UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al.,	:	Civil Action No.:
	:	1:23-cv-108
Plaintiffs,	:	
versus	:	Friday, April 28, 2023
	:	Alexandria, Virginia
GOOGLE LLC,	:	
	:	Pages 1 - 31
Defendant.	:	

The above-entitled motion to dismiss was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:00 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 23-108, United States of America, et al. versus Google LLC.

Would counsel please note their appearances for the record.

MR. MENE: Good morning, Your Honor. Gerard Mene with the U.S. Attorney's Office.

THE COURT: Good morning.

MS. WOOD: Good morning, Your Honor. Julia Tarver Wood on behalf of the United States. With me today are my colleagues, Aaron Teitelbaum and Mr. Dan Guarnera.

MR. TEITELBAUM: Good morning, Your Honor.

THE COURT: And I recognize we probably have a fair number of other attorneys in the courtroom.

MS. WOOD: We do, Your Honor.

THE COURT: I'm only going to hear from the main spokespeople which are from the federal government and the Commonwealth of Virginia.

MS. WOOD: Yes.

THE COURT: All right. Is there someone here from Virginia?

MR. HENRY: Good morning, Your Honor. Tyler Henry from the Office of the Attorney General of Virginia on behalf of the plaintiff states.

THE COURT: Good morning. All right.

And for the defense.

MR. REILLY: Good morning, Your Honor. Craig Reilly here for the defendant Google, together with my co-counsel Eric Mahr, Sara Salem and Daniel Bitton. And with the Court's permission, Mr. Mahr will address the Court.

THE COURT: Very good. Thank you, Mr. Reilly. Good morning.

All right. This is before the Court on the defendant's motion to dismiss. Obviously this has been a well-briefed motion. So I had a chance to go over the papers, but I'm going to give each side a brief opportunity to focus on any of the highlights that they really want to stress today.

And Mr. Mahr, you, I believe, filed early this morning some new authority. I don't know if the plaintiff had a chance yet to respond to that. So they should also, if they feel they need to respond, as well; all right?

MR. MAHR: Yes, Your Honor.

THE COURT: The podium is yours.

MR. MAHR: Thank you, Your Honor. And again, Eric Mahr on behalf of Google.

We appreciate your time, especially since Google's motion to dismiss is really directed to the critical gatekeeping function that the district court plays in all

cases, but we think especially in complex antitrust cases, and especially critical as that function in a district where we obviously move so quickly. Certainly there's not a different standard for antitrust cases under 12(b)(6), but the Supreme Court in *Twombly* made clear that in general and particularly in antitrust cases, a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed.

In words that directly address what we think is the let's-just-wait-and-see-what-happens-in-discovery approach that the plaintiffs are asking you to take in this case, the Supreme Court in *Twombly* went on to say: "It's no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in discovery." We're just going too fast here.

The first time we met with you, you said -- you talked about running shoes, but you also talked about laser focus on the issues that matter. And we think, especially after a three-and-a-half-year investigation, the Department of Justice ought to be able to provide the detail this circuit requires with respect to their alleged market shares, ought to be able to plead the minimum market share to meet the Fourth Circuit's threshold for monopoly power, and ought to be able to plead, in a straightforward manner,

facts as simple as whether any of the federal agency advisers on -- advertisers on whom they seek relief are actually direct purchasers entitled to damages.

With the Court's permission, I'd like to first focus on three issues which -- I guess before turning to the more comprehensive one, market definition, which would result in the complaint's dismissal completely, but we have three points that, while not complete dismissals, I think are very clear on the face of the complaint, very different than the Southern District of New York cases, and would significantly narrow the issues in the case.

The first I mentioned earlier is the complaint's admission that Google's market share in AdX -- this is the ad exchange, the kind of middle part of the ad tech stack -- is only around 50 percent, nowhere close to the Fourth Circuit's 70 percent threshold for monopoly power.

THE COURT: Well, you know, I think you overemphasize this bright-line or threshold matter.

I agree with you that the case law strongly suggests that it's unusual to find illegal monopolization if there's not at least a 70 percent, if not more, market share.

