be asked the matters to do with market definition.

So we say that it's not the case that a bespoke process is required for each person.

So, madam, that's what we have to say about proportionality. Unless you have any questions, those are my submissions.

THE CHAIR: I think in your submissions you were talking about applying the KAD obligation to the 46 custodians, which was the 44 plus the two.

MR KENNEDY: Yes, madam.

THE CHAIR: You consider that would be disproportionate; would you be content if it was confined to those 46 custodians?

MR KENNEDY: Well, madam, we're in some difficulty in answering the question, in that we haven't had any indication of what Google thinks the total number or the identity of the people who would fall within the meaning of "people with relevant responsibility and accountability". What I can say is that we're open to discussing whether or not there is a finite list of people that can be drawn up. Whether that's limited to those custodians or whether it's those custodians and others, for example, madam, you will note that the Practice Direction envisages not only people with responsibility for the underlying matters, but also those with responsibility for conduct of the proceedings being subject to the order. So it may be that the appropriate order is the 46 plus relevant people with conduct of the proceedings.

As I say, madam, we're in difficulty in giving a definitive answer to that, in circumstances where we don't know whether on a strict reading of the rule, madam, there would be 150 people or 200 people that would fall within it.

So we are open to a finite list, and we understand that that's what's been done in the other cases. I think in the Foundem case a finite list of people to whom the KAD order applied was agreed.

If I can put it that way, madam, and maybe come back to you in light of what Mr Holmes has to say about that, I would be grateful.

THE CHAIR: Yes. If you could find me the reference to the case that would be helpful.

MR KENNEDY: Of course, madam.

THE CHAIR: Thank you.

THE SHORTHAND WRITER: Could we have a break, please?

THE CHAIR: I was just receiving a rather a hard stare from one of the referendaires to the same effect. Should we have a 10-minute break? So we will come back at 3.05.

(2.57 pm)

(A short break)

(3.05 pm)

THE CHAIR: Yes, Mr Holmes.

MR HOLMES: Thank you, madam. We resist the application, and that is for three reasons.

First, in our submission, this obligation would not achieve anything useful in the circumstances of this case. That is because it is very unlikely to unearth additional documents and data that are needed to resolve the case fairly.

Secondly, we say that the Tribunal can have confidence that those documents and data have been and will be captured by the massive existing disclosure exercise. The Class Representative's allegations that gaps have been shown in the regime are not well-founded. I will go through his -- Mr Kennedy's four examples.

They are clearly the best that the Class Representative has been able to muster for the purposes of this hearing, and we say they do not show a source of adverse material that was not obtained and not accessible under the existing process.

Third, we say that this is a not a simple and costless addition to the existing regime. It would involve a burdensome and challenging further process of enquiry covering a large and indeterminate number of people, and that is notwithstanding the fact that it is not an obligation, primary obligation to search for documents.

Given the lack of benefit from, or reason for it, we say it is disproportionate and should be rejected.

Now, I will develop those points in turn. But, as a preliminary comment, can I first draw out a couple of additional points about the disclosure exercise which is already underway? I know you've already heard submissions about that in relation to the Repository 1 set, but I think it's worth noting some other features.

You have the point that the proceedings were inspired by and reflect arguments raised in other proceedings in the United States. Those proceedings were well underway when the claim was brought. It's not correct, therefore, to say that the documents were collected were for purposes other than the present proceedings. They were collected with the issues that are in play in these proceedings very much in mind, and huge effort was devoted to collecting documents in the context of the US proceedings. The overlap in the proceedings and the approach to collection in the United States were explained in a letter I already took you to, the letter of 3 May 2023. It's in the salient documents bundle, at tab 13.

THE CHAIR: Yes.

PROFESSOR WATERSON: No. Correspondence bundle?

THE CHAIR: I have a 3 May 2023 letter at my tab 13.

MR HOLMES: Tab 13, yes, great. Thank you, madam. I momentarily had mislaid my bundle.

If we can turn, first, to page 452, you see, at paragraph 3, details are given of the US proceedings. Just by way of example, for Epic Games. Epic alleges Google has monopolised an alleged Android app distribution market through its Google Play policies and licensing deals with Android device makers. Epic alleges that Google has restrained trade in the alleged separate Android market for in app payment processing. The other proceedings are of similar scope.

What they go to show is that the issues in those proceedings are very closely related, very familiar to anyone involved in these proceedings.

Then, turning on to page 466, this is the annex which describes the US disclosure exercise. Paragraph 2 explains that there were 12 rounds of requests for production involving over 300 requests.

Paragraph 5, which you have seen, explains that the approach involved identifying centralised repositories or identifying relevant custodians and applying search terms.

Paragraph 6 explains that there was a process of negotiation between the parties to identify relevant custodians, the date ranges, the search terms and categories of searchable documents.

Paragraph 7 explains that 44 custodians were identified, and their documents were searched using search strings.

Then, at 11, you see that approximately 48.1 million documents were collected as a result of this process and that search terms cut them down to 6.2 million. They were then manually reviewed for relevance using a team of 400 document reviewers and 3 million documents were disclosed. In these proceedings, you have the point that the custodial documents from the US discovery set, amounting to some 2 million of 3 million documents were disclosed and, in addition to the US documents, there have been a number of other UK non-custodial repositories used.

