

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 FUNCTION MEDIA, L.L.C.,) (
5) (CIVIL DOCKET NO.
6) (2:07-CV-279-CE
7 VS.) (MARSHALL, TEXAS
8) (
9 GOOGLE, INC., AND) (JANUARY 5, 2010
10 YAHOO, INC.) (9:30 A.M.

11 PRETRIAL HEARING
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
13 UNITED STATES MAGISTRATE JUDGE

14
15 APPEARANCES:

16
17 FOR THE PLAINTIFFS: (See Attorney Sign-In Sheet)

18
19 FOR THE DEFENDANTS: (See Attorney Sign-In Sheet)

20
21 COURT REPORTER: MS. SHELLY HOLMES, CSR
22 Deputy Official Court Reporter
23 2593 Myrtle Road
24 Diana, Texas 75640
25 (903) 663-5082

(Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

I N D E X

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated.

3 We've got a hearing in 2:07-CV-279, Function
4 Media versus Google. It's a hearing on exhibits and
5 other assorted pretrial matters.

6 What says the plaintiff?

7 MR. TRIBBLE: Good morning, Your Honor. Max
8 Tribble for the plaintiff. Plaintiff is ready.

9 THE COURT: For the defendant?

10 MR. GILLAM: Gil Gillam on behalf of Google,
11 Your Honor. We're ready. Ed DeFranco and Amy Candido
12 will be doing primarily the work this morning.

13 THE COURT: All right.

14 MR. DEFRANCO: Morning, Your Honor.

15 THE COURT: Morning.

16 Well, we've got several matters to take up.
17 Ordinarily, I'd just start with exhibits and move
18 through like that, but there's some pending motions.

19 Where do we stand on the motion in limine
20 that deals with the untimely disclosed prior art
21 exhibits?

22 MR. BRANDON: Your Honor, Jeremy Brandon for
23 the plaintiff.

24 I believe Your Honor carried that after the
25 last hearing, and we have made a list of all of the

1 defense exhibits that we contend fall within the ambit
2 of the MIL 17 should the Court grant it. And that's --
3 that's about as far as we've gotten.

4 THE COURT: We've got a list now?

5 MR. BRANDON: Yes, Your Honor.

6 THE COURT: Okay. We've got a list now?

7 MR. BRANDON: Yes, Your Honor.

8 THE COURT: But -- okay.

9 MR. DEFRANCO: Your Honor, there -- I think
10 there are two pieces of that. There is a recently filed
11 motion in limine that dealt with two issues. One was a
12 witness' testimony, and the other was the AdForce prior
13 art disk, and that was more recently filed. The AdForce
14 prior art disk, Your Honor, we filed an agreed
15 stipulation last night.

16 THE COURT: Neither party is going to use
17 that?

18 MR. DEFRANCO: That's out of the case.

19 THE COURT: Okay.

20 MR. DEFRANCO: Nobody's going to use that.
21 It's not going to be heard about in this case at all.

22 The earlier motion in limine, just to
23 revisit that for a brief moment, we had served a 282
24 notice, or we had identified a reduced list of prior
25 art. We narrowed it down to a far more limited set than

1 had been in the case before, and with that shortened
2 list, we gave some examples of the type of documents so
3 that -- and as I said at the argument, from our
4 perspective, we were new to the case and didn't want any
5 confusion about what art we were talking about, so we
6 gave an example of a document. We didn't mean that
7 identification to be comprehensive. That motion in
8 limine is still on the table, and the Court reserved
9 judgment on that.

10 So when the parties talk about exhibits
11 today, we tried to simplify it by talking about
12 categories, and one category of disputed exhibits are --
13 would fall under the result of that motion. In other
14 words, they say some prior art documents should come out
15 because if that motion is granted, they won't be in the
16 case.

17 THE COURT: Okay. All right. Well, I'll
18 deal with that, then, as a category.

19 I've also got this issue about Function
20 Media's motion to preclude admission of untimely
21 evidence related to Mr. Lee. That's still on the table?

22 MR. TRIBBLE: Still on the table, Your
23 Honor.

24 THE COURT: Well, let's -- let's go ahead
25 and start there. It's as good of place as any to start.

1 MR. TRIBBLE: The -- you know, basically,
2 our complaint, Your Honor, is that they want to call
3 Mr. Ben Lee as a -- as a witness in this case. For
4 almost two and a half years, Google failed to identify
5 him as a person with relevant knowledge. We served a
6 30(b)(6) notice during the fact discovery. They didn't
7 put Mr. Lee up as their corporate representative on
8 licensing issues.

9 Instead they put up Mr. Chen. We asked
10 Mr. Chen, pursuant to the notice, question after
11 question about all kinds of licensing issues at Google.
12 He had failed to consult with Mr. Lee. They didn't feel
13 that he needed to consult with Mr. Lee in order to
14 respond to topics on our deposition notice. And
15 Mr. Chen testified 117 times in his deposition "I don't
16 know."

17 And so now fact discovery -- after fact
18 discovery closed on September 18, on October 2nd, when
19 we were about 32 or 33 days from trial, because the
20 trial at that time was set for November 4, for the first
21 time ever, they amend their witness disclosures to add
22 Mr. Ben Lee, and they -- but they only designated him on
23 the issue of the Google -- the Google/IV license
24 dealings. That was the only topic that they identified
25 him for.

1 Then in November, our damages expert issued
2 a report relying upon the corporate testimony of Google,
3 and then in their rebuttal report, Mr. Wagner cites over
4 and over again an interview he had with Mr. Lee, who was
5 never disclosed during fact discovery. They never
6 searched for and produced any of those documents.

7 We did a search last night. Ben Lee's name
8 does not appear on a single document that they have
9 produced in this case. They have not produced the
10 documents relating to these licenses they want him to
11 testify about. The -- and, basically, the Ben Lee
12 interview, which I believe may have occurred -- was it
13 the day before Mr. Wagner's report?

14 Yes, he had the interview -- Mr. Wagner,
15 their expert, had the interview with Mr. Lee the day
16 before his rebuttal report was due, and in footnote
17 after footnote, they cite Mr. Lee as the basis for all
18 kinds of assumptions that Mr. Wagner is making that are
19 in direct contradiction to the 30(b)(6) testimony, the
20 corporate testimony of Google.

21 THE COURT: When was Wagner's report served?

22 MR. TRIBBLE: November 25th, Your Honor.

23 And so even Mr. Wagner's interview with
24 Mr. Lee occurred after what would have been the trial
25 date but for the fact that Google asked for and urged

1 this Court, over our strong objection, to move the trial
2 date, and now they're seeking to improperly profit from
3 having gotten the trial date postponed, and, in fact, in
4 their briefing on this issue, they suggest to the Court
5 that the appropriate remedy would be to postpone trial
6 yet again to let us reopen discovery on this issue.

7 And the fact of the matter is, they make it
8 appear as if we're asking -- as if we asked for further
9 depositions after their corporate testimony, and they
10 cite a letter. What we asked for are the documents
11 related to the Google/IV licenses, which they -- they
12 did not produce.

13 We didn't ask for further depositions on
14 this, I don't believe. But the -- and so, for example,
15 they say in their brief they want Mr. Lee to come rebut
16 the false inferences or statements of Mr. Bratic in his
17 report. Well, his allegedly false statements are based
18 upon their corporate testimony.

19 So, for example, they say they -- they want
20 Mr. Lee to come and testify that Google has a policy of
21 not paying a running royalty, that they only pay a lump
22 sum or a capped amount as a royalty. When, in fact, we
23 asked Mr. Chen this very question in his deposition, and
24 he testified that there was no policy, but that he stood
25 by his memo -- his e-mail that he wrote to others at

1 Google saying, "Just because we're Google, we can't
2 dictate the terms." This was related to the cap issue,
3 and so now they're going to have Mr. Lee come in and
4 contradict their 30(b)(6) testimony.

5 THE COURT: The portion where he said that
6 the fact that they were Google didn't seem like a very
7 compelling argument, is that his testimony?

8 MR. TRIBBLE: That's -- yes, and it's backed
9 up by --

10 THE COURT: In negotiation, though?

11 MR. TRIBBLE: Yes.

12 THE COURT: Right.

13 MR. TRIBBLE: Exactly. And just so it's
14 clear, we did ask for a depo on the IV license issue,
15 but the -- but the point of the matter is, they've moved
16 the trial date. They've -- they're just trying to bring
17 in a witness to contradict their 30(b)(6) testimony, and
18 it -- it all should have been done during fact
19 discovery, and, you know, reports have already been
20 done. Our expert relied on their testimony in good
21 faith. You know, it's just unfair, Your Honor.

22 And by the way, this is a theme that will
23 come up over and over again today about stuff that was
24 produced late and trying to contradict the testimony of
25 30(b)(6) witnesses.

1 MS. CANDIDO: Good morning, Your Honor.

2 THE COURT: Morning.

3 MS. CANDIDO: Mr. Tribble doesn't tell you
4 that essentially on October 2nd, the date that Google
5 was to provide its trial witness list for the first time
6 pursuant to the Court's schedule, it's not an amendment,
7 it was the first trial witness list, Google put Mr. Lee
8 on its disclosures for trial, the Rule 26(a)(3) pretrial
9 disclosures, and --

10 THE COURT: Had it previously disclosed him
11 as a person with knowledge?

12 MS. CANDIDO: It had not because we weren't
13 aware, frankly, of his knowledge as being relevant until
14 it was prompted by Function Media's request for a
15 witness who could provide corporate testimony on these
16 Intellectual Ventures license agreements with Google.

17 And just to explain, the Intellectual
18 Ventures licenses had to be produced with these entity
19 names redacted pursuant to Intellectual Ventures'
20 confidential information and agreements with them.

21 So they're -- they're, frankly, on their
22 face, they're pretty confusing. They just say Entity A
23 and Entity B and Entity C, and the witness -- the
24 30(b)(6) witness just got tripped up and couldn't
25 remember which was which of all these entities, and,

1 therefore, he would say he didn't know.

2 So we went and found a witness who would be
3 able to testify about those agreements, and that was
4 Mr. Lee, and we wrote to Function Media and told them
5 expressly that Mr. Lee was Google's corporate
6 representative on the topic of Google's license
7 agreements with Intellectual Ventures, and offered
8 Mr. Lee for a deposition on October 5th. That was
9 months ago.

10 THE COURT: Why didn't you reoffer Mr. Chen?

11 MS. CANDIDO: So we offered -- oh, why
12 didn't we reoffer Mr. Chen? Well, because we figured
13 that Mr. Lee would be able to provide thorough and
14 better testimony on those agreements than Mr. Chen would
15 be able to, but, I mean --

16 THE COURT: Well, had Mr. Chen previously
17 been designated as a person that provided the
18 corporation's testimony with respect to the license
19 agreements?

20 MS. CANDIDO: Mr. Chen was the designee on
21 broad topics related to the license agreements, that's
22 correct, and on this one license agreement, in
23 particular, because on their face, they have all those
24 Entity A and B names, the witness despite, you know, our
25 efforts to prepare him was unable to testify competently

1 about those agreements, so -- and the attorney from
2 Function Media, you know, taking the deposition asked
3 for someone who would be able to do that, and we found
4 that person. It was Mr. Lee, and we designated him, and
5 we offered him for deposition.

6 Subsequently, when we got Function Media's
7 expert report on damages, there were several statements
8 in there that we believe are false and that contradict
9 the face of certain of these license agreements that on
10 their very terms are clear, but Google's -- I mean,
11 sorry, Function Media's expert, you know, is making
12 contrary assertions, and Mr. Lee spoke to Mr. Wagner in
13 rebuttal -- our damages expert in rebuttal on those
14 points.

15 And in light of all that, we decided to
16 upgrade Mr. Lee from the -- Google's may call list,
17 which is where he was originally, to the will call list
18 along with the other witnesses, that as we've refined
19 our preparation for trial, we've identified will be the
20 people that we bring live to trial. So we've updated
21 Function Media with that information, and it was shortly
22 after that -- I'm sorry, that same night, we also
23 offered Mr. Lee again for deposition and don't see any
24 reason why that deposition can't take place before trial
25 without moving the trial date.

1 We merely said that under the case law, it
2 would be -- given the importance of Mr. Lee's testimony
3 under the Fifth Circuit test, it would be appropriate if
4 need be, and we don't think that there's any need for
5 it, to have a short continuance if Function Media
6 believes that that's what required, but we don't see any
7 reason why we can't just take this deposition and -- and
8 proceed.

9 Mr. Lee's testimony -- his rebuttal
10 testimony is important, you know, to Google's damages
11 case, and under the law, the Fifth Circuit, the
12 importance of the testimony is to be considered as well
13 as prejudice.

14 I want to address prejudice for a moment.
15 There was a previous agreement with Function Media.
16 With respect to individuals on the initial disclosures
17 list, because the lists were very long, lots and lots of
18 witnesses and without -- you know, the parties agreed
19 there would be no reason to depose all of these
20 witnesses if they weren't coming to try, and we agreed
21 that if need be, if one of those people did ultimately
22 become a trial witness, that the parties would agree
23 that that person would be made available for deposition
24 before trial.

25 So while Mr. Lee was not specifically on

1 that list, the parties clearly contemplated that there
2 may be situations where a witness would come up that had
3 not previously been deposed and would -- the parties
4 agreed that that person would be deposed before trial.

5 So that really shows that there is no
6 prejudice to Function Media. This is deposing a late
7 witness right before trial when they got upgraded to
8 the witness list is not beyond the scheme of what was
9 contemplated, and I should note, Mr. Lee is the only
10 witness this applies to.

11 This is not a situation where there are
12 multiple witnesses that need to be deposed before trial.
13 He is the only one, and he is important to our damages
14 case, and as a result, under the Betzel case, you know
15 that the preclusion is a very drastic remedy and the
16 standard for preclusion is high, we believe that
17 Mr. Lee's testimony should not be excluded.

18 THE COURT: Is Mr. Chen on your will call
19 list?

20 MS. CANDIDO: Mr. Chen, I believe, is on
21 the will call list. Mr. Chen, you know, would address
22 different license agreements than Mr. Lee, and we
23 did -- we would like to have Mr. Lee as corroboration of
24 Mr. Chen's testimony that Google's practice, not policy,
25 as Mr. Tribble was saying, but Google's practice is to

1 enter into and has a strong preference for entering into
2 lump sum license agreements rather than uncapped running
3 royalty agreements.

4 MR TRIBBLE: May I respond, Your Honor?

5 THE COURT: No. I'm -- I'm granting the
6 motion. It seems to me that -- seems to me like the
7 issue is whether or not a 30(b)(6) witness had been
8 properly prepared, and had he been properly prepared, we
9 wouldn't be in this situation.

10 Now, you know, I ruled in limine that I
11 wasn't going to, you know, grant a motion in limine that
12 prevented a corporate representative from changing his
13 testimony but that I was going to invite an instruction
14 from the Court.

15 It seems to me like from where I'm sitting,
16 that the effort to use Mr. Lee is -- is an effort to
17 sort of end run what I did in limine, and I'm not going
18 to allow it. So I'm -- you know, I'm granting the
19 motion.