At the same time, however, as I've looked at that issue, and New York also looked at that similar type of argument, these types of complex cases look at multiple

factors. And so there are factors other than simply market share that could result in a finding of illegal monopolistic activity, such as, you know, really rapacious conduct with rivals, destruction of rivals, for no good economic reason.

And, I mean, there are allegations in this complaint that Google went out and specifically targeted and purchased rivals and then cannot show that there was a good economic reason for doing so other than to basically eliminate the rival.

Again, whether the evidence will support that at the end of the day is a totally different matter. But in terms of pleading, you know, you've got over 300 paragraphs. It's a horrendously long complaint. And I certainly don't disagree with you that probably a good portion of that complaint frankly could be cut. But obviously knowing that this would be a robust motion to dismiss in this case, I think that the plaintiff, you know, loaded up that complaint with an awful lot of detail.

And so the argument about the market share, I don't believe that the case law actually supports the argument that you've made. And certainly this is an issue which I think is sufficiently fact-specific, that it would not be appropriate to resolve it on a motion to dismiss.

MR. MAHR: If I can make just two points in response, and then I'll move to my next point, having heard

you.

THE COURT: All right.

MR. MAHR: The first point is, I think when you talk about -- there are two elements here, it's monopoly power --

THE COURT: Right.

MR. MAHR: -- and then conduct. And when you refer to rapacious conduct, which we obviously contest, that's a separate element. And part of what the plaintiffs do, they try to conflate the two elements. But monopoly power is a separate element.

With respect to monopoly power, I agree, 70 percent is not like an absolute barrier, but there's no case that I'm aware of where these other factors have done the work to get a share of 50 percent up to 70 percent. That's kind of something that when it's close, these other factors can come in and affect how you look at the market share, but to make that kind of jump, there's no case out there that does it.

Moreover, the points that they try to say are additional factors are like super competitive pricing. But that's exactly the kind of conclusory statement that *Twombly* said, it's not enough. You just can't say super competitive pricing when other places in the complaint, like paragraph 224, Google -- they say Google's AdX price is only

one of the highest in the industry.

One of the highest in the industry is not super competitive monopolistic prices above everybody else; it just means some have high prices, some have lower prices, and Google has the higher prices. So they can't do the work with that.

The same on this point they stress about we've had a 20 percent price on AdX for 15 years. Well, the complaint itself said we started that 20 percent price in 2008 when AdX, the ad exchange, was nascent. So when you have nothing, we charge 20 percent.

The fact that in 15 years of allegedly unlawful conduct, that -- and alleged going from a nascent to a 50 percent market share, Google hasn't been able to raise price once. That's an indication of the lack of market power; not the existence of it.

I appreciate you --

THE COURT: All right.

MR. MAHR: -- giving me time on that.

The other two points -- or the second point is plaintiffs' attempt to re-examine two transactions the federal government cleared well over a decade ago.

THE COURT: And they admit in the complaint -- at least from the Department of Justice's standpoint, they admit mea culpa that they made a mistake.

You know, I don't think that argument -- it may -- whether or not it's permitted during the trial, should we have a trial, whether I would allow that to come in, but the fact that a decision is made at one point, and then as things evolve problems occur, I don't think that makes a big difference. I mean, at the time, what, the FTC and the -- at the time the Department of Justice approved those two purchases or mergers, the evidence was different than it is now.

So, looking back, I mean, the Government has admitted that the Department of Justice made a mistake in letting you purchase AdMeld. I think that's the one that they were talking about. Yeah.

MR. MAHR: Well, take DoubleClick back to 2008. What they're doing is extending discovery back from 2013 to 2016, which is really where the crux of the anticompetitive conduct they allege took place. And they're stretching discovery back to 2008 to ask you essentially to re-examine transactions that were found lawful after an eight-month investigation in the case of DoubleClick, and a six-month investigation in the case of AdMeld. And so this eight-month and six-month, we're going to go back and look at them 15 years later when we don't have contemporaneous documents, we don't have a contemporaneous understanding of the market then. That's what those mergers would be judged

on then.