Since then there has been further disclosure, financial data disclosure, Stage 2 disclosure is ongoing, with further searches and further documents and data provided and to be provided.

So, on any view, this has been a massive exercise. Google has invested huge time and efforts in locating relevant materials. The issue for the Tribunal is whether it should usefully -- the obligation today be usefully added to this regime.

We say not for the three reasons I have articulated.

Starting with the first of those, we say it's unlikely to help in identifying further materials that are important for the resolution of the claim. Mr Kennedy has explained that the obligation would apply to Google's employees with accountability or responsibility within the company or organisation for the events or circumstance which were the subject of the case. It would require them to assess whether they're aware of any documents adverse to Google's case in the proceedings, and that is of course one half of the relevance assessment. Documents are relevant for the purposes of disclosure if they are either helpful or unhelpful to the case of a party to the proceedings.

The difficulty with operationalising, it's an obligation in this case, arises from the nature of the issues which arise. Those issues, we say, do not lend themselves to a ready identification of adverse documents. This is not a case which turns on sharp disputes of primary fact, whether and when a meeting took place, what was discussed, who said what to whom, as you alluded to, madam, smoking gun documents of the kind that are sometimes decisive in civil litigation.

Where there are sharp-edged disputes of that kind one can readily see how a known adverse documents obligation would work and usefully contribute to the fair resolution of a case, but that is not this case.

Instead, the central issues which arise in the case are ones of objective economic appraisal. They relate to the definition of the relevant markets, to the assessment of whether Google is dominant on one of more of those markets, to the competitive effects of various technical features and contractual arrangements, to the fairness of Google's pricing, adjudged under the particular tests laid down in the EU case law, and to the extent to which the developers pass on the service fee to their downstream customers.

Now, of course, data and documents will be relevant to assessing those questions. They are ordinary course of business materials generated over a lengthy period of well

over a decade by the people involved in the relevant parts of the business. Those documents have been collected and they have been disclosed in very large volumes. But a competition claim raising those types of objective question is not well suited to a known adverse documents regime, and it's worth perhaps noting, if one returns to the authorities bundle for a moment and to the relevant Practice Direction, which is at tab ...

THE CHAIR: 6.

MR HOLMES: 6, thank you, madam. And turn to page 323 of that tab and the general provisions at the front of the direction. You see at paragraph 1.4:

"The Practice Direction shall not unless otherwise ordered apply to proceedings which are a competition claim as defined in Practice Direction 31C."

So competition claims are expressly excluded unless otherwise ordered by the court hearing them from the scope of this regime, which applies -- there was some suggestion, I think by Mr Kennedy, that it applied in the High Court generally. But I know, madam, that you are well alive to the point, it applies specifically to the business and property courts, so it's not universal, even in the High Court. But, in any event, and perhaps as a consequence of the nature of the economic assessments that are central to competition case, it is not generally applicable to such claims.

We say that the task of identifying from the mass of materials, which have already been disclosed and which have been generated over many years, which documents and data may be helpful or adverse to one or other of the parties is far from straightforward for obvious. That is why huge numbers of documents and large volumes of data have been collected based on agreed search terms and cuts of the available data sets.

You will recall, madam, and as Mr Kennedy observed, this application is the reincarnation of a previous abandoned application at the last CMC, which was for

Google's lawyers to hand over all relevant documents within ten days of receipt. You queried then whether it would be straightforward even for the lawyers in the case to identify documents that are relevant in the case.

Mr Kennedy showed you it, but I think we could perhaps return to it, so that I can highlight the passage that I particularly have in mind. It's at salient documents bundle volume 2, tab 24, page 622 of the bundle numbering.

THE CHAIR: Yes.

MR HOLMES: It's the passage at the foot of the page, beginning at line 23:

"Not every relevant ..."

This is you speaking, madam:

"Not every relevant document is disclosable because it might be disproportionate, for example."

Picking it up, perhaps, at line 18:

"Isn't there a problem with how that order would work? Because relevant documents in a case like this, and in a lot of cases in the CAT, we have targeted disclosure and the requests -- the whole point about the various categories and the orders that are to be made is the focus is on particular areas that the Class Representative thinks will be relevant. I am not quite sure how it is going to work because you're asking RPC to consider, what you will consider, your client will consider is relevant. You're asking RPC to sit in your client's shoes and you may have very different ideas about relevance."

Now, we say that we respectfully agree that is an issue in relation to the order that was proposed last time around, but we also say that the concern is amplified very significantly by the present proposed obligation, which would apply not to the lawyers in the case, who are deeply immersed in the litigation, but to an indeterminate number of Google business people with responsibility for the activities which are covered by

the litigation.

Given the broad nature of these issues, the sensible course is not to make enquiries of relevant business people as to the existence of adverse documents, but instead to identify custodians and search their course of business documents, as has been done. If necessary, to supplement that by means of targeted non-custodial and custodial disclosure, building on particular search terms that are thrown up by the first search. That's exactly what is happening in this case.

Both Mr Kennedy and Mr Jones have returned to one focused concern when developing their reasons for having this obligation, and that is a concern of documents being identified in the process of proofing witnesses that might then not be disclosed. A witness might say: I have a document that's relevant to this, which I think cuts against what Google is saying.

The concern is that in those circumstances Google would not disclose it. We say that is not the case.

