

EXHIBIT 117

PUBLIC

In the Matter Of:

UNITED STATES vs

GOOGLE

BRIAN O'KELLEY

September 29, 2023



1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

4 - - -

5 UNITED STATES OF : CASE NO.
6 AMERICA, et al., : 1:23-cv-00108
: -LMB-JFA
7 Plaintiffs, :
:
8 v. :
:
9 GOOGLE, LLC, :
:
10 Defendant. :

11 - HIGHLY CONFIDENTIAL -

12 - - -

13 September 29, 2023

14 - - -

15

16 Videotaped deposition of
17 BRIAN O'KELLEY, taken pursuant to notice,
18 was held at the law offices of Goodwin
19 Procter LLP, The New York Times Building,
20 620 Eighth Avenue, New York, New York,
beginning at 9:03 a.m., on the above
21 date, before Michelle L. Gray, a
Registered Professional Reporter,
22 Certified Court Reporter, Certified
23 Realtime Reporter, and Notary Public.
24

22 - - -

23

24

Page 2

1 APPEARANCES:

2

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Page 4

1 APPEARANCES: (Cont'd.)

2

3 ALSO PRESENT:

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5 VIDEOTAPE TECHNICIAN:

6 Lem Lattimer - in person
 7 (Lexitas)

8 ZOOM MONITOR:

9 Nathaniel Avila - zoom
 10 (Lexitas)

11

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Page 5

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2 I N D E X

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5 Testimony of: BRIAN O'KELLEY

6 By Ms. Wood 11, 344

7 By Mr. Justus 193

8

9 - - -

10

11 E X H I B I T S

12 - - -

13

NO.	DESCRIPTION	PAGE
14	O'Kelley Exhibit 1 Amended and Restated Display Media Services Agreement MSFT-0001492336-98	199
15	O'Kelley Exhibit 2 E-mail Thread 8/7/11 Subject, Google-AdMeld DOJ Investigation DOJ-ADS-0000077953	211
16	O'Kelley Exhibit 3 E-mail Thread, 5/4/20 Subject, Highly Confidential OKELLEY000346-49	217

17

18

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22

23

24

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1 reading it right, matches to that
2 statement.
3 Q. And what is the first
4 sentence of your Comment BO 15?
5 A. "I don't think this stands
6 up."
7 Q. Why doesn't looking at
8 intermediary services in the ad tech
9 stack, a separate antitrust market, stand
10 up?
11 MS. WOOD: Objection to the
12 form. Misstates.
13 **THE WITNESS: So she's**
14 **saying different firms offered**
15 **independent ad tech services, and,**
16 **therefore, they are each separate**
17 **from an antitrust perspective.**
18 I guess she's saying, like,
19 SSP is a market and DSP is a
20 market, whatever. And I'm saying
21 you can't be -- I think I'm
22 saying -- you can't -- the
23 independent ad serving market has
24 been obliterated is good evidence

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1 think I'm saying or what I
2 remember saying here is about
3 independent firms offering various
4 services necessary to match supply
5 and demand.
6 I'm saying that each of
7 those services -- yeah, I think
8 I'm just saying that my opinion is
9 that doesn't follow logically.
10 BY MR. JUSTUS:
11 Q. All right. Let's go --
12 let's move on.
13 Let's go to Page 301 at the
14 bottom right.
15 A. Okay.
16 Q. Do you see BO 27?
17 A. Yes.
18 Q. You say, "Careful here.
19 High price is good for publishers. Price
20 isn't fully set by Google because of
21 header bidding and direct sales by
22 publishers. Google's take rate is highly
23 variable."
24 Did I correctly read your

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1 that if you're just an ad server,
2 you can't survive.
3 And I state FreeWheel, which
4 is a video ad server owned by
5 Comcast. You know, I was saying
6 that Comcast was buying other ad
7 tech companies, and I'm presuming
8 that they are trying to have
9 enough pieces to be able to
10 compete with Amazon or Google.
11 BY MR. JUSTUS:
12 Q. Mr. O'Kelley, when you say,
13 "I don't think this stands up," are you
14 expressing the view that you should not
15 look at the different intermediary parts
16 at the ad tech stack as separate
17 antitrust markets?
18 MS. WOOD: Objection --
19 MR. WEISS: Objection.
20 Asked and answered.
21 MS. WOOD: Objection to the
22 form. Foundation. Calls for a
23 legal opinion.
24 **THE WITNESS: Just what I**

