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**IN THE COMPETITION** Case No: 1424/5/7/21,1589/5/7/23,1596/5/7/23, 1636/5/7/24  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

18<sup>th</sup> July 2025

Before:

The Honourable Mr Justice Roth  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Claimants**

**Kelkoo.com (UK) Limited & Others**

And

**Defendants**

**Google UK Limited & Others**

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

Sarah Love & Matthew O'Regan (Instructed by Hausfeld & Co LLP, Linklaters LLP,  
and Preiskel & Co LLP) on behalf of Foundem, Kelkoo, Ciao, and Connexity

Meredith Pickford KC & Julianne Kerr Morrison (Instructed by Herbert Smith Freehills  
Kramer LLP, Bristows LLP)  
on behalf of Google

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1 Friday, 18 July 2025

2 (9.30 am)

3 (Proceedings delayed)

4 (9.39 am)

5 THE CHAIR: Yes, Ms Love. So, where are we now? Is it A ...?

6 MS LOVE: Sir, we have reflected overnight on what disclosure has already been  
7 ordered and on the time available and the priorities. We will not be pursuing A23,  
8 notwithstanding Mr Hunt's view that it remains relevant. In relation to A24, my  
9 understanding -- and I may need to ask Mr Pickford for confirmation -- is that the  
10 financial information that you have already ordered, following his offer on A21, would  
11 encompass the management accounts for Google Shopping Europe. If that is the  
12 case, then I don't need to pursue A24 as a distinct request.

13 MR PICKFORD: Sir, to be clear -- well, firstly, I believe that is correct, but the offer  
14 that I made yesterday, I think might have been misunderstood. It was a means of  
15 seeking to get through the rest of the A series.

16 THE CHAIR: Yes.

17 MR PICKFORD: Our position is the same in relation to all of them, that we can give  
18 what we can give, and those are the things that, sir, you alighted on yesterday. If we  
19 have to debate each one, then we will have to debate the relevance of it. We say  
20 they're not -- it's not sufficiently relevant. But my offer was a global one for all of them.

21 THE CHAIR: And I think I made it clear that my approach was also that, as it's not  
22 a burden on Google because these are readily available, rather than having an  
23 extensive discussion on relevance, which I haven't expressed a view on.

24 MR PICKFORD: Indeed.

25 THE CHAIR: So, I'm not ordering it because I've decided it's relevant. I'm ordering it,  
26 really, as a pragmatic way forward.

1 MR PICKFORD: And the same duration, as I understand.

2 THE CHAIR: Yes.

3  
4 Discussion regarding A26 of A3 Bundle

5 Submissions by MS LOVE

6 MS LOVE: Sir, I think you then cut to -- and I'm afraid that there is one remaining  
7 A that is somewhat different in nature to the others, which is A26, which is not financial  
8 data, but operational.

9 THE CHAIR: There is also -- this covers A25; does it? You've talked about A24 ...

10 MS LOVE: A25, in the spirit that Mr Pickford has outlined, we don't pursue.

11 THE CHAIR: A25 is not pursued. Right.

12 MS LOVE: A26. Sorry, I'll~...

13 THE CHAIR: A26 is agreed post-April 2020 ...

14 MS LOVE: Now, A26 is somewhat different in nature, because it is about the number  
15 and identity of the merchants. It's to whom the leads are going. Mr Hunt requested  
16 data on merchants displayed in the boxes for Pre-Decision, Decision, and Post-  
17 Decision periods, and it's relevant for several reasons.

18 One -- and Mr Noble has expressed agreement on this. I can take you to A27, where  
19 he's asked the analogous disclosure for a different period from the Claimants. It is in  
20 relation to the assessment of merchant multihoming and network effects. But the other  
21 is to basically understand, in the context of a potential multi-stage theory of harm, what  
22 has happened in the early period, in the period after the Shopping Box, and in the  
23 period up to 2013 and slightly beyond that, when we moved to a transition to paid for  
24 listings; what has happened to the merchant relationships and, in particular, whether  
25 Google's self-preferencing conduct enabled it to improve the quality of its own CSS  
26 and distort competition by diverting traffic away from competing CSSs.

1 As you said, Google agreed to produce this from April 2020 to date. The data could  
2 be produced for earlier, but Mr Wisking has indicated -- and for your note, that is in  
3 paragraph 70 of his witness statement, which is behind tab 17, page 155 -- that it  
4 would require significant engineering resources and bespoke solutions that would take  
5 12 to 14 weeks to get the whole step back to the start of the Pre-Decision period.

6 THE CHAIR: Just give me the reference again, please.

7 MS LOVE: It's paragraphs 70 and 71 of Wisking 8, which are in Tab 17, page 155.  
8 So we have narrowed from the period from the launch of the OneBox until 2014. So  
9 that one has Pre-Decision, start of Decision, then the move from Froogle to Google  
10 Product Search, and only to the UK and Germany and France. It's necessary, as  
11 I said, to understand how the quality and nature of the merchant relationships has  
12 changed over time, and to understand the multi-homing now.

13 THE CHAIR: Just pausing there. Why is that relevant to abuse?

14 MS LOVE: Well, sir, the pleaded Kelkoo claim from pre-2008 is that -- as you've seen  
15 from questions 2 and question 3 of the Abuse JES -- is that the demotions began and  
16 Google is building a competitive advantage, which then comes in stages thereafter.  
17 One important aspect of that is understanding the merchant relationships that are  
18 being built, understanding whether merchants are going to multiple CSSs or moving  
19 increasingly towards one. And is understanding, basically, where the leads are going,  
20 so that Google is building up network effects and benefiting, gaining competitive  
21 advantage before then. It may actually assist, sir --

22 THE CHAIR: Well, then it would, if it's demoting and the traffic is going -- there's less  
23 traffic through CSSs and more through Google. It will build up a relationship. That's  
24 fairly obvious, isn't it? But why does it need to be quantified in this way?

25 MS LOVE: Sir, my understanding is that both of the economists are agreed in principle  
26 on the desirability of knowing about the number and identity of the merchants. And if

1 I could ask you --

2 THE CHAIR: Well, it might be desirable, but why is it necessary? I mean, the abuse  
3 isn't building up relationships with merchants. The abuse is demoting other sites. This  
4 is one of the consequences.

5 MS LOVE: The question is whether the Box has enabled them to develop merchant  
6 relationships as a consequence of the abusive behaviour. Sir, it may assist to actually  
7 turn back to the JES, because one thing that is missing from the Scott Schedule is the  
8 requests that Mr Noble has made. If you turn to bundle 2, tab 1, page 53, one sees  
9 what Mr Noble is asking for and his rationale. It's a different period. We are asked to  
10 go further back for each EEA country and the UK, 2004 to 2007. And he refers to the  
11 need to understand the multi-period theory of harm, and he refers to wanting to  
12 understand about merchant multihoming. So Kelkoo is providing this and --

13 THE CHAIR: I am just trying to ... (Pause)

14 Mr Hunt takes the view you're going to need equivalent data from Google. Without  
15 that, this sort of analysis, as I understand it, can't be done. Kelkoo has some data for  
16 2004 to 2007.

17 MS LOVE: Kelkoo is providing this. Kelkoo has agreed to provide this within  
18 a fortnight. I can say it has taken a significant diversion of senior management time  
19 to get this done, but we are doing this. We appreciate the period that we are seeking  
20 from Google is longer, but it is fewer countries, and this does appear to be, sir, a matter  
21 on which both expert economists are agreed.

22 But I'm told that Mr Hunt has a slightly different theory, which is about the quality of  
23 the Box being low, but whether the merchant relationships are nevertheless facilitated  
24 by the abuse that doesn't appear in it. But, in principle, the idea that one needs to  
25 understand the merchant side of it and one needs to look at multihoming seems to be  
26 common ground.

1 THE CHAIR: Yes. He says it needs equivalent data. On that basis, it could be that -  
2 - I'm not sure I fully appreciate what they're seeking to do, but I note that the agreement  
3 you pointed to, if Google were to do it for the period -- the launch of Product OneBox  
4 was 2005, wasn't it?

5 MS LOVE: I believe (inaudible) --

6 THE CHAIR: Yes, for 2005 to 2007.

7 MS LOVE: He wants it to look at the network effect and the multi-homing for a wider  
8 array of reasons and quality and the multi-period strategy. But my point is -- not  
9 speaking as an economist, my point is a more basic one, which is that both are agreed  
10 about the utility of seeing the merchant side of this, notwithstanding the effort that's  
11 involved.

12 THE CHAIR: They read on (audio distortion). But you say you're focusing on the early  
13 period because that's the period where you have to establish Abuse for the later  
14 period ...

15 MS LOVE: Well, it's about when traffic was diverted to Google Comparison Shopping  
16 Sites. It may be that the traffic wasn't diverted immediately, but if you want to prove  
17 Abuse in the Pre-Decision period, the question is how one tracks through what  
18 advantage is being gained in merchant relationships into the subsequent  
19 improvements and into the subsequent stages. And that's, in particular, why we have  
20 asked to go through to 2014, to move to the paid listings.

21 So we have taken on board what Mr Wisking has said about the time and effort, and  
22 that is why we have sought to limit it in this way. (Pause)

23 THE CHAIR: I think it's appropriate, but you're going to -- 2008 is the start of the --  
24 looking at, you say, France, Germany and the UK.

25 MR PICKFORD: Sir, before we get too stuck --

26 Just one moment. Sorry.

1 THE CHAIR: Yes. (Pause)

2 MS LOVE: So I don't know if it assists, if it might help for me --

3 THE CHAIR: Yes.

4 MS LOVE: -- (audio distortion) from Mr Pickford's purposes. It is apparently critical to

5 see across the period to understand the multi-stage use, and in particular, whether the

6 changes in relationships in the earlier period have facilitated or been relevant to the

7 move to the paid listing. We would be content to narrow it to the UK and Germany, all

8 the way up to 2014. Sorry, either the UK or Germany. We are more interested in

9 understanding across time, than the EEA countries, if Mr Hunt is being told to choose,

10 given the resources. I don't know if that helps, Mr Pickford.

11 THE CHAIR: Yes. Mr Pickford, what do you say about this?

12 Reply submissions by MR PICKFORD

13 MR PICKFORD: Sir, thank you. The parallel that Ms Love has sought to draw here

14 between the request of Mr Noble and Mr Hunt is, we say, an inapt one. That's for the

15 following reasons.

16 Firstly, this is a foreclosure case. What the Claimants are seeking to demonstrate is

17 that they were unduly affected by discriminatory behaviour by Google. So, the focus,

18 we say, should be on what happened to the Claimants, not alleged benefits to Google.

19 First point.

20 Secondly, in terms of what is proportionate -- so that's why our request is more on

21 point than theirs, because we're focusing on what happened to them. They're focusing

22 on what happens to us.

23 THE CHAIR: Well, aren't they two sides of the same coin?

24 MR PICKFORD: Well --

25 THE CHAIR: Let's go to you and not to them. That's the merchants. If there's greater

26 loyalty of merchants to you, well, that's going to affect them.

1 MR PICKFORD: But the point is, sir, what happened to them, not what ultimately  
2 happened to us. But, in any event, there are further points to make about this that are  
3 important.

4 Second, is that we are willing to provide what we can provide, and we're not asking  
5 the Claimants to provide anything that they don't have. We're not asking them to  
6 construct new engineering solutions to find data they haven't got. What we can  
7 provide is post-2020, and we're providing it.

8 THE CHAIR: Well, you've got the data. It's not that you haven't got the data. It's the  
9 problem of collating it.

10 MR PICKFORD: Well, I --

11 THE CHAIR: I think, isn't that right?

12 MR PICKFORD: I think the evidence -- it's not totally clear that we'd even be able to  
13 produce, fully, what's being sought. But the first thing --

14 THE CHAIR: No, you do the best you can. But the problem is, it's not that you haven't  
15 got the data, it's that you have a different data storage system, and therefore it's  
16 complicated to extract it. That's what Mr Wisking says.

17 MR PICKFORD: That is the essential point.

18 THE CHAIR: Yes.

19 MR PICKFORD: But, sir, the third and most important point in relation to this is this ,  
20 effectively, a reciprocal request from Mr Noble, because Mr Hunt saying, "Well, I want  
21 this data", and Mr Noble's saying, "Well, if you're going to have it for Google, then we'll  
22 have it for you, for your clients, please". We are quite happy, and we see the sense  
23 that if the Claimants don't get this data, then nor do we. We are not going to press our  
24 request, A27, if the Claimants' request is denied.

25 THE CHAIR: Yes.

26 MR PICKFORD: And so --



1 THE CHAIR: They have to prove their case. So, if they say they're not getting  
2 something, they need to prove their case, I can see in that case you don't need  
3 anything to rebut it. But I don't think that really helps very much. To the extent they  
4 withdraw their case, any part of it, you won't want disclosure to deal with it, because  
5 you're not making any positive case as such.

6 MR PICKFORD: But sir, then I come back to my first point, which is, this is  
7 a foreclosure case, and ultimately, the secondary effects that are referred to, both in  
8 terms of what then happened to the Claimants and I would say even further removed  
9 from what then happened to Google, are not critical aspects of the case that they need  
10 to prove, certainly insufficient to justify the onerous obligation of seeking to reconstruct  
11 and interrogate data that currently we can't do. Mr Wisking has been told it will take  
12 12 to 14 weeks just to do this particular exercise.

13 THE CHAIR: And that may be if it's for the -- I think that was before the reduction in  
14 the request, in the scope of the request.

15 MR PICKFORD: So I can take instructions on whether how much difference that  
16 makes. So as my understanding is, one of the core problems here is the need to build  
17 the engineering solution, to be able to interrogate the data. I think once that's done,  
18 I don't know, and I'll have to take instructions, as to whether it makes a big difference  
19 on how long the period is. If I may, it could probably be helpful for the Tribunal to know  
20 that.

21 THE CHAIR: Yes, that would be helpful. (Pause)

22 MR PICKFORD: So that's certainly our understanding and my instructions. That  
23 particular question, as in how much difference would it make, if it was only going to be  
24 this length? What's the time estimate, then, has not been put. But our understanding  
25 of the basic obstacle is the design of the solution for extracting that data. So, one  
26 would not expect, at the very least, there to be a proportionate reduction, simply

1 | because the time period was reduced.

2 | THE CHAIR: Yes. (Pause)

3 | (10.01 am)

4 | THE CHAIR: Yes, I think I can just about understand what is behind this. I think I will

5 | order this for the UK. I think the request was now either the UK or Germany. So, at

6 | Google's option, it can be for the UK or Germany, if there is any ease of application

7 | between the two from 2005 to 2013. (Pause)

8 | So, I will limit the period slightly.

9 | And then you are giving it from April 2020 for the UK, Germany and France. Well,

10 | I think we can stick to the UK, Germany and France from April 2020. So, there will be

11 | a gap, but I do not think that is going to matter, in the long run of things. So, I think

12 | you'll have to develop the solution to reach the data, which is not -- it says it is a

13 | sophisticated engineering solution, but it is not that you cannot do it and you have got

14 | the data.

15 | So that will be -- I am dealing with A26. So, there are two parts of it. As for 2005 to

16 | 2013 for the UK or Germany at Google's option and from -- is it April 2020?

17 | MR PICKFORD: That's right.

18 | THE CHAIR: For the UK, France and Germany.

19 |

20 | (10.03 am)

21 | MS LOVE: Sir, I'm grateful. For two minor points. Firstly, I think we had asked for up

22 | to 31 December 2014. So that one gets over the hurdle of the move to the paid

23 | listings, and there's the before and after. And you said 2013, so I just wanted to check

24 | which one you --

25 | THE CHAIR: 2013.

26 | MS LOVE: Okay --

1 THE CHAIR: You will see why it's happened as a result of the move, when looking at  
2 from 2020.

3 MS LOVE: The other thing: we had offered to narrow the number of countries on the  
4 basis that that affected it. If we've just been told by Mr Pickford that basically it's the  
5 upfront cost of getting the solution and the number of countries doesn't make  
6 a difference, then it seems to be that once it's being done --

7 THE CHAIR: I don't think he knows. But I think you'll get a picture of what's  
8 happening, and it's going to be equivalent in other countries, and whether the precise  
9 degree is the same doesn't matter. I don't think it will be able to -- you know, there's  
10 a certain amount of rough and readiness in all this. If this is the consequence in the  
11 UK, one can then assume the consequence is similar in other countries where the  
12 same process is happening.

13 MS LOVE: So up to 31 December, 2013 in the UK is what we are being offered then?

14 THE CHAIR: Well, I said the UK or Germany, because you said that, but if you prefer  
15 the UK, we can say the UK.

16 MS LOVE: UK.

17 THE CHAIR: UK, all right.

18  
19 Discussion regarding Counterfactual

20 Submissions by MS LOVE

21 MS LOVE: I think we now leave the A categories behind us --

22 THE CHAIR: Yes.

23 MS LOVE: -- and we move on to the Counterfactual and C, and there are two aspects  
24 of expert requests in relation to the Counterfactual: there's data, which is C1, C2, C3;  
25 and there are documents, which are the E's. I'm proposing to start with the C's, which  
26 were the subject of the Counterfactual Joint Expert Statement before moving on to the

1 documents.

2 In fairness to Mr Pickford, and to orientate ourselves in relation to the Counterfactual,  
3 bearing in mind that the issue that's going to be determined at the first trial, is:

4 "... the appropriate Counterfactual, had Google complied with applicable competition  
5 laws over the entire period of the infringement or infringements as found in the [Google  
6 Shopping] Decision or by the Tribunal ..."

7 I ought to probably start by seeing what Google has said, which is its pleadings, and  
8 what the answer is to that question. For convenience, I'm going to take it from the Re-  
9 Amended Defence in the Kelkoo matter, which you will find behind tab 10 in bundle 3.

10 Because Mr Pickford is right to say they have pleaded --

11 THE CHAIR: Yes.

12 MS LOVE: -- the "what"; it's the "why" that we're interested in. And the relevant  
13 paragraph, which is 3A.11, begins at the bottom of page 273, and the meat of it is over  
14 the page to 274.

15 THE CHAIR: Yes.

16 MS LOVE: Throughout the Decision Period, according to Google, there would still  
17 have been Product Universal, there would still have been Shopping Units, there would  
18 still have been algorithmic demotions. Google doesn't deal explicitly in this pleading  
19 with manual demotions. Of course, you'll recall, sir, that its case in the binding recitals  
20 hearing was that they weren't something that the Commission had included in the  
21 Abuse, and the Tribunal has now rejected that argument. And between 2008 and  
22 2013 there would have been no links in the Product Universal to Google's own CSS.  
23 From 2013 to 2017, there would have been an opportunity for CSSs not themselves  
24 to feature in the units, but for them to feature product offers from merchants. So, it's  
25 basically the Compliance Mechanism. And then from 2017 onwards, the Compliance  
26 Mechanism.

1 So, it is a multi-period Counterfactuals, and it's not just, "well, we have taken  
2 everything that the Commission found to be unlawful and strip it out", it's a bit more  
3 complex than that. And also for your notes, sir -- we don't need to turn it up -- it is  
4 pleaded in paragraph 81B.1, that:

5 "Google will [be serving] factual and expert evidence ... [on] the counterfactual  
6 [question]."

7 Now, that obviously raises several issues. There is an issue about whether that is  
8 a Counterfactual that is open to Google as a matter of law, and Mr Hunt has  
9 recognised that in the Counterfactual Joint Expert Statement, but there is also -- and  
10 this is where we come to the number of the expert evidence -- there is a question of  
11 what is likely and realistic in a non-abusive world for Google to have done, and I'm  
12 paraphrasing the test in the case law and very broad strokes.

13 In particular, there is a question whether the specific two stage multi-period  
14 Counterfactual that has been pleaded is likely and realistic, as well as lawful. And we  
15 don't know what Google is going to say about why that Counterfactual is the likely and  
16 realistic one, as opposed to anything else.

17 Now, given that Google has advanced this positive case, both Mr Hunt and Mr Noble  
18 agree that it will be important for them to see the witness evidence and the  
19 documentary evidence from Google to support that positive case, and I don't think it  
20 needs to be turned up, but Mr Noble's agreement on that is reflected in paragraph 41  
21 of his witness statement. But of course, neither of them has yet seen what that factual  
22 or documentary evidence will consist of.

23 The critical fault line between the economists is whether that is all that is needed, and  
24 whether the economists, indeed the Tribunal, can be confident that there is no need  
25 for, and no value added by, any quantitative analysis of data against which the  
26 economists could evaluate whatever Google may put forward by way of explanations

1 in support.

2 Now, Mr Noble is confident. Mr Noble says, and we can take it either from the  
3 Counterfactual Joint Expert Statement or indeed from his witness statement  
4 that this type of evidence will be sufficient for determining the appropriate  
5 Counterfactual, and currently does not envisage undertaking economic analysis  
6 specifically to inform the Counterfactual itself.

7 So, the position is that he's going to be giving expert economic evidence, but that  
8 evidence is apparently not going to include or reflect the product of economic analysis,  
9 or at least any kind of quantitative analysis. He is just going to review the factual  
10 witness and documentary evidence, and he says that that will take account of the  
11 options for Google's Shopping Service that it considered at different stages, and the  
12 technical feasibility and other considerations at the time that would have been relevant  
13 to the changes Google would have made, and he's going to opine on that.

14 He seems, as we have seen from the Abuse JES, to be starting from the position that  
15 the assumption, that the Compliance Mechanism is restoring effective competition by  
16 ensuring equal access to the Boxes, and it brought the Infringement to an end.

17 Mr Hunt, on the other hand, considers, yes, it will be necessary to take the factual and  
18 documentary evidence into account, but one needs to review it against Google's  
19 abilities, and in particular, Google's incentives to take a particular course of action to  
20 assess whether it is a realistic and a plausible Counterfactual. And if I could ask you,  
21 sir, to --

22 THE CHAIR: Sorry, to assess whether it's plausible? Insofar as the remedies  
23 concerned, is it plausible if they're doing what they've undertaken to do, as in the  
24 Remedy, you say, doesn't correct the abuse, but it's plausible that they're doing it,  
25 because they are doing it. So, and they say, "If we're doing this from the time that the  
26 Commission has ordered in the Remedy, it could have been done earlier". And it's

1 very difficult to say, "Well, it couldn't have been done". I thought your point is that it's  
2 not sufficient and it's not adequate.

3 MS LOVE: There are several points, Sir. As you said, there is the question about  
4 whether what was done in 2017 was lawful, and if it wasn't, we'll have to look at what  
5 else might have been done. But there is also a question about whether it is actually  
6 realistic that it would have been brought back to 2013, as opposed to other  
7 possibilities.

8 THE CHAIR: They're only looking -- You can't establish what actually would have  
9 happened in the world that never existed. All one can say is on a broad brush  
10 approach what could have been the conduct in a case like this and what by this rather  
11 sophisticated conduct might have occurred that would have avoided the abuse. I don't  
12 think one can start getting into great analysis of what is more likely to have happened  
13 in the Counterfactual world, because it's most impossible.

14 MS LOVE: Sir, that is -- I mean, where exactly one puts the threshold, that doesn't  
15 remove the need to assess the realism. What are the options that Google had to  
16 satisfy demand, customer demand, for product queries? How did Google make money  
17 from its search engine business? How do those profits link back to the Product Search  
18 aspects? Whom is Google competing with? How is it competing and what might it  
19 have expected in terms of profitability from the different options?

20 THE CHAIR: Well, why is profitability relevant?

21 MS LOVE: Well, Sir, one assumes that Google is seeking to do profit maxim ...

22 THE CHAIR: Yes, but we don't need a Counterfactual. You don't have to produce  
23 a Counterfactual that generates the maximum profit for Google. You need to produce  
24 a Counterfactual that you say would avoid the abuse. And if Google says, "Well, then  
25 we would have made less money", well, tough. People, dominant companies that  
26 abuse their position do it to make money and if they conduct themselves in a non-

1 abusive way, they make less money. So, to define the most profit maximising  
2 Counterfactual, we're getting to an exercise that starts being over-engineered and it  
3 becomes impossible. These cases which are difficult enough become insuperably  
4 difficult. It's got to be a reasonable Counterfactual. It doesn't have to be the most  
5 profitable Counterfactual for Google.

6 MS LOVE: Saying, sir, that it would be the most profitable -- our concern is that Google  
7 is going to be putting forward factual and documentary evidence that say not just the  
8 what, but the why.

9 THE CHAIR: Yes, the question will be, does Google's Counterfactual avoid the  
10 abuse?

11 MS LOVE: Well, the question may also be whether even taking it at face value in the  
12 light of the witness and the documentary evidence, it actually -- I don't know whether  
13 it's likely or more likely than other things, it's actually something that stacks up. And,  
14 sorry, probably a bad idea to sort of draw examples out of nowhere.

15 Let's say that a witness statement comes from Google, someone saying, "Well,  
16 looking back, there would have been, I don't know, three options. One would have  
17 been to carry on with the OneBox; one would have been to do whatever it is they've  
18 said they'll do in their pleading; and one would have been some other thing, I don't  
19 know, I'm going to hypothesise, drawn from something they did in another vertical.  
20 And this individual says, "In my view, we would obviously have chosen option two of  
21 doing what they've pleaded they'll do, because that would have been the profitable  
22 thing, looking at it as it stood at the time and in hindsight". And the question is, how  
23 does one prove that? How are the economists going to kick the tires on that and  
24 evaluate it and understand whether any of it actually stacks up? Obviously --

25 THE CHAIR: I think one gets to a stage of really over-engineering these cases, which  
26 are difficult enough as they are, making them far harder to try, far more expensive than



1 necessary in getting Claimants their remedy. And if there is a plausible Counterfactual  
2 that avoids the abusive effects, and it's plausible then to say, well, there's another  
3 plausible Counterfactual, and we will then spend a lot of time thinking about which one  
4 might have been applied in a world that didn't exist, that really extends the scope of  
5 these trials, and I'm very concerned about that. They're complicated and expensive  
6 enough trying to get remedies for people who suffer from this conduct.