Indeed, the Practice Direction, as we read it, of this Tribunal in relation to the preparation of witness evidence excludes that type of behaviour.

If we could go, please, in the authorities bundle to tab 8, page 382.

THE CHAIR: Yes.

MR HOLMES: Look at paragraph 3.2. This is under the heading "The content of witness statements", and:

"A trial or appeal witness statement [it says] must set out only matters of fact of which the witness has personal knowledge that are relevant to the case and must identify by list what documents, if any, the witness has referred to or been referred to for the purposes of providing the evidence set out."

Now, we say that applies and extends to documents identified during the process of proofing witnesses. But to put this concern absolutely to rest, we would have no

difficulty confirming that enquiries will be made of all the factual witnesses who are proofed to give evidence, to ask whether they are aware of any known adverse documents in relation to the matters covered by their evidence and to disclose those documents within a reasonable and realistic period.

We say that would be a focused and proportionate direction and it would cabin this in a way that would address the proportionality concerns which are writ large in the light of Mr Kennedy's submissions, suggesting that as many as 46 custodians might need to be quizzed, including those no longer with the company, or perhaps more.

We think that is a focused way of addressing a concern that, as I say, both Mr Kennedy and Mr Jones majored on in their submissions when developing version 1 and version 2 of this application, and that may provide a satisfactory way forward.

But you have my submission that, given the nature of the issues in this case, this would not help.

That brings me to the second point. We say the existing framework of disclosure is working well. We say there are not any obvious gaps or deficiencies that have come to light in relation to it. Several have been suggested by the Class Representative's solicitors, but we say on inspection they are threadbare, and they really show -- go to show how little of concern there is here.

Now, three were set out in the applications letter, if I could deal with those first. The first concern relates to the identification of relevant custodians and Google's identification of two additional potential factual witnesses who have now been added as custodians. It's described in the applications letter, and we could perhaps go to see what is said there. It's in the salient documents bundle, at tab 2, page 11.

THE CHAIR: Yes.

MR HOLMES: You see, from paragraph 39, that Google's solicitors identified two additional potential witnesses of fact, Mr Rawles and Mr Byers, and the complaint is

made, at paragraph 40, that this happened only two days. Only days after Mr Maikish of Google had confirmed that the Repository 2 custodians were those that were most likely to possess relevant documents. Now, that "most likely to possess relevant documents" was of course the formulation that the Tribunal had specified in its order following CMC 3. We say, with respect, that is the right question to address one's mind to when deciding whether the correct set of custodians have been identified.

And we stand by what Mr Maikish said in that witness statement. We think the 44 original custodians and the 13 that were the subject of Repository 2 disclosure are, and were, the persons who are most likely to possess relevant documents. But the fact that somebody is a suitable witness of fact doesn't mean that they are also necessary for inclusion as, or selection as, obvious custodians.

The reason why Mr Lee Rawles and Mr Rick Byers weren't included as custodians is simply because they do not fall within that category as people who are most likely to possess relevant documents. They have been identified instead because we think they have relevant factual evidence to give on particular matters that arise in this case. The reason why their documents have been collected and why they have been added as custodians is in fairness to the Class Representative, so that their evidence can be tested in the light of documents in their possession.

So the documents have been collected because they're witnesses, not because they were ever suitable custodians under the criterion that was applied by Mr Maikish in giving his witness statement.

So we simply say there's nothing to this point. It's bad point to suggest that the two additional witnesses of fact have been identified means there was anything amiss about the original identification of custodians.

THE CHAIR: But if they are significant enough to be selected to be factual witnesses; does that not suggest that -- nobody these days works in a vacuum -- they could be

custodians most likely to have these documents?

Does that follow?

MR HOLMES: They are giving evidence on particular features of the industry, particular trends in the industry. I think I can say one is going to be commenting on the cloud -- so one comments on web apps and one comments on gaming. So, really, they're industry trade witnesses describing how the industry operates. That does not make them -- we stand by our point, that does not make them suitable custodians because of their core involvement in running the relevant businesses across the relevant timeframe. That's not why they're being put forward.

Now, of course, in fairness, given playing cards face up and all the rest of it, we have made a collection of documents. We anticipated that's what the Class Representative would ask for, but that's not because we see them as core suitable custodians. So there's no mismatch between the identification of those factual witnesses and Mr Maikish's statement only days before. That's a simple confusion on the part of the Class Representative's advisers.

Madam, we're also conscious that the 1,200 documents have been pored over by the Class Representative, and what there isn't before you today is a single example of a known adverse document arising from their searches.

You asked, madam, whether they have provided relevant material. Well, the material was disclosed because it was responsive to search terms and it's within the scope of these proceedings. But, of course, the test when you're deciding upon the incremental value that a known adverse document's obligation would provide isn't whether it would generate yet more relevant material. We have relevant material a-go-go already in these proceedings. You know, 2 million of them are out there for the Class Representative to romp through later.

There is no -- and that is why the test for disclosure is not only whether documents are

relevant, but whether the disclosure is necessary and proportionate. We say that a known adverse documents obligation is not -- a need for a known adverse documents obligation is not demonstrated by the addition of two new custodians by reason of the fact that they will be giving factual evidence.

So the second category was the existing -- was alleged problems with existing disclosure relating to the behavioural issues data, and that's developed in the applications letter, salient documents bundle 1, tab 2, page 11, beginning at paragraph 41.