There's no problem to say they've set the stage. Of course. And we give a very simple, but I think very apt, analogy that you buy a fancy sports car, you're setting the stage for maybe reckless driving and speeding years later, but that doesn't make the purchase of the sports car unlawful. It's still the reckless driving that's unlawful. And they haven't explained why -- the transactions themselves. They haven't alleged it. They just said it's table setting and setting the stage.

We think, on that basis, that there's no reason to go back -- to have the parties go back and try to redo what the Department of Justice and the Federal Trade Commission already comprehensively addressed 15 years ago.

THE COURT: All right.

MR. MAHR: The third point, the *Illinois Brick* indirect purchaser bar.

The plaintiffs do not contest that the indirect purchaser bar applies to the federal government, and yet all they said for their damages claims is in paragraph 278. "United States departments and agencies, including ones in this district such as the Army, purchased open web display advertising using Google and non-Google ad tech tools." That is not an allegation that they directly purchased anything from Google. And they don't even say they

purchased from Google, but just that the display advertising uses those tools.

We think that to -- you know, we think this matters, because, as you obviously know, lawyers preparing a case for a jury compared to preparing a case for an experienced sophisticated federal judge, it's a very different question, especially in cases as complex as this and an injury as complex as this. And the fact that they can't make a simple, straightforward allegation that we directly purchased X from Google, I think is really telling. They obviously know this is a requirement for damages; it's black-letter antitrust law, and, yet, they haven't said it.

Now, they also admit -- and this is important -- that you -- that the key for *Illinois Brick* is to look at every stage of the ad tech products. Well, there is no way an advertiser -- and that's what the federal government agency advertisers are, advertisers. Advertisers don't purchase anything from publisher ad servers. And advertisers don't publish -- purchase anything from ad exchanges. They are on the other end of the ad tech stack. And so there can be no direct purchaser relationship with those two parts of the stack at all.

And when you get to the publisher -- the buyer's side, the advertising side, the advertising tools in the ad tech stack, they don't do any better there. Theoretically,

an advertiser could work -- purchase directly from a demand-side platform, but there's no allegations here of monopolization in demand-side platforms, so that's out.

And that leaves them with ad networks. And, again, theoretically, they could purchase directly from ad networks, but they haven't said. That requires us to spend a large part of our five-and-a-half months with these eight federal agency advertisers finding out what they bought, from whom, when. What kind of relationship did they have. Were they direct purchasers. Was there an ad agency in between. Did the ad network from which they purchased take ownership of the inventory and then resell it, or were they -- it's a mystery, and they could have easily pled it, and they failed to.

So, again, we think this matters, we think this is a way of narrowing the case, and it's an important ground for dismissal.

THE COURT: All right.

MR. MAHR: With that, I'll turn to market definition.

Now, this is obviously -- there's a lot of complexity, three market definitions. They have put a lot of adjectives in front of their market definition, and there are different reasons for each of the markets as to why those aren't valid. But I'm going to try to focus on just a

few of the fundamental cross-cutting flaws in their market definitions.

And, first, we recognize that, more times than not, market definition is a fact issue. But that doesn't change the fact that the Fourth Circuit has recognized dismissal is appropriate when the complaint fails to even attempt to plausibly explain why a proposed market should be limited in a particular way.

And if that weren't enough, and if *Twombly*'s general direction for specific facts and conclusions were not enough, the plaintiffs in this case had the benefit of the first motion to dismiss in the ad tech constellation of the case -- the cases, and that was a ruling by Judge Freeman. And Judge Freeman could not have been clearer that the market alleged in that case, which was online display advertising services on the open web, like here, particularly concerned her because they excluded social media advertising and direct negotiations. And she ruled that if plaintiffs wanted to make -- to exclude those obvious substitutes -- and there might be a basis to exclude them, but they have to plead under *Twombly* additional facts that indicate that the categories accepted from the identified market are not economic substitutes.

They haven't even tried here. They -- Judge Labson so -- Labson Freeman also specifically

admonished plaintiffs in that case that it is not sufficient for plaintiffs to allege, for example, that close-ended advertising services like Facebook, Amazon, Twitter, we can add TikTok and Snapchat to that, are not reasonable substitutes by just saying it's so. Instead, they have to explain, with factual allegations, not conclusions, why it's so.