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1 paper on Ms. Scott Morton's paper?
2 MS. WOOD: Objection to
3 form.
4 It obviously goes on.
5 **THE WITNESS: That's the**
6 **beginning of my comment, yes.**
7 BY MR. JUSTUS:
8 Q. Is -- and so you agree the
9 price Google charges publishers is
10 constrained by header bidding?
11 MS. WOOD: Objection to the
12 form.
13 **THE WITNESS: I'm saying**
14 **that header bidding provides some**
15 **pushback on Google's ability to**
16 **fully set price for publishers,**
17 **yes.**
18 BY MR. JUSTUS:
19 Q. And the same for direct --
20 let me ask a better question.
21 And the price Google charges
22 publishers is also constrained by
23 publisher direct sales?
24 MS. WOOD: Objection to the

Page 302

1 form.

2 **THE WITNESS: So if**

3 **publishers sell directly, Google**

4 **has to, in some way, honor the**

5 **direct-sold campaigns.**

6 BY MR. JUSTUS:

7 Q. Does that constrain Google's

8 open auction take rate, in your view?

9 MS. WOOD: Objection to the

10 form.

11 **THE WITNESS: I'm just**

12 **reading this again.**

13 **So she's saying the price**

14 **will be too high if Google has**

15 **market power, and I'm saying they**

16 **don't have total pricing power**

17 **because there's competition from**

18 **header bidding and from publisher**

19 **direct sales. Yeah.**

20 BY MR. JUSTUS:

21 Q. All right. Let's move on.

22 Go on to -- a little bit

23 later, where you say -- actually, BO 27.

24 Do you see where it says,

Page 304

1 doing their job.

2 **And I'm particularly not --**

3 **whether that's the case or not, I'm just**

4 **saying that would be an argument to make**

5 **about why Google charges more than**

6 **competitors.**

7 Q. Let's go on to -- let's go

8 back to Page 299.

9 Do you see where it says at

10 the bottom, Ms. Scott Morton writes in

11 her paper, "All roads lead through

12 Google."

13 Did I read that right?

14 **A. Yep. Yep.**

15 Q. And then you comment,

16 "Google is going to point to the way that

17 Amazon and others are injecting ads into

18 publishing, using header bidding to avoid

19 routing through the ad server as evidence

20 that there are plenty of ways to not pay

21 the Google tax."

22 Did I read that -- did I

23 read your comment correctly?

24 MS. WOOD: Objection.

Page 303

1 "Google had a strong argument here that

2 when they win, it's in a fair auction

3 that is in the benefit of both the buyer

4 and the seller, and that since AdSense

5 bids on inventory, whether or not they

6 are the exchange and since the exchange

7 is open to all buyers, this price setting

8 is a consequence of being good at their

9 job, not their monopoly position."

10 "There" -- let me stop

11 there. Did I read that right?

12 MS. WOOD: Objection.

13 Incomplete.

14 BY MR. JUSTUS:

15 Q. You can still answer.

16 **A. You read what you read**

17 **correctly.**

18 Q. What does that mean? It's

19 your comment. What does that mean?

20 **A. I'm speculating that if**

21 **Google pays the highest price to the**

22 **publisher and drives good result for the**

23 **advertiser, then the price they take is**

24 **earned, in essence, because they are**

Page 305

1 Again, incomplete.

2 **THE WITNESS: What you read**

3 **is the first sentence, yes.**

4 BY MR. JUSTUS:

5 Q. Is it fair to say that

6 Amazon is an alternative to buying and

7 selling digital ads through Google?

8 MS. WOOD: Objection to the

9 form.