The nub of the complaint is, at the third CMC, Google's counsel noted that there would be data disclosure relevant to behavioural issues. That is being provided as part of the Stage 2 disclosure process.

I should say that the disclosure report right back at the beginning of this process from Google stated in relation to Repository 12 that this would be dealt with in the following way -- we should perhaps turn it up. It's at core bundle C/3406.

THE CHAIR: 3406.

MR HOLMES: Yes, so this is the back of the disclosure -- second page of the disclosure report. You see Repository 12, which is the relevant repository here:

"Once the number of experts; fields of expertise and list of issues for the experts has been identified and agreed, the parties will liaise to discuss any additional repositories of data required."

So this was always a process that would be driven with input from the experts and datasets have been disclosed and will be disclosed in response to this request.

In cooperation with the claimants.

The second point here is that the kind of data we're talking about shows how unpromising, in my submission, a known adverse documents obligation would be. Now, documents relevant to a factual dispute will -- may clearly present themselves

as adverse. That's in the smoking gun scenario, where there are hard edged factual disputes. But data sets, in the context of this case, are very unlikely to present themselves as adverse prior to their analysis. I think that was fairly acknowledged by the Class Representative in her skeleton argument responding to Mr Ross's point concerning financial databases. This process will always be dependent on expert analysis with the parties agreeing what material will be useful for their experts and what material is available within the central repositories that Google holds.

So the obvious way of approaching this kind of disclosure is to work out what Google has that may shed light on the issues in the case and for the parties to cooperate to ensure it's disclosed for consideration by experts on each side. That's exactly what we are doing. That's not a process that will be assisted by a known adverse documents obligation.

Now, for the first time today the Class Representative's advisers have chosen to focus on a particular document. You will recall this was the document containing various strings which, of course, are indecipherable to lay people. CR/569. Now, of course, if that had been identified before we could have led witness evidence to explain to you what that document means.

What I can tell you is that it has been the subject of enquiry between the parties and enquiry that shows that this is not a process that the Class Representative finds wholly unintelligible. Just to give you one example of this, the correspondence bundle at 569 --

THE CHAIR: Yes.

MR HOLMES: Sorry, I don't have the tab number, but I hope you can find it, perhaps, from the page.

THE CHAIR: Yes, I'm nearly there.

MR HOLMES: It's tab 73, if that helps.

THE CHAIR: Page 569 in the bundle?

MR HOLMES: Of the correspondence bundle.

THE CHAIR: Yes, I think I have that. Is that the middle of a letter?

MR HOLMES: It is, yes. The letter begins on 566. It's RPC's letter of 9 January. Actually, perhaps if we pick it up on 566, you see that this is correspondence relating to the behavioural documents and data sets disclosed.

At 2, you see that it sets out Google's responses to "your client's queries as regards documents contained in the relevant repository".

On page 570, you see at E, I think, a series of queries in relation to the document and they are confidential. You see, they go on over two pages. They contain various clarifications to questions.

I must say neither the questions nor the answers make much sense to me, as a lawyer, looking at this for the first time. But that is rather the problem with presenting a document at the last minute in this way and suggesting that it shows that the disclosure is useless. We say that conclusion simply can't be drawn. What is apparent is that the parties are liaising in relation to that document and the process is working as it should.

The third alleged problem relates to project names, and we can perhaps go back to the applications letter to see how that point is put. It's dealt with at SD1, tab 2, page 12.

THE CHAIR: Yes.

MR HOLMES: It's a short paragraph. This is the third of the three reasons given.

What it says is:

"The Class Representative has identified a number of project names that appear to relate to matters relevant to the Play Store proceedings."

You see there is then reference to two particular examples, which are confidential.

If I could just ask you to review how they are described there in the yellow text.

THE CHAIR: Yes.

MR HOLMES: So, just as a preliminary observation, these are exactly the kind of projects that you would expect a company -- the kinds of competitive action that you would expect a company like Google to be taking. There's no suggestion of anything untoward in those two project names. They are potentially of relevance. As to whether they're likely to be adverse or not, that is highly questionable. If anything, the passages cited here suggest that the materials may be helpful in showing that Google is subject to significant competitive constraints which it's seeking to address.

At all events, the Class Representative has identified the projects in question as things that are of interest to her and Google has agreed to undertake targeted searches to locate further responsive documents.

So, again, far from showing that the existing two stage process is not working, this is a clear example of it working well. It may well generate further relevant material. Whether that material will be adverse or beneficial to a party cannot be determined at this stage, but it's exactly the kind of process you would expect in a case of this kind, poring over a decade of normal business activities within a large number of people at Google.

There was reference also to the acronym PITA, which I think was aimed at showing the difficulties that the Class Representative was under. I'm not sure how that really goes to the justification of a known adverse documents obligation. For what it is worth, that abbreviation does have a meaning. I might leave the Tribunal to guess at it. It's a common internet acronym. It means pain in a certain part of the anatomy. It's not a project name. This may be the Class Representative clutching at straws.

The fourth alleged problem emerged only after the applications, and it relates to the fact that some documents attached to the US expert reports are not included in the UK disclosure set. I think you have my submissions about that.