7 You're getting quite a lot of financial information that's going to give you some of this  
8 material that exists, which we've been through before under I think it was A15 or  
9 something, maybe A21, which is going to provide a lot of detailed financial information  
10 and to go beyond that, it seems to me at this stage, is just leading to excessive  
11 disclosure and excessive costs and excessive complication.

12 MS LOVE: Sir, it is intended as a sense check and also as a precaution because, of  
13 course, we don't know what the factual evidence will be or the documentary and both  
14 experts who agreed on the importance of that. It is a sense check, you say, well, if  
15 they put forward something that is plausible it is a sense check that will enable one to  
16 have a yardstick to consider whether it really is plausible.

17 If I may, Sir, in the light of the indication you've given, I would like to turn behind me  
18 and take instructions.

19 THE CHAIR: Yes, well, I think it envisages a way of running a case on the  
20 Counterfactual, which I just think is, as I say, over-complicated and over-engineered.

21 (Pause)

22 MS LOVE: Sir, in the light of that indication, I'm going to move on from C1, C2, and  
23 C3 to the part that both economists agree in principle is relevant and is within the way  
24 that Mr Noble wants to do things, which is the document requests.

25 THE CHAIR: Yes.

26 MS LOVE: So, these are covered in paragraph 2 of Kelkoo's Draft Order, and they

1 form Part B of the confidential schedule to that order, starting on page 32 of it. And  
2 they are said by Google not to be within the scope of the Expert-Led Disclosure  
3 Process, which was exclusively for data; and we've covered that yesterday.  
4 Mr Pickford has accepted that Mr Hunt does indeed want this information.

5 The one other aspect of the document request that I think I need to address before  
6 turning on to the categories themselves, is the assertion that we are making them at  
7 a very late stage and that they could and should have been made sooner. That is  
8 raised in paragraph 3 of Google's Skeleton Argument. In particular, Google says, in  
9 the light of a letter from Mr Hunt from 13 November, that:

10 "... the Claimants were free to instruct their economic expert in good time to feed into  
11 their requests for document disclosure at the CMC in November ..."

12 (Pause)

13 THE CHAIR: Well, let's not worry too much about that. Let's look at the request. So  
14 E1 is decision-making about the Product OneBox. Google says, well, this depends on  
15 Foundem's contested paragraphs. Mr Hunt says, no, it goes to the Counterfactual for  
16 that period, the Pre-Decision period to see Google's decision-making and I can see  
17 some force in that. That is why it's now advanced this way, which is, I think, different  
18 from the way this was raised previously.

19 MS LOVE: Yes.

20 THE CHAIR: And, I think, Mr ...

21 MS LOVE: I don't believe there to be any objection to this request on the grounds of  
22 proportionality. It's addressed in paragraphs 77 to 79 --

23 THE CHAIR: Thank you.

24 MS LOVE: -- of Mr Wisking's Eighth witness statement.

25 THE CHAIR: Yes.

26 MS LOVE: And it seems to all be about the OneBox and of course, sir, you already

1 have the point --

2 THE CHAIR: Yes.

3 MS LOVE: -- which is that --

4 THE CHAIR: Let's ask Mr Pickford, what do you say about this request? I don't think  
5 Mr Wisking says that this is particularly difficult. He says it's not relevant, but he  
6 doesn't say that there is great difficulty searching for these documents.

7 Reply submissions by MR PICKFORD

8 MR PICKFORD: That's correct, Sir. On the issue, which I'm only going to deal with  
9 very, very briefly, of the fact that there was a request that was made before, but on  
10 a different basis, but essentially for the same documents, there is authority which I can  
11 take you to that states clearly that the principle in *Henderson v Henderson*, that is you  
12 bring forward your case in full and if you fail in relation to that case, you're not entitled  
13 to bring forward a new version and some better arguments later. That applies equally  
14 to interlocutory matters as well as final hearings. I hear, Sir, that you are minded --

15 THE CHAIR: If you don't have necessarily your expert at the early stage and then the  
16 expert gets into the case and develops the way they're looking at it and wishes to  
17 analyse it and say, "Well, actually, this is an important area of inquiry. You haven't  
18 explained that to the Tribunal, but this is the way I want to be thinking about the  
19 Counterfactual for that period and this is very relevant to it". Provided it's not going to  
20 derail the progress of the case, it seems to me it would be a very harsh approach to  
21 say, "Well, no, you can't, because you raised this before on a quite different basis".  
22 It's not a legal argument, it's a disclosure request.

23 MR PICKFORD: That is understood, sir, and I would only note that Mr Hunt was  
24 instructed when Mr Moser was making the failed submissions on this in November.  
25 But I'm not going to press that point because I can see that, sir, you'd like to deal with  
26 this on the substance. So, I have some points to make on that.

1 THE CHAIR: Yes.

2 MR PICKFORD: As we understand it, certainly from the way that this was put in the  
3 Claimant's skeleton, there are essentially two core bases on which it's said that  
4 documents are needed about OneBox, even if there is no OneBox claim. So, we're  
5 putting aside for the moment has Foundem pleaded a OneBox point, and we are  
6 assuming that they haven't and we're grappling with, well, should these documents be  
7 disclosed in any event?

8 The first argument -- and I quote from paragraph 41 of the Claimant's Skeleton -- was  
9 that:

10 "Mr Hunt requires these documents for the specific purpose of informing his  
11 Counterfactual analysis to determine whether (if an abuse is established before 2008)  
12 Google would have acted in the same way in relation to the Product OneBox in the  
13 Counterfactual before 2008."

14 So that's the first approach. They're saying, "Okay, we're focused on the pre-2008  
15 period. Let's assume that we have demonstrated that it is unlawful". They must mean  
16 in that context unlawful because of the application of demotions because of course  
17 we're not in the unlawful because of the OneBox world. And they say, "But  
18 nonetheless, Mr Hunt wants to investigate whether the OneBox would still have been  
19 in play". And we say that he's missing the essential legal point of a Counterfactual in  
20 that analysis.

21 The Counterfactual -- and it's in my submission, trite law -- is intended to remove the  
22 infringing conduct. And as soon as you start to not only remove the infringing conduct,  
23 but conducts that aren't infringing, you're no longer in the world of a valid  
24 Counterfactual because you're not isolating the issue that you're concerned with. You  
25 are effectively, if you're removing both the demotions and you're removing the  
26 OneBox, implicitly you're assuming there was a problem with the OneBox. And you

1 can only establish that if there's an Infringement in relation to the OneBox. So my  
2 submission is that the first basis is not a legitimate basis, because implicit in it is really  
3 an attack on the OneBox. And as soon as one appreciates and accepts that the  
4 OneBox is totally legitimate, there is no reason to start investigating a world without it.  
5 Now, it may be said by Mr Hunt, "Well, even if that's right, you know, just in terms of  
6 getting an entirely full picture, I still want to know how all these things worked". And  
7 my submission is, well, at that point, a proportionality issue does come into play  
8 because that is so far removed from really what you should be focusing on that it isn't  
9 fair to make a disclosure order in relation to it. So, there is, in my submission,  
10 a proportionality issue lurking there insofar as that's the argument that's being put.  
11 The second basis on which it's said that Mr Hunt requires these documents is it's said,  
12 well, let's assume that there wasn't an abuse before 2008 and therefore that Google  
13 would have maintained its Product OneBox. Now, even in putting it that way, that  
14 implicitly accepts that we must be right on the first.  
15 I think these are arguments in the alternative. They're saying even if it's right that the  
16 OneBox would have been there in 2006 to 2008, perhaps what that implies is that as  
17 part of the Counterfactual post-2008, that would have been a world where Google  
18 might have wanted to have used a OneBox instead of what it actually did. And the  
19 problem with that basis for the request is it doesn't correspond to any one's case.  
20 What Mr Hunt should be investigating on behalf of his clients is their Counterfactual,  
21 and it's not their Counterfactual that we'd have implemented a OneBox, and it's not  
22 our Counterfactual that we would have implemented one.  
23 So we say that that is equally not a logical basis for asking for what Mr Hunt is seeking.  
24 THE CHAIR: When you say it's not your Counterfactual that you would not have  
25 implemented ...?  
26 MR PICKFORD: I may well have added far too many notes into my sentence. What

1 I'm trying to say -- and I'll say it again to make sure I'm getting it right -- is that our case  
2 on the Counterfactual post-2008 is that we made the minimal changes to the Shopping  
3 Boxes, as they existed then. For the Product Universal, would have taken away the  
4 link that took you to the standalone site. And when we're in the Shopping Unit world,  
5 we'd have basically implemented the Remedy. Neither of those involve  
6 a Counterfactual. We're saying, actually, what we would have done is we'd have had  
7 the OneBox instead. We'd have continued that through the period. That's not our  
8 case, and it's not the Claimant's case either.

9 So we say, equally, that doesn't stack up as a reason for seeking this material. So  
10 those are, as I understand it -- I mean, they are the bases that are put forward in  
11 paragraph 41 of the Claimant's skeleton. If there's a different reason, I can address  
12 that, but that's my understanding of what is being said by the Claimants, and our  
13 response to it.

14 THE CHAIR: Yes. Ms Love, if you'd like to respond to that.

15 Submissions by MS LOVE

16 MS LOVE: Sir, this is all -- I also got somewhat lost in the notes. Obviously, if -- Kelkoo  
17 and Foundem have got pleaded cases, apart from these paragraphs, to the effect that  
18 Google's conduct was abusive before January 2008. The OneBox was part of that  
19 conduct. As we've been through yesterday, it was the precursor to the Product  
20 Universal, which was included in Google's Comparison Shopping Service. The  
21 reasoning in the Preliminary Issues Judgement, the binding recitals judgment, by  
22 extension, applies to it. And at least to that extent, it was part of the unlawfulness, and  
23 if those cases succeed -- and again, we're setting aside paragraphs 94C to 94F of  
24 Foundem -- there'll be a need to consider what Google would have done in a non-  
25 infringing world.

26 Now, obviously, if those cases don't succeed, we don't need to look at the

1 Counterfactual before 1 January 2008. I confess to not having quite followed  
2 Mr Pickford's point, but, no, we don't need to explore Counterfactuals to lawful  
3 conduct. Even in the case of their not succeeding, when the clock ticks from  
4 31 December 2007 to 1 January 2008, the question is: what happens? Google has  
5 said what happens. This is not about whether it's Google's case. This is about us  
6 having, and our expert having, material against which to test and evaluate that case.  
7 We understand there to be no serious issue as to the proportionality of this.

8 THE CHAIR: Yes.

9 MS LOVE: It is just ensuring that the experts have material. We know they're not  
10 going to get the quantitative information. I do ask rhetorically: what are they going to  
11 do? They will have Google's witness statement and whatever material there is on that.  
12 How will they evaluate? Against what yardstick? What will the economists bring to  
13 the party without anything on Google's thinking on what came before and --

14 THE CHAIR: Well, there will be thinking about demotions and the design of the  
15 algorithms and the application -- or how Google's ... Did Google Shopping exist at that  
16 time? The Google comparative site before 2008. I can't remember when was --

17 MS LOVE: Yes.

18 THE CHAIR: It did. Yes. So, how Google treated Google Shopping compared to --  
19 how they were treated compared to Google Shopping in terms of being less visible?  
20 I find it a difficult one, but on balance, Mr Pickford, I think I will order it. I think, to  
21 understand how Google would have acted in the Counterfactual, having an overview  
22 of its strategy regarding comparative shopping and links to merchants is important.  
23 And this is part of that. I can see that it's arguably relevant. On that basis, where it's  
24 not burdensome, I think it's better to earn favour of ordering that disclosure, so I will  
25 do so.

26 So that's E1. You get that, Ms Love. E2 is agreed, I think.

1 MS LOVE: Yes. Green. It's green. And there's -- we'll return to the joys of timescales  
2 later. So, I need to catch up. I think I'm in -- E3, I think is also part of the green  
3 contingent.

4 We then moved to E4 and E5 and then E8. Sorry, Sir, I'm conscious that it's now been  
5 over an hour and I don't know about the transcriber.

6 THE CHAIR: Let's go another 15 minutes. We'll do one more.

7 MS LOVE: Thank you, Sir.

8 THE CHAIR: Let's do E4.

9 MS LOVE: E4 is for documents relating to Google's decision to move to a paid  
10 inclusion model in the Shopping Unit, and for the standalone Google Shopping website  
11 in the EEA in 2013. It is addressed in paragraphs 82 to 83 of Mr Wisking's Eighth  
12 statement, which are at page 160, behind Tab 17. I apologise, Sir, I'm just going to  
13 do some paper rearrangement here, pleadings (inaudible).

14 Mr Wisking says that the Claimants appear to no longer maintain that they or Mr Hunt  
15 require it for the purpose of his analysis. Just for the record, Sir, that's not quite right,  
16 because Mr Hunt was prepared, in the interest of proportionality, not to pursue it if  
17 Google and Mr Noble consider that the existing disclosure is sufficient for the purpose  
18 of establishing Google's pleaded case on the Counterfactual. We've not had that  
19 confirmation, although, as I've said, Mr Noble seems to agree in principle that  
20 documents on the Counterfactual will be important. But, subject to one exception, we  
21 are content not to pursue it. That exception you can see in the right-hand column of  
22 the -- let me just have a look -- of the Schedule to the Linklaters letter, and you can  
23 also see it in page 178 of the Scott Schedule ... (Pause)

24 Which is that there's a gap in relation to:

25 "... 'Google's decision making on when to move to a paid inclusion in the EEA (as  
26 distinct from the US market), including revenue projections for the EEA.'"



1 Now, Google has referred to some documents, some existing documents in the  
2 disclosure. They're not in the bundles, but, as I understand it, the position is that they  
3 don't address the EEA, as you can see from the further response column. And we say  
4 that it is --

5 THE CHAIR: What you're saying is that they address the US, do they? Or what?

6 MS LOVE: Yes. And in circumstances where Google's positive case on the  
7 Counterfactual -- now we are in the world that Mr Pickford endorses -- is that they  
8 would have moved to paid inclusion in the EEA in 2013. We say those documents are  
9 relevant to whether and when Google will actually have made that decision. So, in  
10 relation to that gap, I maintain that --

11 THE CHAIR: They did move to paid inclusion in 2013. Isn't that right?

12 MS LOVE: It was slightly different. It was the Shopping Unit, and their case is that  
13 they would have moved to a paid inclusion in the means of the Compliance  
14 Mechanism for 2013.

15 THE CHAIR: I see. (Pause)

16 But you're looking at -- when you say you want documents on their decision-making  
17 on when to move to paid inclusion, you mean the paid inclusion in the Shopping Unit,  
18 don't you? That's what they did, because you want an actual document of their  
19 decision-making?

20 MS LOVE: Yes. The decision to move to a paid inclusion model in the Shopping Unit  
21 and for Google's CSS in the EEA.

22 THE CHAIR: Yes.

23 MS LOVE: Sir, I'm not sure, again, that there has been any specific proportionality  
24 grumble or this is one of the ones that's very burdensome or unduly burdensome or  
25 inordinately burdensome or whatever other types of burdensome.

26 THE CHAIR: What I'm just trying to understand is this. Obviously, we're not going to

1 look at all these documents, but there are some documents which are listed in the  
2 "Google's position" column which do address this. Then you say, in your further  
3 response, there's a gap. But the gap is basically the entire request; isn't it?

4 MS LOVE: We're responding, Sir, to what's been said, to plug the gap.

5 THE CHAIR: Well, the documents being disclosed seem to relate to this to some  
6 extent. It's not complete, but ...

7 MS LOVE: Sir, I'm sorry. I'm told that the wording in the Scott Schedule, in the leftmost  
8 column, which is, "and for Google's CSS in the EEA" -- that that wording has been  
9 added to clarify the scope of the request. I'm sorry that that seems to have caused  
10 this ambiguity. I can go back to the original.

11 THE CHAIR: For Google's CSS in the EEA.

12 MS LOVE: Yes. I haven't been back to the archaeology of the wording in the  
13 Scott Schedule, but that would make sense because as you say, Sir, currently there  
14 seems to be a gap -- the request seems to comprise the gap, if I can put it in those  
15 terms.

16 THE CHAIR: Can you help me? Where is this in the joint -- is this covered in the Joint  
17 Expert Statement? No, it's not in.

18 MS LOVE: I think probably the best place to take this up will be the schedule in  
19 bundle 4, tab 41, and internal page 356.

20 THE CHAIR: 356 is ...

21 MS LOVE: Yes. Oh, sorry. There you see the words "in the EEA" have been added  
22 in red. I apologise Sir, something in the font colouring has (audio distortion). Google's  
23 response documents to be referred, you can also see that they have agreed to provide  
24 some FTC exhibits, the FTC being, again, the US proceedings. So, again, in my  
25 submission, it doesn't fully close the gap, because we are obviously focusing on the  
26 EEA.

1 THE CHAIR: Yes, Mr Pickford. What do you say about ...?

2 Reply submissions by MR PICKFORD

3 MR PICKFORD: So, sir, our understanding of the reason for this request is that the  
4 Claimants are content that they can see that they have documents about why we  
5 moved to a paid inclusion model that happened first in the US. And they're saying,  
6 "Well, we've got plenty about the US, but we want more about the EEA". The response  
7 to that is, essentially, there's a misunderstanding, I think, on behalf of the Claimants  
8 as to how Google works in the -- the decision to move to a paid inclusion model is  
9 taken, ultimately, but by Google, as something that it would like to do, if it can  
10 worldwide. Then it -- what it always pretty well does is it rolls out things first in the US  
11 and then subsequently in other countries. So, it's not surprising that there might be  
12 less documents going to this issue in the EEA.

13 We have disclosed strategy documents, which is where the issue has currently been  
14 canvassed. Now, we say that should be sufficient. However, again, trying to move  
15 things on speedily, if the Tribunal is minded to request further disclosure in relation to  
16 this, we are willing to offer our launch reports for the boxes in question. To our mind,  
17 that would be the most targeted way of providing what it is that the Claimants are  
18 seeking, insofar as there is anything more to be had from those than they already have  
19 from our strategy.

20 THE CHAIR: What are the launch reports?

21 MR PICKFORD: The launch reports, I just need to check for which particular products.

22 (Pause)

23 So, that's the launch reports for the Shopping Unit in each jurisdiction. We're not  
24 saying that there's going to be vast amount more in terms of the rationale in those,  
25 because, as I said, the rationale for introducing a paid model -- because that's  
26 a decision on which they do have material. But if they want to know about the specifics

1 of the launch in each jurisdiction, they can have the launch reports.

2 THE CHAIR: Well, I think you should give the launch reports, but I do think you should  
3 also give, if there are -- and I'd be surprised if there's nothing -- any strategy  
4 documents on the decision to continue the rollout in the EEA, and when in each  
5 country. Well, the launch report will be after that decision's taken. But the strategy of  
6 saying, "This has worked well in the US and we want to extend it into Europe or we  
7 want it now try it in France or in the UK and see if it produces this result and if it  
8 exceeds, does that or better, then we want to extend it across other countries".

9 There'll be some sort of strategic thinking about how we introduce it into the EEA.

10 MR PICKFORD: Of course, Sir, and we have already disclosed our strategic thinking.  
11 We've disclosed our strategy documents. That's one of the things that the Claimants  
12 got in the November --

13 THE CHAIR: For the EEA?

14 MR PICKFORD: Yes. What they're saying is, "We got all your strategy documents,  
15 and from that, what we've been able to discern is quite a lot about what happened in  
16 the US and less about what happened in the EEA".

17 I've explained there's a simple explanation for that, which is the way that products are  
18 rolled out.

19 THE CHAIR: Well, I'd understood the Claimants to say, "We have strategy documents  
20 that basically cover the US, and we don't have anything that really looks at the EEA".

21 MR PICKFORD: No. Our search was not for US strategy documents, it was for  
22 strategy documents more generally.

23 THE CHAIR: And that's been done and disclosed?

24 MR PICKFORD: Yes, and the complaint is, well, there's more in the US than in the  
25 EEA, to which we say: not surprising.

26 THE CHAIR: Yes.

1 MR PICKFORD: But as I've said, we are, pragmatically, to try to find a way through,  
2 willing to offer launch reports.

3 THE CHAIR: Yes, let me just hear from Ms Love. You want to respond to that? They'd  
4 say that they did look for strategy documents, including the EEA, and what was the  
5 results of that search you've been provided with?

6 MS LOVE: Sir, my understanding is that such searches have been carried out in  
7 relation to strategy in general, and they were not country specific. And it is exactly --  
8 it is the lacuna, Sir, that you rightly identified, which is a decision is taken in principle  
9 to move to paid inclusion. Fine; one starts in the US, one rolls out. But there is then  
10 a question of the "when" and the "how" and the "why" and do we go this country? Do  
11 we go "then"? And launch reports, interesting as they may be, as the name suggests -  
12 -

13 (10.51 am)

14 THE CHAIR: As I understand Mr Pickford, that search has been carried out, and the  
15 results of it you have been provided with. I mean, all I can do is order that insofar as  
16 not already searched for, Google should conduct a reasonable, proportionate search  
17 for any strategy documents covering the rollout of the paid inclusion model in the EEA,  
18 and into particular countries in the EEA. That is what you want. And either you find  
19 some more or you say, well, that is exactly what we have looked for.

20 MR PICKFORD: It's not exactly what we look for. We look for something that should  
21 include that, because we've looked for all our strategy documents, which would include  
22 that, but not specific to that.

23 THE CHAIR: Yes, so I think it will be I think I will make that order and it would then  
24 be, I think, for the Claimants to write to you, by reference to these documents saying  
25 that actually in none of these 7, 12, 15, whatever it is, documents, is there any  
26 consideration of extending this to the EEA? And surely that must have been

1 considered at some point, whether to do it and when? And those are the documents  
2 that then you need to look for. Or you may say, well, actually, if you look at this  
3 document, that document, that is exactly what they are doing. But I do not think I can  
4 take it further. And we have agreed on the relevance of that. You have said what you  
5 are missing. You said, well, actually, it has been provided. So, I think you just need  
6 to liaise. And insofar as it has not been provided and not covered in the documents,  
7 I am saying not in the degree of specificity. I am saying general strategy documents,  
8 regarding the extension of the paid inclusion model in the EEA, and then to particular  
9 countries in the EEA, including the timing.

10 MR PICKFORD: Yes. On that, I'm assuming that this is the Decision countries in the  
11 EEA, not decision --

12 THE CHAIR: Yes, the Decision countries.

13 MR PICKFORD: Yes, thank you.

14 THE CHAIR: Yes, quite right, the Decision countries.

15  
16 (10.53 am)

17 THE CHAIR: Right, E5, and but we'll take our break. So I'll return at 11.00.

18 (10.53 am)

19 (A short break)

20 (11.09 am)

21 THE CHAIR: Yes.

22  
23 Discussion regarding Draft Order, Request E5 of A3 Bundle

24 Submissions by MS LOVE

25 MS LOVE: So, we move on to E5, which is in page 180 of the Scott Schedule. And  
26 this is a request for:

1 "Documents [relating to] Google's assessment or testing of including results from third-  
2 party CSSs in the ... OneBox, the ...Product Universal and/or the Shopping Unit."

3 Is it relevant to the Counterfactual issue? Again, we are in a world of what Mr Pickford  
4 says Google would do, which is that they would have done this in stages, and they  
5 would have had a paid inclusion coming in, in 2013, just in a slightly different variant  
6 to what happened in the real world. It would have been the Compliance Mechanism,  
7 and again, it's obvious that is relevant material against which to test that.

8 As far as the OneBox is concerned, the arguments that are made are essentially  
9 a repeat of those that were made in relation to E1, which I've already addressed, and  
10 which you have already decided on. And as far as the Product Universal or the  
11 Shopping Unit go, Google's answer is really that this has been addressed by the  
12 existing disclosure. And I think Mr Wisking deals with this in paragraphs 81 through  
13 to 84 of his witness statement, although in fairness to him, there's not a great deal on  
14 E5 specifically.

15 Now, we have acknowledged, Sir, in the annex to the Linklaters letter that we were  
16 looking at shortly before the short adjournment, and that is in Bundle 4, page 357, we  
17 have acknowledged that three documents have been pointed to by Google that relate  
18 to the testing of possible inclusion of third-party Comparison Shopping Services in the  
19 Product Universal. Those are three documents that all seem to be from one six-week  
20 period in 2012 relating to testing. And our acknowledgment seems to be being held  
21 against us as, well, that's that job done. But yes, some stuff has been caught, but  
22 there has been no disclosure to date that has specifically focused on this issue, as it  
23 applies both to the Product Universal and the Shopping Unit. And so we maintain this  
24 request, because the existing disclosure on this obviously relevant issue is incomplete.

25 THE CHAIR: Yes. (Pause)

26 Yes, Mr Pickford.

1 | Reply submissions by MR PICKFORD

2 | MR PICKFORD: Thank you, Sir.

3 | So, dealing with each period in turn. The Product OneBox era: Ms Love says that the  
4 | arguments are the same as in relation to E1.

5 | Now, in E1, what they were seeking was documents effectively about the introduction  
6 | of the OneBox, so they could understand more about it. And Sir, you said that it was  
7 | finely balanced, but you were ultimately going to give them that, in order that they  
8 | could understand more about the development of the products.