I think the plaintiffs completely ignored -- and I know they're not bound by it, but they completely ignored that these obvious substitutes need to be -- you have to explain at least why they -- you don't believe that they're in the market.

And one reason we didn't challenge market definition in the Texas case in the Southern District of New York is there were twice as many paragraphs devoted to market definition that made those explanations. We don't agree with them, we think they're absolutely wrong, but we can't fight the allegations at a motion to dismiss stage. We can fight, under *Twombly*, the complete lack of any allegations, is what we have here.

Just to take a couple of these. You know, they exclude web -- they tried to limit it to web, that's one of the adjectives. That excludes advertisers that placed advertising on mobile apps as opposed to the Internet.

So take the New York Times. If you're a New York

Times reader, you can access the New York Times either by doing a search for it. If you can find a search engine, you could do a search for it and go onto the New York Times web page and read the New York Times there. Or you can have the app on your phone, which is also the New York Times, and you can read it through the app.

If an advertiser is looking to seek a New York Times reader, there's no explanation in the complaint as to why they would find advertising on the Internet site any different than advertising on the app. No explanation at all. We're just supposed to take their word for it, and they get a free pass into discovery.

Same with open. That one little adjective, "open," limits, very transparently -- excludes, very transparently, Facebook, TikTok, Amazon, the very companies Judge Freeman said if you're going to take this market definition seriously, you've got to at least explain why these people aren't included, and they ignored it all.

All of these are addressed in basically a footnote, Footnote 4, where they lay out all the different competitive constraints and all these other methods of digital advertising, and then say, but our focus is open web advertising. Markets aren't defined by the plaintiffs' focus; markets are defined by reasonable substitutes. And, again, the law is clear that if you're going to exclude

reasonable substitutes, you need to explain, in facts, not conclusions, why.

So those are my main points, Your Honor. I could -- I could talk more, but I think that's --

THE COURT: I think you've done a good job of focusing on what are the key points.

So now we'll give Ms. Wood a chance to respond. I assume you're going to be the main spokesperson.

MS. WOOD: Actually, Mr. Guarnera is going to respond, Your Honor.

THE COURT: All right. That's fine.

Start with the last question first, because that, obviously, is the absolutely core central issue, and that is the market.

MR. GUARNERA: The market definition issue, Your Honor?

THE COURT: Yes.

MR. GUARNERA: Yes, Your Honor.

So Google's arguments on market definition fail because we've taken the three markets -- the three markets at issue as they exist in the real world, as they are recognized by industry participants, including Google's own employees and Google's own internal documents, as we cite in the complaint. Figure 1, for example, lays out the ad tech stack exactly as we've pleaded it, Your Honor.

Google questions and quibbles with the precise degree of substitution that might be possible in our markets, but that's a fact-intensive question that does not approach the kind of glaring deficiency that the Fourth Circuit has said would be needed to grant a motion to dismiss on market definition.

Google referenced mobile advertising, for example, as an alternative form of digital advertising, but Google has a different product to -- Google, itself, uses a different product to sell -- to sell advertising on mobile apps, AdMob, as we allege.

And, Facebook, Your Honor, we -- firstly, it's important to note that all of Google's arguments about the markets assume the advertiser perspective. But here, the ad exchange, for example, it has to attract and appeal to both publishers and advertisers. And Google doesn't even allege that publishers, for example -- it would be an alternative for a publisher to use Facebook's ad tech products, because, of course, Facebook's products are just for Facebook. A publisher has no alternative to turn to if a monopolist were to raise the cost of a publisher ad server or an ad exchange.

We also allege that there are differences from an advertiser's perspective with respect to social media, for example. Such as the fact that social media has different

reach. Again, if you are buying into Facebook, that means your ad will appear on Facebook as opposed to the thousands upon thousands of other websites that are on the Internet, which allow opportunities for advertisers to reach -- to reach potential customers in a broad range of settings, including, you know -- again, on different types of websites, at different times, depending on, for example, if a customer just visited an advertiser's own website and the advertiser wants to target that user again in the near term. If that user is not on Facebook, then the advertiser won't be able to reach them at the time that doing so would be most valuable to the advertiser.