Those documents are agreements and data. We have offered to provide them, but they have been the subject of analogous non-custodial disclosure in the UK proceedings, and we don't accept that that represents any kind of a gap in the process that we have been going through in these proceedings, so no gap or inadequacy of approach.

The final point concerns the burdensome nature of the obligation. We say that a known adverse documents obligation is unlikely to be beneficial in terms of turning up documents which are important which will not have already been captured by the disclosure regime that is in place. We also say the existing disclosure regime is working reliably and on track.

If the obligation would involve little or no cost or difficulty, then one might accept it regardless of its limited utility. But we say that's not the case.

In the application, the Class Representative states that the order sought does not require the defendant to carry out any further searches beyond those already carried out and that it's therefore intended to be targeted and proportionate. Mr Kennedy made a similar submission.

But that is not the reality. The requirement applies to any person with accountability or responsibility within the company or organisation for the events or circumstance which are the subject of the case. You have my point that that could extend to a large number of past and present Google employees, a point from which Mr Kennedy did not demur. There is some guidance from the case law as to what is involved in operationalising a known adverse documents order and we have cited it in our skeleton.

It's the Castle Water case. It's at tab 1 of the authorities bundle. I might just quickly go there if the Tribunal will permit me.

THE CHAIR: Yes.

MR HOLMES: You will see on the first page that it's a 2021 judgment of Mr Justice Stuart-Smith, as he then was. At page 2, in the first paragraph, you see that the judgment arises out of disputes about disclosure heard at the second CMC.

Paragraph 2 explains that the case was a dispute arising out of the sale by the defendant to the claimant of its non-household and sewerage retail business.

Paragraph 5 notes that the parties have produced a list of issues for disclosure, not something which is available in this case, to focus a known adverse documents enquiry.

At paragraph 6, you see that there was an unresolved dispute as to the obligations that arise under the pilot.

The relevant discussion is then on page 5, beginning at paragraph 8. His Lordship notes there the absence of authoritative clarification in relation to the area of known adverse documents.

Paragraph 9 sets out the meaning of a adverse document and of awareness.

Then, at paragraph 10, consideration is given to the question of what the obligation of a party may be to discover what is known -- whether it has any known adverse documents that must be disclosed.

If I can just ask the Tribunal to review that paragraph, please.

(Pause)

THE CHAIR: Yes.

MR HOLMES: So three points, if I may.

First, the point that Mr Kennedy noted, the obligation extends to make enquiries of past as well as present employees.

Secondly, the steps that need to be taken will be fact and context specific. But the real sting from our perspective is the third point:

"It may be asserted with some confidence ..."

This is about halfway down from the hole punch. You may not have a hole punch, madam, joys of electronic bundles. It's about eight lines up:

"The Practice Direction gives no guidance on what has to be done to amount to reasonable steps. However, it may be asserted with some confidence that in a case of any complexity on at all, or an organisation of any size, reasonable steps to check whether a company or organisation has known adverse documents will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation unless the issue in question is irrelevant to others."

Now, of course, you have it well in mind, madam, Google is an organisation of significant size and that these proceedings are proceedings of significant complexity, probably as complex as litigation gets.

In that context, the obligation proposed by the Class Representative would be a very substantial and complex one to put into effect. A potentially large number of relevant people could require to be questioned, if the obligation were left at large, and the questioning would require a process of educating the individuals concerned. Insofar as that could be done, on a large number of complex and quite amorphous issues, not of primary fact, but of economic assessment, I have in mind there are over 44 issues just in the list of expert issues, which is the only list of issues which has been compiled to date in these proceedings. That would be a time-consuming, costly and difficult process.

Given the lack of good justification, we say it would be clearly disproportionate to impose an open obligation of the kind proposed.

So, we say, if an obligation of any kind is to be imposed -- and we say that none is needed -- it should at least be more focused than the present enquiry, and you have

my proposal that it could be focused upon the factual witnesses that Google proofs for trial and, in relation to the specific matters to be covered in their evidence, as to whether they are aware of any adverse documents relating to those matters and, if any are located, they would be disclosed.

That would be an obligation of much greater focus and would keep it within more manageable bounds because it could be done in parallel with the question of proofing, and it could be focused on the matters that their evidence covers. It also appears to cover, we apprehend from the submissions made today and at the previous CMC, the specific concern that is really motivating the Class Representative above all others, the concern that we might learn of documents when quizzing witnesses which we then don't disclose, and we can lay that to rest.

We think it's already inherent in the Practice Direction that that would not in practice be done, but this, I think, can put it beyond doubt and would ensure that positive enquiries were made.

Unless there are any questions from the Tribunal, those are my submissions.

THE CHAIR: Yes, thank you, Mr Holmes.

Mr Frazer, do you have any questions?

MR FRAZER: No, all clear. Thank you, chairman.

THE CHAIR: Mr Waterson?

PROFESSOR WATERSON: No.

THE CHAIR: Thank you, Mr Holmes. I have no questions either.

MR HOLMES: Thank you, madam.

THE CHAIR: Mr Kennedy.

MR KENNEDY: Madam, just a few short points in reply. If I could just start with the application of PD/57AD to competition claims in the High Court, we accept absolutely that it doesn't apply to competition law claims in the High Court and that is clear on the

face of the Practice Direction. There's no suggestion in the Practice Direction, however, that it's inapposite to apply to competition law claims by their nature and, of course, there is a specific Practice Direction that deals with competition law claims and disclosure which reflects the requirements, amongst other things, of the directive. Of course, there's a similar Practice Direction in this Tribunal that reflects the requirements of the directive.