9 | In my submission, in the absence of a OneBox claim -- and that's how Ms Love is  
10 | putting it, she's saying even if we don't have a claim, we're still entitled to this material -  
11 | - it's not realistic that they need to know about the potential inclusion of third parties in  
12 | the OneBox. That's nobody's case; it's not their case, it's not our case. And in my  
13 | submission, it's therefore irrelevant.

14 | In relation to the other periods, we have searched, and we've provided what we've  
15 | been able to find. And the difficulty here is that they're simply saying, well, they only  
16 | relate to a certain period, and we'd like you, therefore, to provide more documents.  
17 | Our position is, we did the search, and this is what was revealed, and it's perhaps  
18 | again unsurprising that they relate to a certain period, because that is evidently the  
19 | period when Google was considering that issue.

20 | So, it's hard to know how much further to take it. If you wished, we could obviously do  
21 | something similar to E4, but we say it's going to be, probably, a nil return, because  
22 | we've done the search, and there are some documents, and we can't magic up  
23 | documents for periods that they don't exist.

24 | THE CHAIR: Yes.

25 | Ms Love, as far as the Product OneBox is concerned you're getting the strategy  
26 | documents for the OneBox under E1. If there's any consideration about doing it



1 a different way, then one would expect that to be reflected there. And as regards the  
2 rest, I mean, the answer is they have searched for this and you haven't identified from  
3 the documents you've got reference to previous documents then saying, "Well, the last  
4 time we looked at this the position was different". There's no suggestion from what  
5 you have seen, that there were other missing documents. And if one is told by  
6 responsible lawyers they have conducted this search for that period, to say, "Well, we  
7 didn't get much", doesn't really take one very far, does it?

8 MR PICKFORD: To be clear, Sir, the search that we conducted was -- this is all part  
9 of the strategy documents -- where there have been a significant number of  
10 documents that go to a variety of issues, this being one of them, the strategy in relation  
11 to this issue.

12 THE CHAIR: Third-party shopping sites. Yes.

13 MS LOVE: Sir, I'm not aware of a disclosure request that was for this specifically. And  
14 I do say that if there's been a general strategy search and there is a possibility of more  
15 focused searching, should it make sense to do it and see what comes up, but I've  
16 heard ...

17 THE CHAIR: It's part of the strategy. I mean, the strategy will be things we're going  
18 to do and things we're thinking about and decide in the end not to do. That's part of  
19 the strategy. You can say, "Well, there's this specific aspect that might be a bit of your  
20 strategy, which we want to look at", but it would have been caught by the search.  
21 I cannot see that it's proportionate to say, well, go and search again for this which is  
22 a subset of the broader strategy. So, the answer is no.

23 E8.

24 MS LOVE: E8, Sir. And I'm delighted to say that after that we are out of the A's, C's  
25 and E's so we are moving on beyond the expert-led stuff.

26 THE CHAIR: E8's the last, yes?

1 MS LOVE: Yes, E8 is addressed in Google's skeleton at paragraphs 47 through to  
2 52, and it is a request for documents that relate to the three offers of commitments  
3 that Google made to the Commission on 13 April 2013, 21 October 2013, and  
4 31 January 2014. I think actually it may be helpful to just see how this is described in  
5 the Shopping Decision.

6 THE CHAIR: Well, I've seen the Shopping Decision. Can I ask you -- I really don't  
7 think we need to look at it now -- why is this relevant?

8 MS LOVE: Well, these are documents that are going to show how Google may, in  
9 2013 and 2014, actually have been considering modifying its conduct to address the  
10 European Commission's (overspeaking) --

11 THE CHAIR: But ineffectively. Inadequately, because the commitments were not  
12 considered sufficient.

13 MS LOVE: Well -- but this is contemporaneous material.

14 THE CHAIR: Yes, but why is it relevant? There's a lot of contemporaneous material  
15 in Google, no doubt billions of documents in Google from this whole period. It doesn't  
16 mean they're all relevant. Why is the discussion about commitments that were  
17 rejected as being inadequate relevant?

18 MS LOVE: The commitments for Google's proposed offer to address what it  
19 understood to be the Commission's preliminary assessment about the infringement of  
20 Article 102 TFEU, and that assessment was subsequently confirmed in the Decision.  
21 We have seen that they've pleaded they would have done various things, including  
22 things from 2013, and this is their actual thinking at the time about what the options  
23 were.

24 THE CHAIR: Yes, but it wasn't good enough so it's not taking one anywhere.

25 MS LOVE: But, Sir, if I may say so, it is information against which one can evaluate  
26 what will now be said in witness statements about what would have happened and

1 | why.

2 | THE CHAIR: Well, what they're saying is for that, they would have done what they did  
3 | in the remedy. That's what they're saying. That's their case, essentially, that they  
4 | would have done it earlier, but they're not saying they would have done what was in  
5 | the commitments, because we know that the commitments were held not sufficient to  
6 | correct and cease the Abuse.

7 | MS LOVE: Sir, there is a question of what -- it's about the strategy and the decision-  
8 | making, Sir. And it is what led them to alight on those particular ...

9 | THE CHAIR: But it was the strategy that was mistaken and inadequate and rejected  
10 | and I don't see how it helps. They're not going to be able to say, "Oh, what we would  
11 | have done in the Infringement period is what we offered in the commitment and that's  
12 | our Counterfactual", because you will immediately say, "No, we have the  
13 | Commission's rejection of that commitment". So that's not good enough. And in any  
14 | event, we know they're not seeking to say that for obvious reasons.

15 | MS LOVE: Sir, what they're saying is that they could have done something from 2013  
16 | and let us hypothesise that they were thinking about what commitments they might  
17 | offer and they said, "Well, we can't do this thing, or we could do that, but it would be  
18 | disastrous". I mean, it is not just what they were offering, it is why. And it is how that  
19 | bears on and how it is a metric against which to test what they're now saying they  
20 | would have done.

21 | THE CHAIR: Well, I think the metric you tested in is their thinking about the Remedy  
22 | and their strategy towards the Remedy, which is what they are saying is the  
23 | Counterfactual. I mean, at the end of the day, they say that's the Counterfactual. You  
24 | say, "No, that's no good because there's still discrimination". So, we throw that out.  
25 | But you then come up with what you say is a plausible Counterfactual which would  
26 | avoid discrimination and you put that forward and if you succeed in saying, well, the

1 Remedy is inadequate, and if your Counterfactual does avoid the discrimination, it's  
2 then really for Google to say, "Oh, that wouldn't work". But at the moment you will be  
3 producing something that goes further than the Remedy, clearly, as a Counterfactual,  
4 and these are all missteps, if I can put it colloquially, on the way to the Remedy and  
5 I just don't see the relevance of it.

6 MS LOVE: If I can take it in stages. Obviously our position is the Remedy was not  
7 good enough, and the Remedy wouldn't have been good enough in 2013. But I need  
8 to start with, they're saying not only it is good enough, but if one actually looks at the  
9 world as it stood in 2013, this is what they would have done. They had other things  
10 they could have done, but this is factually what they could have done.

11 THE CHAIR: As I was trying to say earlier, to try and actually say what is the most  
12 likely thing they would have done is making these cases far too difficult. The question  
13 is, if the Remedy doesn't remove the discrimination, you put forward an alternative  
14 model which does remove the discrimination which is plausible and technically feasible  
15 and then it's for Google to say why that somehow couldn't work, and to say, well, we  
16 look at Google's internal thinking and working and saying this is the most likely thing  
17 they would have done, I don't think you have to go that far.

18 You produce a model which avoids discrimination, which is plausible, practicable, fits  
19 with the way they run their website and then that will be, unless they can say this goes  
20 too far or it's unworkable or whatever, a Counterfactual. And to go into every bit of  
21 their thinking on everything, seems to me is just exaggerated and disproportionate.  
22 Plus, I really do not see why the commitments are relevant. They didn't go anywhere.  
23 I mean, you know what they are. You know what the three commitments were  
24 because that's public.

25 MS LOVE: We don't. The third one was market tested, Sir.

26 THE CHAIR: Well, wasn't it market tested with your clients who were complainants.

1 MS LOVE: But not the two that preceded it. Sir, it is obviously their positive -- they  
2 who have put forward positively and affirmatively what the world would have looked  
3 like from 2008 to 2013 and 2013 to 2017 and we know what the world looks like today.  
4 And the first stage will be for us to kick the tyres on that, as it were, and this is material  
5 that shows what they were actually thinking at the time. Sir, if I may, I'm going to --

6 THE CHAIR: What they were thinking at the time in the sense that we hope the  
7 Commission will accept this, and that we can get away with it. And the answer was  
8 put bluntly, no, you can't or at least the Commission initially may have been  
9 sympathetic, but then when they tested it with various people in the market, they  
10 realised, no, this isn't going to work. So ...

11 MS LOVE: Sir, may I turn behind me and take instruction?

12 THE CHAIR: Yes. I just don't see that it advances the case.

13 MS LOVE: Sir, we have heard what you've said and we are not pursuing E8 in the  
14 circumstances.

15 I think we then move on to the miscellany of other requests and I was proposing --  
16 because it is a discrete topic that, she said with cautious optimism, we might crack  
17 through this side of lunch -- to move next to an aspect of the request which is part of  
18 the Connexity Draft Order, which is the DMA documents.

19 THE CHAIR: Yes. If you just help me on the Schedule.

20 MS LOVE: We are on page 216 of the Schedule.

21 THE CHAIR: 216, thank you.

22 MS LOVE: And the bit between where we are now and where we're moving to, there  
23 is a miscellany of R's and SS's which I may have to return to after lunch. And this is  
24 for:

25 "Any documents provided by Google to the European Commission during its  
26 investigation in Case DMA ... Alphabet ..."

1 Yes.

2 THE CHAIR: I think you've restricted it to pre-existing documents. Is that right?

3 MS LOVE: Yes. The original request was broader. It was raised in a letter from  
4 Preiskel on 17 April 2025. I don't think I need to turn to it but for your note, it's behind  
5 Tab 77 of Bundle 4, page 630. And it has, as you say, now narrowed down to what  
6 I think has been termed the "Underlying Documents".

7 THE CHAIR: Yes. Well, let me hear from Mr Pickford on that. The factual question  
8 in the present cases is whether there is self-preferencing and discrimination. If that is  
9 part of the Commission's investigation, albeit under a different legal framework, why  
10 are those documents not relevant?

11 MR PICKFORD: In my submission, more precisely, the factual question that we've  
12 joined issue on is the sufficiency or otherwise of the Remedy, because we say the  
13 Remedy addressed the problem in the post-Remedy period and the Claimants say,  
14 "No, the Remedy didn't address the problem".

15 THE CHAIR: The Claimants say you are still abusing your dominance.

16 MR PICKFORD: Yes, exactly. They didn't address it and therefore --

17 THE CHAIR: You're still self-preferring.

18 MR PICKFORD: Yes. Because the Remedy is not sufficient because your claim that  
19 it met the problem is a bad one. That's what they say. In that context, that's more  
20 precisely what we're actually joined issue on. And we say we do not need to have  
21 disclosure under a different legal regime in relation to a regulatory process that  
22 ultimately involves a different analysis, in order to answer that question. We've --

23 THE CHAIR: But if there are documents showing and looking at whether self-  
24 preferencing is continuing, those are relevant to whether the Remedy is sufficient, are  
25 they not?

26 MR PICKFORD: In my submission, they are different legal questions and --

1 THE CHAIR: They might be different legal questions but the documents showing  
2 whether self-preferencing is continuing is relevant to our legal question. We're looking  
3 at Underlying Documents. They might be relevant to a number of different legal  
4 regimes, but the question is why are they not relevant to the legal regime that we are  
5 concerned with, namely whether there is abuse in the form of self-preferencing and  
6 discrimination against other Comparative Shopping Sites? That's the question this  
7 Tribunal has to address and the fact that someone is looking at the same documents  
8 for a different purpose doesn't mean the documents are therefore irrelevant for the  
9 present purposes in this Tribunal.

10 MR PICKFORD: Sir, I don't think our position is put in terms of pure irrelevancy. It's  
11 put in terms of how close is this to make it justifiable given trespassing in relation to  
12 other ongoing regulatory investigations. From Google's perspective, there is  
13 a significant concern, given that there are quite a lot of regulatory investigations about  
14 its conduct, that Claimants will continually seek to cross feed from one to another when  
15 it's not ultimately necessary. They are different legal questions and in my submission,  
16 ultimately, that means that the issues with which this Tribunal is concerned are best  
17 addressed by focusing on our proceedings and the documents that we have that we  
18 are already disclosing in those proceedings in relation to that rather than in relation to  
19 other regulatory proceedings. That's --

20 THE CHAIR: We're looking at underlying -- we're not looking, as I understand it, at  
21 your submissions to the Commission. As I understand, Underlying Documents, it's  
22 the documents that the Commission have asked for from what Google is doing, not  
23 your representations, not your legal arguments, which I concede concern a different  
24 regime. But if, through that investigation, it is coming up with internal Google  
25 documents that relate to self-preferencing, it seems to me they are potentially very  
26 relevant to this regime and the question this Tribunal is addressing. It can't be

1 disproportionate because you've been producing them to the Commission. And  
2 I would have thought that there are very strong grounds for saying they should be  
3 disclosed. And you say there's a danger of sort of mission creep in terms of disclosure,  
4 well, I'm dealing with this request, not dealing with some subsequent request which, if  
5 it's even open to the Claimants, one would have to consider them. But I'm looking at  
6 this particular request now.

7 MR PICKFORD: Sir, I have no other submissions to make but I --

8 THE CHAIR: Well, you must produce --

9 MR PICKFORD: -- (inaudible) the Tribunal.

10 THE CHAIR: Yes.

11 MS LOVE: Sir, I don't know how much I need to add. It's not the legal reason.

12 THE CHAIR: You've got the order you want so there's nothing for you to add. Let's  
13 move on.

14 MS LOVE: I then move on, in that case, to the exciting chunk that was between  
15 page 180 and page 216 of our Scott Schedule, which are the other applications that  
16 the Claimants have made and as Ms Radke has explained in paragraph 33 of her First  
17 witness statement, our position is that the logical and efficient course of action is to  
18 crack through these now.

19 MR PICKFORD: Sorry, can you tell me -- I don't have that version. By the  
20 Scott Schedule --

21 MS LOVE: Yes, yes.

22 MR PICKFORD: (Inaudible) you actually do.

23 MS LOVE: We're going to go through -- so there are some issues of principle in  
24 relation to the Remedy.

25 THE CHAIR: Section 3b, starting on page 184?

26 MS LOVE: Yes.



1 THE CHAIR: Yes.

2 MS LOVE: No, sorry. I'm sorry, Sir, I need to -- it's also going before that. It's the  
3 bottom of page 3a. So, we're into the issues of privilege and natives. What I hope to  
4 do, Sir, is before lunch to get through some of the sort of principal points.

5 THE CHAIR: Yes.

6 MS LOVE: In particular --

7 THE CHAIR: Can you just help me, sorry. The fact that 3a. is in blue, does that have  
8 any significance in terms of confidentiality?

9 MS LOVE: No, Sir, I think -- although I will stand corrected by those who compiled the  
10 Scott Schedule -- that the distinction that's being made is paragraphs of the orders  
11 and individual document categories and the schedules.

12 THE CHAIR: I see. So anyway, blue doesn't mean confidential.

13 MS LOVE: Not in this. The fact that we're asking for a privilege log is not itself  
14 (overspeaking) -- confidential.

15 THE CHAIR: That's clearly not -- I can't see why it would be confidential. I just wanted  
16 to check. Fine. That's clear.

17 MS LOVE: I think it's a more (inaudible) light shade of blue as opposed to dark  
18 turquoise.

19 THE CHAIR: Yes. So you're --

20 MS LOVE: So, we're going to start with the Kelkoo requests, which are supported by  
21 the other Claimants. They fall into two categories. The first is the Remedy disclosure  
22 or Compliance Mechanism disclosure. There are some individual document requests,  
23 but I want to start with the three big sub issues which are: native versions, privilege,  
24 and gaps in relation to period and custodians. There is then the Strategy disclosure,  
25 where we are into individual requests.

26 So, starting with the text of the order and the sort of principal points, before we descend

1 into whatever email and document requests remain, we're going to start with native  
2 versions, the TIFF -- about TIFFs. That is, for your note, covered in paragraph 7 of  
3 Kelkoo's draft order, which is in Bundle 1, Tab 3, page 16.

4 THE CHAIR: I was sent a revised --

5 Yes.

6 -- a revised Kelkoo Draft Order.

7 MS LOVE: Yes, Sir. That was --

8 THE CHAIR: That was added yesterday?

9 MS LOVE: Yes, Sir.

10 THE CHAIR: Or is that a Connexity Draft Order that you --

11 MS LOVE: I think you had revised versions of both, that were intended to reflect the  
12 narrowing of the requests., I hope (overspeaking) --

13 THE CHAIR: Yes, it's Kelkoo/Ciao, which is disclosure order. Page 257. Right,  
14 apparently. So, is that the one we should look at then? If that's the latest ...

15 MS LOVE: It should be Bundle 1, Tab 3.

16 THE CHAIR: Bundle 1, Tab 3 was the earlier version, but the latest version I think is  
17 Bundle 1, Tab 28, which was added yesterday morning.

18 MS LOVE: I stand corrected, Sir. I had marked up prematurely and things have  
19 moved on.

20 THE CHAIR: Well, that's what we all were working off, but then somebody produced  
21 another one.

22 MS LOVE: Where are we? So now we're looking for paragraph 7 of that, which  
23 happily is the same as the previous paragraph 7 on page 263.

24 THE CHAIR: Yes. So that's on page 263.

25 MS LOVE: Yes. Now, Sir, the central point here, which is a discreet and narrow one,  
26 is that when Google has provided disclosure and inspection of the Remedy documents

1 that were ordered in the previous CMC -- and that was done in stages in February and  
2 April of this year -- that disclosure was largely in a TIFF format. I'm told by Mr O'Regan  
3 a TIFF is a tagged image file format that's used for storing graphics and images.

4 So, in essence, the underlying documents were the Google Workspace equivalent of  
5 a Word or an Excel or an email thread, but what Kelkoo got were the images, and  
6 each came with a plain text file. Now, that gave rise to a series of issues, and I think  
7 that's probably most convenient --

8 THE CHAIR: Yes, I saw that from the --

9 MS LOVE: Yes.

10 THE CHAIR: You're not asking for Google to go back to what you've already got, as  
11 I understand it, but you're saying going forward you want them in --

12 MS LOVE: Yes, in native --

13 THE CHAIR: In native versions.

14 MS LOVE: Yes.

15 THE CHAIR: Is that right?

16 MS LOVE: Yes. Well, Ms Radke has -- I probably do need to use the witness  
17 statement, otherwise you get into the minutiae of email correspondence. The  
18 problems are summarised in Tab 13, page 97, paragraph 37. (Pause)

19 THE CHAIR: Yes. So the problem is that you're getting them in an image format.

20 MS LOVE: Yes.

21 THE CHAIR: But if you got them -- a native version can be used perhaps in slightly  
22 different ways. As I understand it from -- and I may have misunderstood it -- Mr Sheff's  
23 witness statement at page 237, paragraph 11 and 12, which is his response to  
24 Ms Radke's statement. He says at paragraph 12:

25 "Producing documents in native format [if one by that means the original] is technically  
26 not possible for some Google [files because they're on the Google workspace files,

1 and so they are not usable outside Google]. For this reason, the tool Google primarily  
2 uses to collect documents for custodial document disclosure, Google Vault,  
3 automatically converts any native Google Workspace files into Microsoft or Adobe  
4 equivalents (i.e. Microsoft Word, Excel, PowerPoint, and Adobe PDF). [They don't  
5 have identical metadata] ..."

6 So, pausing there, they are, however, searchable.

7 MS LOVE: Yes.

8 THE CHAIR: So, if you got the documents as converted -- as explained by Mr Sheff -  
9 - as Microsoft Word, Excel, PowerPoint, and Adobe PDF, that would deal with the  
10 searchable point.

11 MS LOVE: That would deal with the searchable point, and, obviously, we would also  
12 want the metadata, which Mr Sheff has helpfully clarified is always downloaded  
13 separately to the document itself.

14 THE CHAIR: If you got that, does that deal with the point?

15 MS LOVE: Well, that would try to basically deal with the point, but Mr Sheff has raised  
16 various issues around whether it's a real problem at all, but also security risks. I don't  
17 know if I need to address you on those. We say that they are --

18 THE CHAIR: So, when one says, you accept that you won't get them in the original  
19 native format, as it were, because that's the Google Doc, Google Sheet or whatever,  
20 and you would be content to get them, as he explains, as converted into Microsoft or  
21 Adobe equivalents. Then the separate XML file, which has the metadata.

22 MS LOVE: Sir, that's what we're asking for.

23 THE CHAIR: Yes.

24 MS LOVE: There has been a lack of precision in the use of native. We're asking for  
25 the closest analogue that is properly searchable, as opposed to this, having a picture  
26 and having a big plain text file and having to go through one and marry it up with the

1 other.

2 THE CHAIR: Yes. So that's what you want.

3 MS LOVE: Yes.

4 THE CHAIR: Yes. Well, what I'm not clear is why that is a problem.

5 MR PICKFORD: Should I try to explain?

6 THE CHAIR: Yes.

7 MR PICKFORD: So, this might seem like a more trivial point in the hearing. This,  
8 from Google's perspective, is the most important point that we are grappling with  
9 today, and it's for this reason.

10 You're right that the first stage in extracting documents using Vault, which is the  
11 principal means by which Google extracts documents, is it converts it from a Google  
12 Doc into a more generally used form such as a Microsoft document. That's stage one.  
13 Stage two is that those are then converted into an image TIFF format. There are very  
14 good reasons for that, and there are two of them. The first is that once it's been  
15 converted from pure native into sort of translated native, it is still a live document that  
16 has live links that can be clicked on and the recipient of that document will potentially,  
17 therefore, trace through from one document to another in Google's systems.

18 Now, for security reasons, the reason why Google provides documents -- not just in  
19 these proceedings, but in all UK proceedings and all proceedings worldwide -- in  
20 image format, is because it is not willing -- for very understandable reasons -- to  
21 provide native documents for the security reason that, even if it has sought to restrict  
22 access, if there is one single link that potentially there's a mistake, or in relation to that,  
23 then parties are able to start clicking through onto other documents, which is not  
24 appropriate. They may well click through into privileged documents. There's all sorts  
25 of things that could happen. So, the first reason why the documents are produced in  
26 image format is it prevents that from happening.

1 Now, the second reason is that, in order to comply with other disclosure obligations in  
2 terms of applying Bates numbering, in terms of redactions, in terms of highlighting for  
3 confidentiality, all of that is appropriately and sensibly and normally done in an image  
4 format. That is not something that Google and -- we understand -- parties, generally,  
5 would seek to do in native form, because you've got to turn it into an image in order to  
6 do those things.

7 THE CHAIR: That's a minority of the documents where you redacted. Partial  
8 redactions you're talking about.

9 MR PICKFORD: Well, I mean, for redactions it's a minority . For the numbering, it's  
10 actually all of them.

11 THE CHAIR: Well, you can deal with the numbering another way.

12 MR PICKFORD: It also protects the metadata from being corrupted or manipulated  
13 anyway (overspeaking) --

14 THE CHAIR: I thought there is no metadata.

15 MR PICKFORD: No, no. I was going to come on to that. This is totally wrong. The  
16 suggestion that these documents can't be searched because there's no metadata  
17 associated with them --

18 THE CHAIR: No, I don't think --

19 MR PICKFORD: -- is incorrect.

20 THE CHAIR: -- (overspeaking) searched, but it's -- I thought Mr Sheff is saying that  
21 the metadata is separate, in a separate file.

22 MR PICKFORD: Yes, but they're associated. So, the way in which one would conduct  
23 a search, sensibly, through these documents is: you search the metadata. You said -  
24 - I beg your pardon, I'll put it differently. You search the searchable text file --

25 THE CHAIR: Yes.

26 MR PICKFORD: -- and the searchable text file will enable you to find where your

1 particular documents that have those particular search terms are. Then you turn up  
2 the image file. So, you can do all of the searching -- the searching is done on the  
3 associated text document, and then when you want to read it, you don't have to read  
4 the text document. You read the original document. So, there's no problem with being  
5 able to search the documents. The information is there to enable that to happen. It's  
6 just that it's in an associated text file.

7 As I have said, no other party, claimant, or competition authority, in any litigation  
8 worldwide, has required Google to go further than producing them in the means by  
9 which -- sorry, I'm just being given something. Just checking that that isn't -- yes, yes,  
10 yes. Yes.

11 So, as I was saying, the approach that Google has consistently adopted worldwide is  
12 the one that we wish to continue to adopt in this litigation. And it most definitely does  
13 not mean that you cannot search through the documents. A disclosure platform  
14 combines the two forms of file and so you can search in the disclosure platform and  
15 you find the documents that you want to look at. It's simply no problem in relation to  
16 that.

17 The fact that there have been some specific problems in this litigation is a different  
18 issue, and it's not a function of the fact that we provide documents in imaged TIFF  
19 format. It's a function of other issues that arose in relation to a certain batch of  
20 disclosure.

21 THE CHAIR: What was the issue?

22 MR PICKFORD: So the issues that are complained about are -- as explained by  
23 Ms Radke -- effectively threefold.

24 Firstly, she explains about applying search terms and de-threading. I've just  
25 addressed you on search terms; they can search these documents. Any disclosure  
26 platform, enables you to search these documents by using the associated text file.