20 If Mr. Chen wants to explain why it was
21 confusing to him to understand Entity A and Entity B and
22 offer that explanation to the jury, the jury will be
23 able to assess his credibility. Likewise, if Mr. Bratic
24 gets up there and testifies to something that's plainly
25 contrary to the face of agreements, it will be subject

1 to cross examination.

2 So -- but this case, the discovery closed a
3 long time ago. It seems to me that Google could have
4 anticipated the need for a witness to testify about what
5 its preference -- strong preference was for either lump
6 sum or running royalty agreements a long time ago when
7 it made its initial disclosures. So for those reasons,
8 I'm granting the motion to preclude.

9 MS. CANDIDO: Your Honor, may I just address
10 one point? I'm sorry.

11 THE COURT: Does it relate to this motion?

12 MS. CANDIDO: It -- it -- well, it relates
13 to the 30(b)(6) issue that was not really briefed in the
14 motion to preclude.

15 THE COURT: Okay. Yes.

16 MS. CANDIDO: Briefly, just because the
17 motion to preclude didn't focus on this issue of the
18 contradiction according to Function Media with the
19 30(b)(6) testimony, we didn't brief this issue. It's
20 teed up for the Wagner Daubert motion.

21 Essentially, our position on a lot of these
22 topics is that the "I don't know" are because of the
23 scope of Function Media's 30(b)(6) topics do not
24 encompass the questions that Function Media was asking
25 these witnesses, and that's a very important distinction

1 because they're only 30(b)(6) on the things that are in
2 the notice.

3 THE COURT: Then I'll take that up in the
4 context of -- that it has been teed up with respect to
5 Wagner's --

6 MS. CANDIDO: Okay.

7 THE COURT: -- motion, okay?

8 All right. Let's talk about the Daubert
9 motion with respect to Mr. Bratic. That's the next
10 thing on my list.

11 MS. CANDIDO: Your Honor, Function -- sorry,
12 Google moves to exclude the opinions of Function Media's
13 damages expert, Walter Bratic, on several subjects. The
14 first one is one that will be familiar to the Court.

15 THE COURT: Acquisitions.

16 MS. CANDIDO: It's -- it's acquisitions.
17 It's -- and, essentially, as the Court's aware, the
18 issue boils down to not simply are acquisitions
19 relevant.

20 No one contends that acquisitions can never
21 be relevant. They can be. The issue is under Lucent
22 and other case law is that the -- there has to be some
23 tie and some nexus to a value that's associated with a
24 particular patent or group of patents in those
25 acquisitions, and that is fundamentally what is missing

1 from Mr. Bratic's analysis, and the reason that's --
2 frankly, the reason that's missing from his analysis is
3 that the patents were not in -- well, in many instances
4 there were no patents in issue in these acquisitions,
5 and to the extent there were patents that happened to be
6 belonging to the company that was acquired, they were
7 not driving the acquisition. They weren't -- the reason
8 for the acquisition, and they were so far off of
9 anybody's radar screen, that they were not independently
10 valued. There was no effort to value them. So there is
11 no Google's sort of valuation of those patents.

12 And Mr. Bratic has made no effort on his own
13 to attempt to somehow take the overall acquisition price
14 and allocate some smaller portion of that to the
15 patents-in-suit -- I mean, I'm sorry, to the patents at
16 issue in the acquisition.

17 Function Media's opposition says, you know,
18 over and over that Mr. Bratic has to rely on these
19 acquisitions because Google -- quote, Google has
20 developed a different model for obtaining right to use
21 patented technologies. It buys companies.

22 Now, that may very well -- well, actually,
23 that statement is not true. Google does not obtain
24 patent rights through acquisition of companies. That is
25 not its practice. It has never done that. And Function

1 Media just sort of keeps saying this over and over, and
2 their support for that is a 2003 presentation that
3 quotes, quote, opportunistic acquisitions for IP.

4 Now, IP is not patents. IP is trade
5 secretes, source code, you know, the products, the
6 developed technologies of these companies. And Google
7 has never said that it doesn't acquire companies for the
8 purpose of obtaining their intellectual property, their
9 source code, their know-how, their trade secrets. That
10 is probably the heart of why Google does acquire a lot
11 of these companies in addition to their personnel and
12 just, you know, the brain power and talents of its
13 people.

14 But that is not -- Function Media likes to
15 say -- sort of play this fast and loose game between IP
16 and patents. Patents are clearly a type of IP, but they
17 are not the only type, and they are not the type that's
18 at issue in Google's acquisition, and there's no support
19 for any contention that they are.

20 And Function Media says that in its report,
21 Mr. -- in Mr. Bratic's report, he specifically documents
22 the technology, the inclusion of patents or patent
23 applications and the transaction and how the technology
24 relates to the accused products. That's simply not
25 true. In Mr. Bratic's report, he mentions that Applied

1 Semantics had, I think it was, one or two patents, and
2 he mentions that Feedburner had one or two patents. He
3 doesn't say anything with respect to the other
4 acquisitions and whether they included patents or not,
5 and he makes no effort to take the overall price for
6 Applied Semantics or for Feedburner and allocate or get
7 to any kind of valuation of the patents at issue.

8 And as a result, those acquisitions prices
9 don't provide any reliable information under Georgia
10 Pacific with respect to what a reasonable royalty rate
11 would be, and it would be improper under the law to rely
12 upon them.

13 As I've mentioned before, the Federal
14 Circuit won't allow experts to rely on license
15 agreements that are not related to comparable
16 technology, even though they're still patent agreements,
17 patent license agreements, and they won't, you know,
18 allow -- and Your Honor won't allow, you know, and this
19 district won't allow reliance on settlement agreements
20 with respect to the actual patents-in-suit which are
21 clearly more relevant.

22 So reaching to this acquisition is clearly
23 an effort to put gigantic numbers in front of the jury
24 to prejudice and confuse the jury.

25 THE COURT: I think I've got a handle on the

1 acquisition issue.

2 MS. CANDIDO: Okay.

3 THE COURT: As I understand your motion,
4 though, you want to prevent him also from discussing a
5 profit computation whereby he assigns the revenue share
6 as a cost or as a profit rather --

7 MS. CANDIDO: That's correct.

8 THE COURT: -- that ought to be considered,
9 and then there are a couple of other points?

10 MS. CANDIDO: Yes. So --

11 THE COURT: You need to address those.

12 MS. CANDIDO: The profits of publishers,
13 this is a situation where Google pays the publishers who
14 display their advertisements a portion of the revenue
15 that Google obtains from the advertisers. That's called
16 the traffic acquisition cost. And it is a cost to
17 Google. Google has to pay that -- pay that to the
18 publishers.

19 And Google -- Mr. Bratic takes that cost and
20 adds it back in to compute what Google's purported
21 profits are for the accused products. So that
22 calculation, just to give you a sense of the magnitude
23 of what's at issue, Mr. Bratic inflates the
24 profitability from 18.5 percent, when these acquisition
25 costs are not included because they're costs, just

1 what's proper, to 89.1 percent, when he adds back in
2 these costs.

3 Function Media misquotes and misrepresents
4 Mr. Wagner's testimony on this issue suggesting that
5 Mr. Wagner says it's appropriate to include the
6 publishers' profits, but Mr. Wagner is very clear. It's
7 only appropriate to include the publishers' profits if
8 the publishers are themselves independently infringing
9 the patent.

10 So in a situation where, you know, a
11 manufacturer made an infringing device and sold that to
12 someone else who then uses it to their benefit, because
13 of the doctrine of patent exhaustion, you should include
14 the patents for the downstream person in the upstream
15 manufacturer's profits. That's something that
16 apparently is sometimes done.

17 But in this case, there is no contention
18 that the publishers are independently infringing this
19 patent, you know, nor could they. They don't have the
20 central computer. They don't have the first interface.
21 They don't have the second interface. So even if all of
22 Function Media's infringement contentions are correct,
23 the publishers cannot infringe, and, therefore,
24 consistent with Mr. Wagner's testimony that he would
25 include publishers' profits only if the publishers are

1 using the patent, the -- is improper to include those --
2 those profits.

3 And then one of the other issues is Function
4 Media's use of this technology charge. This is an
5 instance where in the acquisitions that Google has made,
6 Houlihan Lokey, in certain instances, prepares
7 acquisition valuation reports, and, apparently, as a
8 method for calculating value of nontechnology
9 components, Houlihan Lokey uses this technology charge.

10 I want to find the -- as Mr. Bratic himself
11 says, the technology charge was based upon the valuation
12 of the technology, the projected acquisition company's
13 revenues, a required rate of return on the technology, a
14 tax rate, and a discount rate, and it's, quote, used in
15 valuing other nontechnology assets of the company.

16 So this is a rate that's based on revenues
17 and projections. It's not based on patents. It's not
18 based on royalty rates, and that it's applied to value
19 nontechnology components on acquisition. There's just
20 no relevance and connection to what an appropriate
21 royalty rate would be for -- to license a patent under
22 Georgia Pacific.

23 The other issue is Houlihan Lokey in certain
24 instances, and I guess, in particular, and the
25 DoubleClick acquisition is what Mr. Bratic is relying

1 Lucent finds that they are not sufficient, that they are
2 not reliable and they're not probative, they should not
3 be admissible.

4 THE COURT: Well, as I understand it, what
5 the Court was saying was that all this evidence was
6 before the jury, you know, primarily, because it wasn't
7 objected to at trial as I read the opinion.

8 MS. CANDIDO: I agree with you.

9 THE COURT: And so they assessed whether or
10 not it standing alone would be sufficient to justify the
11 lump sum that was awarded by the jury north of 300
12 million dollars, as I read the case, right? And then
13 there at the end, they say, "Well, we don't mean to
14 suggest that this evidence, you know, could never
15 provide foundation, but in this case, it doesn't provide
16 the foundation that's necessary to support this award."

17 MS. CANDIDO: Well, I believe that there
18 are -- the Lucent case and others find that, you know,
19 agreements that are patent license agreements that are
20 not based on comparable technologies aren't -- aren't
21 admissible and aren't probative or sufficient under
22 Daubert to allow an expert to rely upon them because
23 they are inherently, you know, misleading and confusing
24 to a jury.

25 It's -- if an expert is up there saying,

1 "Here are these license agreements, and they say
2 10 percent," it's very hard for the jury not to -- to
3 make the distinction between a software license or a
4 code license or an oil well license, you know, whatever
5 the thing may be. They're not patent licenses, and that
6 could be very confusing to a jury to just throw those
7 large percentages up there that aren't tied to anything
8 relevant, especially when there are probative, relative,
9 comparable technology patent licenses that the experts
10 can rely upon and should rely upon.

11 And I just want to address that Mr. Wagner
12 does say that these sort of, quote, unquote, combined
13 licenses -- these are different. Combined licenses are
14 where there are both software rights and patent rights,
15 for example, and Mr. Wagner says those can be relevant
16 if, and this is a very important, if you can isolate the
17 value of the patent component.

18 And Mr. Bratic makes no effort whatsoever
19 to -- with any of these sort of, quote, unquote,
20 combined licenses, if those other ones can be called
21 that, I don't think they include patent rights, but even
22 if they did, he made no effort to allocate what portion
23 of that percentage is attributable to the software as
24 opposed to the patent rights, and so he's just
25 overinflated the royalty rate that would be applicable.

1 And, in particular -- well, there's just --
2 there's another mischaracterization, I believe, in
3 Function Media's brief, and that is that Mr. Wagner
4 believes that these royalty source agreements that
5 Houlihan Lokey relied upon are reliable, and, in fact,
6 Mr. Wagner testified that, you know, he no longer -- he
7 said, quote, I have in the past, but I've become less
8 and less fond of it, and I have a real question whether
9 going forward I'm ever going to use royalty source
10 again.

11 You know, he goes on to say that you have to
12 do a lot more work than just taking the information from
13 royalty source is what he's concluded, and that's
14 essentially saying what I just did, that if you're going
15 to rely on these combined licenses or software licenses,
16 you need to do the work to take those down to a patent
17 level, and Mr. Bratic has not done that for anything,
18 for acquisitions or for these licenses.

19 The other sort of big issue -- well, there's
20 two others. One is the valuation of certain
21 acquisitions, and I guess to the extent it's an
22 acquisition, it's not -- it may not be an issue, but
23 just --

24 THE COURT: I think I've got the argument on
25 that, using the current value of the stock?

1 MS. CANDIDO: Yes.

2 THE COURT: I understand your position on
3 that.

4 MS. CANDIDO: Yes, okay. There's also a
5 Google/AOL marketing agreement. This is an example of
6 the same thing. It's a software license agreement. I
7 don't believe it even en -- encompasses patent
8 component, but to the extent it does, Function Media's
9 expert has not made any effort in discussing that
10 license to drill down to the patent level.

11 In fact, Mr. Bratic admits in his report,
12 quote, it is not representative of the terms which would
13 be agreed to in the hypothetical negotiation which
14 clearly doesn't pass the sufficiently comparable to the
15 hypothetical license standard.

16 The other important issue, too, is that
17 Mr. Bratic does not perform a thorough analysis under
18 Georgia Pacific 13. We're supposed to allocate the
19 portion of realizable profit that's allocated to the
20 invention as opposed to all the other inputs, including
21 nonpatented inputs and Google's inputs. He just sort of
22 gives lip service to that in a paragraph, in a sentence,
23 really. And that's not sufficient allocation.

24 I believe that that -- I think there's one
25 more issue, I'm sorry. Oh, the purchase -- relying, of

1 course, again, on the purchase price of the
2 acquisitions. Function Media says they really just want
3 to rely on Applied Semantics purchase price and then
4 dMarc, YouTube, and AdMob, again, we don't believe
5 acquisitions should be in, period. We've discussed
6 that, but it's also important to note that if you're
7 going to use the valuation of Applied Semantics, they've
8 inflated that valuation by using current stock price.

9 And as to YouTube, that's an acquisition
10 that does not involve any patents and does not involve
11 advertising technology. It involves an acquisition of
12 content. We've made that clear in prior briefing, and
13 as a result, even if the Court were to allow Function
14 Media to rely upon advertising-related acquisitions in
15 some fashion, YouTube is not one of those.

16 That's it.

17 THE COURT: Thank you.

18 MR. NELSON: Morning, Your Honor.

19 THE COURT: Morning.

20 MR. NELSON: I'd like to go through the
21 categories that Ms. Candido discussed one-by-one. As
22 discussed in our motion -- excuse me, in our response,
23 Google's motion is notably unclear about what specific
24 types of testimony regarding acquisitions they're trying
25 to exclude.

1 And the context is the thing here, and they
2 can't just say acquisition, acquisition, acquisition,
3 therefore exclude. You have to look at the context of
4 how we're using it. And Mr. Bratic very carefully goes
5 through one-by-one and uses them in different -- for
6 different particular points.