So we say that is the explanation, as far as we can apprehend from the Practice Direction for that difference.

Madam, we know at least one case in which issues which are similar to competition law issues -- and this is not in the bundle in fairness to Mr Holmes -- in Optis v Apple the president of this Tribunal sitting in the High Court did make a known adverse documents order in a FRAND case which of course raises not dissimilar issues to those issues that arise in proceedings of this nature and which are equally, if not more, complex than the issues that arise in these proceedings.

So we say that the fact that it doesn't apply to competition law claims in the High Court is no reason not to apply it, to import this obligation into the right claim in this Tribunal.

Madam, the first of Mr Holmes' points was that the order sought would serve no utility and it was said that the examples that we have given and relied upon make good that submission.

However, we have only received the documents that fall within one of the gaps. For the three other gaps, we have not yet seen the documents. The 160,000 US documents, we have not seen them. We don't know what's in them. We don't know whether there's adverse documents in them.

For the behavioural documents, we only received those yesterday. We have not had a chance to review them, and we're not in a position to say today whether or not they're adverse. But neither -- Mr Holmes may be in a position. I doubt he personally is, but

in any event we have not had an opportunity to review them.

Likewise, documents responsive to the two project names referred to in paragraph 44 of the application, no disclosure has yet been provided in respect of those, so we don't have -- haven't had an opportunity to work out whether or not there are documents that would answer to the order that is now sought.

So to say there's no utility served by the order is speculation on Mr Holmes' part. He took you back to a description of the exercise that was undertaken in order to gather the documents that fall within Repository 1, and he emphasised, again, that 2 million documents falling within that repository have been disclosed in these proceedings.

However, madam, as I said to you in my submissions, we're concerned not about documents that fall within those repositories, but documents that fall outside those repositories. So it's not enough to say that there are 2 million documents and there was a big review that was done elsewhere if, as I have shown you, there are things that fall outside those repositories which either are relevant or may be relevant to those proceedings, and it's that category, the unknown unknown category, as I put it in my submissions, that we are interested in.

In terms of the operationalisation -- if that's a word, madam -- of the order sought, it's suggested that it will be difficult for business people and people within the organisation to apply the definition of adversity. Madam, we say that's simply not the case. These are documents that are created by Google and people who work for Google in the course of ordinary business.

At the last CMC, Mr Draper said, specifically in relation to the data that concerns behavioural issues, he said:

"We care about these matters. We keep a very close eye on them."

So the idea that there are matters of the nature of the document I showed you that someone within Google may not be aware of, and may not be able to say whether it's

adverse or not, is simply not realistic. Indeed, Mr Holmes very fairly said that he didn't understand the document that we had referred the Tribunal to earlier. So it's not the case that lawyers are necessarily better placed to understand the documents in question, and doubtless the answers that have been provided by RPC in correspondence have been provided in consultation with lay people within Google who create these documents in the ordinary course of business.

So we say that the complex nature of the documents isn't a reason not to make the order, madam.

I didn't mean to interrupt you, madam. Perhaps you had a question.

THE CHAIR: I was going to say isn't the behavioural issue, isn't that now one of the issues for the experts in the process of disclosure to be led by the experts? Is that not how it's going to work?

MR KENNEDY: The experts will address it, madam. But it may well be that the people who know of the existence of adverse documents -- staying with this example -- are the lay witnesses who create them, the lay employees whose job it is presumably to track things like side loading and to track things like how people respond to the display of one error message -- sorry, one warning message or two warning messages.

Mr Draper said that there are people in Google who are interested in this thing -- these things, and who keep an eye on them. It may be if you asked those people: are you aware of any document that's adverse to Google's case?

To take a concrete example, it may be that someone knows of a survey that was done that says that people find the warning messages that Google puts up extremely difficult and extremely off-putting. That may not have been disclosed. We don't know.

But it's not a stretch of the imagination to think that there's someone who is a lay witness in Google who knows that answer off the top of their head, madam. That's what we're seeking to identify. We're not talking about --

THE CHAIR: On this behavioural issue, as I understand it -- and someone please correct me if I'm wrong -- the experts are going to discuss what information they require. That request will be presumably sent to Google. They say: we need all data you have that relates to consumer behaviour on this point.

So, presumably, all relevant data will be provided; it won't be necessarily filtered so that Google only send you things that are in their favour. Someone can correct me if I'm wrong, but is that not how it's going to work? Because it has to be based on objective evidence, don't forget.

MR KENNEDY: Madam, I don't think there is a process -- and someone will correct me if I'm wrong -- there's not a further process laid down specifically with respect to the behavioural data.

The nine documents were identified in correspondence, 23 November, 26 January. A further I think four or five hundred were disclosed yesterday. It may well be that we have further questions in respect of those, and we will ask those questions in correspondence, and I assume no objection will be taken to us asking those questions outside of the Stage 2 process, of course, due to the nature of the timing.

But there's not -- there's no specific process that envisages the experts making requests of each other or anything of that nature, madam, if that answers the question.