1 There's an issue about, de-threading and de-duplication, and I address that in  
2 a moment.

3 There is an issue about some balloon comments and embedded images that weren't  
4 viewable. And there is a complaint about a lack of metadata, with one particular  
5 tranche of disclosure.

6 Now, in relation to each of those, I've addressed you on searchability. In relation to  
7 email threading, Google de-duplicates the documents that they provide and provides  
8 sufficient data alongside the metadata, alongside the image documents, to allow email  
9 threading using commonly used platforms. That's addressed in Mr Sheff's statement  
10 at paragraph 18. I'm not going to take you to it, but that's his evidence.

11 There was a technical error that caused issues with balloon comments for a small  
12 number of documents, which was addressed, and we put our hands up to the fact that  
13 there was an error there, but it wasn't an error resulting from the fact that they were  
14 TIFF documents. It's quite possible and feasible, and they normally are, produced  
15 with all of the balloon comments. It's just an image snapshot. It was just there was  
16 an error in relation to a certain batch.

17 And the evidence of Mr Sheff again, paragraph 21 and 22, is that the embedded image  
18 problem affected less than one per cent of the documents disclosed, in the region of  
19 750 emails, and that issue is being corrected. It's being corrected without the need to  
20 abandon the normal approach that Google adopts for very good security reasons.

21 In relation to the incorrect metadata, the reason why that arose, again, has nothing to  
22 do with the format in which the documents were provided. The reason why that arose,  
23 again, as explained in Mr Sheff's evidence -- this is at 23 to 25 -- is that ordinarily,  
24 Google uses Vault in order to collect documents, and that properly preserves the  
25 metadata. There was a particular tranche of documents that was collected not using  
26 Vault, but by using hyperlinks. And that process did not lead to the creation of the



1 corresponding XML file of the necessary metadata, and so the data for that had to be  
2 extracted manually.

3 Now, we have corrected that problem. We addressed that on 6 June, and provided  
4 a list of all the missing data. And that problem would have remained the case whether  
5 the documents were provided in translated native format, or in the image format in  
6 which they were provided.

7 So, Sir, whilst we accept that there have been some problems in relation to inspection  
8 of documents, they are not connected with the fact that they're provided in image  
9 format, and they have been addressed, or are in the process of being addressed. And  
10 it's not just a sledgehammer to crack a nut to see the native documents, it wouldn't  
11 even address the problems, but it would introduce a whole host of new problems in  
12 relation to security, and also making the process of creating disclosure far harder. And  
13 of course, wherever the documents that are being provided are documents that have  
14 already been provided in other disclosure -- sorry, in, in other litigation -- I'm trying to  
15 think which -- that's certainly the case of -- I think in relation to some -- that's the format  
16 in which they've already been provided.

17 So, Sir, it seems like it's a sort of slightly technical and small point. From Google's  
18 point of view, it's a very big deal, because it's simply not willing to provide versions of  
19 native documents that have the security risks, in particular, that are associated with  
20 that.

21 THE CHAIR: So, when you provide documents to the Commission, they are in TIFF  
22 format? Is that what you're saying?

23 MR PICKFORD: Well, yes. Or ordinarily -- obviously there may be some documents,  
24 or some disclosure that we give, that will deliberately be in a different format, because  
25 there is a reason for doing that. For instance, in relation to a spreadsheet, one might  
26 need to ultimately provide data, obviously not in TIFF format; that would probably be

1 | very, very upsetting to Mr Hunt, if that's what he received.

2 | So, we're not saying that where it is appropriate, we will never deviate; what we're  
3 | saying is, particularly in relation to documents, the standard practice has very good  
4 | reasons for it, and has been quite adequate in all other litigation worldwide, and we  
5 | are very, very concerned about an order that requires us to deviate from that stance.

6 | (Pause)

7 | THE CHAIR: Yes.

8 | Ms Love, you've heard what's said on behalf of Google.

9 | Submissions by MS LOVE

10 | MS LOVE: Sir, we fully accept that some of the issues are discrete errors, and they  
11 | have been fixed. They have been fixed after a certain amount of time and effort, and  
12 | there's also a concern, by those behind me, of some of the errors arise again, but  
13 | they've been fixed.

14 | But there are inherent issues that arise from this TIFFs and text files combination,  
15 | because what Mr Pickford described is essentially a process where one has to juggle  
16 | and go between two different versions. There's a screen of plain text from a long email  
17 | thread, and you run your searches on that, and you find a hit, and you then scroll  
18 | through the picture and work out where it is. It is simply more cumbersome. It is more  
19 | cumbersome for the Claimants who are the smaller and less well resourced parties  
20 | than Google, and I do not say anything about what Mr Sheff is saying about whether  
21 | it can be done, and it's all very interesting in principle, but it is the experience of those  
22 | behind me that it is simply more cumbersome.

23 | And so the question is: what is the actual problem for Google? And the security risk  
24 | from hyperlinks, Mr Sheff has said in paragraph 32 of his witness statement that the  
25 | hyperlinks could be "flattened", which sounds very dramatic, but I understand it's just  
26 | a way of removing or deactivating them. And he says it's more time consuming. He

1 doesn't actually give any concrete details of how much more time, and I would also  
2 add that this is prospective. We're not asking for a re-run on the documents that have  
3 been done; this is just whatever further disclosure is given from this point.

4 As far as emails are concerned, which is what we understand from Mr Sheff to be the  
5 ones that can't be flat and squished two questions:

6 First, how big an issue is this going to be in practice? Because my understanding is  
7 that most of what is being disclosed here is at least 15 years old, and almost none of  
8 it is less than 5 years old. So, there is, first of all, a question of whether any links in  
9 this document would still be live, and so you'll recall Mr Pickford yesterday saying,  
10 well, if there were a hyperlink to some data -- and this was by reference to the  
11 alternative searches -- well, it's probably unlikely to go anywhere.

12 But the other thing I would add is that there is -- one has the impression that there's  
13 going to be some sort of wild west and documents are going to be released, and  
14 people will click on them. Under Rule 102 of the CAT Rules, disclosure is for the  
15 purpose of the proceedings, and any disclosure that is into the Confidentiality Club or  
16 the LEO Ring is pursuant to the terms and the undertakings of the confidentiality order.  
17 So Google is not left unprotected from any possible misuse.

18 And the second issue that Mr Sheff has raised is storage costs and efficiency. Again,  
19 those aren't quantified, and one would rather hope and expect for a company that,  
20 well, Google does this for a living, that this is rather marginal. And again, I wonder to  
21 what extent this is the misapprehension that we're asking for the whole lot, as opposed  
22 to just going forward. And what it seems to come down to, from Mr Pickford's not  
23 willing, is sort of, well, it's like that and that's the way it is. And it's normal for Google,  
24 and no one else has complained, so tough. And the question is, it may be unusual for  
25 Google, but it's not actually unusual in the standard of High Court litigation, and the  
26 question is actually whether it's actually burdensome, or just burdensome relative to

1 the Google norm elsewhere? And I do say that it does seem to be very much in the  
2 latter category, and when one sets the cost and inconvenience and effort to the  
3 Claimants against these unquantified assertions by Google, the balance should come  
4 down firmly on our side.

5 MR PICKFORD: Sir, may I address the one point that was raised by Ms Love?

6 THE CHAIR: Yes.

7 Reply submissions by MR PICKFORD

8 MR PICKFORD: The cost and inconvenience comes down to a submission that there  
9 is a problem in relation to searching. There is no evidence that Ms Love has pointed  
10 to that says that you cannot -- using a normal disclosure platform -- search in a way  
11 that combines the two types of documents effectively into one, so that the platform is  
12 running the search on the text file but nonetheless provides you with the answer on  
13 the original image file. That's what we say that you can do, and Ms Love has no  
14 evidence to say that you can't do that, and in my submission, there is, therefore, no  
15 credible problem that the remedy -- that is disclosing everything in native format --  
16 needs to address.

17 The suggestion that we can rely on Rule 102 of the Tribunal's rules; I'm afraid to say,  
18 we say, is totally inadequate. As much as the Tribunal may have rules that if someone  
19 was to go off on an excursion and click a link, they wouldn't be doing that having been  
20 authorised to do that by the Tribunal, that is not a sufficient protection for Google, in  
21 terms of the possibility of there being security risks, and that security risk doesn't just  
22 run in relation to potential inadvertent access to documents that they shouldn't have  
23 in the context of the litigation, for instance, a privileged document, there is a security  
24 risk generally on enabling parties that shouldn't have access to Google systems, to  
25 gain access to Google systems. It's sort of rule 101 of internet security, that you don't  
26 give parties who shouldn't have access to your systems routes in via the back door.

1 And we are very, very resistant to it.

2 THE CHAIR: As I understand Mr Sheff, what he's saying is Google can flatten  
3 hyperlinks, but not in emails.

4 MR PICKFORD: Correct, and obviously emails are quite a large part of the disclosure.  
5 So, just saying, "Oh, well, it's only going to be in some of them", that doesn't remotely  
6 address --

7 THE CHAIR: I understand that.

8 MR PICKFORD: -- the security problem. And this is all for what? I mean in our  
9 submission, this is not a credible complaint, in terms of something that needs this  
10 deeply disproportionate response. (Pause)

11 THE CHAIR: Ms Love, what Ms Radke says -- it's paragraph 37, is that right? Of her  
12 First witness statement on page 97 -- is that the passage that deals with this, in  
13 Bundle 1?

14 MS LOVE: Sir, in case it assists, I understand that the majority of the documents,  
15 indeed possibly the vast majority, have been disclosed in TIFF format, don't contain  
16 hyperlinks. So, we're talking about a small number of documents, and also apparently  
17 it's only in the emails, because the rest can be flattened.

18 I'm sure that we can talk about sledgehammers and nuts, I'm sure that we can look at  
19 a solution that involves TIFFs for the emails with the hyperlinks that may still be active,  
20 but Mr Pickford has talked about sledgehammers and nuts. We do say that reducing  
21 it all to pictures and text files, out of this concern that someone will find a way into  
22 Google's entire system through one stray link.

23 THE CHAIR: It will enable someone to do that. I can see their security concern. I'm  
24 just looking at what you're saying, and I think your evidence on this is in that  
25 paragraph. Is that correct?

26 MS LOVE: Yes, and again, we're not saying it can't be done, it's just less effective.

1 It's more cumbersome. It's more time consuming. It just builds in --

2 THE CHAIR: Yes, well I can see that. But it's the complaint -- the general complaint  
3 is in the second sentence, the application of search terms and threading de-duplication  
4 was less effective.

5 And then the further concerns, the further issues, are the things that Mr Pickford said  
6 have been addressed and there was an error and so on. So, it's really that it's more  
7 cumbersome and it's less effective to do it than if you had them in Word format.

8 MS LOVE: I would add in relation to the errors, it's with hindsight to say, "This was an  
9 error, that was an error, it's been fixed". It is we who have had to make the running,  
10 in proactively raising the error in correspondence and trying to get it fixed. So, without  
11 any -- I don't demur from the proposition that there have been errors in the TIFF-ing,  
12 as opposed to inexorable TIFF-ing things, but from our perspective, it's all resource --

13 THE CHAIR: And you're worried it will happen again. I understand that. (Pause)  
14 I think I will just rise for five minutes to consider this; it's obviously quite important.

15 (12.07 pm)

16 (A short break)

17 (12.14 pm)

18  
19 THE CHAIR: Ms Love, I can understand your client's desire to get the Word or  
20 PowerPoint format, but in view of what I have been told, I am not prepared to order  
21 that. If the TIFF format -- image format -- is what is being provided to regulatory  
22 authorities, such as the Commission, I think that is what you will have to work with,  
23 and I appreciate it is more cumbersome, but it is not impossible.

24 All I would add is that, given the particular problems that have occurred with some  
25 documents, is just an exhortation that Google should take particular care that those  
26 documents do not recur -- those problems do not recur, because we have a situation

1 | where the Claimants will have to have the more cumbersome searching, and that is  
2 | only clearly compounded if then they encounter those problems.

3 |  
4 | (12.16 pm)

5 | MR PICKFORD: Sir, that is well understood. Obviously, there can be a situation  
6 | where one seeks to do things too quickly and we will endeavour to avoid those  
7 | problems. One way of doing that is we'll obviously need adequate time in which to do  
8 | the disclosure that we're going to do.

9 | Yes.

10 | MS LOVE: Sir, I'm grateful for that indication. One thing I would add is, in the light of  
11 | the helpful clarification provided by Mr Sheff, which you alighted on about the  
12 | metadata always being downloaded separately, we do see no reason why it should  
13 | not be ordered that the metadata be provided. I believe that the paragraph 7 of the  
14 | latest draft order has some wording to that effect. We would ask for that to survive.  
15 | It's the last sentence.

16 | THE CHAIR: Are you not getting any metadata?

17 | MS LOVE: We generally are, Sir, and there was the glitch with the ones that were not  
18 | in the Vault, that was something else.

19 | THE CHAIR: Yes, but that was an error. You are being provided with metadata --

20 | MS LOVE: It was an attempt, in the light of Mr Sheff's evidence, to ensure that that  
21 | is --

22 | THE CHAIR: Yes. Well, I think that should apply across the board.

23 | MR PICKFORD: Sir, yes. There's no need for an order to that effect. That's what  
24 | we're doing. The fact that there was an error when we didn't use the Vault and we  
25 | used hyperlinks --

26 | THE CHAIR: Yes.

1 MR PICKFORD: -- that's not because we didn't think that we were supposed to be  
2 providing metadata. It's because there was an error. THE CHAIR: Yes.

3 MS LOVE: I'm grateful for that confirmation. So, I think we then move on. Sir, we're  
4 in your hands about the time for the lunch adjournment, in the light of the early start.

5 THE CHAIR: Well, no. I think we'll take lunch at 1.00 pm.

6 MS LOVE: I'm grateful.

7  
8 Discussion regarding privilege

9 Submissions by MS LOVE

10 I now move on to the second, more general point that has arisen in relation to the  
11 Remedy, the Compliance Mechanism disclosure, which is privilege.

12 THE CHAIR: Yes.

13 MS LOVE: Now, that is addressed from paragraph 55 of our Skeleton and  
14 paragraph 56 of Google's. To map it on to the various draft orders, it crops up in  
15 paragraph 3a. and paragraph 6 of the Draft Order for Kelkoo/Ciao's Disclosure  
16 Application. And I'll come to this in due course. It also crops up in relation to  
17 paragraph 5 of the Connexity Draft Order. But rather than go through the various order  
18 provisions now, I just want to start with a recap of the relevant disclosure that has  
19 triggered this privilege debate.

20 THE CHAIR: Yes.

21 MS LOVE: That is the disclosure that you ordered, Sir, in the Order of  
22 20 December 2024:

23 " ... the strategy behind and reasons for the selection and design of the Compliance  
24 Mechanism and for not selecting possible alternatives, including, in particular,  
25 documents showing what Google considered would be the best way of resolving the  
26 issue which the Commission was identifying as being prohibited."



1 The individuals from whom that disclosure was sought were the "Core Remedy Team"  
2 and, as I think you'll recall from paragraphs 13 and paragraph 20 of the witness  
3 statement of Mr Braendle -- I'm sorry, I'm probably butchering his name, Mr Braendle -  
4 - that is a core team of individuals who are most closely involved in the design and  
5 creation of the Remedy. So, this wasn't the team giving legal advice. This wasn't the  
6 team saying whether they agree or disagree with the Commission about whether  
7 there's a problem or what the problem is. This is the team that, according to  
8 Mr Braendle, was taking the competition issues that the Commission was identifying,  
9 that the Commission went on to find to be abusive, and the team was thinking through  
10 what should be done.

11 For your note, Sir, Mr Braendle's witness statement is behind Tab 107 of Bundle 4.

12 THE CHAIR: Yes. Well, we don't have to go there.

13 MS LOVE: Yes. We don't have to go --

14 THE CHAIR: (inaudible) my note.

15 MS LOVE: Yes, yes.

16 THE CHAIR: I'm not producing (overspeaking) --

17 MS LOVE: You can see, Sir, that if you go to page -- I think it's 977 of Bundle 4. At  
18 the bottom, in paragraph 20, is the list of individuals who are in the Core Remedy  
19 Team. (Pause)

20 THE CHAIR: Just so I -- you want to remind me of the logic of the period that was  
21 ordered. Was that to deal with just before the Decision to the period in which the  
22 Remedy was being finalised? Is that the --

23 MS LOVE: Yes.

24 THE CHAIR: -- was that the logic of 1 June to 30 September?

25 MS LOVE: 27th was the Decision, and then September, I want to say the 28th. The  
26 28th was the Remedy. So, you ordered a couple of weeks before and it was going to

1 | be taken in stages, basically, get you to have a look at it.

2 | THE CHAIR: Yes.

3 | MS LOVE: What you, with respect, rightly observed at the November CMC, was that  
4 | it seemed hard to think that at least some of these sorts of documents would be  
5 | privileged. And you raised, for example, the possibility that maybe there had been  
6 | work internally to test the impact of the proposed mechanism. I do actually want to go  
7 | to the transcript, which is in bundle --

8 | THE CHAIR: Well, I quite got the point, and you mention it in your skeleton as well.  
9 | Yes.

10 | MS LOVE: You said:

11 | "If necessary you can come back I suppose it will be early in the New Year [happy,  
12 | happy thought] and say, 'We also want this, this and this and we think they are not  
13 | privileged for these reasons', and Google can make out its case for privilege."

14 | THE CHAIR: Yes, and what you now say --

15 | MS LOVE: Well --

16 | THE CHAIR: -- is that 65 per cent of the documents were withheld --

17 | MS LOVE: Yes.

18 | THE CHAIR: -- completely.

19 | MS LOVE: That's in their entirety. So, 60 to about 64 per cent of the 3300-odd  
20 | responsive ones. Apparently, we can't even see the header. The whole thing is  
21 | privileged. And there's a further 392 with partial redactions. So, in total, more than  
22 | three quarters are at least partly privileged, and we can't see almost two-thirds at all.  
23 | Prima facie, that seems like a somewhat surprising state of affairs. Google's response  
24 | is to say, "Well, we always said it was like this, a significant proportion would be  
25 | privileged", and they refer back to Mr Wisking's Sixth witness statement, in which he  
26 | talks about a significant proportion having been created in correspondence between

1 Google's legal team and external counsel. Mr Wisking also refers to -- and I think we  
2 do need to turn this up -- paragraph 39 of the relevant disclosure statement. That is  
3 in Bundle 4, behind Tab 7, and I think it's page 53 in the electronic version. In 53  
4 (audio distortion) are his general observations, without waiving. (Pause)

5 THE CHAIR: Yes.

6 MS LOVE: Now, Sir, we fully appreciate that some of these documents will be  
7 privileged in whole or in part, but given that this is, as you observed, supposed to  
8 include design issues -- and this is the team doing the design -- it seems a bit  
9 surprising that for every one email that says, "Well, look, here's some thoughts. We  
10 could do x, we could do y. Here's one mock up. Here's another. We tested this.  
11 That's what happened" -- for every one email like that, there will be three that have the  
12 dominant purpose --

13 THE CHAIR: Well, you want them to make good the assertion -- this sweeping  
14 assertion of privilege -- is what you're saying.

15 MS LOVE: Yes. I would also add that, as Ms Radke noted in paragraph 41 of her  
16 witness statement, when we raised queries about some of the documents with partial  
17 redactions -- so when we had enough information to probe a bit more -- the parts of  
18 two of those documents, Google agreed to withdraw its claim for privilege. That does  
19 suggest that where the Claimants' solicitors have had enough to go on, that they can  
20 put forward a more detailed query, some of it's been --

21 THE CHAIR: Have you had responses on the others?

22 MS LOVE: I'm going to turn behind. (Pause)

23 Sorry, sir, I don't want to misstate the position. We're finding but, Sir, but for at least  
24 a couple it's been withdrawn, and we have tried to find different ways to cut through  
25 this. Linklaters asked on 15 May for a bit more information and for some metadata,  
26 and they were knocked back on the 29th May. They said on 16 June, "Well, as an

1 alternative, please, could you review these withheld documents?" That was rejected  
2 on 18 June. So, we asked for a privilege log, and to be clear, that's not supposed to  
3 be a detailed or granular explanation. What we want is just the essentiality of what  
4 would be noted in the course of a privilege review, why this document is being  
5 withheld, and why it's said to be privileged.

6 What we got back was basically that that's just as bad as a re-review of all of these  
7 2000-odd documents, because the information is not held. That is in paragraph 129  
8 of Mr Wisking's Eighth witness statement. That's Bundle 1, Tab 17, page 175.

9 THE CHAIR: Yes. I've got it.

10 MS LOVE: Yes.

11 THE CHAIR: Can you ask what's the position? Surely somebody can tell me that  
12 about the remaining partial privilege assertions.

13 MS LOVE: Of the ones that have been queried?

14 THE CHAIR: Yes. Ms Radke says that on 16 June she asked -- Linklaters asked for  
15 explanations about the remaining partial privilege assertions and as per her witness  
16 statement on 19 June, there wasn't a response. But surely there's a response by now.

17 MS LOVE: Well, my instructions are that, they withdrew some after we asked, and  
18 they've retained some, but with no substantive explanation (inaudible).

19 THE CHAIR: How many of the -- you say that the partial gave me a figure for how  
20 many documents ...

21 MS LOVE: We had 392 partially redacted --

22 THE CHAIR: 392.

23 MS LOVE: Yes.

24 THE CHAIR: Of the 392 how many did you query?

25 MS LOVE: I believe the figure is six, but I'm going to turn --

26 THE CHAIR: You queried six of them.

1 MS LOVE: Yes, and of which two were withdrawn and the rest were told no. These  
2 are the partial ones, though this is the --

3 THE CHAIR: Yes. So when you -- I haven't got the letter of 16 June.

4 MS LOVE: I think that that's in Bundle 4, Tab 34, around page 229.

5 THE CHAIR: Let me just have a look. (Pause)

6 Annex 2 to this letter. (Pause)

7 MS LOVE: Annex 2 begins on page 228. (Pause)

8 It eventually became final.

9 THE CHAIR: Yes. So, there are five documents, and you said two were withdrawn  
10 and you've queried the other three. What's been the response to that?

11 MS LOVE: I believe that there's no substantive response for the other three  
12 redactions --

13 THE CHAIR: No response yet on the other three.

14 MS LOVE: For the other three the response is that they're maintaining redactions.

15 THE CHAIR: But you've raised particular points as to why they don't seem to be  
16 privileged, as if they had been answered.

17 MS LOVE: I'm told we've not had a detailed response to the points that we have raised  
18 in relation to those other documents. (Pause)

19 THE CHAIR: And now you're seeking for the others, the privilege.

20 MS LOVE: The claim for privilege to be substantiated by reference to some --

21 THE CHAIR: Yes, well, you're entitled to do that.

22 Mr Pickford, why wasn't there a privilege log kept from the review?

23 Reply submissions by MR PICKFORD

24 MR PICKFORD: Because there isn't a requirement to create a privilege log.

25 THE CHAIR: No, but it's standard practice, isn't it?

26 MR PICKFORD: Well.

1 THE CHAIR: Because if you don't, you have to go and then substantiate it document  
2 by document.

3 MR PICKFORD: Well, Sir. What is actually standard practice in relation to the  
4 provision of documents and claims for privilege --

5 THE CHAIR: Yes.

6 MR PICKFORD: -- can be addressed by reference to Practice Direction 57AD, which  
7 makes clear that you can claim privilege on a class basis as long as the person  
8 claiming privilege is satisfied that that's properly made out -- I can take you to it, Sir,  
9 but that shouldn't be controversial -- that it's perfectly permissible and normal to claim  
10 privilege on a class basis, not on an individual document by document basis.

11 THE CHAIR: But if it's challenged --

12 MR PICKFORD: Yes.

13 THE CHAIR: -- then you've got to look at it document by document or if it's challenged  
14 for particular documents, you've got to look at it for particular documents.

15 MR PICKFORD: And we have looked at it. There are five documents that have been  
16 challenged.

17 THE CHAIR: Yes.

18 MR PICKFORD: And we have made very -- the two on which there have been  
19 changes are very minor changes but we have agreed to make those changes.

20 THE CHAIR: And the other three (inaudible) been queried on 16 June --

21 MR PICKFORD: And the other three we're continuing to assert privilege and we've  
22 done that.

23 THE CHAIR: Well, you haven't replied to the --

24 MR PICKFORD: We have -- (pause)

25 We haven't replied. I'm sorry. I thought we had.

26 THE CHAIR: I just was told you hadn't replied.

1 MR PICKFORD: Yes, I beg your pardon.

2 THE CHAIR: That's now, what, four weeks? Five weeks?

3 MR PICKFORD: Well, Sir, we can obviously reply and I apologise that we haven't  
4 replied.

5 THE CHAIR: But it's just not --

6 MR PICKFORD: But, Sir, that is very, very different to an order that we create  
7 a privilege log in respect of 2,000 documents that were reviewed and are only entitled  
8 to claim privilege in the future if we create a log.

9 THE CHAIR: Well, you don't have to create a log. You can make an affidavit,  
10 specifying for each document which category it comes into, but this is a lot easier and  
11 less burdensome and it would be the sort of thing one would have thought would have  
12 been done at the time, because it's pretty standard practice. Any privilege review  
13 requires that a log is kept because then you can respond to particular challenges.  
14 I just can't understand why it wasn't done. (Pause)

15 MR PICKFORD: Sir, I can't do better than the evidence before you. The evidence  
16 before you -- there are a number of paragraphs of Mr Wisking's disclosure statement  
17 that explained the process that was gone through in relation to privilege. You were  
18 taken to one of them; there are five of them.