10 **THE WITNESS: I would say**

11 **that Amazon has competitive**

12 **products to Google but not all**

13 **parts of Google. So they are**

14 **competitive in some areas.**

15 BY MR. JUSTUS:

16 Q. What areas?

17 **A. Amazon has a DSP, as does**

18 **Google. Amazon has an SSP that is**

19 **somewhat competitive to AdX. And they**

20 **have -- you know, they are a publisher in**

21 **the sense of, like, all their e-commerce**

22 **inventory, they sell ads on their own**

23 **e-commerce stack. I don't think that's**

24 **directly comparable to Google, but they**

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1 don't have a publisher ad server like
2 DFP.
3 Q. Let's go, Mr. O'Kelley, to
4 Page 386 now. I'm sorry to skip back and
5 forth.
6 Do you see where
7 Ms. Scott Morton writes, kind of the
8 middle of the page, "But given the
9 enormous profits to be made, as indicated
10 by Google's 40 percent return on
11 investment, we also would expect to see
12 new entrants" -- let me withdraw that
13 question and read a little more, because
14 it's a little hard to parse from that.
15 "Fewer and fewer companies
16 service the digital advertising market.
17 This is not in itself unusual, even in a
18 competitive market. But given the
19 enormous profits to be made, as indicated
20 by Google's 40 percent return on
21 investment, we also would expect to see
22 new entrants."
23 Did I read that portion of
24 Ms. Scott Morton's paper accurately?

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1 Exhibit 11.)
2 BY MR. JUSTUS:
3 Q. Now, Mr. O'Kelley, I'm
4 showing you what we are marking as
5 O'Kelley Exhibit 11. Do you recognize
6 this document?
7 A. Yes. It's our 2011
8 strategic plan.
9 Q. I should note it's the
10 metadata on top.
11 A. Yep.
12 Q. Does -- any reason to doubt
13 this is a true and accurate copy of
14 AppNexus's 2011 strategic plan?
15 A. This may not be the final
16 version of it.
17 Q. Any reason to doubt it's a
18 true and accurate copy of at least a
19 version of AppNexus's 2011 strategic
20 version?
21 A. Definitely a version of it.
22 Q. All right. We're going to
23 have to do the same exercise we did a few
24 minutes ago, and I'm sorry for that. But

Page 307

1 A. Yep.
2 Q. And then, Mr. O'Kelley, what
3 did you comment in response?
4 A. I said, "Don't know. Most
5 people think ad tech was massively
6 overbuilt and overfunded over the past
7 10 to 15 years, so lack of new entrants
8 right now would be a consequence of that
9 too."
10 Q. All right. You can put that
11 document aside.
12 During your time at
13 AppNexus, Mr. O'Kelley, was protecting
14 against fraud, ad fraud, a major
15 competitive concern?
16 A. Yes.
17 MS. WOOD: Objection to the
18 form.
19 MR. WEISS: Yeah, I'm going
20 to join that objection.
21 MR. JUSTUS: Can I have
22 Tab 35.
23 (Document marked for
24 identification as O'Kelley

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1 we're going to look for Slide 25 notes.
2 The crazy part is I've
3 marked this in advance, obviously, and I
4 have trouble finding it.
5 MR. WEISS: It's, like, just
6 a couple off the back.
7 THE WITNESS: Okay. I see
8 slide 25 notes.
9 BY MR. JUSTUS:
10 Q. Okay. And then we're
11 actually going to talk about, this time,
12 the slide immediately before it.
13 A. Okay.
14 Q. Do you see the slide
15 entitled "Preventing Disaster"?
16 A. Yes.
17 Q. And then the first line
18 says, "Why important. Our reputation
19 equals everything. It's critical to
20 ensure the market tells us that we're as
21 good as we say we are."
22 Did I read that right?
23 A. You did.
24 Q. Under "Auditing, Fraud,

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1 Malware, Et Cetera," it says, "Will ruin
2 our relationship with Microsoft faster
3 than anything else. We saw this at Right
4 Media."
5 Did I read that right?
6 **A. Yes.**
7 Q. What happened at Right Media
8 related to fraud?
9 MS. WOOD: Objection to the
10 form.
11 **THE WITNESS: I don't**
12 **remember, right this second, what**
13 **this is referring to.**
14 BY MR. JUSTUS:
15 Q. Okay. It continues under
16 "Auditing, Fraud, Malware," "One-strike
17 rule on critical inventory partners may
18 be zero. Ditto buyers."
19 Did I read that right?
20 **A. You did.**
21 Q. Were you worried that
22 Microsoft, as your biggest customer,
23 would move away from AppNexus if there
24 were fraud issues?