MR HOLMES: Madam, I hesitate to interrupt, but we wrote in December to ask Hausfeld to identify its data requests, which we assumed would be in consultation with their experts. I understand that at present they have indicated that they have no particular requests. But, as Mr Kennedy observes, it will be open for them to come forward with requests in the light of the behavioural disclosure that has been given. I understand that letter is at -- for your note -- correspondence bundle 1657, paragraph 5.

THE CHAIR: Yes.

Mr Holmes, when data requests come in for behavioural evidence, I have to say I would be concerned if Google was selective in the information that it disclosed, so that if something was adverse and responded to behavioural evidence that an expert had -- in fact fell within the expert's parameters of its request, I would expect Google to hand that over.

MR HOLMES: Of course, but the question is what data Google holds that will be relevant to assessing the behavioural questions. That is not something -- it's not difficult to assess what kinds of data might be relevant to that question, and Google has indicated what things it does hold, as I understand it, and it's indicated certain categories of data that it doesn't hold. Contrary to popular impression, there are limits to the information that Google has available to it about the operation of Android telephones, but there is some data. I think categories of data have been identified. As I understand it, some have just been disclosed. Of course, we will engage responsibly with the Class Representative, who will no doubt be guided by their experts.

THE CHAIR: I think you took me to a letter where various categories have been identified, and I'm just basically clarifying my own assumption that it would be all relevant data that was held in relation to that category that was handed over, whether or not it was adverse.

MR HOLMES: Yes.

THE CHAIR: Yes, thank you. Thank you.

MR KENNEDY: Sorry, madam, can I just take instructions for one second, madam? Forgive me.

THE CHAIR: Yes.

(Pause)

MR KENNEDY: Madam, I think we can leave the behavioural data there, but the more

general submission is that we don't accept that these proceedings are of such complexity or that the issues that arise in them are not ones that are susceptible to a KAD order whereby you ask lay people whether or not they are aware of documents that go to particular issues. We say that these are sophisticated people with sophisticated understandings of Google's business and that they are well placed to answer that question. That's the general submission, setting to one side the specific issue of behavioural issues.

Madam, final point, proportionality. A suggestion of narrowing the scope of the order to, I think, those witnesses who are proofed was made for the first time by Mr Holmes. That's the first time that any narrowing has been offered. I said in my submissions previously that we are open to suggestions, but at present we maintain the application as made and we say, at the very least, any narrowing would have to include relevant in-house counsel who have conduct of the proceedings as envisaged by PD57(a). It's not just people with responsibility and accountability for the underlying facts and matters; it's also people with responsibility and accountability for the conduct of proceedings. So we say at least in-house counsel plus some others and we reserve our position on whether or not that's limited to people who give factual evidence, so we maintain the application as made for the present.

Unless I can be of any assistance, madam, those are my submissions in reply.

THE CHAIR: Yes, thank you.

Mr Holmes, do you have anything to say about that last suggestion?

MR HOLMES: Only that it seems to us to take us straight back into the previous RPC application which we think was rightly rejected by the Tribunal. I can understand that lay people might have -- there may be sense in asking relevant witnesses who are giving evidence if they have any documents at their disposal, but the in-house counsel just seems to add another layer of burden and it's not clear how they're going to be

well placed to assist.

MR KENNEDY: Madam, we say it's perfectly --

THE CHAIR: I was going to say what about the scenario where someone goes along, they know the litigation is proceeding, someone goes along to the in-house counsel and says: I think I've got this, and they hand it over. You may tell me that's not very likely but, anyway, if that is the scenario, so the in-house counsel is aware that someone who isn't going to be a factual witness has handed them a document, what do we say happens to that?

MR HOLMES: So in that case, then, we could say that if the witnesses disclosed documents either to in-house counsel or to external solicitors in the course of proofing or something of that nature, then it would be disclosed; we have no problem with that.

THE CHAIR: I think my assumption was that it would be a non-factual witness, so it's not someone who is going to be proofed. So someone who hears about the litigation and says: good Lord, the stance we're taking is completely inconsistent with this --

MR HOLMES: Madam, I understand. May I just take instructions? My instructing solicitors may have something.

THE CHAIR: Yes.

(Pause).

MR HOLMES: So, madam, in-house counsel are basically involved in the existing disclosure exercise; in other words the documents that are being given currently. Now, obviously, if somebody came to in-house counsel with an adverse document outside that process of disclosure, we don't have any difficulty that they should disclose it and we could try and find a form of words to capture that, if that's a source of concern.

THE CHAIR: Thank you.

MR KENNEDY: Madam, if I might just interject. We think that in-house counsel are very likely to have documents or to know of documents which are adverse and to be

well placed to make the assessment. The submission that was made in the skeleton argument is that lawyers are peculiarly well placed to make the assessment of adversity. Now it's said that they're not well placed, I think, or perhaps that it's additionally burdensome on those people to make that assessment, so I'm not sure which one it is, madam. But an ordinary process might be that in-house involved in litigation see the hot docs that are identified during a disclosure process.

Now, the question arises, Mr Holmes seems to suggest that the relevant people involved at the moment have only been involved in the UK disclosure process and in which case it might be that the relevant in-house individuals need to be different individuals, but we think that in-house counsel with responsibility for the suite of litigation, if you like, this litigation and investigations that concern matters related to these proceedings are very likely to have additional knowledge of adverse documents as compared to just the lay people who are going to give factual evidence. So we think that that is likely, madam.