7 I believe at the end, Ms. Candido stated
8 that these Houlihan Lokey rates and the technology
9 charges were somehow different. I agree. I don't think
10 that's part of their motion, but they've -- because I
11 was unclear about what was included in their motion. We
12 wanted to be very safe about how Mr. Bratic -- and so
13 any time he used any part of an acquisition, we
14 addressed in our motion.

15 THE COURT: Let me ask you this question --

16 MR. NELSON: Yes, sir.

17 THE COURT: -- since we're on context.

18 MR. NELSON: Yes, sir.

19 THE COURT: As I read Mr. Bratic's report,
20 the way he wants to use acquisitions, at least one of
21 the ways, to say when they want something, they'll pay
22 for it and they'll pay more than the market bears for
23 it.

24 MR. NELSON: Yes, sir, that's absolutely
25 right.

1 THE COURT: Well, what case law exists that
2 allows me to use -- I mean, I've -- I've read the cases
3 that I think exist on this issue that talk about when
4 it's appropriate to use acquisitions in this context.
5 There's, I think, a couple of patent cases, and there's
6 some trade secret cases, but, you know, do you have a
7 case that says that I can use this big acquisition to
8 show that Google would pay a bunch of money when it
9 really wants something --

10 MR. NELSON: Yes.

11 THE COURT: -- in the hypothetical
12 negotiations?

13 MR. NELSON: I have three. The first is the
14 Mars case which came out last year from the Federal
15 Circuit. It was a couple sentences in this particular
16 part. It says that one can use acquisitions or others
17 to try to get to -- to establish a purchase price. The
18 second --

19 THE COURT: Did that case involve patents,
20 though?

21 MR. NELSON: In terms of --

22 THE COURT: I mean --

23 MR. NELSON: I mean, it was -- it was about
24 patent licensing.

25 THE COURT: Right.

1 MR. NELSON: So -- so -- but I don't -- I
2 don't understand --

3 THE COURT: Did the acquisition issue deal
4 with the acquisition of a company and its patent
5 portfolio?

6 MR. NELSON: It was in dicta, Your Honor, so
7 it was not -- there was -- there was no direct statement
8 that one could use this in terms of the Georgia Pacific
9 factors, no, that's right, but what it did say was that
10 in the course of considering what the damages are, one
11 can look at the acquisition of a company to determine
12 what the appropriate amount of damages is, and that's
13 what we're using it for here, and that's a transition --
14 there's two other cases I want to -- I want to get to,
15 but I'd also like to talk about this TransClean case for
16 a second.

17 I think TransClean actually shows the
18 difference between how we want to use the acquisitions
19 here and how -- what the Federal Circuit has said is
20 inappropriate to use acquisitions for. In TransClean,
21 they tried to use the acquisition price as part of the
22 royalty base itself.

23 So, for example, Company A acquires --
24 Defendant A acquires Company B, and -- and the plaintiff
25 wants to use that acquisition and -- and get a

1 percentage of that -- of that acquisition price.

2 THE COURT: The good will is already
3 subsumed in the royalty that would have been applied to
4 the infringing products that were --

5 MR. NELSON: Exactly, because of it's a
6 reasonable royalty and because you're essentially double
7 counting the base, and they said you can't do that.

8 That is absolutely not what we are trying to
9 do here. And so the second case I would mention, which
10 was going to be the third I was going to say, but
11 because it's -- it's right on point right now, Georgia
12 Pacific itself says you can consider any relevant
13 evidence in determining what the hypothetical
14 negotiation is going to be.

15 Now, we are -- so there are the 15 factors
16 itself, but then you can go beyond the scope of those 15
17 factors when you're trying to determine what this
18 hypothetical negotiation is. Not as a starting point,
19 not as what the royalty base would be, but in trying to
20 determine all relevant data points about what this is
21 worth to the infringer, which is the ultimate question
22 here.

23 And so, for example, in Applied Semantics,
24 just to use that as an example, in Applied Semantics
25 there are two points to this. One is this 21.9

1 technology royalty rate, which is a separate issue, but
2 for the purchase price, Google has admitted that it does
3 not use the Applied Semantics' technology that it
4 bought. Instead it bought the company to delay a
5 competitor's enter into the very same product line that
6 they would have to have a license on.

7 It is the most -- in terms of concentric
8 circles, Your Honor, it is the most relevant coverage of
9 what Google believes this product is worth because it is
10 almost a one-to-one relationship between what they tried
11 to block for a competitor coming in and that acquisition
12 versus this product line that is at issue in this case
13 and this exact accused product.

14 So Mr. Bratic says, "This is a data point.
15 This is perhaps one of the most relevant data points
16 because Google has paid -- we know they've paid this
17 amount of money to delay entry of a competitor by 18
18 months or so, and I can use that because it's the same
19 product line -- if they are paying that amount of money
20 to delay entry of a competitor, I know that this is at
21 least one data point that I can use," he says, "about
22 what Google values this technology about and about why
23 they want to entry this market and have the right to use
24 this technology via a license." And that's how he uses
25 the Applied Semantics transaction.

1 And so -- and Georgia Pacific is very clear
2 that -- that in all those relevant real-life data points
3 are the most relevant of data points, and that's what
4 he's using here.

5 The third case -- so that's number two. The
6 third case I would say is the Integra case, which in
7 their briefing, in Google's briefing, they say that the
8 acquisitions of an entire company can be used as a,
9 quote, sanity check on what the damages are going to be.
10 And this is essentially what Mr. Bratic has done here.

11 There -- and I want to also be clear on one
12 point that has come out that -- of what Bratic --
13 Mr. Bratic did on how he used them. He used all these
14 data points, Your Honor. He was not cherry picking,
15 which I think it's clear under Lucent you can't. He was
16 not saying, "Well, I want to take the 21.9 percent one,
17 and I don't want to take the 2.6 percent one." That's
18 not what he did.

19 He took all -- all the royalty rates -- we
20 have these Houlihan Lokey reports, for example, and they
21 go through acquisition by acquisition by acquisition,
22 and there are eight or nine relevant acquisitions that
23 in our corporate testimony we handed a list of
24 acquisitions to Google's corporate representative, and
25 we said, "Which ones are relevant to this -- this

1 field?" And they went through eight or nine, and we
2 used all eight or nine of them, whatever -- you know,
3 there's -- he -- Mr. Bratic addresses every single one
4 of them.

5 There were a couple that Google's corporate
6 representative said were not to acquire anything except
7 for people, so he didn't consider those because those
8 weren't anything except essentially buying a person's
9 contract, and the other seven or eight he went and
10 marched through every single one of them and used them
11 in terms of figuring out the worth of the technology and
12 the purchase price.

13 And so that gets us -- so I think we've
14 talked about Applied Semantics, and, again, Integra,
15 which says that you can use this as a sanity check.

16 And then -- so then the question is, well,
17 what about -- can you use in terms of the YouTube
18 transaction, this dMarc transaction, and AdMob, which
19 are the three we plan to rely on at trial about what
20 something is worth. And Mr. Wagner, their expert,
21 states very forcefully that Google has a policy of only
22 paying, you know, low sums of money for -- for companies
23 or for technology, that they only do lump sums.

24 So let's take dMarc, for example. In dMarc,
25 the way they structured the transaction was purely

1 incentive-based. There was, you know, X amount of
2 million up front and then gradual milestones up until it
3 reached as much as 1.2 billion dollars.

4 Now, they have come in and said, "Well, we
5 never ever" -- and it's not just -- Mr. Wagner is very
6 clear on this point. He says, "I'm looking at the
7 entire universe. I'm not just looking at relevant
8 licenses. I'm looking at what Google is as a company,
9 and Google as a company, their policy is to do lump sum
10 licensing." And if he can look based -- and that's --
11 that's why -- that is an integral part to his conclusion
12 because the route of it is there are very few, if any,
13 lump sum licenses that Google has in this relevant
14 field. So they have to go beyond -- Mr. Wagner has to
15 go beyond the scope of the field in order to come to a
16 conclusion that Google's strong preference is for lump
17 sum licensing.

18 And so we say, "Look, if that's true, then
19 what about this dMarc transaction where it included
20 patents, it's right" -- it was -- the patented
21 technology was overlapping with -- with -- the patents
22 were overlapping with the technology, and they
23 structured the transaction so that it was in milestone
24 payments. There were a couple of other transactions
25 that were -- acquisitions that were the exact same way.

1 Were not going to rely on them, but they -- again, same
2 stepping stone purpose, which was they're not lump sum.

3 THE COURT: Well, do you need the value of
4 the transaction to show that they're not lump sum?

5 MR. NELSON: Well, Your Honor, we would --
6 if the issue is the value of the transaction for the
7 dMarc, we'll stipulate that we won't --

8 THE COURT: I mean, I'm just saying that's
9 the purpose -- I mean, I agree with you it may be
10 relevant for some other reason such as to rebut -- cross
11 examine Wagner's view that, you know, the policy or the
12 preferences for lump sum licensing, but, I mean, if
13 that's the case, then why is the size of the transaction
14 then irrelevant?

15 MR. NELSON: We'll stipulate, Your Honor,
16 that we won't use the actual purchase price as long as
17 we can talk about the milestone payments of it.

18 THE COURT: I'm not saying that's what I'm
19 going to do.

20 MR. NELSON: No, I understand, and just to
21 be clear, I understand Your Honor's point, and we'll --
22 we will not use the purchase price as long as we can
23 talk about the milestone payments.

24 THE COURT: Here's my biggest problem is if
25 he -- in his report, all of these acquisitions are

1 listed under the rates paid for comparable patents, the
2 Factor No. 2 under Georgia Pacific, and I read the cases
3 that deal with that issue, and they don't seem to
4 support the use of just acquisitions, in general, to
5 show what the rates paid, you know, for licenses under
6 comparable patents is. So that's -- that's my problem
7 with -- with his report.

8 MR. NELSON: Well, Your Honor, on Georgia
9 Pacific Factor 12, he goes through it. It's not Georgia
10 Pacific Factor 2 completely. It is Georgia Pacific
11 Factor 2 with respect to what you said, which is this
12 market value point. And so he talks about it in many
13 different instances, and this is why in our briefing we
14 talked about the different places where he uses it.

15 So with respect to the market value, you're
16 absolutely right, and about this lump sum -- lump sum
17 versus running royalty and how they use it, you are
18 absolutely right that he uses it for that limited
19 purpose in Georgia Pacific 2, but then in Georgia
20 Pacific 12, he goes through and uses these technology
21 rates, these royalty rates that are, I believe, even
22 Google would admit, are -- are relevant here Mr. Wagner
23 has stated, that you can use a developed technology
24 royalty rate. And our -- our brief has specific
25 citations to Mr. Wagner's testimony on this where he

1 talks about how Mr. Wagner himself uses as a starting
2 point, forgetting about the Georgia Pacific 15 factors,
3 as a starting point, he uses software licenses, he uses
4 combined licenses, and this is -- and then he adjusts,
5 which Mr. Bratic did.

6 Ms. Candido spent more than a few minutes at
7 Mr. Bratic's deposition talking about these issues with
8 him, and these -- Your Honor, all of these -- all of --
9 every single one of these issues go to the weight, the
10 weight, not the admissibility of the evidence, and --
11 and just literally the day of Mr. Wagner's deposition,
12 i4 -- the i4i opinion came out, and the Federal Circuit
13 could not have been more clear on this point that when
14 in a Daubert motion, talking about an expert, indeed an
15 expert in this case, weighing the different factors,
16 every single one of what Ms. Candido has stated is a
17 complete flaw with Mr. Bratic's opinion, goes to the
18 weight of the evidence.

19 And we have no problem at all having
20 Mr. Bratic talk about this in direct or cross
21 examination. I mean, I'd love for them to talk about
22 how -- you know, how Mr. Bratic's conclusions are
23 somehow, for example, inconsistent with the terms of the
24 license or inconsistent with, you know, Google's
25 licensing policies or inconsistent with their policies

1 on acquisitions or fair market value. This is exactly
2 what, you know, trial by jury is about, and letting a
3 jury figure out and weigh this as admissible evidence.

4 But it's -- it's the -- Mr. Bratic has not
5 gone out on a limb here. He's not used some, you know,
6 formula, unlike Mr. Wagner in one instance, he's not
7 used some made-up formula that has not existed. He
8 is -- he and Mr. Wagner are essentially using the same
9 type of technology. You know, I spent some time with
10 Mr. Wagner going through his prior testimony, and he
11 admits he uses the same methodology as Mr. Bratic here.

12 And so if that's the standards is whether --
13 for Daubert, is this reliable, do other experts use it
14 in the field, well, you know, their own expert does, and
15 so I don't know how more clear we can get that -- that
16 this is reliable under Daubert than if their expert has
17 used this same methodology in the past.

18 And if Your Honor likes, I can go through
19 each one of the five different ones. I think there
20 are -- there are clear answers for every one of them
21 about --

22 THE COURT: Well, you need to answer her
23 argument about the -- the inclusion of the portion of
24 the revenue that's shared with the publisher --

25 MR. NELSON: Yes, Your Honor.

1 THE COURT: -- or the exclusion.

2 MR. NELSON: Yes, Your Honor. Can I point
3 you, please -- I don't know if this is on.

4 So this is Mr. Wagner's deposition
5 transcript, and if you just focus on Page 103, Line 6,
6 this is quoting actually trial testimony. I believe
7 it's in the i4i case, but I'm not sure off the top of my
8 head right here.

9 Mr. Wagner is stating that one has to look
10 at the profits that are, quote, enabled by the patent,
11 and there's -- there's -- it's Line 6 -- Page 226, Line
12 19, "Your words, it's the profits from the products or
13 service that is enabled by the products?" "Yes."
14 "Those are your words, right?" "Those are my words."
15 "You stand by that testimony?" Line 14. "I do given
16 the facts of the case."

17 And the issue here, how AdSense works is
18 that the advertisers pay Google, Google then reports
19 that money as revenue and then pays some defined
20 percentage of that to the publishers. Google admits,
21 and they actually fought -- Your Honor, this is actually
22 in Mr. Bratic's report, I believe. It's certainly in
23 his deposition. Google fought the Securities and
24 Exchange Commission, Your Honor, on whether they had to
25 report this money as revenue or not, but there is

1 certainly nothing -- first of all, there's nothing in
2 Georgia Pacific that says you have to use profits. One
3 can rely on revenue, and you can go to the Mars case,
4 for example, that's cited in our brief, and there's -- I
5 mean, revenue -- the royalty rate can even be greater
6 than the entire profit, and so -- and -- and not only
7 that, Google has stated, and, again, in Mr. Bratic's
8 report he says, that revenue is the key metric for
9 Google. They want revenue increases and revenue
10 increases and revenue increases.

11 They actually in many cases don't even care
12 about profit. They want increases in revenue. So they
13 have to -- after a fight with the Securities and
14 Exchange Commission, they have to report this as
15 revenue, and the reason why they do is because Google
16 can essentially set what it pays to the publisher at any
17 rate it likes. In fact, in this case, in this case,
18 there's two different rates. One is at -- and I don't
19 want to get into the specifics here.