19 THE CHAIR: Yes.

20 MR PICKFORD: And he sets that out in some detail. If it would be helpful, I can give  
21 you the reference so that you can see that.

22 THE CHAIR: Yes, I've got it. I've got the disclosure statement. So if you want to tell  
23 me which paragraph.

24 MR PICKFORD: It's paragraphs 36 to 41 is where he deals with this issue of privilege.  
25 I think that begins on page 52 of bundle 4, the privilege review. Sir, if I could just ask  
26 you to read those paragraphs first so you understand what was done. (Pause)

1 THE CHAIR: He doesn't give any figures. A significant number ...

2 MR PICKFORD: If I may, I'd like to address you on the figures because I'm afraid that  
3 there was a false premise underlying Ms Love's submissions about that. What she  
4 said to the Tribunal was incorrect. It was said, by Ms Love -- and she relied on this at  
5 least twice -- that it's very surprising that there should be the number of privileged  
6 documents in the materials that were provided, because this was simply a group of  
7 technical custodians who were involved in the Core Remedy Team, whose documents  
8 would have been provided. If you go back to the document that she took you to, which  
9 was in Bundle 4 at page 977.

10 THE CHAIR: Yes, but the figure of 2,107 being wholly withheld is correct, isn't it?

11 MR PICKFORD: I'm not disputing that but what I am saying --

12 THE CHAIR: That is 65 per cent.

13 MR PICKFORD: I don't dispute --

14 THE CHAIR: That's also correct.

15 MR PICKFORD: As I understand it, no one tells me that it's wrong. But the point is -  
16 -

17 THE CHAIR: That is pretty extraordinary, I have to say. The fact there may be two  
18 lawyers in the team, that doesn't mean that therefore such a huge proportion would  
19 be privileged. It's possible but it's surprising.

20 MR PICKFORD: Sir, Mr Wisking provided a disclosure statement. He is an officer of  
21 the court, and he is a highly experienced solicitor and he has explained the basis on  
22 which the review was conducted and he's explained that it was a proper substantive  
23 review. It wasn't simply looking at headers claiming privilege. And it might be  
24 surprising, Sir, to you that there were that many privileged documents, but in my  
25 submission, ultimately it shouldn't be that surprising given the context of what we were  
26 searching for. What we were searching for was documents about the considerations



1 that went into the design of the Remedy.

2 Now, there are two aspects of that. There's the technical aspects. There is plainly the  
3 legal aspects. What did we actually have to do?

4 THE CHAIR: There's also the third aspect, which is the commercial aspect.

5 MR PICKFORD: Yes.

6 THE CHAIR: Which is very important and you would expect quite a lot of consideration  
7 to be given to the commercial aspect.

8 MR PICKFORD: Yes. Yes, but equally, this was a very significant decision that was  
9 taken by the Commission against Google. The legal implications of it were obviously  
10 profound. And, in my submission, it is hardly at all surprising that Google devoted very  
11 great resource to considering the legal implications of what it might do and what it was,  
12 ultimately, being asked to do.

13 THE CHAIR: Can you help me. How big was the Core Remedy Team? How many  
14 people did it comprise?

15 MR PICKFORD: Well, the senior members, I think, there are those set out in  
16 paragraph 20, which is 12. So, there were 12 senior members of the team. I'm just  
17 going to take instructions on whether I can give you more information.

18 THE CHAIR: Paragraph 20 of ...?

19 MR PICKFORD: Sorry, that's paragraph 20 of Mr Braendle's statement, which is at  
20 page 977 of the Bundle.

21 MS LOVE: And Sir, if it assists, if you turn forward to 974, Mr Braendle says that at  
22 any one time the team had approximately ten individuals, some joined and others left.  
23 So, we, of course, accept there were two in-house counsel in there. I don't know at  
24 what points they were in it, but obviously in-house counsel being CC'd or in-house  
25 counsel being on the email chain doesn't itself transmute the non-privileged into  
26 privileged.

1 MR PICKFORD: No, no. But no one is suggesting that that is the case. I mean, I'm  
2 in a slightly difficult position here in that I personally know the degree of legal  
3 involvement in the development of the remedies. But obviously, I'm not going to give  
4 evidence on that, but it is, in my submission, it stands to reason that a case such as  
5 this, with the implications that it had, would have been subject to very intensive legal  
6 scrutiny and that is the implication of the good faith review for privilege that  
7 Mr Wisking's team has done, as described by Mr Wisking, applying the proper  
8 principles in English law. Now --

9 THE CHAIR: I'm just astonished they didn't adhere to normal good practice of keeping  
10 a privilege log because that's the simplest way of verifying, if queries are raised, which  
11 of the different categories -- they've raised, I think, he says there are four categories  
12 on which -- three categories of privilege that were asserted. Three categories of  
13 justification. (Pause)

14 (12.42 pm)

15  
16 THE CHAIR: I am sorry, Mr Pickford, Mr Wisking says it will take a junior lawyer  
17 between 15 and 20 days, less time than it seems you need to respond to the  
18 outstanding queries in the letter of 16 June and I think it has got to be done. I note  
19 that two of the five queries on partial redactions have led to some modification.  
20 Obviously, the Claimants cannot query total redactions, because they have no basis  
21 of seeing anything. I think that is appropriate in this case. I mean, whether it leads to  
22 a change or not, we do not know. But I think, I will order that.

23  
24 (12.43 pm)

25 MR PICKFORD: That's been ordered in respect of the Remedy disclosure?

26 THE CHAIR: That's in respect of the -- yes, just the Remedy disclosure. Yes.

1 Yes, where do we go next.

2 MS LOVE: Sir, I don't know if we've already effectively had our answer, but there is  
3 also the separate question which is raised in paragraph 6 of our draft order on  
4 Bundle 1, Tab 28, page 263 about --

5 THE CHAIR: For the ...?

6 MS LOVE: For such disclosure as I hope, in due course, to persuade you to order in  
7 relation to other Remedy documents and there is also, in paragraph 5 of the Connexity  
8 draft order which is behind Tab 6. I'm sorry, I'm conscious, there's probably a further  
9 updated version of that but let me look. I think, no, there isn't.

10 THE CHAIR: The future --

11 MS LOVE: Well, I need to be careful because it's described in Google's skeleton as  
12 some sort of open-ended prospective obligation for all future disclosure exercises. But  
13 we're just asking for the disclosure arising out of the order that you make, Sir. And  
14 I emphasise, we're not after chapter and reams and reams, but we're essentially just  
15 saying that there needs to be a proper record of why privilege is being asserted for  
16 what it's asserted for.

17 THE CHAIR: Well, no, I won't order that. I think as a result of the exchange I've had,  
18 I'm sure that the privilege log will be made and if there are later queries, then it can be  
19 resolved by reference to that. But I don't think it has to be provided to you. It isn't  
20 normally provided.

21  
22 Discussion regarding R and SS Disclosure requests

23 Submissions by MS LOVE

24 MS LOVE: Sir, we then move on to what I believe is the final general point of principle  
25 in relation to the Compliance Mechanism and Strategy disclosure, which is gaps. And  
26 this is the subject of paragraph 4 of the Kelkoo Draft Order. Let me just locate myself

1 in the new version behind Tab 28. It's additional custodians, Mr Pickford is naming.

2 THE CHAIR: This is paragraph ...?

3 MS LOVE: 4, so page 262. And there is a question of time period. There is a question

4 of custodians and there is also a question that is now agreed as time scales about

5 searching Filer/X20, which is a further repository.

6 THE CHAIR: The timescale? This is to go back, is it, from --

7 MS LOVE: Yes.

8 THE CHAIR: Previously it was the --

9 MS LOVE: 1 June.

10 THE CHAIR: -- I'm just -- but the previous order was from 1 June.

11 MS LOVE: Yes, Sir.

12 THE CHAIR: But you're now seeking it to 27 June.

13 MS LOVE: Oh, no, sorry. The first order was started on 1 June instead of the 27

14 June. So it started as we've discussed just shortly before the Decision and for the

15 period from 1 June to the 27 June, so the month or so that preceded the Infringement

16 Decision, there were three documents that have been disclosed that cover that period

17 and there are no documents that record decision-making or input from various senior

18 individuals, even though the existing disclosure, as I will explain, makes it clear that

19 the Remedy team, the Core Remedy Team, were seeking input from those individuals.

20 Now, Mr Wisking has moved matters forward somewhat helpfully, and it may be

21 convenient to turn to paragraph 92 of his witness statement.

22 THE CHAIR: Sorry, I was raising what's slightly ...

23 MS LOVE: Oh, sorry, is this paragraph ...?

24 THE CHAIR: Point 4a --

25 MS LOVE: Yes.

26 THE CHAIR: -- is internal documents for the period 1 November 2016 to 27 June. Is

1 | this because it's going beyond the Core Remedy Team? Is that ...?

2 | MS LOVE: Yes, Sir, the Core Remedy Team as a group --

3 | THE CHAIR: Yes.

4 | MS LOVE: The long and short of it is not really apposite to capture those who were  
5 | involved prior to the Infringement.

6 | THE CHAIR: And so these people identified at the end of paragraph 4a, they're not  
7 | part of the Core Remedy Team. Is that the point or ...?

8 | MS LOVE: They're additional individuals who are not part of the Core Remedy Team  
9 | and who were not caught by the previous searches. I'm sorry, no, some of them are,  
10 | because there's the question of time period, whether we go back to November.

11 | THE CHAIR: No, no, it was a very small point. I just was trying to understand why it  
12 | goes up to 27 June, when the previous one started on 1 June because it seems to  
13 | overlap.

14 | MS LOVE: There's the question of what we do during June, given how few documents  
15 | we've got, but there's who are the right people to search prior to the Commission  
16 | Decision and then how far back one searches them. And then there is what happens  
17 | going forward, thereafter. And there's a separate issue about senior decision-making.

18 | THE CHAIR: Yes.

19 | MS LOVE: If I could start with the question of how far back you go, because you'll  
20 | recall, Sir, from November, it was a "take it in stages" approach. What Mr Wisking has  
21 | explained in paragraph 92 of his statement, which is at page 162 of the Bundle you're  
22 | in --

23 | THE CHAIR: Yes.

24 | MS LOVE: -- is that Google has agreed to run searches going further back. And  
25 | Mr Wisking says, goes over the page, basically that it makes sense to go back to  
26 | 18 April 2017, because that is:

1 "... the date on Google's response to the Commission's Letter of Facts ..."

2 And so that is a logical starting point, to think about the potential options to address  
3 the imminent infringement findings. And he says that he understands from Google's  
4 external counsel during the Commission Investigation that it was once Google had  
5 responded to the Letter of Facts, that Google had a sufficient understanding of the  
6 Commission's near final case against it, to consider what a potential remedy would  
7 look like.

8 A couple of things about that --

9 THE CHAIR: Yes, you're catching up. You're at 92b., are you?

10 MS LOVE: Yes.

11 THE CHAIR: Yes, I see. Yes.

12 MS LOVE: Now, first of all, I confess that we stub our toe on the logic that responding  
13 to a Letter of Facts is what will help you as an undertaking in the very late stages of  
14 an antitrust investigation, which has by then been running for about seven years, to  
15 understand what the regulator finds anti-competitive.

16 If what Mr Wisking is trying to say is that the Letter of Facts helped to sort of clarify or  
17 crystallise the nature of the likely infringement findings, then even on that logic,  
18 presumably the right date to go from is when Google received the Letter of Facts,  
19 which I believe was 28 February. So, Google did an SO response in November 2016,  
20 and then the Letter of Facts was subsequently sent on 28 February.

21 So, even on its own terms, we don't quite follow the thinking behind the date that you  
22 respond to a letter is the date when you know more.

23 But in any event, our bigger point is that Mr Wisking hasn't actually engaged with the  
24 point about the documents already disclosed, which suggests that planning was  
25 underway well before then. Can I ask you to turn to the letter that Linklaters wrote on  
26 15 May, which set out what the document was, and it is in Bundle 4, I believe it's on

1 | page 126, behind Tab 19.

2 | THE CHAIR: Tab 19. Yes, yes.

3 | MS LOVE: And the letter starts at 124.

4 | THE CHAIR: Yes.

5 | MS LOVE: But what I am interested in is paragraph 3.2, and in particular, 3.2.3.

6 | (Pause)

7 | THE CHAIR: Yes. And that last line is:

8 | "... may have commenced as early as November 2016 ..."

9 | MS LOVE: It may help if I actually show you the email to which reference is being

10 | made there, because happily that is in the same bundle, and it begins at page 483.

11 | (Pause)

12 | Sorry, it's a little bit hard to make out, because people are replying in line to other

13 | people, but perhaps the most convenient place to pick it up is near the top of page 484.

14 | THE CHAIR: Yes.

15 | MS LOVE: I'm being cautious, because I don't know what's in blue or yellow or

16 | whatever, but you see --

17 | THE CHAIR: I'll just read it to myself.

18 | MS LOVE: From Mr Tholomé saying, "Hey guys".

19 | THE CHAIR: Yes. (Pause)

20 | Yes.

21 | MS LOVE: I don't know what Mr Pickford's answer to that will be, because Mr Wisking

22 | hasn't dealt with it in his statement, but we say that the sensible thing to do, to avoid

23 | having to keep coming back on this, is just to go to something that's rooted in the

24 | actual documents, to go back to November 2016.

25 | And in relation to custodians, I think we are nearly there, but simply to include all of

26 | those who seem appropriate from the existing disclosure, actually on custodians, and

1 I'm now looking in the Scott Schedule, I think there has been movement, and there is  
2 partial agreement, but we're not quite clear on why some names are still left out.

3 THE CHAIR: Custodians for 4a. or 4b.?

4 MS LOVE: This is the custodians for 4a., yes. So, it begins on page 211 of the  
5 Scott Schedule. (Pause)

6 My suggestion is just that we run this the whole way to 27 June, so that we've got  
7 complete coverage for the period up to the Infringement. (Pause)

8 THE CHAIR: Yes, so you say the issue is -- is it 18 April or 1 November? And then  
9 the three extra custodians; is that it?

10 MS LOVE: I think I don't know whether there is still a live issue. There was also  
11 a question of whether it made sense, given that we know that the list of names for the  
12 pre-Infringement period was incomplete, to cover the period from 1 to 27 June.  
13 I confess to being somewhat unclear whether that's still live. We just say this makes  
14 sense to go back to when we know, on the basis of who we know was involved, I don't  
15 think (inaudible) the limits of how far I can take this. And I'll ask it for Mr Pickford to  
16 say why.

17 THE CHAIR: What's the significance of 27 June?

18 MS LOVE: That's the date of the Infringement Decision. (Pause)

19 THE CHAIR: Yes, but I think Google's last response is 31 May, to the Commission.  
20 So, at that point, the Commission will be finalising their draft decision. Yes, so I really  
21 don't think you need to go beyond 31 May, having gone from 1 June before. Yes, so  
22 that's what we're -- it's the extent of this debate on 4a.

23 MS LOVE: In relation to June, and I hear what you have said, Sir, our concern is that  
24 not that there weren't searches done, but that they were done in relation to the Core  
25 Remedy Team, and I believe I'm correct in saying that that was formed from the date  
26 of Infringement. I'm sorry, I'm back trying to --



1 THE CHAIR: That was from 1 June. That was for the period from 1 June.

2 MS LOVE: Er, I'm just --

3 THE CHAIR: That was the previous order.

4 MS LOVE: Previous order was for the Core Remedy Team without these additional  
5 custodians from 1 June --

6 THE CHAIR: Yes.

7 MS LOVE: -- and it has turned up three documents for June, when we would it -- if  
8 anything, expect the activity to be ramping up, instead of --

9 THE CHAIR: Well, I'm not sure, because you'd be waiting for the Decision at that  
10 point. I don't think that follows. Well, I think anything of relevance would have gone  
11 to the Core Remedy Team, because that's what they're there for.

12 So, I think you can stay at the 31 May, but the question is when it starts. Well, there's  
13 no magic date, but I can see that that's necessarily the relevant date. Nobody's  
14 suggesting going back to the date of the SO.

15 Well, Mr Pickford, what do you say about this, these additional months?

16 Reply submissions by MR PICKFORD

17 MR PICKFORD: Sir, what we say is this: in relation to the start date, we  
18 wholeheartedly agree with the point that you just made, that there is no magic date.

19 The date, therefore, needs to be selected on the basis of what is sensible and  
20 proportionate in terms of being likely to capture the vast bulk of helpful documents.

21 Now, there is evidence that you've been taken to in relation to that, which is that the  
22 point in time when Google started to focus on the thing that it really needed to grapple  
23 with at that point, which was what's its Remedy was going to look like, was after it had  
24 replied to the Letter of Facts. And Ms Love has, mischaracterised our point in relation  
25 to this. It's not that it's a logical time and that we could not logically have done it  
26 beforehand. It's that the factual evidence is, that's when we started doing it, and

1 there's a practical reason for that. It's because up until that point, our attention was  
2 on, well, let's respond to what we're having to respond to and respond to that Letter of  
3 Facts, and then from that period onwards, okay, we've done that, now let's turn our  
4 attention to Remedy.

5 So, it's just a simple practical question. We've answered in our evidence when we  
6 think that -- given that Mr Wisking has spoken to the relevant people and  
7 Cleary Gottlieb who were dealing with that, and they've said, "This is when we started  
8 thinking about the Remedy".

9 THE CHAIR: I understand.

10 MR PICKFORD: And the fact that there might be a random email from a few months  
11 earlier, in my submission is not sufficient to start this disclosure process all the way  
12 back in relation to November. What that indicates is it is conceivable there was some  
13 attention within Google being paid to the possibility that they might have to do  
14 something. But in terms of what we're trying to get at here is what was the real  
15 reasoning underpinning the Remedy, which we actually ultimately implemented. And  
16 that's the April date.

17 And then in relation to -- should I address you on custodians?

18 THE CHAIR: Yes.

19 MR PICKFORD: So, on custodians, we are proposing four custodians. Three of them  
20 are in the Core Remedy Team, so that's another reason why it would be duplicative to  
21 go beyond 31 May, but so you've already made your --

22 THE CHAIR: And the other three that they seek --

23 MR PICKFORD: The other three -- so in relation to each of those, starting with  
24 Mr Bethell, he is head of Competition, Regulatory and Engagement. He's a senior,  
25 very senior, Google lawyer. And one has to ask: what is the marginal benefit of adding  
26 in a lawyer for this period? When what that is likely to do is substantially increase the

1 hit rate on privileged documents that they're not going to get.

2 THE CHAIR: The other two?

3 MR PICKFORD: The other two are Mr Tholomé. Mr Tholomé is the person who sent  
4 the email back in November that Ms Love referred to. We say if you're with me in  
5 relation to 18 April, Mr Tholomé is effectively -- there's no particular relevance,  
6 therefore, to including Mr Tholomé. He wasn't -- there's no evidence that he was  
7 involved.

8 THE CHAIR: He's emailing on 28 June about this, isn't he? Or on 5 July? What page  
9 is it? Page 483 of Bundle 4.

10 MR PICKFORD: You're right. I think he forwarded an email again later.

11 THE CHAIR: Well, that's 5 July.

12 MR PICKFORD: Yes.

13 THE CHAIR: And on 28 June -- so he's still involved. He's writing to Mr Anand --  
14 probably mispronounce it, Murugappan -- on 5 July. So, they're obviously involved.

15 (1.07 pm)

16  
17 THE CHAIR: Well, look, we can spend a lot of time on this. I am not going to -- I think  
18 18 April is a sensible date. It is just that we have got to start somewhere. Logically,  
19 you either start with the receipt of the SO, or you start somewhere later. You are not  
20 asking for the receipt of the SO, which is a while back.

21 So, I think 18 April on the evidence makes sense. I will add Mr Tholomé and  
22 Mr Murugappan to the custodians, but not Mr Bethell.

23  
24 (1.08 pm)

25 THE CHAIR: And that's 4a -- we'll come back to the rest of it after lunch at 2.05.

26 I think we obviously got the timing point; that's important, and we may have the

1 OneBox. But otherwise, are we on target, Ms Love, to complete by 4.30?

2 MS LOVE: I'm looking behind me to get some nods.

3 THE CHAIR: Yes, good.

4 MR PICKFORD: Sir, could I make two very short suggestions on that?

5 THE CHAIR: Yes.

6 MR PICKFORD: The first is that the SS and R categories, which are the ones that  
7 you gave us an indication in relation to yesterday. We have written a letter in relation  
8 to those --

9 THE CHAIR: Yes.

10 MR PICKFORD: -- and that went this morning, I understand. We said it would be  
11 sensible to deal with those at the end, rather than risk not getting through some of the  
12 bigger categories before we get to those.

13 And secondly, we would ask for a short amount of time, probably about 15 minutes, to  
14 be allocated to Google making its disclosure applications. They are basically the  
15 (inaudible) ones that have been ordered, and it would be unfair if we didn't get to those.

16 THE CHAIR: Right, so two hours of Claimants, and then from 4.00 for Google. Yes,  
17 so I'll come back at 2.00.

18 (1.09 pm)

19 (The short adjournment)

20 (2.02 pm)

21 THE CHAIR: Yes, Ms Love.

22 MS LOVE: Sir, I turn now to the other aspect of paragraph 4 of our draft order. We've  
23 dealt with 4a, which is the Pre-Decision period. 4c is agreed, save as to the timing  
24 within which it will be done. So, we are left with 4(b), which is senior decision-makers.  
25 And Mr Wisking addresses this in paragraph 96 onwards of his Eighth witness  
26 statement, which is in Bundle 1, Tab 17, page 164.

1 THE CHAIR: Yes.

2 MS LOVE: And go through to paragraph 101. It may be convenient to start just by  
3 reading those to see what it is that he's saying and I'll then make some submissions  
4 on it. (Pause)

5 I could just do it to two points. The first is about, really, the terms in which Mr Braendle  
6 described the involvement of the leadership team. These are the sort of people who  
7 are informed about, but not actually involved in the decision-making around the  
8 creation and implementation of the Compliance Mechanism. And he says that you  
9 accepted that in the November CMC and that's his paragraph 101 and then the  
10 paragraphs before it, which essentially point to the limits of what's been unearthed in  
11 the disclosure so far.

12 THE CHAIR: Yes.

13 MS LOVE: I have to confess, we don't really follow the point about not many  
14 documents because, of course, that's the reason why one is making a request that  
15 gaps have been identified. What really matters to say is what the documents that we  
16 have identified indicate about the individual decision-making and the involvement of  
17 those named individuals. Just to take one example, I'm not proposing we have an  
18 exhaustive trawl of all the documents that name all of these people, but the document  
19 that we have referenced in our letter, in paragraph 4.1.12, which was the source of  
20 a couple of the names, is in Bundle 4, behind Tab 47, internal page 475. (Pause)

21 THE CHAIR: It starts at ...

22 MS LOVE: I'm sorry, I think it starts at page 473. The one that ends in 460822. But  
23 to pick up the email thread, because obviously they run from the back upwards, it sort  
24 of starts at page 475. The last page, 476, is a bunch of footers. You can see -- sorry,  
25 the font is rather small -- about halfway down, page 475, there is an individual,  
26 Ameera Naguib, who is discussing five remedy options and various people -- there's

1 various privileged boxes. But then, if you go up the page, to the subsequent  
2 responses, you see Mr Friedman -- Greg Friedman -- saying:

3 "I have started a doc with proposed possible product changes."

4 Then, scrolling further up again, we have Mr Leiteritz, the Product Manager for Google  
5 Shopping, and he is raising questions on it. He is also --

6 THE CHAIR: This is -- yes, I've got it.

7 MS LOVE: Yes. And --

8 THE CHAIR: "Hey, Greg, I have a question ..."

9 MS LOVE: Yes. And his last line, before signing off as Raphael, is:

10 "Could you give me comment rights so that I can mark the respective sections?"

11 Now, Mr Leiteritz is listed in paragraph 25 of Braendle 1 as one of the Leadership  
12 Team, and I think he was Product Lead for merchant tools. We then have Mr Tholomé  
13 popping up again above that. Then, if we go up -- so we're going up towards the start  
14 of the document, but chronologically we're going ahead -- we have Mr Tholomé and  
15 Mr Leiteritz getting these comment rights. Then, right at the very start of the email  
16 thread, Mr Friedman saying:

17 "Hello all,

18 "We have fleshed out the proposals more [blah, blah, blah, blah, blah]."

19 And his email of 6 July 2017, at 07:41:

20 "Please take a look and comment. We can also discuss."

21 So, this is not just senior individuals being informed, "You know, look, this is what's  
22 happening". They are being asked to comment. In fact, some of them are asking if  
23 they can comment and they're really working with members of the Core Remedy Team  
24 on the details. Now, that is just one document. There are other documents that are  
25 to or from or referencing Chrissy Seib -- Ms Seib -- for instance, in what were R12 and  
26 R19. Mr Schindler is referenced in R23. Mr Varian -- I'm sorry, it's probably Professor

1 Varian, isn't it -- in R24. And Mr Tholomé, we have already seen. Ms Seib is  
2 mentioned in 39 emails. Mr Schindler --

3 THE CHAIR: Isn't the point -- sorry to interrupt you -- not that they were not involved  
4 at all, because as you just demonstrated, they were, but that their involvement was by  
5 interaction with the Core Remedy Team or members of the Core Remedy Team.  
6 That's indeed how you get these documents. What is there to think that you're not  
7 getting relevant documents, which they are parties by the authors or recipients from  
8 the disclosure of the Core Remedy Team?

9 MS LOVE: Sir, there is a particular point in relation to Mr Pichai, which I will come  
10 back to.

11 THE CHAIR: Yes.

12 MS LOVE: These individuals, what I would say is that it is -- you were asked about  
13 the leadership team in November 2024, Sir.

14 THE CHAIR: Yes.

15 MS LOVE: And you indicated not that they were unimportant, but that you anticipated  
16 that the Core Remedy Team disclosure would show the relevant interactions. What  
17 the disclosure so far has revealed is that there were interactions, but it's not revealed  
18 much about the content, or it's revealed very little about it. So that's why we're asking  
19 for custodians to be added.

20 In relation to Mr Pichai, in particular, if I could ask you to turn --

21 THE CHAIR: But before we get to Mr Pichai, they may not reveal much. Well, one  
22 possibility is some stuff was done in meetings, and not in documents. But insofar as  
23 there are any documents, you would expect it would be that they're interacting with  
24 the remedy team, because you're looking at their involvement in the strategy and  
25 decision-making regarding the Remedy and, therefore, adding them as independent  
26 custodians is relevant if one thinks they would have been, as it were, communicating

1 with other people, who are not in the remedy team, about the Remedy, or conceivably  
2 communicating with each other and not copying in people in the remedy team.

3 MS LOVE: Well, the difficulty is, Sir, that we just don't know. What we know is that it  
4 is obvious that they were getting more than just being told this is what's happening.  
5 They were thinking about these things actively, and it's a limited number of individuals  
6 for a relatively brief period. We say that, in the circumstances, the impression as to  
7 their importance that you had is borne out --

8 THE CHAIR: Yes.

9 MS LOVE: -- and they should be added. In relation to Mr Pichai, the most convenient  
10 summary for him is that in paragraph 4.1.1 of Linklaters' letter of 15 May, which is at  
11 internal page 127 of the Bundle.

12 THE CHAIR: Of Bundle 4?

13 MS LOVE: Yes, still in Bundle 4.

14 THE CHAIR: Yes. (Pause)

15 Paragraph number?

16 MS LOVE: 4.1.1. So I'm just taking you to it --

17 THE CHAIR: Yes.

18 MS LOVE: -- because it's a convenient summary.

19 THE CHAIR: Two meetings with Mr Pichai.

20 MS LOVE: Yes. (Pause)

21 THE CHAIR: Is Mr Friedman in the Core Remedy Team? You've not added him so  
22 I imagine he probably is.

23 MR PICKFORD: I can answer that. He is, Sir.

24 THE CHAIR: Yes, yes, that's why he's not been added in to your list.

25 MS LOVE: No. Sir, we take the point that there may have been directions given in  
26 meetings and the interactions may have been oral, but meetings have minutes,



1 meetings have slides, meetings have agendas, meetings have people who go away  
2 with notes or action points or next steps. And our point is a simple one, which is that  
3 these are senior individuals who are clearly actively involved in the decision-making  
4 and it seems that there is more that we have not yet seen that's going on at a very  
5 high level within Google and Alphabet.

6 We have attempted to focus on those whom we see in the disclosure so far. We have  
7 specifically recognised that these searches will take longer, which is why we've  
8 proposed five weeks. We therefore ask that these individuals be added for the period  
9 from 1 June to 30 September, four months. (Pause)

10 THE CHAIR: What was Eric Tholomé's position?

11 MS LOVE: Mr Tholomé, I believe, is a Director of Product Management, and the  
12 disclosed documents indicate that he was involved in framing auction principles. He  
13 was the individual from November 2016, and he was involved in subsequent strategic  
14 decisions about which options to go with and I'm told he's mentioned in 21 emails.

15 THE CHAIR: But he's not in the Core Remedy Team, obviously, because otherwise  
16 you wouldn't be identifying him here?

17 MS LOVE: No, he's not in the list of individuals in the Core Remedy Team in  
18 paragraph 20 of Braendle 1. (Pause)

19 I would emphasise, Sir, we're not going for the whole of the Leadership Team. We've  
20 tried to target those whom we see as having had this sort of involvement from the  
21 materials that have already been disclosed.

22 THE CHAIR: Yes. (Pause)

23 The slide deck and the speaker notes, it is referred to in 4.1.1 (i), do you know who  
24 that was sent to? Received it?

25 MS LOVE: (Inaudible) many of these documents.

26 THE CHAIR: Either this one or the August one,. (Pause)

1 MS LOVE: Sorry, Sir, the document itself is in the bundle -- we don't think we know to  
2 whom it was sent. Just a document entitled "Sundar briefing".

3 We've already covered Mr Pichai and Mr Tholomé. Ms Seib was a Business Lead in  
4 Google Shopping and the disclosed documents indicate that she was engaged in  
5 relation to the options and meeting with engineers such as Mr Zenger from the Core  
6 Remedy Team.

7 Mr Schindler is a Senior Vice President in sales and is another member of the  
8 Leadership Team, along with Mr Leiteritz, and the disclosed documents indicate that  
9 he was involved in the strategy around the impact of the proposed remedy on the  
10 merchants and on Comparative Shopping Services. He's mentioned in eight emails.

11 Professor Varian is Google's Chief Economist. He's mentioned in 31 emails and the  
12 disclosed documents that we have seen indicate that he was involved in considering  
13 and proposing which type of bidding models would be best.

14 Mr Leiteritz was the other one of the names in the Senior Leadership Team -- in the  
15 leadership team, sorry. He was the Product Lead for merchant tools and disclosure  
16 indicates that he was overseeing projects to ensure that only true aggregators  
17 participated in the new PLA, and he was part of considering whether to include links  
18 to CSSs in order to achieve that and he's mentioned in 41 emails.

19 THE CHAIR: Yes, okay.

20 Yes, Mr Pickford.

21 MR PICKFORD: So the issue here is whether there is any reason to believe that the  
22 Core Remedy Team, of which its 12 members over time have had their records  
23 exhaustively searched, would not be providing the core Remedy documents. The  
24 question is not whether other people were involved in signing off on the decision-  
25 making. Plainly, any important matter such as this, the CEO at some point is likely to  
26 sign off on it, or to give some indications of the way that he'd like the Core Remedy

1 Team to proceed with. The question is whether the Core Remedy Team is not going  
2 to be in receipt of the core documents in relation to the instructions to them. And we  
3 say there is no reason to believe that that would be the case.

4 What was suggested, Sir, by you was what about the possibility that there might be  
5 documents, say, between people who are outside the Core Remedy Team? One  
6 would expect that there would be some examples of that that would somehow come  
7 to light, even from the documents that we've disclosed because the reason why that  
8 would happen is because if there was something sufficiently important, you've seen  
9 the way that these emails go, there's some dialogue between some people and then  
10 a document gets forwarded to another group of people and then forwarded to another  
11 group of people.

12 The Claimants haven't highlighted a single example of some conversation that they  
13 say started off as between people that were outside the Core Remedy Team and  
14 therefore it makes sense to extend the searches to that group. And our submission,  
15 is that the justifications that have been advanced for each of the six additional people,  
16 in addition to the 12 that we've already searched, are exceedingly weak.

17 If the Tribunal, for example, were to be persuaded that because Mr Pichai gave some  
18 directions to the Core Remedy Team when he got a presentation that that means,  
19 well, one brings in Mr Pichai, well, the same reasoning is going to apply to CEOs  
20 generally. I mean obviously there's only one CEO here but my point is --

21 THE CHAIR: No.

22 MR PICKFORD: It's a very weak basis --

23 THE CHAIR: Yes.

24 MR PICKFORD: -- for going beyond, is clearly a very sensible limitation, which is that  
25 we actually had a defined team of people that were in charge of ultimately taking this  
26 decision and implementing it.

1 THE CHAIR: Well, I tell you what I'm minded to do, because I think there's a lot of  
2 force in what you say, and it does slightly echo my initial view back in whenever it was,  
3 November. It is possible that there was some communication between members of  
4 the Leadership Team, which was not copied to the Core Remedy Team.

5 But from what I've seen, and I know far less about this than probably anyone else in  
6 this room, but I will -- I'm willing to just be persuaded to order a search of two of these  
7 people, because from what little I've seen, it seems likely that if there was discussion  
8 among the leadership team, they would have been involved, and that's Mr Tholomé  
9 and I think Mr Schindler, given what I've been told about his role, given that it's a period  
10 of only a few months -- four months. Either that's going to reveal that -- I cannot  
11 believe there would be discussion that they were not -- one or the other -- was not  
12 involved in.

13 So, we'll broaden the net to that extent, but beyond that, I think we really are fishing  
14 around for something that's very unlikely to be there.

15 And so that's as far as I'm just persuaded by your submissions, Ms Love, to give those  
16 two. But that's it.

17 MS LOVE: That concludes the sort of bigger points of principle. And we now descend  
18 to the R and SS requests, the outstanding Connexity requests relating to specific  
19 documents --

20 THE CHAIR: Yes.

21 MS LOVE: -- and also I think we had some homework, which Mr O'Regan will update  
22 you on, in relation to the domains for A15 for Connexity.

23 If I may, Sir, I'd like to turn behind me and check the position in relation to what is left  
24 of R and SS. (Pause)

25 I am told that SS is resolved, and for the R documents, we are down to one that may  
26 remain in issue.

1 MS MORRISON: Sorry, Sir, I think this might be my only rising, but we'll see.

2 I have only just been told what's in issue, and we would just like to ask for five or  
3 ten minutes so that we can go and discuss that, because we have only just been told,  
4 and I think it would be worth us having a quick discussion.

5 THE CHAIR: Well, either we can move on to something else, then I could rise and  
6 you can confer.

7 MS MORRISON: Yes.

8 THE CHAIR: I think that's probably the sensible way.

9 Should we deal with the domain names? Is that something you're in a position to deal  
10 with? To wrap that up. That was one of the A requests, wasn't it?

11 MS LOVE: In that case, I will play musical chairs with Mr O'Regan, and then hopefully  
12 we can knock that on the head.

13 THE CHAIR: Yes. Mr O'Regan.

14  
15 Discussion regarding domain names

16 Submissions by MR O'REGAN

17 MR O'REGAN: Yes, Sir. It's in relation, I think, to your request. Request A15 on the  
18 penalty data -- the Claimants to consider which websites they would maintain the  
19 request in relation to.

20 By way of background, Sir, what everyone calls Connexity is actually historically three  
21 separate groups that by acquisition are now in a single corporate group that is called  
22 Connexity, but historically there were certainly between 2004 and 2015, there were  
23 three separate groups.

24 The first was originally known as Bizrate, then as Shopzilla, and is now Connexity, Inc.  
25 Second one is a company called -- or a group called -- PriceGrabber, which was  
26 acquired by Connexity in 2015.

1 THE CHAIR: Sorry, just pausing, the second one is PriceGrabber. The first one was  
2 called --

3 MR O'REGAN: Originally Bizrate, then it became known as Shopzilla, and then  
4 changed its name again, in 2014 I think, to Connexity.

5 And the second one is called PriceGrabber. Eventually that was acquired by  
6 Connexity in 2015, that had other owners before then.

7 Then there's a third group called Become, and that was also acquired by Connexity in  
8 2015.

9 So, reflecting the -- or effectively, were this claim started before 2015, would have  
10 been three completely separate Claimant groups. In our submission, we consider it's  
11 necessary to search domains from each of those different groups.

12 THE CHAIR: When was Bizrate/Shopzilla acquired by Connexity?

13 MR O'REGAN: It wasn't, Sir; it's just changed its name over time.

14 THE CHAIR: So that's become Connexity Inc?

15 MR O'REGAN: What is now -- that's Connexity Inc, and always has been, in  
16 a corporate structure since.

17 THE CHAIR: And it's the other two that were acquired?

18 MR O'REGAN: Were acquired in a variety of transactions.

19 So, I am instructed it's necessary to search across a number of different domains, or  
20 domain groups, to reflect the separate corporate ownership over time.

21 THE CHAIR: Where was the list? Can you remind me of the domain names? It was,  
22 I think I got page 56 of the --

23 MR O'REGAN: Back of the Abuse JES.

24 THE CHAIR: Yes. That's why we've got so many --

25 MR O'REGAN: Yes, and also reflecting particularly on the Connexity side, but also  
26 the Become side, that there were a portfolio of, I suppose you might describe it of

1 "domains" that were under each group.

2 So the original list is page 54, internal 54. So that would be Bundle 2, Tab 1, page 56.

3 THE CHAIR: Yes.

4 MR O'REGAN: We've narrowed it down, Sir, to nine corporate groups, nine domains,

5 that come across the three separate groups. It is probably easier if we set this out in

6 writing, I think.

7 THE CHAIR: I think so, yes.

8 MR O'REGAN: Just to give you the --

9 THE CHAIR: The nine domains from the Connexity list.

10 MR O'REGAN: Yeah, some of those will have within them different geographic

11 endings, so .co.uk, .de, .fr, et cetera. And there'll be three from Become and only one

12 from PriceGrabber.

13 MR PICKFORD: Sir --

14 THE CHAIR: I'm just trying to -- just before -- when you say nine domain names how

15 many sites is that?

16 MR O'REGAN: 19 sites in all, which I can accept is more than, I think, the six you had

17 envisaged. But it's largely driven by the --

18 THE CHAIR: Nineteen sites in total?

19 MR O'REGAN: Yes, Sir.

20 THE CHAIR: Yeah.

21 MR O'REGAN: I appreciate that my learned friend probably hasn't heard this before,

22 but I only heard it myself over lunch.

23 MR PICKFORD: Actually a different point that I've risen for, Sir.

24 You've made a direction in relation to this, and it was six domains.

25 THE CHAIR: Yes.

26 MR PICKFORD: And I don't understand the submission that's now being -- it was

1 six domains per Claimant, and now Mr O'Regan seems to be asking for more than  
2 six domains, and I'm not quite sure on what basis, because that matter has already  
3 been decided. I understood that the question was simply: what were their names  
4 going to be?

5 MS LOVE: Sir, I thought we said six for Kelkoo and six for Ciao, and we would need  
6 to take instructions from Connexity, there being no client in the room.

7 THE CHAIR: That is right. I haven't said what we'll do with Connexity, because we  
8 didn't understand --

9 MR PICKFORD: (Inaudible).

10 THE CHAIR: So, just to be clear, you say you've narrowed it down to nine domains  
11 from Connexity and three from Become. Is that right?

12 MR O'REGAN: So, including the geographic indicators at the end, so the .co.uk or .de  
13 for example, that would be nine from what is the Connexity "group", for want of a better  
14 word. Seven from Become and three from PriceGrabber, and that comes to 19.

15 And the reason we take that approach, Sir, is to ensure there is a realistic spread of  
16 what is a sample. So, the sample is realistic both in terms of geographies, but also  
17 the different ownership groups and the different sizes of those domains at various  
18 times.

19 And we do take my learned friend's point that it's more than the six that the other  
20 groups are --

21 THE CHAIR: Well, and that was -- actually, it was six sites I think, from that list. And  
22 you're saying that Connexity -- just a moment. (Pause)

23 Well, we're trying to get a sample of the application of penalties, aren't we, for this  
24 purpose. And, I mean, it seems to me that we don't have to go right across the board  
25 in that way, and I would hope that you can be more confined.

26 MR O'REGAN: My recollection, Sir, is --



1 THE CHAIR: I appreciate it comes from different companies, but -- when you say  
2 three from Become, but none from PriceGrabber.

3 MR O'REGAN: So, PriceGrabber had a single domain, "PriceGrabber", then it was  
4 dot whatever, so it'd be three geographic domains from PriceGrabber. I don't know  
5 the instructions on which ones those are.

6 THE CHAIR: Well, it'll be the ones --

7 MR O'REGAN: They'll be on that list somewhere.

8 THE CHAIR: But, when we said six from Kelkoo, it was six out of that list, wasn't it?  
9 We've got on page 56?

10 MR O'REGAN: Yes, Sir.

11 THE CHAIR: Yes.

12 MR O'REGAN: Six from Ciao --

13 THE CHAIR: Yes. I mean that they're all the same. The Ciao, for example, are  
14 effectively all the same domain. And what we're saying is it's six sites.

15 MR O'REGAN: Yes --

16 THE CHAIR: So, it seems to me, here, if you have one of the PriceGrabber sites, you  
17 can choose which one, which was the more -- I don't know, if one is more significant  
18 than the others -- to have three of the Become sites, I don't know which ones here are  
19 Become, and --

20 MR O'REGAN: Become, Buycentral and Decido.

21 THE CHAIR: Buycentral is Become, is it? (Pause)

22 Can I ask this then, before we settle this: when Bizrate became Shopzilla, did the  
23 Bizrate site cease to operate?

24 MR O'REGAN: Both sites operated in parallel.

25 THE CHAIR: So, they continued to operate right through?

26 MR O'REGAN: With slightly different -- yes, I think some are still operational now. Not

1 all of them. So, they were operating in parallel --

2 THE CHAIR: So, it's not that they were closed down and became Shopzilla taking  
3 over?

4 MR O'REGAN: No, I think the company has changed its name because it sounded  
5 better.

6 THE CHAIR: Yes, but they continued the old sites, yes?

7 Well, I think we do it by sites, because it's the sites that, as I understand it, get the  
8 penalty. It's not --

9 MR O'REGAN: Penalties were applied by site --

10 THE CHAIR: By site. Yes.

11 MR O'REGAN: -- and/or by geography, and/or over different periods of time. So  
12 therefore, in order to have a long time period across the whole of the EEA, one needs  
13 a reasonably broad number of sites in order to capture the penalties at different points  
14 in time, particularly where, as I understand it, this sample is effectively to replace what  
15 was the original request for the 361 SO Response Aggregators, which itself was A16.  
16 Am I right?

17 THE CHAIR: Yes.

18 MR O'REGAN: So, we're not pursuing A16.

19 THE CHAIR: Well, it seems to me in that case, the other two are having six sites.  
20 I can see that this one's more complicated, and that if you have, for this one, nine sites,  
21 whether it's one PriceGrabber and three Become and five Connexity or you want to  
22 do it in some other configuration.

23 MR O'REGAN: So, it would be nine geographic domains.

24 THE CHAIR: It would be nine different geographic domains, if you want to do it that  
25 way.

26 MR O'REGAN: Yes, Sir, I think -- if i may just turn my back for one second.

1 Yes, Sir. We'll take the nine, but we will obviously communicate to Google --

2 THE CHAIR: You can choose the nine.

3 MR O'REGAN: -- what the nine are.

4 THE CHAIR: So, it would be six Ciao sites, six Kelkoo sites and nine from the

5 Connexity list.

6 MR PICKFORD: Domains, sir.

7 THE CHAIR: Sorry?

8 MR PICKFORD: I just want to clarify that's domains. When they say site, they're not

9 going to say Bizrate and then go okay, so Bizrate is one. We'll have Bizrate France,

10 Bizrate Deutsch, Bizrate --

11 THE CHAIR: So, it's nine out of this list?

12 MR PICKFORD: Yes.

13 THE CHAIR: On page 56 of Bundle 2.

14 MR PICKFORD: Yes.

15 MR O'REGAN: So, so.

16 THE CHAIR: I think they're using sites to be the individual one and domain to be the

17 collective but it's nine out of the list.

18 MR O'REGAN: For clarity, bizrate.co.uk would be one and .de would be a second.

19 THE CHAIR: Exactly.

20 MR O'REGAN: I'm grateful, Sir.

21 THE CHAIR: Yes. So then at that point would it be sensible -- so we sorted that out,

22 I think. We now move to the specific documents and that's the area you wanted to

23 take instructions; is that right?

24 MR O'REGAN: My learned friend wished to take instructions.

25 THE CHAIR: There's been some communications. Is that right, Ms Morrison?

26 MS MORRISON: Yes. So, I've taken instructions while we've been talking. So, there

1 is now still one issue on the Remedy and Strategy request, but it's just one: R23.

2 THE CHAIR: Right. So, we can turn to that one. Do you know which one it is?

3 MS LOVE: Musical chairs, Sir. Right. And I'm just going to confirm that -- R23, is it?

4 Yes. Okay -- before I address you on something which has been resolved. Always  
5 best to confirm these things are right.

6 THE CHAIR: R23 --

7 MS LOVE: R23.

8 THE CHAIR: -- which is on -- where in our schedule is that?

9 MS LOVE: It will be somewhere around the 190s, I hazard a guess. I'm sorry, Sir, it  
10 will be actually in my notes. And let me just -- it's always exciting to be told which ones  
11 these are. Right. R23.

12 THE CHAIR: On page 193 of Bundle 2.

13 MS LOVE: R23 on page 193. You are ahead of me, Sir. Now, right.

14 THE CHAIR: So, this is at the meeting you were referring to when seeking the  
15 custodians, I think. One of the two meetings with Mr Pichai.

16 MS LOVE: Yes, so this is a request for any meeting notes, slides and any documents  
17 relating to just one meeting.

18 THE CHAIR: Yes.

19 MS LOVE: Again, Sir, just by way of orientation, this is material that arises out of what  
20 we've already had in the Remedy disclosure, so we are following up on the specific  
21 linked documents or gaps or things of that sort. Google's answer is, in essence, "Well,  
22 we're not looking because if there were documents, it's reasonable to assume that  
23 they would have been gathered and reviewed already".

24 Now, Sir, we know that there was a meeting with Mr Pichai, the CEO, at which CSS  
25 outreach, to garner support for the Remedy that had been proposed, was discussed.

26 It seems like an obviously relevant and important meeting and it seems reasonable to

1 assume from the subsequent emails, which is an email from Mr Bethell to  
2 Mr Schindler, that at least someone has taken some notes in relation to it because  
3 there is discussion of a suggestion around branding.

4 I'm sorry, I'm just wondering if it may be convenient to turn up the meeting note itself  
5 and for that I'm just going to flick through my online bundle and Tab 4. Yes, so I believe  
6 that this is on page 493 of Bundle 4.

7 It's a short point. We know that there's a presentation for Mr Pichai in the disclosure,  
8 though, given the date, we don't know if it's the right deck. So, there were slides for  
9 at least one. It's reasonable to think there will have been slides for others. And we  
10 know that at least someone has come away from this with a list of action points. And  
11 we do say, if Google thinks that these will already have been caught, then they can  
12 and should go away and check. And particularly in circumstances where we know  
13 there was a meeting, we know at least some meetings have slides. The dates are  
14 known, the attendees are known. This is modest, targeted and reasonable. Sir, I was  
15 told yesterday that my clients want the moon on a stick. This is a really big, important  
16 needle in a very small haystack and Google should have a magnet.

17 THE CHAIR: Mr Pickford, it may well be that this will be found on the disclosure that  
18 I ordered a short while -- sorry, Ms Morrison --

19 MS MORRISON: No problem, sir.

20 THE CHAIR: -- this is your department -- when I said that Mr Schindler is now  
21 a custodian to be searched so it may well be --

22 MS MORRISON: Precisely. That's actually why this is still in issue. It would be  
23 consistent with your order on paragraph 4b to go after this one meeting because we  
24 would anticipate it would be caught in the disclosure exercise as being done.

25 THE CHAIR: But what may have happened is, does indeed happen, is that those  
26 people have discarded, even if it's electronic, may have discarded it and therefore one

1 has to look widely. I think I will say that insofar as it's not revealed by the disclosure  
2 audit under 4b, that Google should look more widely for any notes of this meeting  
3 because it does seem to be a slight gap. So, what do you want to say about that?

4 MS MORRISON: I need to find the documents that have been referred to. Two  
5 documents that are referred to (several inaudible words) but the header is the  
6 (inaudible), so the inference is that those were the briefing notes for that meeting and  
7 our submission essentially is, sir, that there's been an extensive search. There has  
8 been -- in fact, the fact that the meeting exists has been clearly identified and there  
9 are three documents that refer to it. So, our, in principle, submission is we believe it  
10 should have already been caught by the searches done so far. So even if there is a nil  
11 return on the further Leadership Team searches, we would anticipate that's because  
12 there aren't any further documents. The documents that do exist have been caught  
13 by the extensive exercises that have been done to date.

14 But we do hear you, Sir, and if you do wish for further searches to be done, I can take  
15 instructions on that.

16 THE CHAIR: It's a fairly confined search because you'll be looking at sort of 11 to  
17 14 August, essentially. And for this, you probably will need to look at Mr Pichai's --  
18 well, 11th to perhaps not -- the meeting was on the 14th, so it's perhaps the 11 to  
19 18 August -- look at Mr Pichai's records because he would presumably have been sent  
20 a note of the meeting. I think that's a reasonable search to conduct. It's not onerous.

21 MS MORRISON: Sir, yes, we will do the first stage of searches and if (overspeaking) -  
22 -

23 THE CHAIR: And if it doesn't come up with the 4b, then I think you should search in  
24 particular at Mr Pichai and records for that. That's Oliver Bethell, is it?

25 MS MORRISON: Yes. That's the senior lawyer. That's where --

26 THE CHAIR: Yes. So, this is not a legal email at all but it looks as though he was

1 | there at the meeting. This document, at page 493, is that dated 15 August? Is that --  
2 | that it says --

3 | MS MORRISON: I believe it is 15 August --

4 | THE CHAIR: Yes, because --

5 | MS MORRISON: -- there's a follow-up the next day.

6 | THE CHAIR: Yes. So, it looks as though Mr Bethell was at the meeting. So, if you  
7 | don't get anything on that in response to the paragraph 4b search, then I think you  
8 | should look more widely for this specific request IN the records of Mr Pichai and  
9 | Mr Bethell. Yes.

10 | MS LOVE: Sir. I think I'm right in saying that that concludes R and SS. So, one then  
11 | advances to Mr O'Regan's domain, which is quite a long way on. Page 216 of the  
12 | Scott Schedule. And I shall play musical chairs again.

13 | MR O'REGAN: Can I just turn my back and take instructions on one of the two points  
14 | that I need to raise with you.