It seems difficult for us to identify with precision who those people might be. It's not within our knowledge and for that reason, as I have said, madam, we maintain the order as sought originally.

MR HOLMES: I am now confused, madam. Is Mr Kennedy suggesting that it would be not those with conduct for these proceedings but with conduct for other proceedings who would be subject to an obligation?

MR KENNEDY: The submission is that we don't know who the relevant people are who are caught by the terms of our order as sought. We're not in a position to speculate about who those people might be. If a list is provided to us and it's explained who the people are and what their role is, it might be that a specific list can be identified.

THE CHAIR: Yes. I'm not entirely sure that I understand the submission that's now

being made. So as I understood it, Mr Holmes was saying in-house counsel are being involved in the disclosure exercise, the disclosure exercise has involved disclosing relevant documents, so adverse documents would be swept up in the relevancy assessment, I am assuming.

What we're now concerned with is something that comes to light out of the existing categories, so it may be known about already, or later, and I think that's where -- those are the documents you're worried about. Is that right, Mr Kennedy?

MR KENNEDY: So we are worried about -- or later, madam, that's correct, and perhaps I wasn't clear and I apologise to you and Mr Holmes. My point is that the people with conduct of these proceedings may have been involved in other proceedings. They may have been involved in the EC investigation, they may have been involved in the CMA investigation. So there's an overlap and we see that from the nature of the repositories at the moment.

Repository 1 is the US proceedings. Repository 4 is the EC Android proceedings. And that's my point, is that there may be knowledge that they have there that doesn't arise strictly out of the disclosure exercise in these proceedings which leads them to know of adverse documents that fall outside of Repository 1 or Repository 4. That was the point, madam. I appreciate it was unclear and I do apologise to you and to Mr Holmes for being unclear.

THE CHAIR: That seems to be expanding the scope well beyond the categories which the parties have proceeded on the assumption are those most likely to be relevant. We're now suggesting that the concept of relevance is in fact a standard disclosure all-encompassing standard of relevance. Is that right?

MR HOLMES: Madam, I hesitate to interrupt; I don't want to interrupt but we are very concerned by the suggestion that this would extend to a requirement for disclosure in relation to ongoing regulatory proceedings from the legal function within Google. That

would seem to raise lots of questions about regulatory -- at the privilege that arises in relation to those ongoing proceedings. We're not required to disclose documents relating to ongoing regulatory proceedings, and that's generally recognised.

THE CHAIR: Yes.

MR KENNEDY: That wasn't -- the submission, madam, wasn't that documents from ongoing regulatory proceedings would be identified. Madam, to the question of categories, there are no categories per se in these proceedings by reference to which disclosure has been provided. There are the repositories which have been identified and we say that the issue arises that has there may be things that fall outside the scope of those repositories which are adverse and that's what we're seeking.

We're not seeking an order for standard disclosure, madam; it's adverse documents and we say that it should extend to people who have responsibility for the conduct of these proceedings and, if they know of adverse documents, those should fall within the scope of the order.

I do apologise if I have caused confusion, madam, and to Mr Holmes.

THE CHAIR: Yes. Thank you, I think I understand that now. Thank you.

There's obviously some very important issues that arise on this issue in particular, so obviously I will want to consult with the panel members and we will reserve our decision in relation to that.

Does that conclude other matters for today?

MR KENNEDY: It does, madam, yes, I think, unless Mr Holmes has anything.

THE CHAIR: So I think we still have the paragraph 6 wording outstanding and I will give some thought to that when also preparing the ruling on the issue that we have just been debating.

There is one other matter that didn't make it to the agenda, which is whether any amendments need to be made to the experts' timetable. So that was mentioned in the

reasoned order where we gave extensions of time for disclosure and we indicated that the parties should liaise about any necessary consequence, extension of time for experts; it would be on the agenda today.

Don't worry if you haven't done it but let's just keep that in mind and you can advise the Tribunal if anything is needed in that regard, but otherwise the timetable is as fixed in the existing order.

Unless there is anything else, I think we may be done for today.

MR HOLMES: Madam, it's just been pointed out to me you don't actually have our combined wording for 6.1 and 6.2. I don't know if it would help if I were just to read that on to the transcript so that you have our proposal for that, just so that it's not in doubt.

THE CHAIR: Is that the wording you came up with earlier?

MR HOLMES: Over the short adjournment we reflected a little further and we came up with what is I think slightly more polished wording and, if it's convenient, I could just read it now so that you have it on the transcript and you can consider it at leisure.

THE CHAIR: Yes.

MR HOLMES: "By 4.00 pm on 15 March 2024 the defendant shall provide worked examples showing how the financial information provided by Google can be used by Mr Dudney to (1) identify the corporate overheads which are unallocated in the defendants' general ledger and/or management reporting packs for Google Play; (2) identify natural accounts for Google Play and; (3) inform the aggregation of Google Play's general ledger accounts into the Google Play P&L."

THE CHAIR: Thank you. Thank you, that's good to have the clarity.

Unless there's anything else, we will rise for the day.

MR HOLMES: Not from us.

MR KENNEDY: Not from us, thank you, madam.

MR HOLMES: Thank you very much.

(4.11 pm)

(The hearing concluded)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?