Google also mentioned Judge Freeman's opinion in the Northern District of California. Obviously that case is now a part of the broader MDL in front of Judge Castel. And the key distinction in that case, from our point of view, Your Honor, is that the advertiser plaintiffs in that case alleged an online display ad services on the open web market. In other words, they combined all of the ad tech products in one market. And when Judge Freeman asked them to replead, it appears that she essentially asked them to replead more facts about the specific products that the advertisers used in the ad tech stack. In other words, the products that we've already alleged.

Again, Your Honor, all of Google's market

definition arguments are ultimately fact-specific questions that are premature on a motion to dismiss.

THE COURT: All right. Then he raised several other issues of the direct purchase argument.

MR. GUARNERA: Yes, Your Honor.

We've alleged that the federal agency advertisers purchased display ads using Google's tools. And this allegation is sufficient because federal agency advertisers are, therefore, direct purchasers of Google services and are, therefore, entitled to recover the overcharges that Google imposed on them as a result of its monopolies.

In other words, the 20 percent take rate, the super competitive take rate that Google charges for its ad exchange, for example, that's money that is paid by the advertiser. It's taken out of the advertiser's payments.

Apple v. Pepper, Your Honor, provides a similar situation where there was a platform, in this case, Apple, that was charging an allegedly super competitive take rate, and the buyers on that platform were entitled, according to the Supreme Court, to seek damages as direct purchasers because they were the ones who were paying the overcharge. And it's -- it's the same situation here, Your Honor.

THE COURT: Well, I think the Supreme Court bricklayer case, which is the one everybody cites for this concept of direct versus indirect purchaser, the facts in

that case are so different from what they are here.

Again, the Court was properly concerned about the multiple layers between the anticompetitive conduct, I guess the manufacturer of the bricks themselves, and the ultimate purchaser. That there was a masonry contractor, who then would sell to the general contractor, who then would sell to the State of Illinois. And the problem is, you know, who does Illinois sue? I mean, yes, Illinois is being -- when they pay their general contractor at an inflated rate, but that inflation is due two or three steps back.

This is, in my view, a completely different situation. As you said, you pay Google. Whether it's Google, you know, ad server or Google exchange or Google publisher, it's still all Google.

I think the only argument that defendants might have down the road -- which, again, is a fact situation -- is if you all had used a real middleman, then there might be a problem, or two middlemen. So, unfortunately, that will require discovery. But, I mean, discovery shouldn't be that difficult. You ought to have that data at your hands right now. I would think probably almost a request for admissions and a couple of quickie interrogatories should probably flesh that out rather quickly.

So I don't think the direct/indirect issue has any real clout on this one.

Go ahead. Let me hear you respond to the other ones then. Market share.

MR. GUARNERA: Yes, Your Honor.

As Your Honor indicated, we completely agree that the Supreme Court has been explicit that there is no 50 percent cutoff. And I think a careful reading of the Fourth Circuit cases proves that the Fourth Circuit doesn't think there's a hard cutoff either.

Rather, when a plaintiff has alleged direct evidence of the ability to control price and exclude competitors, that's the ultimate question. That is the functional test of whether a defendant has monopoly power, and we've pleaded both here.

Google claimed that our allegations that Google charges super competitive prices are conclusory, that is certainly not true. I would direct the Court to paragraphs 149, 196, 224, 230, 266, where, for example, we allege that real-time bidding technology has become largely commoditized. In fact, Google itself is concerned that it's become commoditized. And, additionally, paragraph 149 where we describe AdMeld which charged a 7 percent fee to provide similar real-time bidding technology. These allegations, again, are more than sufficient on a motion to dismiss.

And, similarly, we also allege extensive examples of how Google has used -- has rigged auctions, has excluded

competitors in order to, again, control its monopoly positions in each of these markets. And that, again -- all the various forms of conduct that we have alleged are unlawful, show direct evidence that Google has been able to exclude competitors from the ad exchange market.

THE COURT: All right. And the last issue is the use of -- or reference in the complaint to the acquisition of DoubleClick and AdMeld, which were events that occurred, you know, quite a few years ago in a different context, frankly. The Internet was, you know, different then than it is now. The online commerce was different then than it is now. And so I am curious as to how, if the case were to go to trial, you intend to focus on those two acts. I mean, they occurred. The Government, at the time they occurred, approved them, did not see an anticompetitive problem, and things changed.