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1 platforms.
2 And so, for years, the whole
3 industry was fighting this through
4 third-party technologies, through, you
5 know, data science, through, you know,
6 all kinds of things. So I think
7 AppNexus, like everybody else, had a team
8 of people focusing on fraud and trying
9 really hard to get that fraud off the
10 platform.
11 MR. JUSTUS: Can I have
12 Tab 36.
13 (Document marked for
14 identification as O'Kelley
15 Exhibit 12.)
16 MR. WEISS: Are you done
17 with this?
18 MR. JUSTUS: You can set
19 that aside.
20 BY MR. JUSTUS:
21 Q. Mr. O'Kelley, I'm showing
22 you what we've marked as O'Kelley
23 Exhibit 12. Do you recognize this
24 document?

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1 **A. I don't know that we were**
2 **worried that Microsoft would move away**
3 **from us, per se.**
4 **I think it was more about**
5 **our reputation, that, you know, to help**
6 **all of our partners, especially**
7 **Microsoft, we had to have a great**
8 **reputation. And that if people were**
9 **using our platform for fraud, that would**
10 **hurt our reputation.**
11 Q. And cause customers to move
12 away, potentially?
13 **A. Potentially.**
14 Q. Did AppNexus subsequently
15 experience issues with ad fraud?
16 **A. We did.**
17 Q. What happened?
18 **A. It wasn't just AppNexus. It**
19 **was the entire industry had -- partially,**
20 **because it was such a new set of**
21 **technologies, there were many loopholes**
22 **where bad actors could insert various**
23 **kinds of invalid traffic into --**
24 **basically, into this set of programatic**

Page 313

1 **A. Not specifically, but it**
2 **looks like an article by Zach Rodgers and**
3 **AdExchanger.**
4 Q. What is AdExchanger?
5 **A. AdExchanger is a website and**
6 **e-mail newsletter that talks about the**
7 **programatic industry.**
8 Q. Do you know Zach Rodgers, in
9 particular?
10 **A. I do. I do. He's**
11 **interviewed me for a number of pieces**
12 **over the years.**
13 Q. Is he -- he is a good
14 journalist?
15 MS. WOOD: Objection to the
16 form.
17 **THE WITNESS: He seems like**
18 **a good journalist.**
19 BY MR. JUSTUS:
20 Q. So at the top of Page 3 --
21 these are, mercifully, numbered, so if
22 you flip --
23 **A. All right.**
24 Q. It says, "Two months into a

Page 314

1 quality-control effort designed to curb
2 fraud, domain masking, and other sketchy
3 practices in its marketplace, AppNexus
4 has offered some details on those cleanup
5 efforts and even given them a name."
6 Did I read that right?
7 **A. Yes.**
8 Q. So in addition to fraud and
9 domain masking, what were some of the
10 other sketchy practices in the AppNexus
11 marketplace AppNexus was experiencing in
12 2015?
13 MS. WOOD: Objection to the
14 form.
15 **THE WITNESS: I don't know**
16 **exactly what he's referring to. I**
17 **think that fraud is a pretty**
18 **generic term, so I think it's**
19 **anything that didn't feel**
20 **legitimate to us at that time.**
21 BY MR. JUSTUS:
22 Q. What are some examples of
23 common fraud?
24 **A. Generating traffic from a**