15 | THE CHAIR: Yes. Well, probably easiest then -- shall I rise for five minutes? Would  
16 | that help you?

17 | MR O'REGAN: I'm grateful.

18 | THE CHAIR: It's always easier if it's not in open court. Yes. I'll come back and then  
19 | that will be our break, essentially. I'll come back at 3.00 pm.

20 | (2.54 pm)

21 | (A short break)

22 | (3.01 pm)

23 | THE CHAIR: Yes. Mr O'Regan.

24 | MR O'REGAN: Yes, Sir. Turning to the Connexity disclosure application. You've  
25 | already dealt with one this morning on the DMA. Two others. The first one is to do  
26 | with disclosure of documents that are referred to in a document that Google has

1 already disclosed. And they are at pages 216 to 225 of the Scott Schedule. I propose  
2 to deal with it relatively briefly in the light of your direction yesterday morning to the  
3 parties, to go away and conduct a reasonable and proportionate searches of  
4 documents that have been referred to in disclosed documents.

5 MR PICKFORD: I don't have that same page number.

6 MR O'REGAN: Yes. They start at number 2, which is on page 217, then they go  
7 through to number 14. They don't have any, any --

8 THE CHAIR: We've done number 1, haven't we?

9 MR O'REGAN: Yes. So, it's 2 through 14 which are all documents that are.

10 THE CHAIR: 217, number 2 is agreed, subject to --

11 MR O'REGAN: Yes, Sir. Basically to try and cut through all this and yesterday's ruling,  
12 there are four, of which I think there's a dispute over what would be a reasonable and  
13 proportionate search because Google has agreed to search for all the other ones, and  
14 those four that are left are some of the documents referred to that don't have  
15 a hyperlink or a URL. And the ones that are left are 4, 6, 7 and 8.

16 So, the document we're talking about is in Bundle 4 at page 682. And the first of these  
17 are on page 683, that's number 4.

18 If we cut straight to the chase as to what would be reasonable and proportionate in  
19 these circumstances, Sir, we're basically what we have is either a snippet of  
20 a document title or just a reference to some kind of document without any real  
21 specificity. And the objection raised against us is that these are not specific requests  
22 and are very vague, such that would be highly burdensome for Google to search and  
23 would be disproportionate.

24 THE CHAIR: So, the reference here is, "plan for mitigating impact", is that --?

25 MR O'REGAN: That is number 4.

26 THE CHAIR: And that is, you say, in the document on page 683.



1 MR O'REGAN: 683, fourth line from the bottom.  
2 Paragraph that starts on July 22 2008 which is 682, yes.  
3 THE CHAIR: 682. Sorry. 682.  
4 MR O'REGAN: Final paragraph.  
5 THE CHAIR: The Product Search team presented a plan.  
6 MR O'REGAN: "a plan for mitigating impact" is what it says. So, clearly, there is  
7 a document that has been presented by those teams, and that is the document that  
8 we seek to be disclosed. It's not described in any greater detail, but, obviously, it's not  
9 our document. We can't provide any greater detail than what is on the page. So that  
10 is number four.  
11 The next one is number 6, which is, I think, on the same page. It's over the page on  
12 683. At the top of the page there, there's a reference in the first line to "a status update  
13 in its strategy review". (Pause)  
14 We seek disclosure of the "status update".  
15 THE CHAIR: Yes.  
16 MR O'REGAN: Then at the bottom of that page --  
17 THE CHAIR: That's number 6.  
18 MR O'REGAN: That's number 5.  
19 THE CHAIR: Number 5 is --  
20 MR O'REGAN: Number 5 has been agreed.  
21 THE CHAIR: Number 5 is agreed, isn't it?  
22 MR O'REGAN: Yes. Number 5 has been agreed. I'm grateful. Then number 6 --  
23 THE CHAIR: We don't need that. Sorry.  
24 MR O'REGAN: Number 6 is at the bottom of that page, and there's footnotes at the  
25 bottom of that page, and there's footnote 2. Then three lines up from the bottom  
26 starting at "However", there's then another report. I don't know how much of this is

1 confidential, so I'm being as elliptical as possible.

2 THE CHAIR: The one "At the September 2008".

3 MR O'REGAN: Yes. So, there's a report. We seek disclosure of that report.

4 Then number 7 is on the next page, 684. That, again, is in the footnotes, at footnote 4,  
5 and it's the results that are referred to in that. The footnote is clearly a document of  
6 some sort, that is those results that we seek disclosure of.

7 Then number 8 is the last one. That should be on 687. Footnote 10. Footnote 10,  
8 the first line, second sentence, there's a reference to an initial analysis.

9 THE CHAIR: Yes. And that's number 8.

10 MR O'REGAN: Those are the four that are, I think, in dispute still, Sir, as to what would  
11 be a reasonable and proportionate search. Google says that there isn't a reasonable  
12 and proportionate search because these are not specific requests for a specific  
13 document and that the descriptions are vague. That's Mr Wisking at paragraph 111(c)  
14 of his Eighth witness statement, who says:

15 "There is no reasonable or proportionate way Google could identify and search for  
16 such documents ..."

17 In our submission, what would be a reasonable and proportionate search, in the light  
18 of the direction yesterday, would be for Google to ask the authors, recipients and  
19 custodians of this document to review it and the terms that are in question. And then  
20 to ask them what these documents are, to the best of their knowledge. If they don't  
21 know or don't remember, then that's where we are. And then to search for those  
22 additional documents. They're clearly over a relatively limited period of time. That is  
23 what would be reasonable and proportionate.

24 Clearly, Claimants cannot be prejudiced by the manner in which Google employees  
25 have chosen to draft documents and to refer to other documents.

26 THE CHAIR: Number 4 is on page 682.

1 MR O'REGAN: 683.

2 THE CHAIR: Yes. What -- I mean, that section of page 682 talks about a number of  
3 things. If we look in that paragraph, which is headed "Context and Background", it  
4 says:

5 "On July 22, 2008, the Product Search team reported to EMG on [et cetera]." [as read]  
6 Down to the third line:

7 "The team presented results from ..." [as read]

8 A few lines down:

9 "At the time, the team estimated that ..." [as read]

10 Have you got the other parts of this? The results from a Universal holdback  
11 experiment? Are you not asking for that?

12 MR O'REGAN: Two has been a resolved, as I understand it, as has three, because  
13 Google has actually provided the document for number 3.

14 THE CHAIR: It's all in the same --

15 MR O'REGAN: That's done in the search for number 2.

16 THE CHAIR: Product Search, 22 January. I see that's number 2.

17 MR O'REGAN: It is possible to identify a document from a vague description, at least  
18 in some cases.

19 THE CHAIR: What's "EMG"? Do you know? The executive something ...

20 MR O'REGAN: The Executive Management Group at Google, a fairly senior group of  
21 managers.

22 THE CHAIR: Well, just dealing with - it's Ms Morrison, is it? That's Mr Pickford.

23 MR O'REGAN: Yes.

24 THE CHAIR: The first one -- I mean, this is a document presented at a meeting on  
25 22 July 2008. So, it's pretty specific. I don't understand the notion saying it's not  
26 a request for a specific document.

1 MR PICKFORD: Sorry, are we dealing with number 4?

2 THE CHAIR: Yes.

3 MR O'REGAN: It's just the one at the bottom.

4 MR PICKFORD: Yes. So, it isn't -- what it said is that there was a Product Search  
5 and ad teams presented a plan. That's --

6 THE CHAIR: At the meeting --

7 MR PICKFORD: Yes.

8 THE CHAIR: Of 22 July with EMG?

9 MR PICKFORD: Correct. That isn't -- well, if I may take a step back.

10 THE CHAIR: Yes.

11 Reply submissions from MR PICKFORD

12 MR PICKFORD: These aren't requests for specific disclosure in the sense of: here's  
13 a specific document. We quite understand that we're outside that territory and we're  
14 not ruling out searching for things that are not expressly identified in that way. The  
15 question then becomes: where does one draw the line as to what appears to be  
16 a document and there isn't any suggestion there is a document? We have sought to  
17 provide, as Mr O'Regan noted, where there appears to be a document being referred  
18 to, we're going to search for it. The difficulty with when it's not clear to us that there is  
19 any document is that what's being suggested by the Claimants is we need to go back  
20 and -- what they've asked us to do is go back and speak to people involved in the  
21 meetings, or that might have produced the documents, and ask them about it. That's  
22 what they're asking for, as part of this request.

23 These are events that took place 17 years ago. We'd said it's just not realistic, that  
24 people involved in a meeting 17 years ago will have any recollection of these matters  
25 at all.

26 THE CHAIR: No, I see that.

1 MR PICKFORD: And that's the essential reason why we resist this. We need some  
2 key. We need some hook on which to search and --

3 THE CHAIR: I think you managed to find, as I understand it -- no, you haven't  
4 managed to find --

5 MR PICKFORD: We haven't found it, but we said we'd do it.

6 THE CHAIR: You agreed to look for the report referred to in the first part of that  
7 paragraph, because that's Request 2.

8 MR PICKFORD: Yes.

9 THE CHAIR: But it seems to me you can equally, in the same way, look for what does  
10 appear to be a document, because "presenting a plan that involves changing  
11 a position mix of specified figures" -- which I won't read out -- is almost certainly likely  
12 to be in some sort of written form, because it's slightly technical.

13 In the same way, you can, as you look for the one above -- the first part of that  
14 paragraph -- you can look for this one. I'm not specifying how you do it. You do  
15 a reasonable and proportionate search. I'm not saying you've got to go and speak to  
16 these people, and as you quite rightly say, that's likely to be a fool's errand. But if  
17 you're looking for the report that's referred to in the first part of that paragraph, surely  
18 you can at the same time look for this.

19 MR PICKFORD: Let me just take instructions.

20 THE CHAIR: Yes. (Pause)

21 MR PICKFORD: We're happy to do a reasonable and proportionate search for those  
22 items still in dispute here. To be very clear -- and I'm very grateful for the Tribunal's  
23 indication -- what that will not involve is going back to speaking to people about  
24 a meeting 17 years ago, but we will effectively adopt the same approach as we're  
25 planning to adopt for the other documents. It may turn up or it may not. In many  
26 cases, it's not clear there is a document, so if there is --

1 THE CHAIR: Well, I think that does sound like a document, I have to say.

2 MR PICKFORD: I agree with this one.

3 (3.19 pm)

4  
5 THE CHAIR: If there is a plan including, primarily through two actions -- so there are  
6 other things as well. As I say, they are rather specific, at least one of the actions. So,  
7 it is likely to be a document. Whether you can find it, I do not know what sort of record  
8 of documents produced for EMG meetings still exists from 2008, but -- and similarly,  
9 just as the status, the strategy review presented to the EMG is going to be a meeting  
10 and a document. Indeed, it says it is included in the deck. So, it is clearly a document.  
11 And GPS must be some other form of meeting, because it says:

12 "At the Sept.2008 GPS, team reported ... following the Sept. 2008 GPS, the Product  
13 Search Team ..." [as read]

14 So, there clearly were these meetings and one expects that the reports of containing  
15 the sort of detail were not purely oral. So, it does appear there are documents.  
16 Whether they can be found on a reasonable proportionate search, we do not know,  
17 but I think you should conduct it.

18  
19 (3.21 pm)

20 MR PICKFORD: Sir, I understand that. The marker that I wanted to lay down is that,  
21 given that we have already searched and we may well not find anything further -- and  
22 what we consider to be reasonable and proportionate does not include, as I've made  
23 clear, speaking to people at the meeting. But beyond that, we are happy to take that  
24 away and take that off the Tribunal's agenda.

25 THE CHAIR: Thank you.

1 Discussion regarding confidentiality redesignation

2 Submissions by MR O'REGAN

3 MR O'REGAN: I am grateful. Turning to our second remaining application that's at  
4 paragraph 4, next to the draft order, which is in Bundle 1, at page 47. (Pause)

5 THE CHAIR: I thought we'd done paragraph 4.

6 MR O'REGAN: It's to do with the redesignation of the confidentiality or otherwise of  
7 a particular document. So page 224 in the --

8 THE CHAIR: Is it on page 224 of Bundle 2?

9 MR O'REGAN: Yes. And that's coloured in different forms. Some of them are  
10 unhelpful. We've got the same numbers running. So, it's coloured in light blue. Now -  
11 -

12 THE CHAIR: Connexity draft Order.

13 MR O'REGAN: That is in bundle 1.

14 THE CHAIR: Yes, at tab 28. Starting at --

15 MR O'REGAN: Tab 6, page 47. There's a separate Connexity Order. So, it's after  
16 the original Kelkoo Order. So, we don't have an updated Connexity draft Order, at  
17 least not as far as I'm aware.

18 THE CHAIR: So page ...?

19 MR O'REGAN: Page 47 of Bundle 1. (Pause)

20 THE CHAIR: Redesignation of a document.

21 MR O'REGAN: The document -- the Scott Schedule reference is at page 224, if you  
22 need that as well, Sir. One needs to be quite careful how one addresses this because -  
23 -

24 THE CHAIR: Well, let me just -- give me a moment, because I haven't read this, to  
25 just understand. Are you asking for it to be designated non-confidential or outer ring  
26 confidential?

1 MR O'REGAN: Non-confidential, Sir. In correspondence, a non-confidential version  
2 has been provided. That's in Bundle 6, at page 160.

3 MR PICKFORD: Sir, before we get too far into the substance, I have actually got  
4 a procedural point to make on this. Just so that you're aware.

5 THE CHAIR: Do you want to raise that now?

6 Reply submissions by MR PICKFORD

7 MR PICKFORD: Yes. This request for redesignation became part of the  
8 Scott Schedule on Monday. There has been a dispute about the document --  
9 a different dispute -- previously about whether they could receive a non-confidential  
10 version, which they then were provided with. Then, as of Monday, the dispute became,  
11 "Right, now we'd like it to be redesignated". They then wrote to us -- I believe, the  
12 next day -- to say, "We'd like this to be redesignated". There is a procedure in the  
13 Confidentiality Order --

14 THE CHAIR: Yes.

15 MR PICKFORD: -- that is to be followed when one wants to redesignate, and it  
16 involves the person requiring the redesignation to explain why they say it should be  
17 redesignated, and then we, as the respondent to that, will get a chance to respond.  
18 Those steps have not been gone through, and this point was raised, in our submission,  
19 very late. The correct approach is that Connexity should explain to us in  
20 correspondence why they say they'd like it redesignated, in accordance with  
21 paragraph 10 of the Order, and we can then take instructions on it. I don't have any  
22 further instructions today on what we're willing to agree, in relation to redesignation,  
23 because it's arisen too late.

24 THE CHAIR: Yes, and obviously there is the intermediate possibility as well of  
25 designating it confidential, but not LEO confidential.

26 Well, Mr O'Regan, this sort of thing shouldn't be raised at the last minute.



1 Submissions by MR O'REGAN

2 MR O'REGAN: It was raised in correspondence, Sir, on 18 June, which is in Bundle 4,  
3 page 772. (Pause)

4 And in that, we requested that the entire document be re-designated as non-  
5 confidential. That's in paragraph 1 of that letter, subparagraph (a), on the first page of  
6 the letter.

7 THE CHAIR: Paragraph 1 or paragraph 2 of this document?

8 MR O'REGAN: Paragraph 1 contains the request. And then paragraph 2 provides  
9 the reasons for that request.

10 THE CHAIR: This letter of 18 June, the document referred to in paragraph 1 is  
11 a different document.

12 MR O'REGAN: It's paragraph 2.

13 THE CHAIR: And the bit in blue here clearly is confidential.

14 MR O'REGAN: Yes, Sir. We don't need --

15 THE CHAIR: So let me just read this. (Pause)

16 MR O'REGAN: Penultimate sentence which goes over the pages.

17 THE CHAIR: Mr Pickford, can you clarify? (Pause)

18 MR O'REGAN: Paragraph 2, sir, we do explain why we challenge confidentiality.  
19 Then the penultimate sentence --

20 THE CHAIR: Was there a response to this letter?

21 MR O'REGAN: There was a response, Sir, which was on 11 July. That's in Bundle 6  
22 at page 128. (Pause)

23 Fortunately it's in the correspondence bundle now, which is at Bundle 6.

24 THE CHAIR: Page --

25 MR O'REGAN: Page 128.

26 THE CHAIR: 128?

1 MR O'REGAN: Yes. (Pause)

2 That letter at paragraph 2, they say they've prepared what they call a "non-

3 confidential" version, that is still to some extent redacted. We'll come to that.

4 And in paragraph 3, they say they maintain the confidentiality designation, and give

5 reasons for that. (Pause)

6 THE CHAIR: Yes.

7 MR O'REGAN: Then Preiskel responded, Sir, on the 15 July, page 137 of that Bundle,

8 repeating the request.

9 And then Herbert Smith Freehills Kramer responded to that letter on the 16 July, and

10 that's at page 204 of that Bundle.

11 THE CHAIR: 137 of Bundle --

12 MR O'REGAN: We're at Bundle 6 now, sir. So, 137 is the Preiskel letter of the 15th,

13 which is in response to the Herbert Smith Freehills Kramer letter of 11 July.

14 THE CHAIR: Yes. (Pause)

15 The letter you showed me was 11 July, was it not?

16 MR O'REGAN: The 11 July letter is the Herbert Smith Freehill Kramer letter, which is

17 in response to the 18 June letter.

18 THE CHAIR: But here it says paragraph 2 of this letter is in your letter of 25 June --

19 oh, I see, you state you do not agree. (Pause)

20 Yes, I see there was an intermediate letter. Yes. (Pause)

21 MR O'REGAN: That provide further reasons as to why the document is not

22 confidential.

23 I need to take you through them.

24 Paragraph 9 of that letter, the request for redesignation as entirely non-confidential is

25 repeated.

26 The reply the following day, I think it's the letter my learned friend was referring to.

1 THE CHAIR: That's on the 16 July --

2 MR O'REGAN: 16 July, yes.

3 THE CHAIR: That's at page --

4 MR O'REGAN: 204. I'm grateful.

5 That's where, at paragraph 4 of that letter, the allegation is made that this is being

6 raised for the first time.

7 THE CHAIR: Did you say 204? I haven't got a page 204. In this electronic bundle.

8 MR O'REGAN: The updated version of electronic Bundle that was filed yesterday,

9 I think you adverted to that issue. I must apologise again, Sir, on behalf of those

10 preparing the Bundles, but it just reflects this --

11 THE CHAIR: I stop at page 196.

12 MR O'REGAN: You've not got the updated bundle.

13 THE CHAIR: It's not been updated.

14 MR O'REGAN: Sir, it was sent to the Tribunal yesterday.

15 THE CHAIR: Well, in any event, we can get that letter.

16 But, so, Mr Pickford, it does look as though this, not only was raised, but it's been the

17 subject of quite a bit of correspondence.

18 Reply submissions by MR PICKFORD

19 MR PICKFORD: It has. My point is that the particular point that's now being pursued,

20 which is that what we should do is redesignate the whole of the document as non-

21 confidential, that that what was asked for, as of 15 July.

22 THE CHAIR: I thought that was -- surely being asked for earlier, wasn't it?

23 MR PICKFORD: My understanding is that, initially, it was being challenged as not

24 being appropriately in LEO. We then produced a confidential version, but that still

25 maintains some LEO material as redacted. And then where that went --

26 THE CHAIR: I thought the letter of 18 June says:

1 "... please confirm that Google consents to the amendment of the designation of [this  
2 document being to non-confidential."

3 Isn't that what's now being asked for?

4 MR PICKFORD: Well, we've come full circle, because in between then, we said, "Well,  
5 our response to that is we can do a confidential version, here's the confidential  
6 version".

7 And now, what's been resurrected as of the 15 July, is something that was canvassed -  
8 -

9 THE CHAIR: But it was asked for, pursuant to the order. You didn't give it; you gave  
10 something less, and they're maintaining their request.

11 MR PICKFORD: Yes, that's true, Sir, but in terms of what was in the Scott Schedule  
12 prior to Monday, it was not the request that's now being advanced, but they want the  
13 whole thing designated as non-confidential. That iteration -- it's true that that was  
14 something that was asked for back on the 18 June --

15 THE CHAIR: (inaudible) draft orders.

16 MR O'REGAN: With the application, Sir. So that would have been on 19 June.

17 THE CHAIR: Sorry?

18 MR O'REGAN: 19 June, with the application.

19 THE CHAIR: Yes, so that's the application I've got, with that draft order. I don't think -  
20 - I'm sorry, Mr Pickford, I don't think there is a procedural point. I think it may be that  
21 there was discussion in between about whether something less would do, but this was  
22 the application issued in June, dealt with in that letter. An intermediate  
23 correspondence doesn't invalidate the application.

24 So, the real question, I think, is to now look at the substance of the whole thing. And  
25 as far as that's concerned, that's a different point. So, I'm not impressed by the  
26 procedural point. Where we've got to now, as a result of all this, and I haven't seen

1 the latest letters, you know, is that you've got a confidential version with a few things  
2 redacted. Is that right?

3  
4 Discussion regarding confidentiality

5 Submissions by MR O'REGAN

6 MR O'REGAN: Yes, Sir, which is confidentiality -- ring confidential -- but not wholly  
7 non-confidential.

8 THE CHAIR: Right.

9 MR O'REGAN: The difficulty we have is that Google haven't produced a highlighted  
10 version of the original document, originally showing what was LEO -- so it should be  
11 in blue -- and what is otherwise claimed to be confidential. So, we don't have that in  
12 blue and yellow respectively, so we have some difficulty.

13 And the challenge we have is that my solicitors, those instructing me, are unable to  
14 take proper instructions from Connexity as to the import, and to some extent the  
15 meaning, of this document, without being able to discuss it with employees who have  
16 the relevant commercial and technical knowledge, who are not in either the LEO ring  
17 or the standard Confidentiality Ring. That's the point that is made in the  
18 correspondence.

19 But, we have some difficulty in identifying now what is LEO. We know what LEO  
20 confidential is now, because we've got a slightly redacted version, but we don't know  
21 what is confidential, but not LEO confidential. If you follow what I'm saying, Sir.

22 THE CHAIR: Yes.

23 MR PICKFORD: We can certainly help with that. We can provide a suitably marked  
24 up document that explains what is LEO confidential and what is confidential. That's  
25 not a problem.

26 THE CHAIR: Presumably some parts will be non-confidential. This is a slide deck, is

1 it?

2 MR O'REGAN: It's a strategy document of some description, sir. The confidential  
3 version is --

4 THE CHAIR: Have I got the wrong document?

5 MR O'REGAN: The confidential version is in Bundle 4, and that's at page 645 of  
6 Bundle 4.

7 THE CHAIR: I'm reading the letter of 15 July from Preiskel, which says the document  
8 is:  
9 "... a slide deck that identifies the basis on which Google measured [certain things]."  
10 [as read]

11 And then there's an appendix. I'm not sure if it's -- is it the appendix that's confidential  
12 or the whole thing?

13 MR O'REGAN: Certain text on certain pages.

14 THE CHAIR: Of the slide deck, or of the annex?

15 MR O'REGAN: Both.

16 THE CHAIR: Both?

17 MR O'REGAN: Because the words that are claimed to be confidential appear in the  
18 front half of the document but are also then referred to in the back end of the document,  
19 where they are -- there is data analysis of some of those terms. That's probably the  
20 best way I can put it.

21 The easiest way for you is to turn the pages, Sir. (Pause)

22 THE CHAIR: Document dates from 2000 and --

23 MR O'REGAN: 2008, Sir. So, if you turn to the document in the original confidential -  
24 - the LEO confidential version is in Bundle 4 at page 645. And the non-confidential  
25 version that's been provided is in Bundle 6 at page 160. That's quite difficult, if one  
26 lays them side by side on a laptop screen, to read all of that.

1 THE CHAIR: It's long documents -- it's not --

2 MR O'REGAN: Mindful of the time as well, Sir.

3 THE CHAIR: Mr Pickford, why is any of this only LEO confidential? I don't quite  
4 understand that. (Pause)

5 Is it that, going to this document, what is LEO confidential here that can't be seen by  
6 those in the wider Confidentiality Ring?

7 Reply submissions by MR PICKFORD

8 MR PICKFORD: What is LEO confidential is techniques that Google uses to assess  
9 websites in its algorithms, and the fact that it's an old document does not make it any  
10 less confidential, because this is not financial information, or something of that nature,  
11 that becomes out of date. It's the crown jewels of how Google operates its business  
12 in terms of details about algorithms. Now, what is said by the Claimants is that there  
13 are public sources that speculate as to what Google does, and therefore, if there's  
14 a public statement about what Google does, then that must mean that it's now in the  
15 public domain, and we say very much like, Mi5, we are unable to either confirm or  
16 deny whether those public statements are true or false.

17 THE CHAIR: Yes.

18 MR PICKFORD: And therefore the fact that there may be some material where there  
19 is speculation is ultimately neither here nor there.

20 THE CHAIR: But it's inherent, if one's looking at how -- what Google is doing to  
21 shopping sites, that the lawyers are going to have to get some instructions from their  
22 client, and that's why we have the confidentiality ring.

23 But which are the bits of this that are said to be LEO confidential? Is that set out in --

24 MR O'REGAN: Page 171, Bundle 6, is the first page.

25 THE CHAIR: 171 on Tab 6 -- Bundle 6. I see. (Pause)

26 MR PICKFORD: Sir, if you want to compare, one looks at page 656, so we can help

1 | you to --

2 | That's the equivalent page in the LEO Bundle in tab 4. You can see what the LEO

3 | information is. (Pause)

4 | THE CHAIR: Yes, I've now got it. (Pause)

5 | Have you got, Mr O'Regan, a technical expert? As opposed to an economist.

6 | MR O'REGAN: I don't think so. (Pause)

7 | Technical experts on either side, as I understand it, sir, have not been appointed for

8 | the First Trial.

9 | THE CHAIR: Yes.

10 | MR O'REGAN: Clearly our CEO is within the wider ring. He's a businessman, not

11 | a technical person.

12 | THE CHAIR: Yes.

13 | MR O'REGAN: You can have technical understanding, obviously, after 20 odd years

14 | in the business, but -- (Pause)

15 | THE CHAIR: And you say, Mr Pickford, on instructions, the same criteria are being

16 | applied in 2025 as in 2008? Is that what you're told?

17 | MR PICKFORD: What I am instructed is that the essence of a number of Google's

18 | algorithms remains unchanged. They obviously develop over time --

19 | THE CHAIR: Yes.

20 | MR PICKFORD: -- but we are, in my submission, understandably, very concerned to

21 | make sure that there are no clues at all that get into the public domain about how our

22 | algorithms work, beyond that which Google has itself very carefully vetted as

23 | appropriate.

24 | THE CHAIR: Well, it won't be in the public domain if it's in the confidentiality ring.

25 | MR PICKFORD: Well, there are two levels here. What's being sought by the

26 | Claimants is that this becomes a non-confidential document. So that's what the actual



1 application is for, and so I need to address you on that.

2 THE CHAIR: Yes.

3 MR PICKFORD: And as far as that is concerned --

4 THE CHAIR: I understand.

5 MR PICKFORD: -- we do maintain that it is wholly inappropriate for that kind of  
6 technical detail to be fully non-confidential. Then, as between what is confidential and  
7 what is LEO, our persistent approach has been that, where we are dealing with these  
8 kinds of highly technical issues, where there are considerable concerns if that  
9 information becomes more widely known than it has to be, then the appropriate  
10 designation is LEO.

11 THE CHAIR: But how can a party -- the lawyers can't appreciate the significance of  
12 these matters, clearly -- how can they get proper instructions, or consider the way in  
13 which this works and whether it involves inappropriate demotion of their sites -- which  
14 is one of their client sites -- without being able to -- within the strictures of  
15 a confidentiality ring -- sharing this with the selected individuals, who are subject to the  
16 confidentiality undertakings?

17 MR PICKFORD: For a start, as you were canvassing with Mr O'Regan, through expert  
18 assistance, that would be one means.

19 THE CHAIR: Yes.

20 MR PICKFORD: And we do have to, in my submission, take a step back and look at  
21 the context here. These matters are very, very important from Google's point of view,  
22 in terms of maintaining their secrecy, and that is both in relation to competitors, and  
23 it's in relation to the fact that once people understand how Google goes about doing  
24 something, they can seek to manipulate the way in which their websites are presented,  
25 to take advantage of that knowledge, and that potentially undermines the effectiveness  
26 of Google Search.

1 THE CHAIR: Yes.

2 MR PICKFORD: The fact that that's very important to Google, in my submission, does  
3 not mean that it's a very important issue in the case, in terms of the precise technical  
4 detail, as to how these algorithms worked.

5 THE CHAIR: Well, it's pretty important in the case, because it's about demotions being  
6 applied to independent third-party sites, in a way that they say would not equivalently  
7 affect Google's site. So understanding, and getting instructions on the demotions is  
8 important.

9 Can I step back for a moment and just ask, this document is from 2008, and this is  
10 applying to -- what is this, Google Shopping Europe? Not Google Shopping Europe,  
11 sorry, Google's operation and handling of sites in Europe, or worldwide, or --

12 MR PICKFORD: Certainly, straight away, I can seek to answer it. (Pause)

13 THE CHAIR: May I step back one bit further then? (Pause)

14 This looks like -- this is from September 2008, this document.

15 MR PICKFORD: Yes.

16 THE CHAIR: And it's about a strategy going forward.

17 And therefore, can I ask you, Mr O'Regan, and it's -- this is not then -- well, no, I'm  
18 sorry. I do maintain the question: is this for Europe? Is this worldwide? Is this --

19 MR PICKFORD: In terms of the signal, the signal will be something that Google relies  
20 upon on a worldwide basis. And I've been instructed in relation to two further points  
21 which are helpful for the Tribunal to be aware of.

22 Firstly, Foundem, Kelkoo and Ciao have technical experts in the ring. So, the  
23 Claimants do have technical experts -- this is something that is being raised by  
24 Connexity, because Connexity have decided not to instruct a technical expert. Well,  
25 in relation to highly confidential technical information, if they wish to make a case about  
26 it, we say they can instruct a technical expert in relation to it, and there are obvious

1 reasons why we don't want to disclose this kind of information to Connexity itself, even  
2 under the terms of the Confidentiality Order.

3 The second point to make is that these signals that are being referred to are not unique  
4 to the specific algorithm necessarily being considered here. There are certain types  
5 of signals that Google uses more widely across its search business more generally.  
6 And, therefore, it is very important, that even in relation to, a signal in relation to one  
7 particular -- that's revealed in one particular document in 2008, that that confidentiality  
8 is maintained, because otherwise one can begin to unravel information about how  
9 Google works, which Google is understandably concerned to protect.

10 THE CHAIR: Yeah.

11 MR O'REGAN: Sir, may I assist?

12 THE CHAIR: Just give me a moment.

13 MR PICKFORD: You asked me a question about what the document was about and -  
14 -

15 THE CHAIR: Because it's proposing a strategy.

16 MR PICKFORD: It's a US document, I'm instructed.

17 THE CHAIR: So, it's a US document.

18 MR PICKFORD: Yes.

19 THE CHAIR: Thank you.

20 MR PICKFORD: But as I said, the signals are worldwide.

21 THE CHAIR: Yes. Connexity's claim, I think, Mr O'Regan, is purely a follow-on claim.  
22 Is that not right?

23 Submissions by MR O'REGAN

24 MR O'REGAN: No. Follow-on claim --

25 THE CHAIR: And thereafter.

26 MR O'REGAN: Nothing before --

1 THE CHAIR: Nothing before.

2 MR O'REGAN: -- 2008, yes.

3 THE CHAIR: Yes and Connexity, is it only UK unlike ...?

4 MR O'REGAN: No. Connexity is -- depending on which part you're talking about --

5 Bizrate/Shopzilla/Connexity business is a US business that expanded into Europe.

6 THE CHAIR: So, it's covering --

7 MR O'REGAN: Slides.

8 THE CHAIR: -- other European countries, is it?

9 MR O'REGAN: Yes. Some of the domains we discussed earlier are in the UK, France,

10 Germany; others are in Italy, Spain. (Pause)

11 THE CHAIR: You don't have a technical expert, but there are technical experts with

12 the other Claimants.

13 MR O'REGAN: To assist, Sir.

14 THE CHAIR: And they will be able to see this and assist in instructing the lawyers for

15 Foundem, Kelkoo and Ciao. Is there any reason why Connexity could not jointly

16 instruct one of those technical experts to look at this document?

17 MR O'REGAN: So, no. And indeed, those behind me who are viewing the files did

18 indicate that would be a possible way forward, would be to either instruct or jointly

19 instruct experts. I'm extremely mindful of time. This has taken a lot longer than one

20 might have hoped or anticipated.

21 THE CHAIR: I'm trying to understand what the point -- I think, but I mean, that does

22 seem the sensible -- the reason we got technical experts and casting my mind back

23 now many years was this sort of problem.

24 MR O'REGAN: Yes (overspeaking) --

25 THE CHAIR: And they are therefore within the LEO ring and I think the sensible thing

26 is, as they are there, that Connexity should jointly instruct one of them for the purpose

1 of this document.

2 MR O'REGAN: It's certainly a way forward, Sir, and we can then see how we go, and  
3 if (overspeaking) --

4 THE CHAIR: And Google should provide you with a document marked up in two  
5 colours so everyone's clear what's what.

6 MR O'REGAN: I'm grateful.

7 THE CHAIR: I think I won't make any order about that, but you'll have liberty to apply  
8 again, probably, if that proves unsatisfactory. MS LOVE: Sir, I think it remains -- we  
9 are almost out of time to talk about timing for the disclosure that you were --

10 THE CHAIR: That's pretty important, timing.

11 MS LOVE: Now, Sir, what we have asked for in the draft Order, describing it in broad  
12 strokes, is that which is available, for instance, these weekly reports, things which are  
13 there, within a couple of weeks.

14 As you've heard, Kelkoo has had a couple of days of senior management time diverted  
15 and we've done our reconstructing. We're going to do things in two weeks and things  
16 that require searches within five weeks. And everyone's aware one has to get on with  
17 things. The clock is ticking. What is being ordered now is a limited proportion, a very  
18 limited proportion, of what was sought. So that's the context for these cumulative  
19 impact points. And I apprehend it won't find favour with Mr Pickford, but that's where  
20 I start the bidding. And I really say it is to him to explain why a company of Google's  
21 wherewithal, which sort of does data retrieval generally, needs longer to run some  
22 searches.

23 THE CHAIR: Yes. Well, what's available within two weeks, that's like the financial  
24 reports, that should not be a problem, should it?

25 Reply submissions by MR PICKFORD

26 MR PICKFORD: I'm not instructed that that is correct. If I may, could I have

1 five minutes with my team. I understand that a proposal has been made but I don't  
2 know what it is yet, so I need to get instructions to offer it to the Tribunal.

3 THE CHAIR: Yes. So you want me to rise?

4 MR PICKFORD: If you could, Sir.

5 THE CHAIR: Yes.

6 MR PICKFORD: Thank you.

7 (4.01 pm)

8 (A short break)

9 (4.14 pm)

10 MR PICKFORD: Sir, I'm very grateful for the indulgence of rising and for the fact that  
11 we took slightly longer than five minutes, but hopefully, it's been productive.  
12 What we propose is to divide the disclosure into four categories and the timing that's  
13 associated with each of those categories is dependent on what's in the category.  
14 So, category A, we propose to provide within three weeks and within category A, that  
15 would be the searches based on the DMA documents. It would be the weekly reports;  
16 it would be hyperlinked documents; and it would be the specific disclosure requests  
17 where there is a title of a document that we can search for. So that's the lowest  
18 hanging fruit in terms of things that should be easiest for us to produce. And we  
19 would --

20 THE CHAIR: And the privilege log?

21 MR PICKFORD: The privilege log? The privilege log we were proposing to put into  
22 category B.

23 THE CHAIR: But we have a time estimate from Mr Wisking.

24 MR PICKFORD: Yes.

25 THE CHAIR: Ten to 15 days.

26 MR PICKFORD: Yes. Well, I think the point is that it's doing everything together but

1 I will turn around and --

2 THE CHAIR: I think that can be done in three weeks.

3 MR PICKFORD: That's understood. In which case, category A would also include the

4 privilege log. Yes. I have nods behind me.

5 THE CHAIR: Yes.

6 MR PICKFORD: So that's the first category then category B, would be the --

7 THE CHAIR: How many weeks?

8 MR PICKFORD: Would be five weeks.

9 THE CHAIR: Five weeks.

10 MR PICKFORD: And that's the existing data searches. That's, effectively, the A ones

11 that the Tribunal has ordered where it's not as straightforward as, for instance,

12 providing the weekly reports which are obviously data, but they are relatively easy.

13 They're ones where we have to go away and actually extract data and make sure that

14 we're providing the data that's correct and it's full and it's in an appropriately usable

15 format. So that's category B.

16 Category C, we are asking for ten weeks and that is custodial searches where we are

17 making our best efforts to find documents.

18 THE CHAIR: Yes.

19 MR PICKFORD: And then the final category is D and for those we are asking for

20 12 weeks and that's all the other custodial searches, for instance, the E category and

21 the remedy category. And then secondly, the data where we have to engage in an

22 engineering process to be able to extract the relevant data. So that's the Penaltyserver

23 data and the A26 merchant data.

24 We are also willing within that to offer, where we can, disclosure on a rolling basis. So

25 if something is ready earlier within those time frames, we will provide it, albeit I think

26 for the first three weeks one, it's unlikely that we're going to be beating the

1 three weeks. But thereafter, we will provide it as and when we can provide it.

2 The reason for those timings is because, given the number of activities that we are  
3 being required to do simultaneously, that is our best estimate of a suitable time frame  
4 that, we believe, we can do it in, putting quite a lot of pressure to make sure that it is  
5 done promptly, but nonetheless also properly and accurately.

6 THE CHAIR: Yes. On the first one where you said the weekly report --

7 MR PICKFORD: Yes.

8 THE CHAIR: -- is that a shorthand for the different categories of financial data that  
9 Ms Lawrance identifies, which I said should be disclosed because they're all existing  
10 documents? They're weekly reports, but they're also the four-monthly and six-monthly  
11 Shopping P&Ls.

12 MR PICKFORD: Can I just take instructions on that, Sir?

13 THE CHAIR: Yes. (Pause)

14 MR PICKFORD: So yes, it extends beyond weekly reports so long as they're  
15 effectively documents that we're providing that have the relevant information. What it  
16 doesn't extend to is where we've got to, effectively, do something within our systems,  
17 which would be into category B, that involves some sort of data abstraction.

18 THE CHAIR: But I think --

19 MR PICKFORD: Extraction.

20 THE CHAIR: -- point about the financial disclosure, which you'll recall I ordered  
21 without taking a view on relevance, was because it's not burdensome because these  
22 are all existing documents and not difficult to obtain. There was no suggestion that it  
23 is difficult. And there were, you know, since September 2022, the six-monthly  
24 Shopping P&Ls, and so on. They're all in that category.

25 MR PICKFORD: Yes. For any documents that exist, what I'm being instructed is that -  
26 - and I have to say, within the 69, one slightly loses track of exactly what has been



1 ordered, I think we'd obviously need to go back and take care with the transcript -- but  
2 my understanding is that there are some where equivalent data has been sought and  
3 for those, they would be in category B, not in category A because there's --

4 THE CHAIR: Yes, I don't think that was true of the financial report.

5 MR PICKFORD: That is not my recollection either but there's some nervousness  
6 behind me to make sure that they don't agree to provide something that isn't in an  
7 existing form within three weeks.

8 THE CHAIR: Yes. Right. Okay.

9 MR PICKFORD: And before I sit down and hand over to Ms Love, in relation to that,  
10 we do still have my application for documents that I asked for 15 minutes for.

11 THE CHAIR: Yes. So, Ms Love, on timing.

12  
13 Housekeeping

14 MS LOVE: Sir, I'm not going to quibble with three and five, subject to behind me.  
15 Where we slightly baulk is ten and twelve, not least because we have even less grasp  
16 than Mr Pickford, of which falls into which category.

17 I'm staring at a calendar now, and I believe I'm correct in saying that 12 weeks starts  
18 to get into October and even ten would get into September, although probably  
19 someone with the ability to do something more nuanced by calendar would be better  
20 placed but -- From today's date. It was late September and October. We do say that  
21 this is starting to be very long and also one then comes into the risk of extensions and  
22 knock on things. We do ask for C and D, the dividing line between which, as I say, is  
23 not entirely clear to me, and I expect it won't be clear to anyone until we sit down with  
24 the transcript, be smooshed together and we aim for eight. And then if extensions  
25 need to be sought or real problems arise, then we can do it that way. But it seems  
26 best to keep things ticking over and keep the pressure on.

1 MR PICKFORD: You can understand why the Claimants want to keep the pressure  
2 on. That's what their *raison d'être* is almost in some of this. But, we say, that that is  
3 unrealistic given the wide scope of disclosure that is now being sought. The Tribunal  
4 has obviously sought to draw an appropriate line as to what is proportionate and what  
5 isn't but that line has ultimately been drawn after these two days, somewhere that  
6 requires a lot of work from Google across a lot of different spheres.

7 We need to make sure that we do the job properly, and it's not going to help anyone if  
8 we are rushed into a task that we are not able to do properly, then there are mistakes,  
9 then there are complaints, and everything takes longer than it should have done in the  
10 first place.

11 THE CHAIR: I see that, I'll give you 12 weeks for category D, but I think you can do  
12 category C in eight weeks.

13 MS LOVE: If it assists, I'm told that eight weeks would take us to 12 September as  
14 opposed to 26 September and category D will only be arriving on 10 October.

15 THE CHAIR: Yes.

16 MR PICKFORD: Sir, on category C, we can try, and we can aim for eight weeks.  
17 There is a considerable concern behind me that that may not be achievable, because  
18 of the length of time that it takes to do the machine searches, to actually start extracting  
19 information before one could even start properly searching over it, which I am  
20 instructed could take four to five weeks, before we even begin the searches.

21 THE CHAIR: I think it -- I've just been told it's till 12 September; it seems quite a long  
22 time away.

23 MR PICKFORD: Well, Sir, it may be quite a long time away -- I can only go on the  
24 basis of what I'm instructed it will take. We are happy to seek to do it quicker, and we  
25 will seek to do it by the 8th, but this particular category comes with a health warning,  
26 that we may have to come back to the Tribunal and ask for an extension if, it turns out,

1 some of the difficulties that we perceive might arise, arise.

2 THE CHAIR: I'll say eight weeks, but I will -- I think the other matters -- where given  
3 the process of getting data -- I think we'll have to live with 12 weeks, for category D.  
4 Yes.

5 MS LOVE: Sir, my understanding was that category D is not just the data and the  
6 engineering and the Penalty Server, but that category D is also going to include the E  
7 documentary things and the Remedy disclosure, and those are document searches,  
8 so it's -- especially if we're sticking with 12 weeks for the category D stuff -- not clear  
9 to us why a particular set of documents searches would have to be hived off to fall into  
10 that category.

11 MR PICKFORD: Because those are full custodial searches. We might have asked  
12 for 12 weeks for both C and D, but what we sought to do was to be helpful, and say,  
13 well, some of these custodial searches are easier than others, probably, and we'll try  
14 and accelerate --

15 THE CHAIR: I will say 12 weeks, and insofar as it's possible for the Defendants to  
16 provide earlier, they've offered it, to seek to do it on a rolling basis. You may get some  
17 before, but I'm not going to -- given the task they have to curtail that.

18 I've put the other one back to eight weeks, as it seems to me, feasible, and that's  
19 where we are.

20 Right. Then your application --

21 MR PICKFORD: Yes.

22 THE CHAIR: -- Mr Pickford. Where is that in the Redfern, or Scott Schedule?

23 MR PICKFORD: It's not in the Scott Schedule, because it appeared to be something  
24 that didn't necessarily have to be raised at the hearing. What it is in is the Abuse JES.

25 But you will see, Sir, when I explain what has happened, why I'm now raising it. The  
26 basic point is: Connexity wrote to us and said, "We haven't got any information, so we

1 | can't help you". So we thought, okay, fine, they can't help us. They then wrote to us,  
2 | this week saying, "Oh, actually we've got lots of information".

3 | It's now therefore somewhat back on the agenda, as a result of the about-turn by  
4 | Connexity. So that's why we need to address it.

5 | Sorry?

6 | MR O'REGAN: (Inaudible)

7 | MR PICKFORD: Okay, and are you prepared to write a statement accompanying that,  
8 | so that we know what you've got?

9 | MR O'REGAN: Yes.

10 | MR PICKFORD: Okay.

11 | MR O'REGAN: So, it might be I need to address the Tribunal to explain where we  
12 | have got to.

13 | I'm grateful, Sir. As my learned friend says in the Abuse JES, and then in relation to  
14 | A27 to A29, Mr Hunt was informed that Connexity had no responsive documents, and  
15 | that is repeated in our skeleton at paragraph 49. It appears from correspondence  
16 | between the parties that that wasn't necessarily correct in its entirety, so we need to  
17 | correct that, and I do so now.

18 | There has been further correspondence with the Tribunal to correct the statement  
19 | made in the Preiskel letter of 9 July, which corrects the situation, it sets out the position  
20 | as regards -- as we discussed earlier -- the Connexity business, the PriceGrabber  
21 | business and the Become business.

22 | So, there is some data which is responsive on the Bizrate/Shopzilla/Connexity  
23 | business, but there is none at all for the other two businesses, I'm mindful of the  
24 | passage of time.

25 | So, I'm instructed that, notwithstanding that, we say that, technically, we're a third party  
26 | in this application, because it's not our claim. Connexity will provide disclosure of such

1 material as it has, and that is set out in the letter to the Tribunal of this morning, which  
2 I appreciate you won't have, Sir.

3 So, we are prepared to provide that disclosure, and Mr Cowen behind me has  
4 confirmed that that will be accompanied by a Statement of Truth, and as to what is  
5 and is not available.

6 I'm also instructed, I think -- (Pause)

7 So, we're not going to take the point as to whether this is a third-party application or  
8 not, and we will provide, if you so order Sir, that the information that Connexity has  
9 provided, verified by a statement of truth, and so I'm instructed to provide that within  
10 14 to 21 days.

11 Can I assist my learned friend in short-circuiting position as regards Connexity?

12 MR PICKFORD: Yeah, it does.

13 THE CHAIR: Is there anything else?

14 MR PICKFORD: Yes, there's hopefully an even smaller one, in relation to Foundem,  
15 which is on the same requests. They've given us a witness statement concerning what  
16 they've got on A29. They haven't done it for A27, and we've asked whether they could  
17 do the same for A27.

18 THE CHAIR: But when you say A27 --

19 MR PICKFORD: So, it's in the JES. That's page 53 of Bundle 2. We made two  
20 applications for disclosure.

21 One is the counterpart of, I think it's A23, which is data on the merchants with whom  
22 the Google's CSSs had relationships for the period 2004 to 2007.

23 THE CHAIR: Yeah.

24 MR PICKFORD: And then A29, for the same period, was clicks on the Google's CSSs  
25 domains from sources other than Google. And we explain the reasons for those, and  
26 I don't understand that there's any point being taken by Foundem, other than that

1 they've said: "Well, we'll give you a witness statement telling you what we haven't got",  
2 and we'd like --

3 THE CHAIR: The Skeleton Argument for the Claimants at paragraph 49 says  
4 Foundem has already disclosed such data as it possessed, referencing a letter from  
5 its solicitors of 1 July.

6 MR PICKFORD: Yes, and there's now a witness statement to that effect. So, they've  
7 confirmed in a witness statement that, basically, you've got all you're getting, and all  
8 we're asking for is: can you do the same thing for A27?

9 THE CHAIR: Yes, I see.

10 MR O'REGAN: I appreciate Sir, you don't have the witness statement, because I don't  
11 think you have the up to date correspondence bundle that it is contained in, but for  
12 your reference, it's in Bundle 6 at page 215, and that's the Third statement of Mrs Raff,  
13 and there's antecedent correspondence immediately before that.

14 The reason it only refers to A29 is that's all Bristows -- at least how those acting for  
15 Foundem understood Bristows' -- request for the witness statement was only related  
16 to A29. But if a witness statement is required in relation to A27, I'm instructed that  
17 Mrs Raff was in court, and is able and willing to provide a further witness statement  
18 confirming that they, Foundem, have already disclosed all that it already has that is  
19 responsive to the request at A27.

20 So, I think that, again, ought to be determinative of that particular issue raised by my  
21 learned friend.

22 THE CHAIR: And that's what you're seeking.

23 MR PICKFORD: That's what I'm seeking. Thank you.

24 THE CHAIR: That can be done within 14 days, presumably.

25 MR O'REGAN: I'm getting nods from the back of the court, Sir. Yes.

26 THE CHAIR: Yes. Is there anything else?

1 MS LOVE: Sir, I think one thing that remains is to keep you apprised of the position  
2 in relation to the case management, following the binding recitals judgment.

3 Sir, I think the position was going to be that there was a case management conference  
4 within three weeks, which would have brought us to the end of July. I understand that  
5 what has been agreed is that we're going to try to sort this out on the papers, and to  
6 the extent that the directions can't be agreed, written submissions will be put in by  
7 25 July. That would, of course, obviate the need for a case management conference.  
8 Given the urgency and the need to press on for Trial, we just wanted to keep you  
9 apprised of where we are on that.

10 THE CHAIR: I'm not sure I'll be able to look at it until the second half of August. So,  
11 you won't get an order by the end of July.

12 MS LOVE: Insofar as --

13 THE CHAIR: But you'll have enough to be getting on with. I have no doubt.

14 MS LOVE: It may be, Sir, that all can be agreed.

15 THE CHAIR: But if all's agreed -- but I say, if it won't be, I'm not in a position to commit  
16 to doing anything by the end of July.

17 Then, as regards costs, if I say, given the differing outcomes of various points, it seems  
18 sensible to say costs in the case, I think -- I think for the privilege log, I will reserve the  
19 costs, depending on the outcome of that exercise. But save for that, costs in the case,  
20 I am a little concerned about the degree of costs that are being incurred. I don't think  
21 disclosure applications should need the physical attendance of so many lawyers in the  
22 Tribunal, particularly when proceedings can be observed online. It does result in  
23 massive bills for everyone. There we are. Anything else?

24 MR PICKFORD: Sir, there were some points held over.

25 THE CHAIR: Yes.

26 MR PICKFORD: (Audio distortion) as you (inaudible) rightly the beginning (several

1 | inaudible words).

2 | THE CHAIR: Yes. That will be -- I think we have 10 October, I believe, but it's now  
3 | only two categories, I think. Yes.

4 | MS LOVE: Sir. Sorry, I'm just going to turn behind me before --

5 | THE CHAIR: Yes.

6 | MS LOVE: So I think it only remains, and I'm sure I speak for everyone on this side of  
7 | the room, to thank you and to thank the other staff of the Tribunal, in particular the  
8 | transcribers, for having risen late and sat early, and to wish you a good summer.

9 | THE CHAIR: Thank you, all of you.

10 | (4.37 pm)

11 | (The hearing concluded)