I sort of agree on this one with defense counsel, that there shouldn't be a whole lot of time spent, other than this is a historical event, it sort of led us to where we are today.

Do you expect to do more than that with those two events?

MR. GUARNERA: I think so, Your Honor.

Firstly, I -- it's not -- when an agency reviews an acquisition, it does not approve the acquisition. It's

not a blank check to get out of jail free on any subsequent use of the acquired asset.

The question here in a Section 2 case allows the Court, allows the jury to look back and to see what Google has actually done with the assets that it acquired. Google is just at war with the Supreme Court's precedent on this point to say that the use of an acquired asset, after it's been acquired, is not actionable under Section 2.

There are numerous Supreme Court decisions that look back on acquisitions as evidence of a course of anticompetitive conduct, as enabling anticompetitive conduct. The 1957 *du Pont* case, *ITT Continental Baking, Grinnell*. All these cases involve, again, mergers that had occurred, acquisitions that had happened in the past, but were still considered relevant to the -- to causes of actions, to anticompetitive conduct subsequently.

With respect to the significance of the agency review, Your Honor, just a few years ago, the Fourth Circuit in *Steves & Sons v. Jeld-Wen* specifically agreed with the district court who had prohibited the jury from hearing any evidence that the Department of Justice had investigated the merger previously because it was considered irrelevant.

And the HSR Act, which permits the agencies to conduct premerger review, has a provision that specifically says that the agencies, in fact, anyone, can challenge a

merger at any time after it closes, even if the agency reviewed it prior to closing.

And in this case, Your Honor, the DoubleClick and AdMeld conduct itself had significant effects on Google's ability to control and maintain monopolies in these three markets.

On AdMeld, for example, AdMeld offered a competing technology that would have undermined the power of AdX, and, therefore, given publishers the ability to substitute other technologies that would allow broad real-time bidding for Google's otherwise must-have ad exchange. And when Google acquired AdMeld, it shut down that competing technology, taking it out of the market, taking away a nascent competitor that publishers could have turned to as an alternative to Google's monolithic control of the ad tech stack.

And, similarly, DoubleClick. Google, which already had incredible power on the ad network side of the stack, acquired DoubleClick, which had 60 percent share on the publisher ad server side, as well as an ad exchange, and then, through that acquisition, had, again, a leading position across the entire ad tech stack, which Google proceeded to reinforce and cement by making Google ads demand, advertiser demand, exclusive to Google's own products.

So we think that both of these forms of conduct are important to the overall case and do play an important role, both as a history of how Google came to be the dominant player that it is, but also because the acquisitions themselves were anticompetitive.

THE COURT: All right. Thank you.

MR. GUARNERA: Thank you, Your Honor.

THE COURT: All right. Mr. Mahr, do you want to respond to any of that?

MR. MAHR: I do, Your Honor. I'll be brief, but I'll take them in reverse order.

The last point, that's exactly why we provided you with the *New York Meta* decision that was handed down yesterday by the D.C. circuit, in which they make clear that past transactions don't become part of the course of conduct just because there was allegedly later anticompetitive conduct.

If they have an anticompetitive conduct case, they can bring that -- they're going to bring that anticompetitive conduct case. But the difference in treating the original mergers as an independently anticompetitive act as part of the course of conduct versus just a stage-setting fact is significant here because it requires us to go back five extra years in an already 15-year scope of discovery just to try to redo what the

federal government did comprehensively 15 years ago.

On the monopoly power, I heard something about real-time bidding being commoditized. But, again, that doesn't say anything about monopoly power. Fifteen years Google has had the ad exchange. Fifteen years it hasn't been able to raise its price from 20 percent. After 15 years, it only has a 50 percent market share, which means it loses one out of every two, and after 15 years, its prices are only among the higher prices in the market, according to paragraph 224. That is not monopoly power.

In terms of the *Illinois Brick* argument, I understand that in the *Brick* case, one company creates the materials for the bricks, then makes the bricks, and then sells the bricks. It's all the same company controlling the whole time, and that's why *Illinois Brick* only looked at the direct purchaser in that case.