Page 316

1 Q. What are the user security
2 threats from ad fraud?
3 MS. WOOD: Objection to the
4 form.
5 **THE WITNESS: When you say**
6 **user security, what do you mean?**
7 BY MR. JUSTUS:
8 Q. Is it potentially harmful
9 for users of the internet when there's ad
10 fraud?
11 MS. WOOD: Objection to the
12 form.
13 **THE WITNESS: Well, I mean,**
14 **most of what we talked about was**
15 **invalid traffic, meaning not**
16 **humans pretending to be human. So**
17 **in those cases, there's no harm to**
18 **the humans because they're not**
19 **actually doing anything.**
20 I think there's a couple of
21 indirect reasons that fraud is bad
22 for humans. One is, if you're
23 monetizing sites that probably
24 shouldn't be monetized, you're

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1 data center or a cloud computing, like,
2 server -- servers faking -- pretending to
3 be humans browsing web pages, to generate
4 ad traffic that is not really from
5 people.
6 Q. What's domain masking?
7 **A. Domain masking is when you**
8 **have real people on a website, but**
9 **it's -- when it gets sent to an ad**
10 **exchange, you tell the exchange, say,**
11 **from The New York Times, or you say, hey,**
12 **this is confidential. I'm not going to**
13 **share the name of the domain, so the**
14 **buyer might not want to buy traffic from**
15 **some random site they've never heard of,**
16 **but they would be willing to buy -- they**
17 **might have an exclusion list that says**
18 **don't buy that site, but if you mask the**
19 **name of the domain or pretend to be**
20 **somebody else, then it would get**
21 **purchased.**
22 So the buyer isn't buying
23 what they expect to buy or they're not
24 blocking what they expect to buy.

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1 pulling money from high-quality
2 journalism, and you're taking
3 money out of the quality side of
4 the internet.
5 But I think most of this has
6 to do with sort of ad tech
7 gimmicks, not, you know, user --
8 end-user outcomes.
9 BY MR. JUSTUS:
10 Q. Are there some types of ad
11 fraud on the internet that can lead to
12 bad -- specifically, bad user outcomes?
13 Let me ask a more specific
14 question.
15 Is it possible that some
16 sort of scam can be accomplished through
17 ad fraud?
18 MS. WOOD: Objection to the
19 form.
20 **THE WITNESS: The kind of --**
21 **the kind of fraud that we're**
22 **referring to is people tricking**
23 **advertisers into buying things**
24 **that they shouldn't.**

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1 more?
2 MR. JUSTUS: Another hour.
3 MS. WOOD: If you want to
4 talk for an hour about AdX's take
5 rates, sure.
6 MR. JUSTUS: We don't have
7 any more questions.
8 THE VIDEOGRAPHER: 3:52. We
9 are off the record.
10 *****
11 (Excused.)
12 (Deposition concluded at
13 approximately 3:52 p.m.)
14
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Page 348

1 INSTRUCTIONS TO WITNESS
2
3 Please read your deposition
4 over carefully and make any necessary
5 corrections. You should state the reason
6 in the appropriate space on the errata
7 sheet for any corrections that are made.
8 After doing so, please sign
9 the errata sheet and date it.
10 You are signing same subject
11 to the changes you have noted on the
12 errata sheet, which will be attached to
13 your deposition.
14 It is imperative that you
15 return the original errata sheet to the
16 deposing attorney within thirty (30) days
17 of receipt of the deposition transcript
18 by you. If you fail to do so, the
19 deposition transcript may be deemed to be
20 accurate and may be used in court.
21
22
23
24

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1
2 CERTIFICATE
3
4
5 I HEREBY CERTIFY that the
6 witness was duly sworn by me and that the
7 deposition is a true record of the
8 testimony given by the witness.
9
10 It was requested before
11 completion of the deposition that the
12 witness, BRIAN O'KELLEY, have the
13 opportunity to read and sign the
14 deposition transcript.
15
16 *Michelle L. Gray*
17 MICHELLE L. GRAY,
18 A Registered Professional
19 Reporter, Certified Shorthand
20 Reporter, Certified Realtime
21 Reporter and Notary Public
22 Dated: October 3, 2023
23
24 (The foregoing certification
of this transcript does not apply to any
reproduction of the same by any means,
unless under the direct control and/or
supervision of the certifying reporter.)

Page 349

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2 E R R A T A
3 - - - - -
4 PAGE LINE CHANGE
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