20 THE COURT: I understand there's a
21 distinction.

22 MR. NELSON: But -- but there -- but
23 there's -- there is a significant distinction between
24 what it pays, number one --

25 THE COURT: You think they can set it at

1 zero? You think they'd like to do that?

2 MR. NELSON: Well, Your Honor, there is a
3 document, and this is cited as I believe it's Exhibit 9
4 in our response, that it can go pretty low, and it can
5 certainly go, again, relatively low. They -- they have
6 said that they are the dominant company in this space,
7 and because they are the dominant company in this space,
8 it's Exhibit 10, Your Honor, it's G003377477, and it is
9 a document among Google's senior level executives that
10 because they are the dominant player in this space, they
11 can at will lower their revenue share, which is, of
12 course, backed up by the fact that they do, in fact,
13 have varying revenue shares for one -- the revenue share
14 for AdSense for Mobile is different than AdSense for
15 Content.

16 And other -- the companies that they
17 acquire, for example, and other industry rates of how
18 much, they pay they differ. Some are higher, some are
19 lower, but they differ. And -- and so the question
20 again is, well, is that revenue? Is that part of the
21 revenue base? Of course, it is. Because they have to
22 report it as revenue. Well, is it part of the profits
23 in terms of what you look at? Well, yes, because
24 without the service, there's no doubt, and I don't think
25 they dispute that the publishers would have zero without

1 -- without the invention. The fact that they're passing
2 on this profit doesn't matter because it's
3 still -- it's -- it's the incremental value -- or,
4 excuse me, it's the sum of the value of the profits.
5 It's the profits both to Google, and it's the profit to
6 the publishers themselves.

7 And so the fundamental issue is can you
8 count the profits of the publishers themselves? If you
9 answer that question, then there's no reason to get to
10 anything else, and Mr. Wagner here in this testimony is
11 saying, well, of course, you can because it's the
12 profits that are enabled by the patented technology, and
13 so that's what we have. It's the profits that are
14 enabled. The publishers profits are enabled by the
15 patented technology. This is the whole long tail
16 argument.

17 And so without the long -- without our
18 service, you the publishers have zero profit, and
19 Mr. Bratic in his report goes through this in
20 substantial detail about that, and then, of course, then
21 there's the question of, well, what should that rate be?
22 And -- and so the question is not just, well, do you --
23 and just to be clear, Your Honor, he does consider the
24 profits to Google. He breaks it out separately, but he
25 also says the additional profit to the publishers is

1 almost all, because based upon the testimony of their
2 corporate representative, they have said that the
3 incremental cost to the publisher of adding this code is
4 nil or close to nil, and these are already existing
5 cites. They say they are -- it's, quote, remnant value.

6 These are -- you know, what that means, Your
7 Honor, is that they exist regardless. The sites exist
8 regardless of the technology, and because the sites
9 exist regardless of the product, they are monetize --
10 this is how they advertise -- this is their marketing
11 campaign. They are advertising the publishers, monetize
12 your product, monetize your website, make money where
13 you couldn't before.

14 And Mr. Bratic, again, has an entire list of
15 things about this in his report, and he goes through it,
16 and he says, well, of course, the benefit -- the profit
17 of the invention is not just -- the revenue goes all to
18 Google, but the profit of the invention is not just to
19 Google. It's to the publishers. The publishers are a
20 huge beneficiary of this invention here, and because
21 they're a huge beneficiary, again, it's the profits
22 enabled by the patent that's recoverable.

23 But, certainly, in terms of -- I mean, it's
24 really -- I mean, there's no doubt that it's part of the
25 revenue base because it's revenue. And then the

1 question is, well, was it somehow wrong to talk about
2 the profits excludable as a matter of law as being
3 unreliable by talking about the profits of the
4 publishers here? No, it's not. I mean, one has to
5 consider the profits to the downstream beneficiaries
6 that profits specifically from the patent itself as part
7 of the overall calculation of the royalty rate, and
8 that's what Mr. Bratic did.

9 Again, something that I would -- I mean, it
10 goes strongly to the weight of the evidence and not just
11 to admissibility.

12 THE COURT: All right.

13 MR. NELSON: And, again, Your Honor, I'm
14 happy to address any of the other issues, for example,
15 on the AOL marketing point specifically or Houlihan
16 Lokey. Just -- just briefly, again, Mr. Wagner actually
17 says that's relevant, specifically in his deposition.
18 He calls it minimally relevant, but it is relevant.

19 THE COURT: You've addressed the two -- my
20 two biggest issues.

21 MR. NELSON: Yes, Your Honor. Thank you.

22 THE COURT: All right.

23 MS. CANDIDO: Your Honor, I'll be very
24 brief, but on the issue that Mr. Nelson was just
25 addressing, again, they're taking Mr. Wagner's testimony

1 out of context.

2 If you look here on Page 100, it says, "If
3 the jury determines that the publishers are using the
4 patented technology here, you would agree that the
5 publishers' profits are to be included in determining a
6 reasonable royalty here, correct?" Mr. Wagner's answer
7 is, "If the jury finds that the publishers are
8 practicing the invention, yes. Otherwise, no." So the
9 idea that Mr. Wagner said that those should be included
10 in all instances is just wrong.

11 Essentially, Justin is saying if I
12 manufacture an infringing device and sell it to somebody
13 else who then uses that device to make a bunch of money
14 in their business that the money that that other party
15 makes should be attributable -- those profits should be
16 attributable to me when it comes time to talking about
17 damages. There's just no support for that.

18 THE COURT: Well, tell me specifically
19 exactly what you're trying to exclude --

20 MS. CANDIDO: We're trying to exclude --

21 THE COURT: -- with respect to this subject.

22 MS. CANDIDO: -- Mr. Bratic suggesting that
23 Google's profitability on the accused products is 89 odd
24 percent by including costs as profits. If he wants to
25 talk about the gross revenue that the products generate,

1 the gross revenue is what it is, but the net revenue,
2 i.e., profits is not inclusive of costs. It's just
3 wrong to include a cost.

4 THE COURT: Well, are you trying to exclude
5 testimony that in the hypothetical negotiation a rate
6 would have been applied against his revenue figure, or
7 are you arguing that he's got to say it would be applied
8 against net profits as you've defined them?

9 MS. CANDIDO: Well, I think what Mr. Bratic
10 is doing is sort of moving between the two. If he wants
11 to say --

12 THE COURT: That's -- no, that's not
13 what I'm --

14 MS. CANDIDO: Okay.

15 THE COURT: I'm asking you a question. What
16 are you -- I mean, I understand -- I mean, I understand
17 what you just told me about exactly what you're trying
18 to exclude, but is it relevant, though, for Mr. Bratic
19 to testify, you know, this is what the revenues are,
20 this figure, this is the profit portion of it that's
21 retained by Google, this is the portion that's retained
22 by or passed on to the publishers.

23 MS. CANDIDO: Well, that in of itself is a
24 fact. It's using -- so I don't think we have an issue
25 with that. The issue is using the profits to then

1 include the publishers' profits in the universe of
2 Google's supposed profits to which he then applies, you
3 know, the 25 percent rule and other things to generate a
4 royalty rate, because, of course, the royalty rate
5 generated by applying the 25 percent rule to these
6 inflated profits is much different than applying it
7 solely to Google's profit.

8 THE COURT: Okay. I understand that.

9 MS. CANDIDO: Okay.

10 THE COURT: As I read Lucent, it's very
11 flexible what evidence is admissible on a reasonable
12 royalty, hypothetical negotiation analysis, and, you
13 know, if the base goes up, there may have to be an
14 adjustment to what the appropriate rate is under the
15 factors, but, you know, it's -- as I read the case, it's
16 pretty flexible what evidence is admissible for the fact
17 finder.

18 MS. CANDIDO: And I don't -- I don't think
19 we take issue with that. It's not -- if he came in and
20 said, "I want to apply a royalty rate to all of Google's
21 revenues -- gross revenues" and looked at other things
22 that supported doing that and ultimately applied it to
23 gross revenues, that would be one thing.

24 It's the representation of those costs as
25 profits to Google that's the issue. If he wants to say

1 these are gross revenues and do analyses based on that,
2 that's different than trying to recharacterize things as
3 cost as profits and then representing that Google's
4 profitability is 89 percent when it's not.

5 There's just a couple of very minor and
6 quick points. With respect to dMarc, Mr. Nelson
7 mentioned that it included benchmark and milestone
8 payments. This is a perfect example of why these are
9 not comparable. It included milestone and benchmark
10 payments because numerous dMarc employees came to work
11 at Google, and Google wanted to incentivize those
12 employees to do a good job and to perform. There's
13 nothing equivalent to that in a nonexclusive license to
14 two patents from Function Media, not at all. So it
15 doesn't speak to that hypothetical negotiation situation
16 at all, and it's just misleading on that point.

17 With respect to Applied Semantics, the issue
18 is -- is similar. He says that Applied Semantics was
19 bought to delay competitor's entry into the market, but,
20 again, a license to patents, the Function Media patents,
21 wouldn't delay entry of competitors because it's a
22 nonexclusive license. So the whole thrust behind the
23 Applied Semantics acquisition is not present in the
24 hypothetical negotiation. Mr. Bratic makes no
25 accommodation for that, and, therefore, it's very

1 misleading and prejudicial to the jury.

2 With respect to the TransClean case, I just
3 want to mention, as Your Honor looks at Mr. Bratic's
4 report, as you clearly have, he is, in fact, trying to
5 rely on the good will portions of these various
6 acquisitions, which is contrary to TransClean, as
7 Mr. Nelson admitted.

8 And then lastly, the Integra case, I think,
9 you know, Mr. Nelson is misrepresenting how that applies
10 in this -- in this case. In Integra, the Court found
11 that 15 million dollars of damages was unreasonable --

12 THE COURT: Well, he may be mistaken as to
13 how it applies. Let's not -- misrepresent is -- is a
14 pretty strong term when it's used in this court.

15 MS. CANDIDO: I appreciate that, and I
16 should say that I believe that Mr. Nelson has
17 mischaracterized our position with respect to Integra.

18 And to clarify, you know, in that case, the
19 Court used the fact that they acquired a company for 20
20 million to show that 15 million in damages was
21 unreasonable, and here, Mr. Bratic -- they say that
22 Mr. Bratic's analysis passes the sanity test, but,
23 again, they're using the value of the entire company to
24 say 590 percent clearly passes the sanity test as
25 compared to 1 point whatever bill purchase price for

1 DoubleClick.

2 However, if you look at the technology
3 allocations, which I still don't believe are
4 appropriately drilled down, but even if you just take
5 those, in fact, the highest technology allocation is 143
6 million. That does not pass the sanity check as opposed
7 to 592 million.

8 Thank you.

9 THE COURT: It's under submission. I'm
10 going to give you a written order on what I'm going to
11 allow and what I'm not going to allow.

12 We've got a motion to reconsider a ruling in
13 limine. Here's -- here's my problem. I'm reading a
14 Circuit case that discusses this very issue that talks
15 about how the inventor had admitted that certain claims
16 on this recliner or sofa or whatever it was, you know,
17 were added during the prosecution.

18 And my question is if it's admissible, you
19 know, for some purpose, how are you prejudiced if I give
20 an instruction out of Kingsdown or one of these cases
21 that -- to the jury that the adding of claims that are
22 supported by the written description, there's nothing
23 improper about that?

24 MR. GRINSTEIN: We're prejudiced, Your
25 Honor, because for the entire trial, the jury is going

1 to hear out of Google's mouth and is going to hear
2 arguments out of Google's mouth that somehow or another
3 we didn't come up with these inventions, that these
4 inventions are not new, we just stole them by looking at
5 Google products.

6 And an instruction that goes into
7 continuation practice and discusses with the jury that
8 in continuation practice, this is an acceptable policy
9 is not going to completely cure the prejudice.
10 Obviously, I'd like that instruction if I lose this
11 motion, but it's not going to completely cure the
12 prejudice of Google sitting here and berating the
13 inventors for doing something which is proper patent
14 practice.

15 And I should go further that the Rule 403
16 inquiry is you don't just look at the prejudice, you
17 also look at the probative value. I think there's an
18 extreme prejudice to this type of testimony because it
19 does not really go to an issue -- it does not really
20 speak to what's true how the continuation process works.

21 More importantly, however, there is not a
22 bit of probative value to this testimony even on the
23 issues for which Google wants to join on it, and they've
24 basically identified two issues. One is general
25 background of where the claims came to be, but that's

1 not really a relevant issue after the Federal Circuit
2 had already said this is -- you know, it's irrelevant
3 that you go and look at another product when you're
4 drafting your claims. There's nothing unusual about
5 that, nothing improper. So as background, it's not
6 relevant.

7 The second issue is written description, and
8 that's really what Google hangs its hat on. And they
9 say, "We need this evidence because it is relevant to
10 our written description defense." And after the time we
11 filed our motion in limine, the original one, No. 47,
12 Google filed its expert report on invalidity, and so we
13 didn't get a chance to brief that expert report when we
14 filed the original motion in limine.

15 That expert report proves that this written
16 description argument is really just pretext because
17 Google is not really even pushing a written description
18 argument in the first place. And let me show you, Your
19 Honor, if you will, may I approach?

20 THE COURT: Yes.

21 MR. GRINSTEIN: I've got here, Your Honor,
22 and I'll also put on the Elmo, this is the expert report
23 of Google's expert, Mr. Lanning, on invalidity. And his
24 entire written description opinion is contained in two
25 sentences in paragraph 247 of his report. There's

1 nothing else. That's it. And in this -- this written
2 description argument, and this is Google's written
3 description position in this case, first, he says, in
4 paragraph 246, he says, "I've been asked to offer some
5 opinions about the designer style standards and
6 distribution factors." And in paragraph 247, he says,
7 "I've looked at the spec" -- that's not really an
8 opinion -- and he says, "In my view, there's no
9 description in the '025 patent spec or file history of
10 these two phrases. Specifically, it doesn't describe
11 what designer style standards and distribution factors
12 are or how they are different from each other or from
13 the claim publisher preferences."

14 That is the entire written description
15 opinion. That is their entire written description
16 argument right there, and that is not a written
17 description argument, Your Honor. Written
18 description -- the concept of written description is did
19 the inventors when they put the claims into the patent
20 have possession of that invention at the original time
21 of the specification?

22 He's arguing right here these are weird
23 words, and I cannot understand what they mean. In fact,
24 that's exactly what he says down in paragraph 248, where
25 he says, "For the same reasons, it's my opinion that

1 these phrases are indefinite because I don't know what
2 they have. They're vague. They don't have any specific
3 meaning." That's really all he's arguing in 247. He's
4 not arguing some, you know, "Listen, there's not a word
5 in the specification about design. There's not a word
6 in the specification about style. He couldn't argue
7 that because it's all over the spec. He's not arguing
8 that there's a word about distribution, because, again,
9 that's all over the spec. He's just saying those words
10 are vague and fuzzy. That is not a written description
11 argument.

12 And I'll even note, Your Honor, all the
13 arguments that you're looking at right here, you've
14 already rejected. You rejected their indefiniteness
15 argument as to designer style standards in Markman. You
16 didn't expressly reject it as to distribution factors at
17 Markman, but you did construe a larger phrase that had
18 distribution factors in it. So I'd say implicitly you
19 rejected the indefiniteness argument.

20 So all of this is to say that if they really
21 need this evidence for a written description defense,
22 then you'd at least expect them to have a written
23 description defense. But that is all they've got, Your
24 Honor. They don't have a written description defense,
25 and that proves that what they're trying to do with this

1 evidence is to prejudice Function Media.

2 The written description argument is simply
3 pretext. It is pretext to get an argument before the
4 jury that, listen, these inventors didn't invent
5 anything. They stole those inventions from Google. And
6 they're hoping that the jury is going to get confused
7 about continuation practice, not understand how the --
8 you know, those inventions date back to 2000, and hold
9 that against Function Media. That's prejudicial, and at
10 least under 403, it should therefore come out.

11 MR. DEFRANCO: Your Honor, let me -- let me
12 start with their brief and their -- their opening
13 statement, their reliance on Federal Circuit law as to
14 why they say this evidence is irrelevant.

15 THE COURT: Yeah.

16 MR. DEFRANCO: And as Your Honor points out,
17 they do start with the Federal Circuit decision in
18 Kingsdown.

19 Now, we've all been familiar enough with
20 that case. We've all seen it, I think, enough to
21 realize that that's an inequitable conduct case. That's
22 not a written description case. Then they have a cite
23 in their brief, and I assume this is just an oversight,
24 but I think it's important to point out that their
25 citation ends before language that the Federal Circuit

1 THE COURT: And that's my question, is how
2 is this evidence relevant?

3 MR. DEFRANCO: Well, one -- one -- one fact
4 in the story line is that toward the end of the
5 prosecution, they changed all their claims. They put in
6 300 and someodd claims that were allowed, and those
7 claims came about after they took a look at Google's
8 products. That's what this issue is all about. We're
9 allowed to say that. We're allowed to bring out that
10 fact. We're not allowed to say that that's, as they did
11 in these cases, that there's something wrong with that.

12 THE COURT: What fact is the jury going to
13 decide is that fact relevant to?

14 MR. DEFRANCO: That -- that's --

15 THE COURT: What issue?

16 MR. DEFRANCO: That's right, Your Honor.

17 Well, first, it's relevant to this written
18 description argument. Now, if they want to attack our
19 expert on cross examination, plainly, they appear to be
20 heading in that direction, they're entitled to do that.

21 This is clearly a written description
22 analysis. It's for them to come back and say, Well,
23 wait a minute, that's not true. You're saying that
24 it's -- it's not laid out in the specification. As they
25 just said, you're saying that the inventor was not in

1 possession. Well, let me show you where that is in the
2 specification. Presumably their inventors and their
3 experts are going to counter that written description
4 argument, but we cite several Federal Circuit cases that
5 say -- that have allowed this evidence in. They've
6 considered that fact. They've rejected any inference
7 that there's bad intent or there's wrongful conduct, but
8 as part of the analysis, that fact was introduced into
9 evidence, and the Courts and the jurors considered it.

10 Now, again, they cite in cases where, you
11 know, the Court discounted that fact. And one of those
12 cases, the Court had already found that -- the ITC, for
13 example, had already found there was written description
14 support. So they said, "We're not going to -- we're not
15 going to go back and look at that -- that fact. It's
16 not relevant anymore. There is support. We've done our
17 analysis."

18 In other instances that they cite, parties
19 did go over the line. They said, you know, they copied
20 these claims. They did the wrong thing. That's not
21 allowed. And the Courts made the point clear that you
22 cannot step over that line. We're not going to step
23 over the line, but we're certainly entitled as part of
24 our written description analysis to say this is a fact.
25 This is how these claims came about. We say there's no

1 support for these claims, and let them come in and
2 attack our expert and cross examine him and let them
3 present their own evidence as to why there is written
4 description support for the claims that we're -- that
5 we're pointing to.

6 THE COURT: Well, do you agree or disagree
7 that the Circuit has said that the written description
8 analysis is judged by the four corners of the
9 specification?

10 MR. DEFRANCO: Yes, Your Honor.

11 THE COURT: Do you agree or disagree that
12 that's what the Circuit has said, that the written
13 description inquiry is to be judged by the four corners
14 of the specification?

15 MR. DEFRANCO: Well, Your Honor, I don't --
16 I don't see that as black letter law that the other
17 facts and circumstances are considered when you read
18 these cases and including that case. They look at the
19 prosecution history and when those claims were added and
20 what was said during prosecution to -- to do the full
21 analysis as to whether there's support for those claims.

22 They don't do a cold, well, let's -- let's
23 just look at patent in a vacuum, and let's look at the
24 claims in a vacuum and try to line up one to the other.
25 They do look at the history of the prosecution. They

1 walk through it. When did these claims come into being?
2 What arguments were made during prosecution? What other
3 facts or circumstances were there that led to these
4 amendments to these claims? They do look, of course, at
5 the specification, but they do that entire analysis when
6 they determine whether there's written description
7 support.

8 Going back to -- going back to the story
9 line, and I'm not -- Your Honor, we know the rules of
10 this Court. We are not going to step over the line and
11 in any way assert that something wrong was done when
12 these claims were added, but, again, I don't think it's
13 unimportant to say there are two story lines here.

14 They are going to introduce evidence of
15 Google's patents and patent applications, for example.
16 They're going to say that Google didn't cite the art at
17 issue in this very case in its own patents and in its
18 patent applications to say that, well, our patents must
19 be valid because Google didn't cite the same art and it
20 thinks its patents are valid. How can that -- how can
21 that possibly be relevant in this patent case involving
22 Function Media's patents, our applications and patents
23 and what art we cite or didn't cite and this fact,
24 this -- this fact be irrelevant or highly prejudicial?
25 It just doesn't make sense on balance.

1 And the cases that they cite, they don't go
2 through a Rule 403 analysis. They don't say that, you
3 know, this was prejudicial and should not come in. They
4 look -- they look squarely on how the information was
5 used and what a party argued about it, and they said,
6 "These parties went over the line."

7 No -- none of these courts say, "You can't
8 introduce this fact because it's too prejudicial." They
9 said, "You cannot step over the line. It's relevant
10 under these circumstances. It comes in. It's
11 considered, but don't go too far." And I'm saying, of
12 course, we're not going to go too far, and there will
13 be an objection for sure, but for both of those
14 reasons --

15 THE COURT: I wish you had a case cite for
16 the case that said that.

17 MR. DEFRANCO: Well, we --

18 THE COURT: I've looked at this pretty
19 closely, and I don't recall any --

20 MR. DEFRANCO: Well, we cite, Your Honor --
21 I'm sorry.

22 THE COURT: No. I'm just saying there's --
23 I found a Circuit case, the one that I identified,
24 Gentry Gallery I think it is, that talks about it being
25 in evidence.

1 MR. DEFRANCO: Well, and we -- we cite --
2 that's one of our Federal Circuit cases, Your Honor. We
3 also cite the PIN/NIP case. That's in our brief, as
4 well. And then we cite -- it's not a Federal Circuit
5 case, but it was obviously a very well known and heavily
6 litigated --

7 THE COURT: The Rambus case.

8 MR. DEFRANCO: Rambus case. And it goes
9 through a detailed analysis in that case, as well, and,
10 again, Your Honor, those cases, yes, they don't say --
11 because presumably that -- that issue wasn't raised,
12 although there was a motion in limine on the Rambus case
13 which I think is -- is relevant here on this point, and
14 the evidence, again, it came in in that case and it came
15 in the Gentry Gallery and the PIN/NIP cases.

16 And in those cases, the Federal Circuit
17 didn't say, "Well, this evidence should not come in
18 because it's prejudicial." It came as part of the
19 analysis, as part of the written description analysis,
20 and it should come in in here in this case for the same
21 reason.

22 THE COURT: All right. Thank you.

23 MR. GRINSTEIN: May I, Your Honor?

24 THE COURT: Briefly.

25 MR. GRINSTEIN: Your Honor, I think the

1 tactic here is obvious. It's mouth the words written
2 description, and having done that, then you're allowed
3 to taint the character of the inventors and claim that
4 they're just copiers and not real inventors, but there's
5 two problems with that.

6 Number one, written description turns on the
7 spec. If it's in the spec, then that means there's
8 adequate support for the claims. If it's not, there
9 isn't, period. That's what the Federal Circuit has
10 said. That's what it recognized Rel-Reeves, or at least
11 the predecessor court recognized Rel-Reeves, that all
12 this evidence of copying is not relevant to written
13 description.

14 But, second, if you're even going to rely on
15 written description, then surely you should at least
16 have a prima facie written description case. And I put
17 their expert report in front of you, Your Honor. I
18 showed that they're not even really arguing written
19 description in this case. I didn't hear Mr. DeFranco
20 actually try to defend that analysis.

21 In fact, they're not pushing written
22 description. You will not see in that expert report
23 some argument that, "Well, these are completely new
24 concepts, and there's no discussion of them in the
25 specification which proves that they weren't in

1 possession of the inventions at the time the
2 specification was filed. Instead, the expert report
3 just says, "These are weird words, and I can't
4 understand what they mean." That's indefiniteness. The
5 Court's already rejected that. I don't think it
6 actually would be before the jury anyway, even if the
7 Court hadn't rejected it.

8 But the fact of the matter is, this evidence
9 is not relevant, and it's especially not relevant when
10 they're not even asserting the defense that they claim
11 it's relevant to. So in a proper 403 analysis, Your
12 Honor, this evidence should not come in. Thank you.

13 MR. DEFRANCO: One more word, Your Honor,
14 may I?

15 THE COURT: Well, no, I don't -- I don't
16 allow surrebuttal.

17 I'm going to grant the motion in limine at
18 this time. You know, the only issue that I think it
19 could be relevant to is written description, and, you
20 know, I don't see you've done a -- your experts have
21 done a written description analysis.

22 Now, I'm not saying I won't let it in, but
23 you need to approach the bench at the time you offer it
24 because it may be part of the story that you want to
25 tell the jury, but right now the only issue that I think

1 it could conceivably be relevant to -- I mean, there's
2 no willful infringement in the case, right?

3 MR. DEFRANCO: That's right, Your Honor.

4 THE COURT: And written description is the
5 one that captured my attention while I was digging
6 through these cases last night, and I'm looking at your
7 expert's report, and it's -- you know, I'm going to
8 allow him to testify as to what -- what he said in his
9 report, and you may get to offer evidence, you know, if
10 I found -- if I find that a prima facie case of written
11 description has been made, you may be entitled to offer
12 the evidence at that point, all right, but based on what
13 I now know, I'm going to grant the motion in limine.
14 I'm reconsidering the prior ruling of the facts of this
15 case, and I'm going to -- I'm granting the order in
16 limine, okay?

17 Let's go to exhibits at this time. What
18 issues remain with respect to the plaintiff's exhibits?

19 MR. BRANDON: Your Honor, we have seven or
20 eight categories. Most of those --

21 THE COURT: Well, before we get started, if
22 I let it in, it's going to be with an instruction from
23 the Circuit cases that there's nothing improper about
24 drafting claims to cover products that are in -- in the
25 marketplace. I mean, that's -- frankly, that's where

1 I'm headed if I let it in as part of the inventor's
2 testimony, so be ready for that. If anybody's got any
3 instructions they want to submit before trial, I'll --
4 you know, I'll entertain them, but I've sort of got one
5 in mind based on the cases that I've read, but for
6 present purposes, I'm -- I'm granting the order in
7 limine.

8 Okay. Talk to me about exhibits.

9 MR. BRANDON: Yes, Your Honor. Again,
10 Jeremy Brandon for the plaintiff.

11 We have about, I think, nine categories
12 of -- of objections. Seven of those, I think, are
13 exclusively based on this Court's limine orders, and my
14 understanding is that Google is not planning, obviously,
15 to introduce these exhibits in violation of the Court's
16 limine order. So there's -- in addition to the limine
17 categories, there's three smaller categories that I'd
18 like to discuss briefly with the Court that Google is
19 contesting, but I don't know how the Court wishes to
20 proceed, but I thought I would begin first with the
21 limine categories that Google is agreeing to and maybe
22 read those exhibits into the record.

23 THE COURT: Well, so they're being admitted
24 over Google's objections, then? Is that --

25 MR. BRANDON: No, Your Honor. These are --

1 these -- I'm sorry, these are exhibits that fall within
2 the motion in limine orders that the Court granted to
3 exclude this sort of evidence.

4 THE COURT: Okay.

5 MR. BRANDON: And so we're just --

6 THE COURT: But they're your exhibits?

7 MR. BRANDON: Yes, Your Honor.

8 THE COURT: Okay. So I've excluded them in
9 limine?

10 MR. BRANDON: These are -- let me back up.
11 I'm sorry. These are our objections to Google's
12 exhibits.

13 THE COURT: Okay. I need to know what --
14 what disputes remain with respect to your exhibits, the
15 plaintiff's exhibits.

16 MR. BRANDON: Okay.

17 MS. CANDIDO: With respect to Function
18 Media's exhibits, there's a large group of them that
19 we -- Google objects to on the basis that they relate to
20 these acquisitions and are therefore not relevant and
21 highly prejudicial.

22 THE COURT: That will be subsumed by the
23 order I'm going to sign with respect to Mr. Bratic's
24 testimony.

25 MS. CANDIDO: I understand that. So there

1 is that category.

2 The next category essentially encompasses, I
3 believe, just one exhibit at this point. That's
4 Plaintiff's Exhibit 315. I guess they have a duplicate
5 of that at Plaintiff's Exhibit 776.

6 This is a rebuttal report of Matthew Lynde,
7 Ph.D., pursuant to Rule 26(a)(2)(B) regarding damages
8 from the Bid for Position, LLC, versus AOL, LLC, case.
9 That's an expert report on damages for an unrelated
10 patent lawsuit prepared by a damages expert with no
11 connection to this action.

12 This is not -- Google's damages expert, I
13 believe, relies upon this in connection with Georgia
14 Pacific Factor 12, which is the portion of the profit or
15 of the selling price that may be customary in the
16 particular business or in comparable businesses to allow
17 for the use of the invention or analogous inventions.

18 And Function Media has not shown that that
19 expert report has any relevance to certainly the
20 invention or any analogous invention. In fact, the Bid
21 for Position case did not relate to that, and,
22 therefore, Mr. Lynde's report would be far more
23 confusing than probative and prejudicial, especially in
24 light of the fact that the expert reports from this case
25 itself will not be in evidence. So the only report they

1 would have would be this report of Mr. Lynde's, which is
2 not relevant and is also hearsay.

3 THE COURT: Well, did your expert rely on
4 it, though?

5 MS. CANDIDO: No, their expert did.

6 THE COURT: Okay. All right. Okay. I
7 understand. I misunderstood what you told me.

8 MS. CANDIDO: I'm sorry.

9 THE COURT: I thought you said Google's
10 expert relied on it.

11 MS. CANDIDO: It is a damages report from
12 Google's expert in a different case --

13 THE COURT: Okay.

14 MS. CANDIDO: -- that Mr. Bratic relied upon
15 in this case. But it's -- we say, as I explained, it's
16 not relevant. It's prejudicial and hearsay.

17 The next category relates to a document
18 under Georgia Pacific Factor No. 8 that Function Media's
19 damages expert relied upon. That's Plaintiff's Exhibit
20 401. That's an analysis of the fair market value as of
21 the December 31st, 2003, of the aggregate equity value
22 of Google. It's a report on the overall valuation of
23 Google, including overall revenues, but it includes no
24 product-specific information at all, and it's also dated
25 in December of 2003, before the damages period.

1 Georgia Pacific Factor 8, of course, is the
2 established profitability of the product made under the
3 patent, its commercial success, and its current
4 popularity, and, therefore, because that report doesn't
5 address a particular product, it's not relevant. It's
6 prejudicial.

7 And, in addition, sorry, the Court granted
8 Google's motion in limine to exclude evidence of the
9 overall valuation of Google, and this exhibit falls
10 within that category in our opinion.

11 The next category --

12 THE COURT: Let's deal -- I mean, let's --

13 MS. CANDIDO: How do you want to handle it?

14 THE COURT: Well, let's deal with the first
15 category first.

16 MS. CANDIDO: Okay.

17 THE COURT: And not -- I mean, I guess the
18 second. The first category was acquisitions.

19 How is this -- this other expert report
20 admissible? I'm looking at the plaintiffs.

21 MR. NELSON: Your Honor, we have two cases,
22 Fifth Circuit cases, the Collins case 621 --

23 THE COURT: Versus Wayne.

24 MR. NELSON: Yes.

25 THE COURT: I'm familiar with it.

1 that your position isn't a hard and fast rule?

2 MS. CANDIDO: I'm sorry, is that a statement
3 or a question?

4 THE COURT: Why isn't it admissible to show
5 that your position in this case isn't really a hard and
6 fast rule? You've taken a different position in other
7 cases.

8 MS. CANDIDO: Well, I disagree with the
9 contention that there's a different position taken in
10 that case.

11 In that case, Mr. Lynde was responding to an
12 expert report that used the 25 percent rule, and, in
13 fact, his testimony is that, you know, he doesn't use
14 the 25 percent rule, but even if he did, the result
15 would be very different from the result that the
16 plaintiff's expert in that case reaches.

17 So it's offered as an alternative, sort of
18 even if he did it wrong, which is not an endorsement
19 certainly of using the 25 percent rule.

20 THE COURT: Well, I'm going to overrule the
21 objection as to that portion of the report.

22 And I'm going to admit just that portion
23 that you've identified, Counselor, as what you want to
24 use.

25 MR. NELSON: Yes, Your Honor.

1 THE COURT: Next category is -- remind me
2 again.

3 MS. CANDIDO: I believe it was plaintiff
4 Exhibit 401, the valuation of Google.

5 THE COURT: Right. Why is that not covered
6 by my order in limine?

7 MR. NELSON: On the acquisitions point,
8 generally, there are --

9 THE COURT: Acquisitions, I'm putting aside.

10 MR. NELSON: No --

11 THE COURT: Are you talking about the --
12 well, go ahead. I cut you off.

13 MR. NELSON: No, I didn't mean to interrupt
14 you, Your Honor. Go ahead.

15 THE COURT: Well, this Exhibit 401 is what
16 I'm looking at.

17 MR. NELSON: Yes, Your Honor. And -- and
18 I'm sorry for being unclear. I think the point in
19 Exhibit 401 will exhibit a broader point about some of
20 the acquisitions, and I will go through 401 right now.

21 The point is that in many of the documents
22 that they classify as acquisitions under their category
23 go beyond just acquisitions, and so to the extent, and,
24 again, we'll rest on the prior briefing on that, but to
25 the extent whatever the Court does on that, there's

1 going to be a separate issue because it's -- many of the
2 documents don't just go to acquisitions. This document
3 is not cited for acquisitions. It's cited in
4 Mr. Bratic's report for the importance of the technology
5 and the importance of the product to Google -- excuse
6 me, to Google. And --

7 THE COURT: Well, as I understood their
8 objection, it was to one portion of it that showed what
9 the total value of Google was as of the date of the
10 report.

11 MR. NELSON: We have -- we're not intending
12 to rely on it for that purpose.

13 THE COURT: Well, redact that portion of it,
14 and the rest of it is admissible.

15 MR. NELSON: Okay.

16 THE COURT: What's the next category?

17 MS. CANDIDO: The next category are a group
18 of intellectual property --

19 THE COURT: Well, it's admissible subject to
20 my ruling on acquisitions. Do you understand?

21 MR. NELSON: Yes, Your Honor, but this is
22 not an acq -- this does not go to acquisitions.

23 THE COURT: I understand, but --

24 MR. NELSON: Yeah.

25 THE COURT: What's the next category?

1 MS. CANDIDO: The next category are
2 intellectual property agreements that Google has entered
3 into with third parties that are not relevant under
4 Georgia Pacific. They -- there's a group of them -- I
5 don't know if Your Honor wants to proceed through them
6 individually. I mean, they include the America Online
7 and Google agreements that are web services agreements
8 and marketing agreements that include rights to the
9 software that they're, of course, using but don't
10 exclude patent rights. That's Plaintiff's Exhibit 320
11 and 321.

12 There's other license agreements that the
13 experts are not even relying upon, Mr. Bratic or
14 Mr. Wagner, as I understand it, and, therefore, our view
15 is they shouldn't be admissible. They're not comparable
16 and no one suggests that they are.

17 THE COURT: Well, is this something that
18 will, basically, rise or fall on what I do with
19 Mr. Bratic's opinions, or is it something discreet?

20 MS. CANDIDO: I believe that the parties
21 would possibly be in a better position to work out these
22 documents between themselves after we receive additional
23 guidance from Your Honor.

24 THE COURT: Okay. Well, I need you to --
25 with respect to 320, 321, and these other ones that are

1 on the list that are being offered -- that are being
2 objected to, I need copies of those left with me. I'll
3 look at those in connection with what I do with
4 Mr. Bratic.

5 MS. CANDIDO: Okay. Would you like copies
6 of the IP agreements and the acquisition-related
7 documents?

8 THE COURT: Well, yes.

9 MR. NELSON: Response on that, Your Honor,
10 or --

11 THE COURT: Well, yes, I'll hear a response.

12 MR. NELSON: We have no objection to
13 excluding any license agreement that Mr. Bratic does not
14 rely on, of course, and we actually, I think, have given
15 a list to the other side of those.

16 Of the others, I think they're trying to
17 back door some stuff in and exclude things that were
18 never in the Daubert motion, and we'd just like to call
19 the Court's attention to that, and there is --
20 Mr. Bratic goes through on a one-to-one basis about
21 what some of these licenses are, and a lot of them are
22 not in the -- in their motion but are on their -- on
23 this list.

24 THE COURT: Okay. Well, let's focus on the
25 ones that are not in the motion, then. Do you have a

1 list of those?

2 MR. NELSON: We can provide it very shortly,
3 Your Honor.

4 THE COURT: Okay.

5 MS. CANDIDO: There's another category that
6 I believe Mr. DeFranco is going to address. Actually,
7 I'll jump ahead to the category that I'm going to
8 address and then turn it over to Mr. DeFranco.

9 One group of documents are documents
10 relating to a pre-July 2007 financial information of
11 Google. So the party agree the hypothetical negotiation
12 would be in July of 2007, and there's a realm of
13 exhibits that relate to revenues and Google's financial
14 position prior to that date that we believe were not
15 relevant, that Function Media is seeking only reasonable
16 royalty damages, and they're not entitled to damages
17 prior to July of 2007.

18 So Google's revenues and status before 2007
19 are irrelevant to any issues in this case, and their
20 potential to confuse the jury and prejudice Google
21 outweighs any value that may be associated with them.

22 MR. NELSON: It's a Georgia Pacific factor
23 about what --

24 THE COURT: Success of the products, is
25 that --

1 MR. NELSON: Well, not only that. It's
2 even -- it's even better for us than that, which is at
3 the time of the hypothetical negotiation --

4 THE COURT: I'm overruling the objections to
5 those. I think those are relevant in this type of a
6 case.

7 What's the next category?

8 MR. NELSON: I have the list, Your Honor, if
9 you want me to go through --

10 THE COURT: Okay. We're back to the license
11 agreements?

12 MR. NELSON: Yes, Your Honor, and I'm just
13 going to go through them.

14 Plaintiff's Exhibit 312 relates to the
15 VoiceAge agreement, which is not part of the -- of the
16 Daubert motion.

17 Same for Plaintiff's Exhibit 313.

18 Plaintiff's Exhibit 3 -- 320 is part of the
19 motion, as is Plaintiff's Exhibit 321. That's
20 encompassed by the motion.

21 We've withdrawn 322 through 324, 325, and
22 335.

23 Plaintiff's Exhibit 341 is not part of
24 the -- of the motion and, in fact, there's -- Mr. Wagner
25 agrees it's relevant.

1 312 and 313?

2 MS. CANDIDO: The objection is 312 and 313
3 is that they're not -- they're not comparable licenses.
4 The technology is not comparable.

5 THE COURT: Okay. That -- that objection is
6 overruled.

7 What's the next one?

8 MR. NELSON: Plaintiff's Exhibit 341 is a
9 license on -- between Microsoft and Google. Mr. Wagner
10 talks about it in his report as does Mr. Bratic. It is
11 an uncapped running royalty rate that --

12 MS. CANDIDO: I'm sorry, I don't believe --
13 just not to interrupt, but I don't think we -- I have an
14 objection to 341.

15 MR. NELSON: Okay. Sorry.

16 THE COURT: 341 is admitted.

17 MR. NELSON: Plaintiff's Exhibit 743, I
18 believe and --

19 THE COURT: Hold on a second. Let her
20 get -- let her get her notes handy.

21 MS. CANDIDO: It's okay. I'm sorry.

22 THE COURT: Go ahead.

23 MR. NELSON: Plaintiff's Exhibit 743, I
24 believe, is a little more tricky. It's an asset
25 purchase agreement about -- from Kaltix, but -- which is

1 then, it doesn't represent what Google's licensing
2 practice was?

3 MS. CANDIDO: It's not probative under
4 Georgia Pacific, and it's prejudicial because it's
5 confusing.

6 MR. NELSON: But there's an entire --

7 THE COURT: Okay. Well --

8 MR. NELSON: Excuse me, Your Honor.

9 THE COURT: -- I'm overruling those
10 objections. 743 is admitted.

11 What's the next one?

12 MR. NELSON: Exhibit 750 is covered by -- by
13 the Daubert motion.

14 Exhibit 753 is the VoiceAge license that
15 both sides admit is -- is relevant. I believe it's the
16 same -- it's related to 312 and 313 that Your Honor just
17 overruled. It's the underlying license agreement to
18 those.

19 THE COURT: Is that 750?

20 MR. NELSON: Excuse me, that's 753.

21 THE COURT: Well, is it related to 312 and
22 313?

23 MS. CANDIDO: It is, Your Honor.

24 THE COURT: Well, consistent with my prior
25 rulings, I'll overrule the objections to that. I

1 understand that it was -- the objection was that it's
2 not a comparable license agreement to the technology in
3 this case or to the patent in case; is that correct?

4 MS. CANDIDO: I'm sorry, that -- that is
5 correct. I guess I'm seeking a point of clarification
6 with respect to like the Kaltix one and other things we
7 just discussed.

8 Mr. Nelson is mentioning that Mr. Bratic
9 mentions them in his report, but he expressly states
10 that he doesn't consider them probative. So I'm not
11 clear on how Function Media is intending to use these.

12 MR. NELSON: Well, I think, for example -- I
13 mean, for Mr. Chen -- for the VoiceAge, there is the --

14 MS. CANDIDO: I'm not talking about the
15 VoiceAge issue.

16 MR. NELSON: For Kaltix --

17 THE COURT: Well, --

18 MR. NELSON: Well, I think -- I don't know
19 if this is the place for it, but --

20 THE COURT: Tell me how you intend to use
21 them.

22 MR. NELSON: In Mr. Bratic's -- to take
23 Kaltix specifically, this came up in Mr. Bratic's
24 deposition, and he said he was relying on the Kaltix
25 transaction, so -- and he called it a relevant license.

1 It's within the admitted relevance field of search and
2 advertising.

3 MS. CANDIDO: I'm sorry, I'm looking at
4 paragraph 204 of Mr. Bratic's report and it says, "Since
5 this acquisition was done in order to type up certain
6 personnel" --

7 THE COURT: Well, I tell you what. He's
8 talking about his deposition. You're talking about his
9 report. My reporter has been here almost two hours now,
10 so we're going to take a 15-minute recess, and y'all can
11 identify whether or not he's relying on it or not. I'll
12 see y'all at 20 until the hour.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: All right. Be seated.

17 All right. We were on 753.

18 MR. NELSON: Yes, Your Honor. I think we're
19 on the same page, although Amy can correct me if I'm
20 wrong.

21 There are two parts to the Kaltix agreement.
22 One is the acquisition, which Mr. Bratic is not relying
23 on and is therefore not part of any motion. It's --
24 it's -- he's not relying on that part.

25 The second part is the underlying license

1 which Google then subsumed when it bought the company,
2 and that he is relying on, and it is part of the
3 relevant search field. And so --

4 MS. CANDIDO: So, Your Honor, the only issue
5 that I have with Exhibit 743 is that Mr. Bratic did not
6 rely upon that in his -- or address it in his expert
7 report. He just brought it up for the first time in his
8 deposition.

9 THE COURT: Is it 753?

10 MS. CANDIDO: That was 743.

11 MR. NELSON: It was, I believe, 7 --

12 MS. CANDIDO: 753 relates to --

13 MR. NELSON: Excuse me, it is 743, that's
14 right.

15 Response, Your Honor?

16 THE COURT: Sure.

17 MR. NELSON: He admitted that it was an
18 oversight in his report. He looked at Mr. Wagner's
19 report and realized he wanted to testify. There is
20 cross examination on it in his deposition, and he talked
21 about it in his deposition.

22 THE COURT: Well, exactly what is 7 -- can I
23 see a copy of it? Exactly what is it?

24 MS. CANDIDO: And, Your Honor, I would just
25 say I think the issue is more one of plaintiffs trying

1 to have the late additions to the expert report issued
2 both ways. You know, their expert's additions are okay,
3 but our expert's additions are not.

4 MR. NELSON: I don't think that's true
5 because in -- there is stuff that --

6 THE COURT: All right.

7 MR. NELSON: Excuse me.

8 THE COURT: Here's -- here's where we're
9 going with this, okay? I do these hearings so that
10 y'all don't have to make your objections and do all this
11 in front of the jury, but my inclination is going to be
12 to just not pre-admit any exhibits and let y'all offer
13 and make all your objections and do this in front of the
14 jury, okay?

15 I mean, these are -- you know, these are
16 issues that counsel ought to be able to resolve. I
17 mean, if it's an inadvertent oversight of an expert and
18 you're not prejudiced by it, it ought to come in. But,
19 I mean, are you -- I mean, at the same time, Counselor,
20 I mean, you've had notice of certain prior art since
21 October, and you're -- and now it's January, and there's
22 a separate motion relating to prior art things.

23 So which rule do you want me to apply, the
24 rule that if it's not in his report, it's not in, or the
25 rule that if it's not in his report, then maybe if

1 there's no prejudice, it can still come in?

2 MR. NELSON: Well, Your Honor, I'm probably
3 the least capable to speak on the relation between the
4 two, and I understand that you want to apply a
5 consistent rule.

6 Let me just state with damages expert
7 reports, both experts at their deposition introduced
8 limited new opinions, and we have no problems with those
9 limited new -- Mr. -- Mr. Wagner introduced something
10 else in his deposition that was a change in his report.
11 We cross examined him on it, and we have no problem with
12 that. We don't object to it.

13 MS. CANDIDO: You moved (sic) on it, didn't
14 you?

15 THE COURT: All right. Objection is
16 overruled to 743.

17 Let's proceed.

18 MS. CANDIDO: That's it on the category of
19 intellectual property agreements, as I understand.

20 THE COURT: All right.

21 MR. NELSON: Yes, Your Honor.

22 THE COURT: What's your next category?

23 MR. NELSON: For the record, Google has
24 withdrawn its objection to Exhibit 344, that's correct.

25 MS. CANDIDO: That's correct, and many

1 others, but we don't need to read those --

2 THE COURT: Well --

3 MR. NELSON: We believe that's it with
4 respect to the license. Thank you, Your Honor.

5 THE COURT: Okay. The next category?

6 MR. DEFRANCO: The next category, Your
7 Honor, on Function Media list, there's a group of
8 exhibits that relate to other litigations. There's 11
9 items in all, and by my count, there's seven deposition
10 transcripts, one exhibit report on noninfringement in an
11 unrelated case, I believe, and three declarations in it.
12 It seems to be a large block of information. It's
13 entire deposition transcripts, not depositions that have
14 been designated for use in this case or anything like
15 that. It seems to be a large block of information
16 including an expert report and transcripts and
17 declarations from other -- other unrelated cases
18 involving Google.

19 MR. BRANDON: Your Honor, my understanding
20 is that Google is only objecting to this category under
21 402 and 403, and we've withdrawn the vast majority of
22 the exhibits that we originally designated under this
23 category, and we're now down to these 11 that
24 Mr. DeFranco spoke of, and all of those, I would submit
25 to you, are relevant and not prejudicial to Google.

1 We're not seeking to introduce the entire
2 transcript to the jury, but rather just to read the
3 portions into the record or to redact and have only
4 those relevant portions shown to the jury, and for a few
5 reasons. Many of the deposition transcripts are
6 depositions of witnesses that will appear in this court,
7 and we might would like to offer those prior depositions
8 for impeachment purposes.

9 THE COURT: All right. I'm limiting all
10 this category for impeachment use only, and if they hit
11 the stand and -- you're not allowed to refer to the
12 prior case by name. You can put in front of the witness
13 prior sworn testimony, but don't go beyond that, all
14 right? But they're limited -- I'm not pre-admitting
15 them. Their use is going to be limited to impeachment,
16 and if you can lay a foundation at trial for the
17 admissibility of any portion of it, then I'll address it
18 at trial.

19 MR. BRANDON: All right. Your Honor?

20 THE COURT: Okay. What's the next category?

21 MR. DEFRANCO: Next category, Your Honor, is
22 a simple one. There are -- the inventors, as you heard
23 yesterday, actually have six patents. Three were
24 asserted in this case. One patent is invalid and is no
25 longer in the case.

1 We think the three that have never been in
2 the case certainly should not come in. Obviously, of
3 the six, the two that are still at issue, will come in.

4 So that leaves the '045, which this Court
5 and the patent office found as invalid. Now, they've
6 raised the issue of the number of patents, and that's
7 something we're going to need to resolve, whether the
8 '045 comes in or not, but I don't see how they can say
9 the inventor has X patents without us being able to come
10 back and say, "Well, one of those was invalid."

11 But in any case, of the six -- they have six
12 on their list. Three are -- have not ever been an issue
13 in here and shouldn't come in.

14 MR. BRANDON: Yes, Your Honor, of the six
15 patents that the -- that the inventors have to their
16 name, five of them have the very same specification.
17 It's the specification that was filed originally in
18 January of 2000. It's the '045 patent, and we've got to
19 be able to talk about the '045 patent at trial in order
20 to -- to talk about the dates and how that this -- how
21 these inventions were filed through the specification in
22 January of 2000. And that the '587 is simply a
23 continuation of the '045, and the continuation of the
24 '587 led to the '025, and then the '059, of course, is
25 the CIP, and then the other two patents are not -- not

1 key to the case, except that they tell part of the story
2 of the inventions and are -- share the same
3 specifications and just have different claims. It's all
4 part of one family of patents.

5 THE COURT: Okay. The two patents that are
6 at issue in this case are admitted. The other ones are
7 not admitted. You can talk to the jury about the '045
8 being issued by the patent office, but don't go further
9 into these other patents.

10 I'm excluding any reference to the fact that
11 the Court has issued a ruling that invalidates that
12 patent, but with respect to the admissibility of -- of
13 evidence, the two patents that are at issue in this case
14 are admitted and the other four are not admitted.

15 Okay. You can talk about, you know, the --
16 what happened in the prosecution, and that -- you know,
17 on the face of the patent, it will -- it will reference
18 the '045, I assume, but I'm just not admitting it into
19 evidence. It's not being asserted, okay?

20 MR. BRANDON: Yes, Your Honor.

21 THE COURT: What's the next category?

22 MR. BRANDON: I believe they have one
23 additional category, at least by my count, and that's
24 the miscellaneous category.

25 Mr. DeFranco, are y'all still pursuing --

1 even pursuing those?

2 MS. CANDIDO: I'm sorry, Your Honor, there's
3 1,600 trial exhibits on plaintiff's list, so I apologize
4 for the delay.

5 With respect to Plaintiff's Exhibit -- oh,
6 this is turned off now.

7 MR. TRIBBLE: I've got it.

8 MS. CANDIDO: It's a button up here. I'm
9 sorry. Oh, thank you. It was right the first time.

10 So this is Exhibit -- Plaintiff's Exhibit
11 93. We object to this document as being prejudicial and
12 hearsay. It refers to there being a 216 billion dollar
13 market for the plaintiff's invention, and there's --
14 that's just hearsay.

15 THE COURT: Well, what is the document?

16 MS. CANDIDO: I believe the document are
17 typed up -- typed up notes, I guess, of Mr. Dean or Ms.
18 Stone.

19 MR. BRANDON: That's correct, Your Honor
20 these are notes that Mr. Dean made to himself, and in my
21 meet and confer with counsel for Google yesterday, they
22 specifically told me they weren't asserting a hearsay
23 objection to any of these miscellaneous docs that
24 remain, but rather just 402 or 403.

25 THE COURT: Well, but, I mean, aren't

1 they -- I mean, they're from your witnesses, though
2 right?

3 MS. CANDIDO: No, plaintiff's witnesses.

4 THE COURT: Oh, I'm sorry. I apologize.
5 For the plaintiff's witnesses, okay, okay.

6 All right. Well, are you -- did you tell me
7 you're asserting a hearsay objection or not?

8 MS. CANDIDO: Yeah. I'm sorry, I'm not
9 aware of that communication.

10 Apologize if that was conveyed to you.

11 MR. BRANDON: Well --

12 MS. CANDIDO: We do want to assert a hearsay
13 objection with respect to this document.

14 MR. BRANDON: Well, with respect to the
15 hearsay objection, Your Honor, if I may, this would be a
16 present sense impression that the inventor wrote to
17 himself back in April of 2002. It, of course, concerns
18 his idea of the value of his patents and relates
19 directly to the hypothetical negotiation. I mean, this
20 is five years before, and he's talking about the ability
21 to dominate -- Mr. Tribble says we'll just withdraw this
22 exhibit.

23 THE COURT: Okay. All right. It's
24 withdrawn.

25 MS. CANDIDO: The next exhibit is

1 Plaintiff's Exhibit 95. If we can pull that one up,
2 please.

3 MR. BRANDON: We'll withdraw Plaintiff's
4 Exhibit 95.

5 MS. CANDIDO: It's the same issue, okay.

6 The next document is Plaintiff's Exhibit 97.
7 This is an exhibit that, as I understand it, Ms. Stone
8 created that's a list of available single billionaires,
9 I believe, from the testimony, that her daughter might
10 find as eligible husbands, and --

11 MR. BRANDON: Your Honor, we'll withdraw
12 this one, as well.

13 THE COURT: I'm not on the list, I can
14 assure you.

15 MS. CANDIDO: I personally am keeping a copy
16 of the list at home.

17 THE COURT: Yeah.

18 MS. CANDIDO: This is Plaintiff's Exhibit
19 157. This is an article that -- and, I'm sorry, this is
20 also the same as Exhibit 164. It's a USA Today article
21 that we believe is irrelevant and prejudicial because
22 it's obviously -- it's quoting Ms. Wojcicki or
23 purporting to quote Ms. Wojcicki regarding the -- the
24 genesis of AdSense, and the plaintiff will have an
25 opportunity to depose Ms. Wojcicki and get her sworn

1 testimony, and this document is otherwise just
2 irrelevant and prejudicial.

3 It also mentions that the houses in the
4 neighborhood where Google was founded sell for over a
5 million dollars. We believe it's prejudicial for that
6 reason, as well.

7 THE COURT: Well, --

8 MR. TRIBBLE: Your Honor, I was called in
9 for this one exhibit. We don't need this preadmitted.
10 I'm going to depose Ms. Wojcicki on this, and we may
11 offer it at a later time.

12 THE COURT: I'll -- I'll table this exhibit.

13 MS. CANDIDO: The next exhibit is
14 Exhibit 348. It's a spreadsheet. It's entitled
15 historical market statistics, and we believe this
16 document is just simply irrelevant, and to the extent
17 that it -- this purports to have anything to do with the
18 market that's at issue in this case or the plaintiff's
19 intend to offer it for that reason, it would be
20 prejudicial because there's no source for this
21 information.

22 THE COURT: Well, what -- tell me, what is
23 it? Who created it?

24 MR. NELSON: This is the document Mr. Bratic
25 relies on in the two thousand -- if you go, Your Honor,

1 to the last page of this document, the second to the
2 last page of this document, you'll see at the bottom
3 there is an eight percent royalty rate here, which is in
4 2002, and Mr. Bratic relies on that to say that in 2002,
5 at least, there is going to be at least an eight
6 percent -- excuse me, let me go back to that page, an
7 eight percent royalty rate of what was in Mr. Dean's
8 head at that time in 2002 as part of the hypothetical
9 negotiation.

10 MS. CANDIDO: So you're stating this is a
11 document Mr. Dean created?

12 MR. NELSON: Yes.

13 MS. CANDIDO: Is that what you're
14 representing?

15 MR. NELSON: Yes.

16 THE COURT: Okay. I'm going to overrule the
17 objections. There's -- there's a string of some of
18 these e-mails that we have a relevance objection to.
19 This is Plaintiff's Exhibit 510, and I suppose
20 plaintiffs might want to address what they purport the
21 relevance to be.

22 MR. BRANDON: Sure. The relevance is --
23 shows the importance and the success of the invention.
24 This is an e-mail talking about Google serving the
25 trillionth ad, and so it goes to the success of their

1 product. It's a Google e-mail going to the success of
2 these products.

3 MS. CANDIDO: I don't believe that this --
4 it's clear from this e-mail that this relates to accused
5 products as opposed to Google's AdWords' products.

6 THE COURT: Overruled.

7 What's the next exhibit?

8 MS. CANDIDO: The next exhibit, Plaintiff's
9 Exhibit 511, it's an e-mail in the same string, so I
10 don't believe our objection is any different.

11 THE COURT: Okay. Well, consistent with
12 what I previously did, I'll overrule the objection.

13 MR. BRANDON: We'll withdraw 528.

14 MS. CANDIDO: Plaintiff's Exhibit 553 is an
15 e-mail from Jonathan Rosenberg to Richard Holden
16 regarding a draft earnings script for an earnings call,
17 and our objection is a relevance objection.

18 MR. BRANDON: This -- this again, Your
19 Honor, relates to damages and the success of the
20 products and the earnings that have been -- that have
21 come about as a result of the product, and so we contend
22 it relates to damages.

23 MR. NELSON: Specifically, Your Honor, it
24 talks about the importance of revenue and how revenue
25 was the metric and the goal for the company.

1 THE COURT: Point me to a particular
2 paragraph.

3 MR. NELSON: May we defer this for about two
4 minutes, Your Honor?

5 THE COURT: Sure.

6 MS. CANDIDO: The -- the next exhibit is
7 Exhibit 557, which I believe is an identical copy of
8 Exhibit 348, and if someone can refresh me about what
9 happened with Exhibit 348, I assume the same should
10 happen with respect to this one. It's a duplicate.

11 THE COURT: It's the one I just admitted.

12 MS. CANDIDO: I -- it was admitted, okay. I
13 apologize.

14 THE COURT: Well, if it's the one --

15 MR. BRANDON: It is a duplicate.

16 THE COURT: -- that culminates in an 8
17 percent --

18 MR. BRANDON: Yes.

19 THE COURT: -- rate as to what he would have
20 expected in '92, was it?

21 MR. BRANDON: 2002.

22 THE COURT: Or 2002, rather. Okay.

23 MS. CANDIDO: So I don't contend this is any
24 different.

25 THE COURT: Same objection, it's overrule.

1 MR. BRANDON: Amy, we can withdraw 558.

2 MS. CANDIDO: Okay. 604. Plaintiff's
3 Exhibit 604 is a request from Brian Axe regarding being
4 promoted to senior product manager, and, again, this is
5 not relevant to any issue in this case.

6 MR. BRANDON: Your Honor, in the text of
7 this document, I believe Mr. Axe refers to the UI, and
8 in his deposition in this case, he refused to admit that
9 there was even an interface on the accused products
10 until presented the document that proved the point, and
11 so we would contend that documents such as this would be
12 an admission by Mr. Axe, and we could use it for
13 impeachment purposes among others.

14 THE COURT: I'm going to overrule the
15 objection. It's not limited to impeachment.

16 MS. CANDIDO: Is Exhibit 686 still at issue?
17 I don't have a copy of that. Could you pull up
18 Exhibit 686, please?

19 So Exhibit 686 is an e-mail, at least it
20 appears -- I think if you follow the -- all the
21 different lines, it's an e-mail to Allen Eustace from
22 Pete Koomen regarding important request, 50 most
23 important projects at Google. And plaintiff, I believe,
24 purports to use this document to show how AdSense is
25 important to Google, but the document does not show

1 that, and it's irrelevant and prejudicial.

2 MR. BRANDON: Your Honor, we would contend
3 that the document does show that, that as part of the 50
4 most important projects at Google, some of those include
5 the Frontend and the ad placement which are encompassed
6 within AdSense, and in any event, this would just be a
7 Google admission that goes to the weight.

8 THE COURT: Well, I'm going to overrule the
9 objection. I mean, it's an issue for the jury.

10 MS. CANDIDO: Exhibit 714 is an e-mail to
11 someone named Nelson at google.com from S. Zhupanov
12 regarding TGIF questions, and we have a relevance
13 objection to this document, as well.

14 MR. BRANDON: We withdrew that.

15 MR. NELSON: No, no, no, hold on.

16 MR. BRANDON: I just -- I don't remember
17 even conferring on this one, and it's not even in my
18 stack of documents here, so can we discuss it offline?

19 MS. CANDIDO: Absolutely.

20 Exhibit 813 is a letter from -- to G. Char
21 from David Drummond regarding a report of e-mail related
22 revenues, and it contains multiple letters. This is a
23 compilation exhibit and e-mail related revenues are not
24 relevant in this case. So this document is not
25 relevant.

1 MR. NELSON: I think this probably falls
2 into the other category of license, actually, and,
3 again, both experts talk about this particular license
4 agreement. In fact, if Google stipulates right now that
5 it's not relying on a Hewlett-Packard license, I mean,
6 we can -- we can rely -- we can withdraw this exhibit.

7 MS. CANDIDO: No, that's fine, Google
8 withdraws its objections to this exhibit, and it
9 declines Mr. Nelson stipulation, just for the record.

10 THE COURT: Okay. It's withdrawn.

11 MS. CANDIDO: Exhibit 872, I'm sorry, we
12 withdraw our objections on that one.

13 Exhibit 888, this is a large document, but
14 it's a Google presentation regarding a one billion
15 dollar revenue plan, and we object to this document on
16 the basis that it talks about Google's overall wealth,
17 and it's prejudicial for that reason.

18 MR. NELSON: We'll stipulate that we're not
19 relying on this for the overall wealth. There are parts
20 of the document -- let me scan the document, Your Honor,
21 that pretty clearly talk about AdSense for Content
22 revenues and their revenues, for example. If you go to
23 this page, AFC, it talks about the five billion market
24 there, and so we will, of course -- we're happy to
25 approach the Court or do whatever is necessary, but

1 there are parts within this document that are relevant
2 and Mr. Bratic relies on.

3 MS. CANDIDO: To the extent that there's
4 just revenue reported in this document, plaintiffs have
5 numerous other revenue reports that they can rely upon
6 for the same information that are not prejudicial in the
7 same way with.

8 MR. NELSON: I mean --

9 THE COURT: Well, just limit your use of it
10 to those portions that focus on the accused products.

11 MR. NELSON: Of course, Your Honor.

12 THE COURT: Okay? I'll admit it subject to
13 those redactions being made.

14 MS. CANDIDO: Exhibit 1067 is a Google
15 document regarding a display controller, and this
16 document is -- is not relevant. It's unclear whether
17 this document even involves a Google product.

18 MR. BRANDON: Your Honor, this document was
19 produced at the outset of the case as part of their
20 engineering document that they were required to produce
21 under the local rules that describe the accused
22 products. Our contention it is -- is it's plainly
23 relevant to the accused products. It talks about the
24 user interface right up front, and there's in any event
25 no prejudice. It's an engineering-type doc.

1 THE COURT: What is the document? It's
2 titled Display Controller. How does it relate to this
3 case?

4 MR. BRANDON: Well, I actually had a
5 conversation with our technical conversation yesterday,
6 and he said it relates in the context of user interface
7 specifically and the capability of the user interfaces.

8 MS. CANDIDO: It doesn't -- whether it
9 addresses user interfaces or not, it's not tied to the
10 accused products. It's not clear that it's talking
11 about a user interface in connection with the accused
12 product.

13 THE COURT: That's my question, is it user
14 interface for these accused products?

15 MR. BRANDON: According to my tech -- I
16 can't represent to the Court, but according to my
17 technical expert, it is relevant to the user interfaces.
18 I don't know if I asked the question if it --

19 THE COURT: Well, I'm not going to pre-admit
20 it, then. If you can lay -- I'm not sustaining the
21 objection. I'm just not going to pre-admit it until I
22 hear what the expert's testimony is about it, okay?

23 MR. BRANDON: Okay.

24 MS. CANDIDO: Exhibit 1331 is an e-mail from
25 Brian Axe to Jason Miller regarding an idea. The

1 subject line is Customized Collaborative Filtering for
2 Publishers. This document involves a suggestion about
3 patenting an idea relating to recommending news
4 articles. That's not relevant to any of the accused
5 products in this case and can be confusing and therefore
6 prejudicial to the jury.

7 MR. BRANDON: Your Honor, 1331 and 1332,
8 which you'll see next, which is a lot like it, talks
9 about Google's philosophy behind patenting, namely, how
10 they need to go out and file patents ASAP and to even
11 file a patent --

12 THE COURT: I'm going to over -- overrule
13 it, overrule the objection.

14 MS. CANDIDO: I believe the basis for our
15 objections are the same for Exhibit 1332, so that's
16 overruled.

17 THE COURT: 1332, those objections are again
18 overruled, and 1332 is admitted.

19 MS. CANDIDO: Exhibit 371 is another copy of
20 that USA Today article that was addressed earlier, so I
21 won't address that one.

22 And Exhibit 1398 is the last one, is a
23 declaration of prior invention under Rule 131 for a
24 patent application. This patent application is not
25 relevant.

1 MR. BRANDON: Ms. Candido, we withdrew that
2 last night.

3 MS. CANDIDO: I apologize.

4 MR. NELSON: Can we go back to Exhibit 553,
5 and let me just point out the relevance of this
6 document, Your Honor?

7 This is -- this document is not about
8 revenue, actually. It's about the patents and Google's
9 patent program. There are a couple relevant points in
10 here. This middle paragraph here, to the extent that
11 this Court allows any testimony on Intellectual
12 Ventures, of course, this talks about how Google is a
13 limited partner in Intellectual Ventures, and then the
14 paragraphs above and below that talk about Google's
15 patents and number of patents they have and the types of
16 licenses may have, many of which are agreed relevant --
17 relevant patents in this case.

18 MS. CANDIDO: I'll withdraw our objections
19 to this exhibit.

20 THE COURT: Okay. 553 is admitted.

21 MS. CANDIDO: That was it, I believe.

22 THE COURT: Well, we were getting close to
23 1,500, so I figured we were getting close to the end.

24 Okay. And you had withdrawn the 131
25 declaration; is that right?

1 MR. BRANDON: Yes, Your Honor.

2 THE COURT: Okay. Okay. Tell me what
3 issues remain with respect to Google's exhibits.

4 MR. BRANDON: Your Honor, there's three
5 categories of documents that we're objecting to beyond
6 the documents that fall within the ambit of the motion
7 in limine orders.

8 One of those categories are Intellectual
9 Venture docs. Another category is just a single
10 category, which is -- has to do with the Net Gravity
11 user guide. It's a 901 objection. And then the third
12 category is a hearsay category with respect to --

13 THE COURT: Could you not bring yourself to
14 say authentication? Is that 901?

15 MR. BRANDON: Yes, Your Honor. Can I start
16 with the 901?

17 THE COURT: Sure.

18 MR. BRANDON: Our only issue with the 90 --
19 with the 901 authenticity objection is that with respect
20 to this single document, this Net Gravity user guide, it
21 was produced to us in multiple parts, and Google is
22 relying on this document in its expert report as an
23 anticipatory reference as a printed publication.

24 And as Your Honor knows, in order to be --
25 to qualify under that standard, you'd have to have a

1 single document, and we don't have any evidence, or at
2 least I can't find any, and in the meet and confer our
3 process wasn't pointed to any, that suggests that this
4 was, in fact, a single document as opposed to multiple
5 documents.

6 The deposition that Mr. Kennedy pointed me
7 to last evening is a guy by the name of Russ Seligman
8 who testified just to the extent that it was multiple
9 documents that I believe he downloaded from the web.

10 And so we just haven't -- haven't seen any
11 evidence that suggests that this was one complete guide,
12 one complete document.

13 THE COURT: What's the response?

14 MR. DEFRANCO: Well, Your Honor, I think we
15 have a disagreement about the testimony that was given
16 at the deposition which we'll be offering and also
17 either through deposition or through live testimony, but
18 he was asked, "Is this a complete user guide, or is this
19 one of many documents or multiple documents that a user
20 would get when they brought the AdServer system?" And
21 he said, "This is one of several documents."

22 I -- it seems to be saying this is one of
23 several documents the user would get. I think it's
24 pretty clear. The question was not terrific, but he had
25 the entire document we're talking about in front of him

1 at the time. It wasn't presented to him in any pieces
2 that were produced separately. He's just describing
3 this as one of several documents that a user would get.

4 THE COURT: Well, is -- is the exhibit that
5 the witness had in front of him the same as the trial
6 exhibit?

7 MR. DEFRANCO: It's the -- yes, Your Honor,
8 it's the entire document. That's my understanding of
9 it.

10 THE COURT: Well, what -- what was the -- do
11 you have a page reference to the actual deposition
12 exhibit?

13 MR. DEFRANCO: Here --

14 THE COURT: I don't to -- you might want to
15 pick your notes up. I think those --

16 MS. CANDIDO: He can pull up the transcript
17 on the system if you like.

18 MR. DEFRANCO: Yeah, it was marked as
19 Exhibit 278 at the deposition, Your Honor.

20 THE COURT: Well, is that accurate?

21 MR. BRANDON: The -- there's other
22 deposition testimony, Your Honor, that -- where he said
23 these were multiple documents. There's one other Q&A
24 where he said this -- this is a multiple -- these are
25 multiple documents.

1 THE COURT: All right. Well, I'm going to
2 admit the exhibit and let them take care of whether or
3 not it was multiple or whether it was one of separate,
4 okay?

5 MR. BRANDON: Okay.

6 THE COURT: I overrule that objection.

7 MR. BRANDON: The next category, if I could,
8 Your Honor, is Intellectual Venture documents which
9 Mr. Nelson is going to address.

10 MR. NELSON: There are two -- three, really,
11 separate issues with respect to Intellectual Ventures.
12 These are -- Your Honor, these are documents between
13 Intellectual Ventures or internal Intellectual Ventures
14 documents about Mr. Dean.

15 And so our first objection is on hearsay
16 grounds, that this is hearsay within hearsay. Actually,
17 it's -- yeah, it's certainly double hearsay, which we'll
18 get to in a second, but more fundamentally, I think
19 what really might dispose of this, there's a 401
20 objection now after Mr. Wagner's testimony. This is
21 Mr. Wagner's testimony, Page 158.

22 This is his testimony, "You do not rely on
23 the interactions between Mr. Dean and Intellectual
24 Ventures in the formation of your opinion; is that
25 right?" Answer: "I do not."

1 So this Court's already granted the limine
2 with respect to the post two thous -- the post
3 litigation interactions between Intellectual Ventures
4 and Function Media, but with respect to the pre-2007
5 ones, this would seem to answer the question right
6 there. So that would be our first objection is on Rule
7 401 relevance grounds that their own experts says that
8 it's -- they don't rely on it.

9 Our second objection is on hearsay within
10 hearsay, and this is an example of an Intellectual
11 Ventures' e-mail of the type -- this is Exhibit 210,
12 Your Honor, of the type that they intend to introduce.
13 Our objection is this is on -- is on hearsay. This is,
14 first of all, not a business record. It's an e-mail.
15 So we have that as a first issue, but then we have
16 double hearsay, which you can see on the first line
17 which is "I told him that we needed all the patents in
18 the family." And he's clearly relaying the conversation
19 he had with Mr. Dean, which we have no idea what
20 exactly -- whether it's truthful or not.

21 Obviously, this was part of the motion on
22 Intellectual Ventures in late September. They had the
23 opportunity to take Intellectual Ventures' deposition on
24 these points and prove up these documents, and they
25 didn't despite having knowledge of this for almost a

1 year with respect to Intellectual Ventures. So this is
2 Exhibit 210.

3 Related to that, which is the same thing or
4 the similar issue, I should say, is a spreadsheet --
5 this is Exhibit 213, again. This is an Intellectual
6 Ventures document, Your Honor, that discusses -- it's --
7 it's hearsay within hearsay. We have no idea who wrote
8 this document, what it's about, even the dates of this
9 document, they I think will admit they can't prove up
10 this document, and they have nothing to establish what
11 the purpose was, whether it's a business record, how it
12 was created, or who put these numbers in there, or
13 anything like that, and even if they can establish that
14 first step, they certainly can't establish the second
15 step of any comments about it, as well.

16 There's certainly no indication that this
17 was created in the normal course of business, and
18 that's, of course, even if you find these are relevant
19 despite their expert's nonreliance on them. So that's
20 Exhibits 210 and 213.

21 Just to complete the circle here, there are
22 two exhibits, Exhibits 211 and 212, that relate to post
23 litigation conversations that fall within the limine.
24 This is Exhibit 211 dated 2008. You see at the top,
25 July 10th 2008, and this also -- I would just mention

1 that this has -- it's clearly litigation. It refers to
2 Mr. Grinstein who is sitting at counsel table for
3 Function Media.

4 Would you like me to leave this on for a
5 couple of seconds, Your Honor?

6 THE COURT: It's post litigation?

7 MR. NELSON: Yes, Your Honor.

8 THE COURT: And I've already --

9 MR. NELSON: Yes.

10 MS. CANDIDO: We're not asserting --

11 MR. NELSON: Okay. So you withdraw Exhibits
12 211 and 212?

13 MS. CANDIDO: I think we can discuss it --

14 THE COURT: Well --

15 MR. NELSON: Okay. It's -- it's Exhibit 210
16 and 213 that are a part of this, and our objections are
17 both on hearsay grounds and relevance grounds.

18 THE COURT: Well, I'm going to overrule the
19 objections on the pre-suit documents. I'll sustain --
20 well, they've been withdrawn as to post-suit, and I will
21 see you-all at -- yes?

22 MR. BRANDON: Your Honor, one more --

23 MS. CANDIDO: I'm sorry, I didn't even
24 get -- may I address just the two post-suit -- I'm
25 sorry, pre-suit --

1 THE COURT: Well, I just overruled it. You
2 want to talk me out of it?

3 MS. CANDIDO: I'm sorry, no, I
4 misunderstood. I'm sorry. No, I don't. I apologize.

5 THE COURT: Okay.

6 MS. CANDIDO: It's been a long day for all
7 of us.

8 THE COURT: Well, it has, I agree with
9 y'all. But I'll see y'all at 1:30 to continue. Well,
10 I'll see y'all after my hearing at 1:30, which is --
11 I'll see y'all at 2:00 o'clock. Be back at 2:00
12 o'clock.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

SHELLY HOLMES
Deputy Official Reporter
State of Texas No.: 7804
Expiration Date: 12/31/10

Date