But, in this case, it's not an ineluctable path from publisher to advertisers. Among other things, we know that there's only a 50 percent market share at that ad exchange level. So half of the sales from any publisher are going through things other than Google's ad exchange. So it's not like the *Illinois Brick* facts where they're all going through the same actor, but, instead, 50 percent are going through ad exchange. And then when you get to the advertiser tools, they don't even seek monopoly power, even

under their strained and narrow market definitions for demand-side platforms, because there's so many of them. So there's just not this direct line that was present in *Illinois Brick*.

Finally, on the market definition, I hear that -- criticism that we are assuming the advertising perspective. First, the DOJ comes here to you on behalf of the United States as advertisers. They're the federal agency advertisers. And then they say, well, don't look at the advertiser perspective, but that is the perspective that they come to you as.

And, again, we think after a three-and-a-half-year investigation, with Judge Freeman specifically saying that if you're going to talk about these markets, you've got to be able to deal with these obvious substitutes that are throughout the complaint -- mentioned throughout the complaint. You can't just say, we've decided to focus on something else.

They've come to the rocket docket, they want to move faster than any other court in the country moves, they want to leap in front of the Southern District of New York cases, they had a three-and-a-half year investigation, and we think they need to be held to a higher standard and not given a pass on a motion to dismiss.

THE COURT: All right. Well, I appreciate the

argument, and I recognize that the discovery burden is heavy, but I know that Judge Anderson is working with you to make sure that, Number 1, their discovery requests are appropriate; and, Number 2, that the responses are coming in promptly and appropriately.

But I've looked carefully at this case, and, as I said, it's a very, very long and technical complaint. At this point, though, the Court must draw all inferences in favor of the plaintiff, even though it's an antitrust case, and I am satisfied that there are enough specific allegations, including various quotes from people within Google, you know, referring to some competitors as presenting existential threats.

Now, again, a business has a right, in our, you know, competitive capitalistic society, to try to protect itself and to try to maximize profits. You know, that's our economic system.

But, at the same time -- this is, again -- as almost all cases that ultimately wind up in this court, it's a balance. There's a balance between trying to encourage innovation and reward people and companies that are able to come up with new ways of doing things, to reward them by making a good profit.

At the same time, sometimes programs that begin completely benignly, perfectly appropriately, we want to

maximize our profit. Nothing wrong with that. But because of the way things evolve, at some point, it goes over the line, and it now becomes so successful that it's basically stifling innovation and competition, and the market is closing down.

I mean, that's the essence of antitrust law is to try to keep -- you know, nothing is static, to try to keep the system working by recognizing that, at certain points, some companies may get too big for their own good, they're self-imploding, or the technology may become so dominant that it's just crushing all other elements where there can be innovation. And whether or not, at the end of the day, the plaintiff that has the burden of proof can show that, that's another question.

Obviously whether the market has been properly described here or defined here is a very legitimate question, but I'm still satisfied, at this point, it's been adequately alleged; and B, that it's fact-specific. And whether these other markets are equivalent is going to be a question of fact, in my view; it's not a question of law.

Again, on the direct/indirect, there -- I think, at least as the allegations are, there's a very strong case that this was a direct purchase because of the nature of how the Google system is set up. Again, how much damages, if any, result from that is a completely different question.

And so, I'm satisfied.

Now, some things, like the degree to which discussion about DoubleClick and AdMeld and the way in which they were first -- when it thought about in terms of, you know, Google's planning about acquiring them and whether or not back then it had an improper anticompetitive intent, I don't know what the evidence is going to show. Motions in limine can address how, if at all, that is going to be addressed during a trial, should we get to that point.

But, at this point, I'm going to deny the defendant's motion to dismiss. I'm finding that the complaint read as we must with the deference given to the allegations are sufficiently specific to support all five of the claims, which are three specific claims as to each of these three markets, the fourth claim being the tying allegation, and the fifth claim being the one for direct damages to the federal plaintiff.

So I'm denying the motion, and I hope that you all can continue to work well on the discovery issues.

We'll recess court for the day.

(Proceedings adjourned at 10:40 a.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR