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# HARM TO THE COMPETITIVE PROCESS IN THE *GOOGLE* CASE

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### **ABSTRACT**

The first of several government antitrust cases targeting Google soon will be decided. The government charged that Google unlawfully maintained a monopoly over internet search, in violation of the Sherman Act. Principally at issue in the case are partnerships Google entered into with Apple and others to promote the use of Google’s search engine, and thus increase Google’s advertising revenue. Controlling precedent required the government to prove that Google did not compete on the merits in entering into these partnerships and thus harmed the competitive process. The article argues that the government failed to prove this and wrongly disclaimed the need to do so. Google was the logical choice when its partners sought to promote one search engine over others, and partnering with Google allowed them to share in the bounty of search advertising revenue.

### **METADATA**

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## Harm to the Competitive Process in the *Google* Case

Two complaints<sup>1</sup> filed in the District of Columbia federal court alleged that Google violated Section 2 of the Sherman Act<sup>2</sup> by maintaining a monopoly through exclusionary conduct.<sup>3</sup> The cases were consolidated and tried in the fall of 2023. Posttrial papers were filed in early 2024,<sup>4</sup> and closing arguments were heard May 2–3. As is often true in antitrust cases, the parties differed not so much on the basic facts as on their meaning and on the attendant litigation burdens.

The defendant is the world’s leading provider of internet search. Brilliant ideas and hard work brought Google enormous success,<sup>5</sup> and the complaints allege that Google acquired monopoly power in three related relevant markets—general search services,<sup>6</sup> search advertising, and search text advertising.<sup>7</sup> The plaintiffs are the federal government and many states, and they are collectively referred to as “Plaintiffs.”<sup>8</sup>

The “mere possession of monopoly power” is not unlawful.<sup>9</sup> At issue is whether Google improperly maintained monopoly power. The key legal precedent is the 2001 en banc decision of the DC Circuit in *United States v. Microsoft Corp.*, which held that the sine qua non of unlawful monopoly maintenance is “exclusionary conduct.”<sup>10</sup> And to “be condemned as exclusionary,” the court held that conduct must have an “anticompetitive effect,” i.e., “it must harm the competitive process,” and “harm to one of more competitors will not suffice.”<sup>11</sup>

This paper addresses whether the conduct challenged in the *Google* case harmed the competitive process, and whether Plaintiffs carried the burden *Microsoft* placed upon them to prove that it did. This paper confines attention to the conduct that was the main focus of the trial—partnerships through which Google promoted the use of its search engine.

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<sup>1</sup> *United States v. Google LLC*, No. 20-cv-3010 (filed Oct. 20, 2020); *Colorado v. Google LLC*, No. 20-cv-3715 (filed Dec. 17, 2020). The consolidated case docket is available at [www.courtlistener.com/docket/18552824/united-states-of-america-v-google-llc/](http://www.courtlistener.com/docket/18552824/united-states-of-america-v-google-llc/).

<sup>2</sup> 15 U.S.C. § 2.

<sup>3</sup> Plaintiffs were imprecise about when and how Google began violating Section 2. In an April 2023 pretrial hearing, Plaintiffs’ counsel repeatedly stated that Google had been violating Section 2 for at least 12 years, placing the onset of allegedly unlawful conduct in early 2011, if not sooner. Tr. of Hr’g on Mots. for Summ. J. Procs. at 47–95, *United States v. Google LLC*, ECF No. 580 (Apr. 13, 2023). When the court asked Plaintiffs’ counsel when Google began violating Section 2, the response was that “it happened after Google’s market share and Google’s power crested over a certain point and it became a monopolist.” *Id.* at 71–72.

<sup>4</sup> The facts recited below were culled primarily from the parties’ proposed findings of fact, which totaled 1,153 pages. The public record is redacted, especially as to numbers related to nonparties.

<sup>5</sup> See, e.g., Danny Sullivan, *The Google Decade: Search in Review, 2000 to 2009*, SEARCH ENGINE LAND (Feb. 1, 2010), [searchengineland.com/the-google-decade-search-in-review-2000-to-2009-34830](http://searchengineland.com/the-google-decade-search-in-review-2000-to-2009-34830).

<sup>6</sup> Delineation of the relevant market for search services is complicated by the fact that they are not sold. The analysis must focus on the means through which a monopoly in search services would be monetized—the sale of advertising.

<sup>7</sup> Search text ads appear in response to search queries and are formatted just as organic search hits. Search advertising is a broader construct consisting of both text ads and product listing ads, which include product images.

<sup>8</sup> *United States v. Google LLC* initially had 11 state co-plaintiffs, and an amended complaint added three. *Colorado v. Google LLC* has 38 co-plaintiff states and territories. The main difference between the cases is that only the *Colorado* case alleges exclusionary conduct in advertising markets.

<sup>9</sup> *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

<sup>10</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc).

<sup>11</sup> *Id.* at 58 (emphasis omitted).

Part I presents the background without going into detail or resolving factual disputes, and Part II examines governing legal principles. While emphasizing the DC Circuit’s *Microsoft* opinion, Part II considers the case law more generally and reviews the development of the law from the drafting of Section 2 to the present.

Part III analyzes facts and arguments bearing on whether Google harmed the competitive process. Part III begins by debunking Plaintiffs’ contention that a special standard applies to Google’s partnerships under the rubric of “exclusive dealing,” and then explains why this case does not present the classic exclusive dealing scenario. Part III further explains how Plaintiffs failed to satisfy the burden *Microsoft* imposed on them. Part IV concludes with predictions of how the court is apt to rule on the various issues presented.

## I. Background

Computer and smartphone users typically access the internet through applications called “browsers.” Internet search with a browser (or other search application) is conducted through a “general search engine” to which user queries are directed. Browsers generally are designed to facilitate user choice among search engines,<sup>12</sup> but they are configured with a default search engine to deliver full functionality out of the box.

Although computer and smartphone users derive great value from internet search,<sup>13</sup> they pay nothing for it.<sup>14</sup> The development of both browsers and search engines is supported by search advertising, which in 2023 generated US revenue of \$88.8 billion.<sup>15</sup>

Search-engine developers are paid to deliver relevant ads in response to certain search queries. A search-engine developer increases its advertising revenue by increasing its usage, which the developer does by improving the user experience and expanding distribution. The most efficient means of distributing a search engine is to make it the default in a browser.<sup>16</sup>

Microsoft made its Bing the default in its browsers Internet Explorer and Edge, and Google made Google Search the default in Google Chrome. Apple and Mozilla, which developed Safari and Firefox, did not develop search engines. Instead, they rented out default status in their browsers for a share of the advertising revenue consequently earned by the tenant search engine.

Search-engine developers pay for default status to boost usage, and it works because many users stick with the defaults. Browser users generally can change the default search engine quite easily, but some users are unaware that they have a choice, and many users trust that the browser developer selected a high-quality search engine.

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<sup>12</sup> The DuckDuckGo browser requires use of its native search engine, but the DuckDuckGo search engine can be used with another browser.

<sup>13</sup> Surveys conducted in 2016 and 2017 found that Americans valued access to search engines more than access to email or smartphones. See Erik Brynjolfsson, Avinash Collis & Felix Eggers, *Using Massive Online Choice Experiments to Measure Changes in Well-Being*, 116 PROC. NAT’L ACAD. SCI. 7250 (2019).

<sup>14</sup> The Neeva search engine launched in June 2020 with a subscription model and no advertising. Despite high quality, Neeva could not generate sufficient revenue and shut down. Def.’s Proposed Findings of Fact at 155–61, ECF No. 910, Pl.’s Proposed Findings of Fact at 12, 25, ECF No. 906, *United States v. Google LLC*.

<sup>15</sup> INTERACTIVE ADVERTISING BUREAU & PRICEWATERHOUSECOOPERS INT’L, INTERNET ADVERTISING REVENUE REPORT: FULL YEAR 2023, at 17 (Apr. 16, 2024), <https://www.iab.com/insights/internet-advertising-revenue-report-2024/>.

<sup>16</sup> Plaintiffs asserted that “defaults are the most important and efficient method of distributing general search engines.” Pls.’ Post-Trial Br. 42, ECF No. 905, *United States v. Google LLC*. Plaintiffs devoted 28 pages of proposed findings to this point. Pls.’s Proposed Findings of Fact at 300–28.

Apple is a major distributor of search engines through the pre-installation of its Safari browser on Apple devices. In 2002, Google began cooperating with Apple through the Information Services Agreement (ISA). To give users the best experience out of the box, Safari was configured under the ISA to direct search traffic to Google. And Google began sharing revenue with Apple when the ISA was amended in 2005.<sup>17</sup>

Google was Safari's default search engine when Apple released the first iPhone in 2007, although users were able easily to switch to Yahoo!. Having the best default search engine was part of Apple's commitment to providing the best user experience out of the box, and Google initially did not pay for default status in Safari on iPhones.<sup>18</sup>

Plaintiffs' posttrial filings focused on the ISA's eighth amendment,<sup>19</sup> which took a year to negotiate<sup>20</sup> and went into effect in 2016. The 2016 ISA specifies that Apple devices must have Google Search set as Safari's default search engine, and Google pays Apple 36 percent of its gross revenue from Safari search queries. Safari is configured so that iPhone users can change the default search engine with just four taps, and they can just as easily install another browser through the App Store.

In 2021, Google paid its partners \$26.3 billion for distribution.<sup>21</sup> Google paid Apple approximately \$20 billion in 2022.<sup>22</sup> Google paid Mozilla and other browser developers more than \$150 million in 2020, which accounted for approximately 80 percent of Mozilla's revenue.<sup>23</sup>

In the Android world, both device manufacturers and wireless carriers distribute search engines. Google's Mobile Application Distribution Agreements (MADAs) with manufacturers oblige them to preinstall a suite of apps including Google Chrome and Google Search. Users cannot delete some apps in the suite, including those two, but the MADAs do not restrict the preloading of any other apps.

Google has Revenue Share Agreements (RSAs) with makers of Android phones and wireless carriers, which retail most Android phones.<sup>24</sup> The terms of Google's RSAs vary across partners and devices. Partners' shares of the advertising revenues depend on how they preference Google's search engine. To get that maximum revenue share, partners must make Google Search the only out-of-the box default.

About half of US search queries go to Google as a default secured in one of its partnerships:<sup>25</sup> Google gets 28 percent of all queries through the Apple partnership, 19.4 percent through partnerships in the Android ecosystem, and 2.3 percent through partnerships with other browser developers.<sup>26</sup> Google gets another 40 percent of US search queries through user-downloaded instances of Chrome and browsers (mainly Internet Explorer and Edge) in which users changed the default search engine to Google.

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<sup>17</sup> Def.'s Proposed Findings of Fact at 365–73.

<sup>18</sup> *Id.* at 365–71, 373–74.

<sup>19</sup> Pls.' Proposed Findings of Fact at 77–81.

<sup>20</sup> Def.'s Proposed Findings of Fact at 378–82.

<sup>21</sup> Pls.' Proposed Findings of Fact at 325.

<sup>22</sup> *Id.* at 325.

<sup>23</sup> *Id.* at 326–27.

<sup>24</sup> Def.'s Proposed Findings of Fact at 451–52.

<sup>25</sup> *Id.* at 331. The defaults account for only 36 percent of Google's advertising revenue. *Id.* at 333.

<sup>26</sup> Pls.' Post-Trial Br. 49.

Plaintiffs asserted three theories to explain how these partnerships unlawfully maintain Google’s monopoly. Although the partnerships are not traditional exclusive contracts, Plaintiffs argued that default status confers such an advantage that the partnerships operate as de facto exclusive dealing,<sup>27</sup> blocking search-engine competition in about half of the market.<sup>28</sup>

Plaintiffs also contended that Google’s partnerships deprived rival search engines of “scale necessary to compete effectively with Google.”<sup>29</sup> Plaintiffs contend that greater “scale,” i.e., more usage, results in greater quality and that, “By controlling search defaults, Google ensures that it has—and will always have—more scale than any other general search engine.”<sup>30</sup>

Finally, Plaintiffs contended that Google’s partnership with Apple keeps Apple from entering the market for general search-engine services. A large part of the contention is the argument that Google’s payments to Apple under the ISA “incentivize” Apple not to develop a search engine.<sup>31</sup>

## II. The Law of Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it unlawful to “monopolize,” but competition on the merits does not violate Section 2 even if it creates or maintains a monopoly. A firm violates Section 2 “only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct” as opposed to growth “as a consequence of a superior product, business acumen, or historic accident.”<sup>32</sup>

### A. Identifying exclusionary conduct

From the moment the Senate Judiciary Committee added Section 2 to Senator Sherman’s bill,<sup>33</sup> Section 2 has been understood to distinguish exclusionary conduct from competition on the merits. Committee chair George F. Edmunds (R-VT) explained that success “by virtue of . . . superior skill” was not prohibited.<sup>34</sup> And committee member George F. Hoar (R-MA) added that “to monopolize” was to use “means which made it impossible for other persons to engage in fair competition.”<sup>35</sup>

Courts understood Section 2. In 1892, a court was “certain” that Section 2 did not prohibit obtaining a monopoly “by legitimate means.”<sup>36</sup> In 1903, a court held that Section 2 did not

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<sup>27</sup> “Generally, a prerequisite to any exclusive dealing claim is an agreement to deal exclusively. An express exclusivity requirement, however, is not necessary because we look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement ‘in the real world.’ Thus, *de facto* exclusive dealing claims are cognizable under the antitrust laws.” *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (citations omitted).

<sup>28</sup> Pls.’ Post-Trial Br. 35–51.

<sup>29</sup> *Id.* at 29–33.

<sup>30</sup> *Id.* at 7, 57–74.

<sup>31</sup> *Id.* at 33. Other parts of the argument are much more granular and relate to particular contractual provisions.

<sup>32</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

<sup>33</sup> On the legislative history of the Sherman Act, see GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES* 25–39 (2020).

<sup>34</sup> 21 CONG. REC. 3151–52 (1890).

<sup>35</sup> *Id.* at 3152.

<sup>36</sup> *In re Greene*, 52 F. 104, 115 (C.C. S.D. Ohio 1892).

prohibit “the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same.”<sup>37</sup>

The 1906 complaint in the landmark *Standard Oil* case challenged only “unfair methods of competition,”<sup>38</sup> and the 1911 Supreme Court decision in the case repeated that phrase.<sup>39</sup> The Court explained that Standard Oil maintained “dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed.”<sup>40</sup>

At the time of the *Standard Oil* decision, “unfair competition” was distinguished from “fair competition.” The most prominent writer on antitrust policy was economist John Bates Clark, who wrote in 1912 that “unfair competition” included “any practice whose natural result is to make survival depend on other qualities than industrial efficiency.”<sup>41</sup>

Economist William S. Stevens published a 1914 article titled “Unfair Competition” which explained:

Fair competition in an economic sense signifies a competition of economic or productive efficiency. . . . If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given.<sup>42</sup>

Stevens’s timely article was cited several times in the contemporaneous Senate debate on the Federal Trade Commission Act.<sup>43</sup>

In one of the first cases to apply the *Standard Oil* decision,<sup>44</sup> the court opined that “to monopolize” under Section 2 meant “to exclude” by means other than “efficiency in producing and marketing a better and cheaper article than any one else.”<sup>45</sup> The court stressed that there was no Section 2 violation if “all competitors . . . enjoy[ed] the free opportunity” to compete.<sup>46</sup>

Leading antitrust scholar Donald F. Turner argued that Section 2 asks whether “the conduct creating or maintaining a monopoly consisted of competition on the merits, such as superior skill, superior products, and superior efficiency.”<sup>47</sup> A few years later, the influential Areeda-Turner treatise asserted that exclusionary conduct “comprehends at the most behavior that not only

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<sup>37</sup> *Whitwell v. Cont’l Tobacco Co.*, 125 F. 454, 462 (8th Cir. 1903).

<sup>38</sup> See Complaint at 97, 173–74, 176, 178, 181–82, *United States v. Standard Oil Co. of N.J.*, 173 F. 177 (C.C. E.D. Mo. 1909) (Equity No. 5371, Nov. 15, 1906).

<sup>39</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 43 (1911) (referring to “unfair methods of competition, such as local price cutting at the points where necessary to suppress competition”).

<sup>40</sup> *Id.* at 75.

<sup>41</sup> JOHN BATES CLARK & JOHN MAURICE CLARK, *THE CONTROL OF TRUSTS* 103 (1912).

<sup>42</sup> William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282, 282–83 (1914).

<sup>43</sup> On the legislative history of the FTC Act, see Gregory J. Werden, *Unfair Methods of Competition under Section 5 of the FTC Act: What Is the Intelligible Principle?*, 85 ANTITRUST L.J. 819, 825–40 (2024).

<sup>44</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

<sup>45</sup> *Patterson v. United States*, 222 F. 599, 619 (6th Cir. 1915).

<sup>46</sup> *Id.* at 620–21.

<sup>47</sup> Donald F. Turner, *The Scope of “Attempt to Monopolize,”* 30 REC. ASS’N B. CITY N.Y. 487, 494 (1975). Turner arguably was the leading antitrust scholar.

(1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”<sup>48</sup>

The Supreme Court adopted the Areeda-Turner definition of exclusionary conduct in the *Aspen Skiing* decision,<sup>49</sup> and appellate courts have echoed the definition.<sup>50</sup> *Aspen Skiing* also declared, “If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory.”<sup>51</sup>

In *Aspen Skiing*, the Supreme Court upheld the jury finding that the defendant’s conduct violated Section 2. The Court explained that the defendant “was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”<sup>52</sup>

The *Aspen Skiing* decision inspired the “no economic sense” test for exclusionary conduct:

If conduct allegedly threatens to create a monopoly because of a tendency to exclude existing competitors, the test is whether the conduct likely would have been profitable if the existing competitors were not excluded and monopoly was not created. If conduct allegedly maintains a monopoly because of a tendency to exclude nascent competition, the test is whether the conduct likely would have been profitable if the nascent competition flourished and the monopoly was not maintained.<sup>53</sup>

Several appellate decisions support the no economic sense test.<sup>54</sup>

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<sup>48</sup> 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626c, at 78–79 (1978).

<sup>49</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985).

<sup>50</sup> *Retractable Tech., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891–92 (5th Cir. 2016) (“Predatory or anticompetitive conduct . . . is conduct, other than competition on the merits . . . , that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. Further, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” (internal quotation marks, brackets, and citation omitted)); *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (“Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.”); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188–89 (2d Cir. 1992) (Section 2 distinguishes “between conduct that defeats a competitor because of efficiency and consumer satisfaction, and conduct that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” (internal quotation marks omitted)); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) (“What section 2 *does* prohibit is ‘exclusionary’ conduct by a monopoly, often defined as behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” (internal quotation marks omitted)).

<sup>51</sup> *Aspen Skiing*, 472 U.S. at 605 (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 138 (1979)).

<sup>52</sup> *Id.* at 610–11. “*Aspen Skiing* is at or near the outer boundary of § 2 liability.” *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

<sup>53</sup> Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test*, 73 ANTITRUST L.J. 413, 415 (2006). The United States advocated this test in *Microsoft* and other cases. *See id.* at 413–14 & nn.3–7. The no economic sense test presumes that every marketplace action is rational and enquires into what makes an action profitable. The test is not a sacrifice test; the cost of the conduct to the defendant is immaterial, even if negligible.

<sup>54</sup> *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.) (“conduct must be irrational but for its anticompetitive effect”); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999) (“[A] finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational.”); *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) (“To be labeled anti-competitive, the conduct involved must be such that its ‘anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm’s long term ability to reap the benefits of monopoly power.”) (quoting *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co., Inc.*, 668 F.2d 1014, 1030 (9th Cir. 1981)). The Seventh Circuit endorsed the test as a sufficient condition. *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 461–62 & n.13 (7th Cir. 2020). But the court rejected the test as a necessary condition. *See id.* at 462 n.13 (citing 3 PHILLIP AREEDA & HERBERT



The foregoing historical review demonstrates that competition on the merits does not violate Section 2. And since the plaintiff always bears the burden of proof, it falls to the plaintiff to show that challenged conduct is not competition on the merits and thus harms the competitive process itself, rather than merely harming a competitor. This is precisely what the DC Circuit held in *Microsoft*.<sup>55</sup>

### **B. The Microsoft decision**

Like *Google*, *Microsoft* concerned the digital economy and allegations of monopoly maintenance. The DC Circuit held that, “to be condemned as exclusionary” under Section 2 of the Sherman Act, the challenged conduct must have an “anticompetitive effect,” i.e., “it must harm the competitive *process*.”<sup>56</sup> And the court emphasized that “harm to one of more *competitors* will not suffice.”<sup>57</sup>

The DC Circuit court stressed that it is the plaintiff “on whom the burden of proof rests.”<sup>58</sup> And the court explained that the “plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect.”<sup>59</sup> The defendant can rebut a prima facie case with “a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”<sup>60</sup>

By using the verbs “proffer” and “assert” to describe what the defendant must do before “the burden shifts back to the plaintiff to rebut the claim,”<sup>61</sup> the DC Circuit suggested a light burden of justification for defendants. And the court noted that the “plaintiff bears the burden . . . of rebutting a proffered justification.”<sup>62</sup> Moreover, the court did not condemn any practice for which Microsoft asserted a procompetitive justification.<sup>63</sup>

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HOVENKAMP, ANTITRUST LAW ¶ 651b3 at 106-07 (4th ed. 2015); 3B PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772c2 at 223, ¶ 114a at 148 (4th ed. 2015)).

The no economic sense test has been endorsed as a sufficient condition by the Court of Justice of the European Union under Article 102 TFEU. See Case C-377/20, Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2022:379, ¶ 77 (“Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits . . . .”) (May 12, 2022).

<sup>55</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

<sup>56</sup> *Id.* at 58.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* The court used the words “demonstrate” and “show” without otherwise characterizing the weight of the plaintiff’s initial burden.

<sup>59</sup> *Id.* at 59.

<sup>60</sup> *Id.* The court observed that Microsoft had put forward no procompetitive justification for some of the challenged practices. *Id.* at 66 (“excluding IE [Internet Explorer] from the Add/Remove Programs utility and commingling browser and operating system code”), 71 (“exclusive dealing contracts with IAPs [internet access providers]”), 71–74 (“exclusive deals” with independent software vendors), 75–76 (exclusivity provisions of the “First Wave Agreements” distributing Microsoft’s Java Virtual Machine (“JVM”)), 76–77 (“campaign to deceive developers” of software to run on Java).

<sup>61</sup> *Id.* at 59.

<sup>62</sup> *Id.* at 67.

<sup>63</sup> *Id.* (“causing Windows to override the user’s choice of a default browser in certain circumstances”), 68 (offering IE and an IE Access Kit free to internet access providers), 74–75 (developing “a high-performance JVM”).

The DC Circuit did not, in so many words, articulate a principle for identifying an anticompetitive effect, but the court characterized the judgment under review as finding that “Microsoft maintained its [monopoly] power not through competition on the merits, but through unlawful means.”<sup>64</sup> And the court’s assessment of some of Microsoft’s practices concluded that they contributed to the maintenance of monopoly and were not “competition on the merits,” while making clear that justification was a distinct issue.<sup>65</sup>

The court condemned other practices without referring specifically to “competition on the merits,” but the court’s rationales implied that they were not competition on the merits.<sup>66</sup> And the court asserted that the case was “about Microsoft’s efforts to maintain [its monopoly power] through means other than competition on the merits.”<sup>67</sup>

Finally, the DC Circuit provided the next best thing to a test for anticompetitive conduct by holding that a practice is lawful if it is “a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”<sup>68</sup> Most other circuits also have held that competition on the merits is always lawful under Section 2.<sup>69</sup>

### ***C. Google’s motion for summary judgment***

Relying on *Microsoft*, Google moved for summary judgment, arguing that Plaintiffs must show “that Google has engaged in conduct other than ‘competition on the merits’ with a resulting ‘anticompetitive effect’ in order to state a ‘*prima facie* case under § 2’ of exclusionary conduct.”<sup>70</sup>

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<sup>64</sup> *Id.* 50; *see id.* at 56 (“this case is . . . about Microsoft’s efforts to maintain [its monopoly power] through means other than competition on the merits”).

<sup>65</sup> *Id.* 62 (a licensing restriction on the initial boot sequence was “anticompetitive” because it had “a substantial effect in protecting Microsoft’s market power . . . through a means other than competition on the merits”), 65 (the exclusion of Internet Explorer from the Add/Remove utility was “something other than competition on the merits” and was “anticompetitive” because it helped in “protecting its own operating system monopoly”).

<sup>66</sup> *See id.* 61 (“the prohibition upon the removal of desktop icons, folders, and Start menu entries” barred PC manufacturers from “pre-installing a rival browser”), 62 (restrictions on altering the desktop “reduced rival browsers’ usage share . . . by preventing . . . actions that could increase rivals’ share of usage”), 66 (“overriding the user’s choice of a browser other than IE as his or her default browse” was the antithesis of competition on the merits), 66–67 (commingling of the Windows and IE code deterred PC manufacturers “from pre-installing rival browsers”), 70–71 (browser exclusive dealing agreements with internet access providers “helped keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly”), 75–76 (exclusivity provisions of the “First Wave Agreements” distributing Microsoft’s JVM “seriously impeded distribution of Sun’s JVM”), 76–77 (intentional deception of Java developers was designed “to thwart Java’s threat to Microsoft’s monopoly in the market for operating systems”), 77–78 (threatening Intel to induce its end to support of Sun’s Java JVM plainly was not on the merits).

<sup>67</sup> *Id.* at 56.

<sup>68</sup> *Id.* at 59.

<sup>69</sup> *See* FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 463–64 (7th Cir. 2020); Retractable Tech., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 892–93 (5th Cir. 2016); New York v. Actavis PLC, 787 F.3d 638, 652 (2d Cir. 2015); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007); Monsanto Co. v. Scruggs, 459 F.3d 1328, 1338–39 (Fed. Cir. 2006); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1110 (1st Cir. 1989).

<sup>70</sup> Def.’s Mem. of P. & A. in Supp. of Def.’s Mot. for Summ. J. at 24, United States v. Google LLC, ECF 451 (Dec. 12, 2022) (punctuation altered). At a hearing on the motion, Google contended that Plaintiffs were required to show that challenged conduct was not “the product of competition on the merits” because “conduct that is pro-competitive or conduct that is a superior product or competition on the merits cannot, as a matter of law, violate the antitrust laws, regardless of its effect.” Tr. of Hr’g on Mots. for Summ. J. Proceedings at 6–7, United States v. Google LLC, ECF 580 (Apr. 13, 2023).

And Google contended that “undisputed facts confirm” that it did not engage in exclusionary conduct.<sup>71</sup>

Although Judge Mehta denied the motion, he did not explicitly reject Google’s contention.<sup>72</sup> But neither did he reject Plaintiffs’ view “that even conduct that is typically thought of as competition on the merits still could be anticompetitive depending on the circumstances. For example, price cutting, though ordinarily procompetitive, can be anticompetitive if done for a predatory purpose.”<sup>73</sup>

Judge Mehta concluded that “the *prima facie* case boils down to one fundamental question: Has the plaintiff shown that the monopolist’s conduct harmed competition? Plaintiffs are not required to make a further showing that the challenged conduct by its nature is anticompetitive.”<sup>74</sup> Judge Mehta did not indicate how Plaintiffs could prove harm to competition, rather than to competitors, without “showing that the challenged conduct is by its nature anticompetitive.”

Judge Mehta’s summary judgment opinion preliminarily examined Google’s partnerships under the rubric of exclusive dealing, reading *Microsoft* this way: “For each exclusive agreement, at the *prima facie* stage, the Circuit simply determined whether the exclusive agreement foreclosed a substantial share of the market. If it did, the court looked to Microsoft to provide a procompetitive justification.”<sup>75</sup> But this reading is difficult to square with either what the DC Circuit did or what it said.

The DC Circuit considered several sorts of exclusive dealing agreements in *Microsoft*. The court quickly passed over the exclusive deals with internet content providers without mentioning a foreclosure share. The court merely pointed to the trial court’s finding that the plaintiffs had failed to demonstrate “a substantial effect on competition.”<sup>76</sup>

With respect to deals with internet access providers (IAPs), the DC Circuit held that the plaintiffs made out a *prima facie* case. The court termed the foreclosure “substantial” but cited no foreclosure share. Instead, the court held that plaintiffs “demonstrated a harm to competition” by showing that the exclusive deals with IAPs “help[ed] keep usage of [Netscape’s] Navigator below the critical level necessary . . . to pose a real threat to Microsoft’s monopoly.”<sup>77</sup>

With respect to exclusive deals with independent software vendors (ISVs), the DC Circuit also held that the plaintiffs made out a *prima facie* case. The court held that deals “had a substantial effect in further foreclosing rival browsers from the market.”<sup>78</sup> The DC Circuit noted that the

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<sup>71</sup> Def.’s Mem. of P. & A. in Supp. of Def.’s Mot. for Summ. J. at 25.

<sup>72</sup> Mem. Op. at 22–23, *United States v. Google LLC*, ECF 626 (Aug. 3, 2023).

<sup>73</sup> *Id.* at 23 (citation omitted). In focusing on “purpose,” Plaintiffs contradicted well-established law. The Supreme Court had held that an improper purpose never makes price cutting unlawful. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . .”). Moreover, *Microsoft* had held that “our focus is upon the effect of that conduct, not upon the intent behind it.” *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc).

<sup>74</sup> Mem. Op. at 23. Because Judge Mehta did not set out the requisite showing, the law of the case is only that Plaintiffs need not show that the challenged conduct is, by nature, anticompetitive. *Cf. Arizona v. California*, 460 U.S. 605, 618 (1983) (“As most commonly defined, the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”).

<sup>75</sup> Mem. Op. at 37 (citing *Microsoft*, 253 F.3d at 71–74).

<sup>76</sup> *Microsoft*, 253 F.3d at 71.

<sup>77</sup> *Id.* at 70–71

<sup>78</sup> *Id.* at 72.

district court “did not specifically identify what share of the market for browser distribution the exclusive deals with the ISVs foreclosed.”<sup>79</sup>

Finally, the DC Circuit held that the plaintiffs made out a prima facie case with respect to Microsoft’s deal with Apple. The deal foreclosed none of the relevant market, since the Apple universe was outside that market.<sup>80</sup> The court, nevertheless, held that the plaintiffs made out a prima facie case by demonstrating “a substantial effect upon the distribution of rival browsers,” which “serves to protect Microsoft’s monopoly.”<sup>81</sup>

Judge Mehta’s characterization of the DC Circuit’s analysis is even more difficult to square with the *Microsoft* opinion as a whole. The DC Circuit set out general principles for Section 2 cases, one of which was that “harm to one of more *competitors* will not suffice” to prove the requisite harm to competition.<sup>82</sup> But foreclosure of a substantial share of the market, without more, proves only harm to competitors.

Because the DC Circuit did not address explicitly whether Microsoft’s exclusive deals were competition on the merits, Judge Mehta inferred that the court reserved the issue for rebuttal. But the court prefaced its assessment of individual practices with the statement that the case was about Microsoft’s monopoly maintenance “through means other than competition on the merits.”<sup>83</sup> And the court held that some conduct was not competition on the merits before considering Microsoft’s rebuttal.<sup>84</sup>

Finally, Judge Mehta did not note the limited role *Microsoft* assigned to foreclosure percentages: “Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function.”<sup>85</sup> The court thus held that insubstantial foreclosure proves the absence of harm to competition, and not that substantial foreclosure is prima facie proof of harm to competition.

At closing argument, however, Judge Mehta related the correct reading of *Microsoft*<sup>86</sup> and repeatedly asked whether Plaintiffs’ position was that a foreclosure showing alone was sufficient to make out a prima facie case. Plaintiffs’ counsel repeatedly declined the invitation to acknowledge that more was required.<sup>87</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 52.

<sup>81</sup> *Id.* at 73–74.

<sup>82</sup> *Id.* at 58.

<sup>83</sup> *Id.* at 56.

<sup>84</sup> See *supra* note 66 and accompanying text.

<sup>85</sup> *Microsoft*, 253 F.3d at 69.

<sup>86</sup> Tr. Bench Trial Closing Arg. Proceedings at 89–90 (“foreclosure is the first step . . . , it’s a screening function”), 94 (“*Microsoft* clearly says foreclosure is simply a screening device to make sure we’ve actually got contracts that are potentially anti-competitive. You then need to show something more, actual anti-competitive effects, in addition to foreclosure.”), 135 (“I think *Microsoft* says they’ve got to show more than foreclosure. Foreclosure is a screen.”).

<sup>87</sup> *Id.* at 89–90, 94–97, 203–06, 431–34, 623. Plaintiffs’ counsel asserted that a subsequent district court opinion in the *Microsoft* case characterized the DC Circuit’s opinion as holding that foreclosure alone was a sufficient basis for condemning exclusive deals. *Id.* at 623 (citing *New York v. Microsoft*, 224 F. Supp. 2d 76, 168, 174 (D.D.C. 2002)). What the district court indicated, however, was that foreclosure was necessary, not that it was sufficient.

#### D. Causation

Section 2 of the Sherman Act does not prohibit monopoly.<sup>88</sup> Nor does it prohibit exclusionary conduct when monopoly is not created, maintained, or even threatened.<sup>89</sup> The “offense of monopolization has two elements: ‘(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’”<sup>90</sup>

Element (2) combines ends and means: The ends are the “acquisition” and “maintenance” of monopoly power, while the means are “willful” conduct distinct from “a superior product, business acumen, or historic accident.” Ends and means are a single element because neither has significance alone and they must be causally related.

*Microsoft* articulated a “rather edentulous test for causation”—that the conduct at issue “is reasonably capable of contributing significantly to a defendant’s continued monopoly power.”<sup>91</sup> The DC Circuit was adamant that liability in a Section 2 action seeking only injunctive relief should not “turn on a plaintiff’s ability or inability to reconstruct the hypothetical marketplace absent a defendant’s anticompetitive conduct.”<sup>92</sup> Thus, the court held that the “exclusion of nascent threats” to Microsoft’s monopoly satisfied the causation requirement.<sup>93</sup>

When causation came up at a *Google* pre-trial hearing, Plaintiffs’ counsel asserted, “*Microsoft* basically says that we don’t have to show causation.”<sup>94</sup> He added: “All the Court has to do is ‘Monopolist, yes. Anti-competitive conduct, exclusionary conduct, yes.’ At that point, the burden is on Google. Show us why it’s okay.”<sup>95</sup> In posttrial filings, Plaintiffs asserted that they need demonstrate only “monopoly power” and “‘anticompetitive’ or ‘exclusionary’ conduct.”<sup>96</sup> But Plaintiffs were wrong.

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<sup>88</sup> See *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”).

<sup>89</sup> See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (“§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in ‘unfair’ or ‘predatory’ tactics.” (citation omitted)); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767–68 (1984) (“In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization.”).

<sup>90</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001) (en banc) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

<sup>91</sup> *Id.* at 79. Essentially the same test was adopted by two other circuits. See *McWane, Inc. v. FTC*, 783 F.3d 814, 839 (11th Cir. 2015); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

<sup>92</sup> *Microsoft*, 253 F.3d at 79. Plaintiffs rely on *Microsoft* for the proposition that all that matters for purposes of a prima facie case is whether Google’s practices limit “rivals’ opportunities in the current world.” Pls.’ Proposed Conclusions of Law at 22. But if a prima facie case is so easily made out, it is just as easily rebutted. *Cf.* *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 213 (D.D.C. 2017), *aff’d* 855 F.3d 345 (D.C. Cir. 2017) (“The standard for the quantum of evidence defendants must produce to shift the burden back is relatively low” in merger cases, in which plaintiffs can make out a prima facie case through little more than market shares.). Plaintiffs always have the ultimate burden of persuasion.

<sup>93</sup> *Microsoft*, 253 F.3d at 79.

<sup>94</sup> Tr. of Hearing on Mots. for Summ. J. Proceedings at 86.

<sup>95</sup> *Id.* at 86–87.

<sup>96</sup> Pl.’s Proposed Conclusions of Law at 1.

*Microsoft*'s "edentulous test for causation" does have bite. The *Google* Plaintiffs had to show roughly what *Microsoft* plaintiffs showed—that Google's exclusionary conduct squelched a significant threat to its monopoly. A court might take for granted that Google's monopoly was threatened by search-engine rivals, but Plaintiffs claimed to prove that Google's monopoly was invulnerable.

Plaintiffs sought to hold exclusionary conduct responsible for maintaining Google's substantial quality lead over rival search engines. Toward that end, Plaintiffs identified many links between usage, which they termed "scale," and search-engine quality, and they argued that the quality benefits of scale are inexhaustible. In posttrial filings, Plaintiffs claimed that "scale is vital for search quality and necessary to compete."<sup>97</sup>

Plaintiffs argued, "By controlling search defaults, Google ensures that it has—and will always have—more scale than any other general search engine. This scale gives Google an impenetrable advantage . . . ."<sup>98</sup> But if "more scale" generates an "impenetrable advantage," Google's monopoly was assured without resort to the alleged exclusionary conduct.

Plaintiffs' evidence shows that, in 2010, Google's share of general-search-engine usage was about 80 percent, while the shares of its closest rivals, Bing and Yahoo!, were both about 10 percent.<sup>99</sup> That gave Google a 4:1 scale advantage, since Bing performed searches on Yahoo! under the terms of a 2010 agreement with Microsoft.<sup>100</sup>

Plaintiffs did little to prove that the conduct to which they object prevented erosion of Google's scale advantage. Google's posttrial filings observed that, "Plaintiffs' experts have not offered the opinion that Apple, Mozilla, and other third-party browsers under contract with Google would have chosen to use a different default search provider but for the challenged provisions in the agreements with Google."<sup>101</sup>

If Google were stripped of its default status, the trial evidence indicates that its scale advantage would remain. Regulators in Europe required browser users to select search engines through choice screens, and yet the aggregate usage share of Google's rivals remained much lower there than in the United States.<sup>102</sup> Plaintiffs' principal economic expert testified that the European experiment indicates that forced use of choice screens would reduce Google's US usage share by just 10 percentage points.<sup>103</sup>

Google Search enjoys a dominant usage share even when Bing enjoys default status. Windows PCs are preloaded with only Microsoft's browser, with Bing set as the default, and yet Google Search accounted for 78 percent of the searches on Windows PCs from 2013 to 2021. Bing accounted for just 14 percent.<sup>104</sup> There are no apparent circumstances under which Google would not have an "impenetrable" scale advantage.

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<sup>97</sup> Pl.'s Post-Trial Br. at 29.

<sup>98</sup> *Id.* at 7. Plaintiffs pointed to numerous distinct ways in which greater scale produces higher quality search and search advertising. Pls.' Proposed Findings of Fact at 338–66. But a Google expert in computer science testified to experiments finding that hardly any of the quality difference between Google and Bing can be attributed to scale. Def.'s Proposed Findings of Fact at 87–96.

<sup>99</sup> Pls.' Proposed Findings of Fact at 190.

<sup>100</sup> Although the agreement doubled Bing's scale, Google contended that its quality did not increase significantly. Def.'s Proposed Findings of Fact at 83–86.

<sup>101</sup> *Id.* at 434.

<sup>102</sup> *Id.* at 436–37.

<sup>103</sup> Pls.' Proposed Findings of Fact at 317–18.

<sup>104</sup> Def.'s Proposed Findings of Fact at 191.

### III. Plaintiffs' Burden in the *Google* Case

#### A. *There is no distinct exclusive dealing standard*

Categorization can be critical under Section 1 of the Sherman Act, which prohibits anticompetitive agreements. Some agreements cannot be justified because they are condemned as per se illegal.<sup>105</sup> For others, a burden of justification is placed on the defendant after just a “quick look” at likely competitive effects.<sup>106</sup> But categorization matters little for single-firm conduct, subject to Section 2 of the Sherman Act. All single-firm conduct is subject to a full assessment comparable to that under the “rule of reason” normally applied under Section 1.<sup>107</sup>

Plaintiffs argued that Google’s partnerships with browser developers and companies in the Android ecosystem should be analyzed as exclusive dealing, although not “only through the lens of exclusive dealing.”<sup>108</sup> And Plaintiffs asserted that, “In the D.C. Circuit, exclusivity and substantial foreclosure are the only elements of a prima facie case of exclusive dealing.”<sup>109</sup>

Plaintiffs correctly observed that *Microsoft* held that a prima facie case is made out by showing that “challenged conduct has an ‘anticompetitive effect,’ meaning that it ‘harm[s] the competitive process.’”<sup>110</sup> But Plaintiffs also contended that exclusive dealing claims are subject to a special standard: While the “general Section 2 standard” focuses on “the competitive process,” a distinct “exclusive-dealing standard” looks only to whether agreements “were exclusive or created substantial foreclosure.”<sup>111</sup>

A distinct “exclusive-dealing standard” did once exist,<sup>112</sup> although not under the Sherman Act. The 1949 *Standard Stations* decision interpreted Section 3 of the Clayton Act<sup>113</sup> to render exclusive dealing per se illegal when applied to “a substantial share” of the market.<sup>114</sup> Justice Robert H. Jackson’s dissent in the case aptly lamented: “If the courts are to apply the lash of the

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<sup>105</sup> See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“Some types are deemed unlawful *per se*. . . Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets. Resort to per se rules is confined to restraints, like those mentioned, that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have manifestly anticompetitive effects.” (citations and internal quotation marks omitted)).

<sup>106</sup> See *Calif. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (An “abbreviated or ‘quick-look’ analysis under the rule of reason” is applied to concerted conduct when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”).

<sup>107</sup> See, e.g., *Leegin*, 551 U.S. at 885 (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” (citation and internal quotation marks omitted)).

<sup>108</sup> Pls.’ Post-Trial Br. at 35–42.

<sup>109</sup> Pls.’ Proposed Conclusions of Law at 16 n.2.

<sup>110</sup> *Id.* at 11.

<sup>111</sup> *Id.* at 14.

<sup>112</sup> Exclusive dealing was not an unreasonable restraint of trade at common law. See *Chi., St. Louis & New Orleans R.R. Co. v. Pullman S. Car Co.*, 139 U.S. 79, 89–90 (1891); *J.W. Co.*, 75 S.C. 378 (1906); *Ferris v. Am. Brewing Co.*, 155 Ind. 539 (1900); *Olmstead v. Distilling & Cattle-Feeding Co.*, 77 Fed. 265 (1896); *Live Stock Ass’n of N.Y. v. Levy*, 54 N.Y. Super. Ct. 32 (1886); *Brown v. Rounsavell*, 78 Ill. 589 (1875).

<sup>113</sup> 15 U.S.C. § 14 (prohibiting the sale or lease of anything on the condition that the purchaser or lessee does “not use or deal in” a competitor’s products where the effect “may be substantially to lessen competition”).

<sup>114</sup> *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949).

antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing.”<sup>115</sup>

In 1957 Professor Milton Handler argued that whether exclusive dealing “intensify[s] competition” or “clog[s] the channels of trade” “cannot be determined by any mathematical formula or by a priori reasoning. Only a factual probe of pertinent economic data gives promise of yielding the correct answer.”<sup>116</sup> The wisdom of Justice Jackson and Professor Handler became the prevailing interpretation of Section 3 of the Clayton Act in the 1961 *Tampa Electric* decision,<sup>117</sup> after which Professor Handler wrote that “the law governing exclusive dealing . . . recognizes that statistics are only the beginning of the inquiry.”<sup>118</sup>

“Despite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws,”<sup>119</sup> and the *Microsoft* decision was not to the contrary.<sup>120</sup> The courts of appeals consistently hold that exclusive dealing is condemned only when the defendant’s conduct is shown to harm the competitive process<sup>121</sup> by unreasonably shutting off part of the marketplace to rivals.<sup>122</sup>

If a distinct “exclusive dealing standard” did exist, it would be applied only after a showing that the challenged practice is apt to harm the competitive process, rather than merely that it takes a particular form. As the court cautioned in one Section 2 exclusive dealing case, “Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form.”<sup>123</sup>

In *Broadcast Music*, the Supreme Court declared: “Literalness is overly simplistic and often overbroad.”<sup>124</sup> The case concerned blanket licensing by copyright collectives under which licensees were entitled to use a collective’s entire repertoire in exchange for a payment unrelated to usage. An appellate court categorized the blanket licenses as price fixing because the collectives acted as a joint selling agent for the rights holders,<sup>125</sup> but the Supreme Court disagreed.

Before categorizing any conduct as price fixing, the Supreme Court explained that the Sherman Act requires a determination of whether its purpose and effect are

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<sup>115</sup> *Standard Stations*, 337 U.S. at 324 (Jackson, J., dissenting).

<sup>116</sup> See MILTON HANDLER, ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION 45 (1957).

<sup>117</sup> *Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320 (1961).

<sup>118</sup> Milton Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 949 (1962).

<sup>119</sup> *E. Food Servs. Inc. v. Pontifical Cath. Univ. Servs. Ass’n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004) (contrasting *Standard Stations* with later cases).

<sup>120</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 72 (D.C. Cir. 2001) (en banc) (“A monopolist, like a competitive firm, may have a perfectly legitimate reason for wanting an exclusive arrangement with its distributors.”).

<sup>121</sup> See, e.g., *In re Epipen (Epinephrine Injection, USP)*, 44 F.4th 959, 983–85 (10th Cir. 2022); *McWane, Inc. v. FTC*, 783 F.3d 814, 827, 832 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270–71 (3d Cir. 2012); *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010); *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 508–09 (2d Cir. 2004); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 393–94 (7th Cir. 1984).

<sup>122</sup> Exclusives of short duration or easy terminability generally have not been viewed as shutting anything off. See, e.g., *Omega Env’t, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163–64 (9th Cir. 1997); *Paddock Publ’ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1997); *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993). Older cases recognized the benefits provided by contracts of non-trivial duration, and upheld exclusives lasting up to a year. See *United States v. Am. Can Co.*, 87 F. Supp. 18, 31 (N.D. Cal. 1949); *Motion Picture Advert. Serv. Co., Inc.*, 47 F.T.C. 378, 392 (1950), *aff’d* *FTC v. Motion Picture Advert. Serv. Co., Inc.*, 344 U.S. 392, 395–96 (1953).

<sup>123</sup> See *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005).

<sup>124</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979).

<sup>125</sup> *Columbia Broad. Sys., Inc. v. Am. Soc’y of Composers, Authors & Pubs.*, 562 F.2d 130, 135–36 (2d Cir. 1977).



to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.<sup>126</sup>

The blanket license was not such a practice. The Court observed that a “substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses.”<sup>127</sup> Blanket licenses were a distinct product that individual rights holders could not offer, so the copyright collectives did not act as agent for the rights holders in negotiating blanket licenses.

In the same vein is *Northwest Wholesale Stationers*,<sup>128</sup> which concerned a purchasing cooperative that expelled a member. An appellate court categorized the expulsion as a per se illegal group boycott.<sup>129</sup> But the Supreme Court held that a “plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.”<sup>130</sup>

In some ways, *Discon*<sup>131</sup> is most on point. The case arose after one of the regional Bell operating companies following the AT&T break-up engaged in fraudulent affiliate transactions to deceive regulators and boost rates. A company that lost business to the affiliate brought a Sherman Act claim, which was dismissed. An appellate court reversed on the basis that the conduct could be categorized as a per se illegal group boycott.<sup>132</sup>

The Supreme Court granted certiorari to address the application of the per se rule against group boycotts.<sup>133</sup> The Court understood a prior decision to have applied the per se rule because of “inferred injury to the competitive process itself from the nature of the boycott,” and the Court declared that “the plaintiff here must allege and prove harm . . . to the competitive process, *i.e.*, to competition itself.”<sup>134</sup>

As in these three Section 1 cases, the *Google* Plaintiffs sought to lighten their burden by placing the case in a special category. And as in those cases, Plaintiffs wrongly presumed that they could bypass the requirement to demonstrate harm to the competitive process. That requirement can be satisfied in various ways, but it cannot be bypassed.

### ***B. Google’s partnerships are not classic exclusive dealing***

Exclusive dealing involves “an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor.”<sup>135</sup> In the classic scenario, the buyer is a

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<sup>126</sup> *Broad. Music*, 441 U.S. at 19–20 (citation and internal quotation marks omitted).

<sup>127</sup> *Id.* at 21–24.

<sup>128</sup> *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

<sup>129</sup> *Pacific Stationery & Printing Co. v. Nw. Wholesale Stationers, Inc.*, 715 F.2d 1393, 1398 (9th Cir. 1983).

<sup>130</sup> *Nw. Wholesale Stationers*, 472 U.S. at 298.

<sup>131</sup> *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

<sup>132</sup> *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1060–61 (2d Cir. 1996).

<sup>133</sup> *Discon*, 525 U.S. at 130 (1998) (citing *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)).

<sup>134</sup> *Id.* at 134–35.

<sup>135</sup> *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010).

distributor and would gain from carrying the goods of multiple vendors,<sup>136</sup> but the defendant vendor bribes the distributor not to do so in order to shut off part of the marketplace to the defendant's rivals.<sup>137</sup>

The classic scenario, however, is not the only one. Distributors could unilaterally decide to deal on an exclusive basis because they have, or are, a scarce resource that cannot be shared,<sup>138</sup> or that is worth more when not shared.<sup>139</sup> In either event, distributors maximize profits by partnering exclusively with the vendor offering the greatest rental payment for the scarce resource.<sup>140</sup> Depending on how one looks at the situation, either the marketplace remains open or never was. In either case, the vendor does not close off part of the marketplace by renting the resource.

Gas stations provide an example, as nearly all of them sell just a single brand of gasoline.<sup>141</sup> Gas stations prominently display the brand of gasoline that they sell and thereby convey useful information to motorists, although the information conveyed is not necessarily about gasoline.<sup>142</sup> At one time, all gasoline brands were owned by petroleum refiners, but many retail chains now sell under their own brands.

When distributors rationally elect to rent out scarce resources on an exclusive basis, antitrust law should be reticent to condemn this business model and deprive the distributors of substantial

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<sup>136</sup> The scenario most analyzed by economic literature posits a monopoly vendor using exclusive dealing to deter entry. See MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS 140–51 (2006); Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388 (1987); Chiara Fumagalli & Massimo Motta, *Exclusive Dealing and Entry, when Buyers Compete*, 96 AM. ECON. REV. 785 (2006); Eric B. Rasmusen, J. Mark Ramseyer & John S. Wiley, Jr., *Naked Exclusion*, 81 AM. ECON. REV. 1137 (1991); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296 (2000).

<sup>137</sup> The need to compensate distributors for granting exclusivity was first noted by Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290, 293 (1956). The need for compensation was confirmed by more rigorous economic analysis. See WHINSTON, *supra* note 136, at 136–39. The need for compensation can make exclusive dealing unprofitable, but need not. See B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POLIT. ECON. 64 (1998); Joseph Farrell, *Deconstructing Chicago on Exclusive Dealing*, 50 ANTITRUST BULL. 465 (2005).

<sup>138</sup> An example is shelf space in stores. See FED. TRADE COMM., REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY (2003); Paula Fitzgerald Bone, Karen Russo France & Richard Riley, *A Multifirm Analysis of Slotting Fees*, 25 J. PUB. POL'Y & MKT'G 224 (2006).

<sup>139</sup> Economic literature has analyzed a scenario of a monopoly distributor (e.g., the only grocery store in town) and two competing vendors. See Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008); David E. Mills, *Buyer-Induced Exclusive Dealing*, 84 S. ECON. J. 66 (2017). Because some customers prefer one vendor's product and some prefer that of the other vendor, the distributor benefits from carrying both vendors' products. But the distributor might benefit even more by using exclusivity as an inducement to extract a payment or low price from one vendor.

<sup>140</sup> This possibility sometimes is recognized under the rubric of "competition for the contract." See *In re Epipen (Epinephrine Injection, USP)*, 44 F.4th 959, 989 (10th Cir. 2022) ("exclusive rebate agreements were a normal competitive tool in the epinephrine auto-injector market to stimulate price competition"); *Race Tires Am. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010) ("It is well established that competition among businesses to serve as an exclusive supplier should actually be encouraged."); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004) ("competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress"); *Paddock Publ'ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42, 45 (7th Cir. 1996) ("Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common.").

<sup>141</sup> A century ago, courts brushed aside the FTC's attacks on single branding by gas stations. See *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); *Standard Oil Co. v. FTC*, 282 Fed. 81 (3d Cir. 1922); *Sinclair Refin. Co. v. FTC*, 276 Fed. 686 (7th Cir. 1921); *Canfield Oil Co. v. FTC*, 274 Fed. 571 (6th Cir. 1921); *Standard Oil Co. of N.Y. v. FTC*, 273 Fed. 478 (2d Cir. 1921). These attacks were premised on the prohibition of "unfair methods of competition" in the FTC Act. 15 U.S.C. § 45(a)(1).

<sup>142</sup> Buc-ee's stations, for example, are known for huge convenience stores and enticing food choices, including brisket.

revenue. Antitrust law should be exceptionally reticent to do so when the distributors are not accused of violating antitrust law and are not given their day in court.

The *Google* Plaintiffs contended that default status in a browser was the “most important and efficient means of” search-engine distribution.<sup>143</sup> But Plaintiffs did not concede the necessary implication, which is that the most important and efficacious funding source for browser development is the strategic use of search-engine default status.<sup>144</sup>

The key background fact in the *Google* case is that browser development is funded by search advertising revenue, which a browser developer taps into by developing a search engine or by partnering with a search-engine developer. Google and Microsoft developed a search engine, while Apple and Mozilla partnered with a search-engine developer.

Internet browsers have default search engines only partly because that secures a share of the search advertising revenue. Every browser developer also determined that it was best to configure its browser with a default search engine<sup>145</sup> so that it would be fully functional out of the box.<sup>146</sup> Apple and Mozilla partnered with Google<sup>147</sup> to assure Safari and Firefox users the highest quality search.<sup>148</sup>

### **C. Competition on the merits**

Emeritus economics Professor Benjamin Klein argued:

Permitting firms to engage freely in competition for distribution with reduced prices or, equivalently, with direct payments to distributors is a reasonable first step in formulating such a general rule that distinguishes exclusionary from competitive actions. Firms that achieve a large share of distribution in this way should almost universally be considered as “competing on the merits.”<sup>149</sup>

The word “almost” has significance, so the antitrust inquiry should not end immediately with the realization that Google’s partners pursued their own self-interests in entering into exclusive arrangements. A firm does not compete on the merits when it acts to impair its rivals’ product or distribution rather than improve its own product or distribution.

Google might have impaired the distribution of rival search engines by negotiating terms with partners that degraded rivals’ distribution without concomitantly improving Google’s distribution. For example, a contract with a browser developer could have specified design choices limiting the ability of users to change the default. But no such allegations were made, and users can easily change the default when it is Google Search.

Google also might have impaired the distribution of rival search engines by overpaying for default status through what amounts to an upside-down predatory pricing scheme.<sup>150</sup> But Plaintiffs asserted that Google paid too little so they could argue that “Google’s ability to capture

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<sup>143</sup> Pl.’s Post-Trial Brief at 42.

<sup>144</sup> Although Google’s large payments to partners must have a material impact on their operations, Plaintiffs insisted that Google failed to prove the impact. Pl.’s Post-Trial Brief at 69–75.

<sup>145</sup> Def.’s Proposed Findings of Fact at 193–94, 203–06, 219–21, 365–67, 438, 444–45.

<sup>146</sup> Outside the United States, that decision has been overridden to some extent by regulators, which have forced the use of choice screens through which users select default search engines.

<sup>147</sup> Mozilla rented default status to Yahoo! from 2014 to 2017. Def.’s Proposed Findings of Fact at 416–17.

<sup>148</sup> *Id.* at 367, 370–71, 378, 380, 382–84, 393–409, 414, 417–22.

<sup>149</sup> Benjamin Klein, *Exclusive Dealing as Competition for Distribution “on the Merits,”* 12 GEO. MASON L. REV. 119, 160 (2003).

<sup>150</sup> *Cf.* *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312 (2007) (analyzing a claim of “predatory bidding” for alder logs).

significant surplus from its search distribution deals is evidence of monopoly power in general search services.”<sup>151</sup>

Plaintiffs asserted that Google did not compete on the merits,<sup>152</sup> but they did not explain how so. Consistent with Plaintiffs’ contention that foreclosure alone made out a prima facie case, they argued that anything suggesting that Google competed on the merits was a justification as to which Google had a burden of persuasion.<sup>153</sup> But Plaintiffs’ notion of justification was erroneous, and the error was not technical or semantic.

As acknowledged in *Microsoft*, “A monopolist, like a competitive firm, may have a perfectly legitimate reason for wanting an exclusive arrangement with its distributors.”<sup>154</sup> Consequently, a monopolist is given an opportunity to justify bribing distributors for exclusivity, and the justification would be that it gave the distributor a heightened incentive to direct its best efforts to promoting the monopolist’s business, and that it gave the monopolist the incentive to invest in its exclusive distributors.<sup>155</sup>

Justification in antitrust is the defendant’s assertion of a legitimate, procompetitive reason “for its conduct.”<sup>156</sup> When the defendant in an exclusive dealing case is not shown to have bribed distributors, it has nothing to justify. The defendant need not justify distributors’ conduct when their pursuit of unilateral self-interest led them to deal exclusively.

Plaintiffs made a variety of arguments to rebut what they treated as Google’s justifications. They argued that “Google’s defense fails because it leaves search consumers and search advertisers unprotected from the harms of Google’s monopoly power.”<sup>157</sup> But this argument misconceives both justification under Section 2 of the Sherman Act and Section 2 itself.

Section 2 protects the competitive process, not “search consumers and search advertisers.” And a Section 2 justification is a claim that challenged conduct furthers procompetitive purposes, not a denial that the defendant possesses or exercises monopoly power.

Plaintiffs also argued that, “The fact that a distributor finds a contract profitable does not answer whether the contract is unlawful under Section 2.”<sup>158</sup> That is so, but the evidence indicates

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<sup>151</sup> Pls.’ Proposed Findings of Fact at 203; see Pl.’s Post-Trial Br. at 27–28.

<sup>152</sup> *Id.* at 1, 31.

<sup>153</sup> *Id.* 62–66; Pl.’s Proposed Conclusions of Law at 27–33.

<sup>154</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 72 (D.C. Cir. 2001) (en banc); see also *In re Epipen* (Epinephrine Injection, USP), 44 F.4th 959, 983 (10th Cir. 2022) (“Courts repeatedly explain that exclusive dealing agreements are often entered into for entirely procompetitive reasons and pose very little threat to competition even when utilized by a monopolist.”); *E. Food Servs. Inc. v. Pontifical Cath. Univ. Servs. Ass’n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004) (“[I]t is widely recognized that in many circumstances [exclusives] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.”); *Omega Env’t, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (“There are, however, well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition.”).

<sup>155</sup> See, e.g., Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 357–60 (2002); Klein, *supra* note 149, at 137–60; Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Howard P. Marvel, *Exclusive Dealing*, 25 J. LAW & ECON. 1, 6–8 (1982); Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101, 124–32 (1983); see also Scott E. Masten & Edward A. Snyder, *United States versus United Shoe Machinery Corporation: On the Merits*, 36 J.L. & ECON. 33, 41–50 (1993) (similar justifications for a leasing-only policy).

<sup>156</sup> *Microsoft*, 253 F.3d at 59.

<sup>157</sup> Pl.’s Post-Trial Br. at 63.

<sup>158</sup> *Id.* at 63.

that Google’s partners determined that renting out default status was the best business model, and Plaintiffs failed to carry their burden of showing exclusionary conduct.

Plaintiffs were right to observe that renting default status to the highest bidder provided “no meaningful check on Google’s monopoly power,”<sup>159</sup> but they were wrong to claim that was the issue. Even if Google did exercise unchecked monopoly power (which no monopolist ever does), that would not prove that it had done anything wrong.

#### **D. Less restrictive alternatives**

If a Sherman Act defendant establishes a cognizable justification for challenged conduct, the plaintiff can prevail by identifying a substantially less restrictive alternative that would have served the same procompetitive purpose.<sup>160</sup> The *Google* Plaintiffs suggested that “Google might have entered into unconditional revenue sharing agreements, Google might have entered most-favored supplier contracts, or Google may not have entered into any search distribution contracts.”<sup>161</sup>

Plaintiffs stressed unconditional revenue sharing<sup>162</sup> and asserted that, “Unconditional revenue-share models are also common outside the general search market and are used in legal contingency fees, sales commissions, and CEO compensation packages.”<sup>163</sup> All of these are contractual arrangements under which one party pays the other if a specified condition is met.

Plaintiffs envisioned contracts<sup>164</sup> with clauses something like this from a hypothetical Google-Apple contract:

In its sole discretion, Apple may set Google as the default search engine in some or all copies of Safari. If Apple does so, Google will pay to Apple X percent of the search advertising revenue generated by queries originating in copies of Safari with Google pre-set as the default search engine.

And Plaintiffs explained the virtue of such a clause this way:

Google would pay distribution partners for Google queries through the device or through specific search access points while permitting distributors to work with competing search providers. For example, an unconditional revenue share would permit Apple to set Google as the default search engine for most searches on Safari but set a privacy-focused GSE [General Search Engine] like DuckDuckGo as the default for private browsing modes.<sup>165</sup>

But Google plainly did not maintain a monopoly just by keeping DuckDuckGo from securing default status for private browsing on Safari. And Plaintiffs did not attempt to explain how Google’s dominant position might have eroded had it employed this less restrictive alternative.

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<sup>159</sup> *Id.* at 64.

<sup>160</sup> *See* *NCAA v. Alston*, 141 S. Ct. 2141, 2157, 2161–62 (2021).

<sup>161</sup> Pls.’ Proposed Findings of Fact at 336 (citing testimony from an economic expert witness). Def.’s Proposed Findings of Fact at 199–202.

<sup>162</sup> Plaintiffs noted that Bing and DuckDuckGo paid Mozilla for distribution although neither was ever set as the default. Pls.’ Proposed Findings of Fact at 12, 453–54. The payments evidently were not large, since about 80 percent of Mozilla’s revenue came from Google. *Id.* at 12.

<sup>163</sup> *Id.* at 454.

<sup>164</sup> One can imagine revenue sharing without a contract. Google could have offered to pay revenue-share bounties for queries directed to it. Browser developers then could have unilaterally decided whether and how to direct queries to Google. The best way, of course, would have been by making Google the default search engine.

<sup>165</sup> Pls.’ Proposed Findings of Fact at 453.

Plaintiffs' posttrial brief asserted that Google's payments to browser developers were the key fact in the case. The opening paragraph trumpeted the fact that Google "spends more than \$20 billion each year to pay for defaults and restrictive contracts."<sup>166</sup> But Google would have spent a similar sum with unconditional revenue sharing.<sup>167</sup>

The first sentence of Plaintiffs' posttrial brief charged that, "Google has exploited its monopoly power to 'freeze the ecosystem' of what should otherwise be a vibrant and competitive industry."<sup>168</sup> The internal quotation is from the testimony of Sridhar Ramaswamy, a former Google executive who launched the browser Neeva. He testified that Google's payments to partners "basically freeze the ecosystem in place."<sup>169</sup> If so, it would have been frozen under Plaintiffs' supposed less restrictive alternative.

Plaintiffs objected to the contractual commitment made by Google's partners to confer default status on Google. But Plaintiffs failed to prove that the commitment mattered much, or indeed, at all. Plaintiffs provided no reason to believe that Google's partners would have redesigned products to eliminate defaults or that they would have made a different choice of the default search engine.<sup>170</sup>

Had Google employed unconditional revenue sharing contracts, the competitive landscape in the Plaintiffs' alleged relevant markets likely would have been about the same. Search engines would have bid against each other by making unconditional revenue sharing offers. And Google would have been chosen as the default on the basis of its quality and expected revenue payout.

If Google's offer was best at the outset, Google's search-engine rivals would have experienced the same scale disadvantage as from Google's actual partnerships, and the disadvantage would have persisted. It is irrelevant that Google's partners could have changed their defaults because they would never have had a reason to do so.<sup>171</sup> An unconditional revenue sharing arrangement with Apple also would have had the same effects as Google's actual contracts in incentivizing Apple not to develop a competing search engine.

Google had no means of achieving a substantial increase in usage without paying large sums in exchange for preferential placement by browser developers and Android phone manufacturers and marketers. And had Google not availed itself of these distribution opportunities, they would have been exploited by rivals. All browsers distributed in the United States still would have had default search engines, and mobile phones still would have promoted particular browsers and search engines.

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<sup>166</sup> Pl.'s Post-Trial Brief at 1.

<sup>167</sup> Plaintiffs argued that the payments would have been greater but for Google's exclusionary conduct. Pls.' Proposed Findings of Fact at 450–51. In making this argument, Plaintiffs engaged in wishful thinking about the state of competition, but economics does support the notion that browser developers could have negotiated a greater share of the advertising revenues if Google's search engine rivals offered more competitive products.

<sup>168</sup> Pl.'s Post-Trial Brief at 1.

<sup>169</sup> Plaintiffs' Closing Slides at B-15, [www.justice.gov/d9/2024-05/421633.pdf](http://www.justice.gov/d9/2024-05/421633.pdf).

<sup>170</sup> Apple proposed terms to Google that would have allowed it to make DuckDuckGo the default for private browsing and Apple had discussions on that subject with DuckDuckGo. Pls.' Proposed Findings of Fact at 261–70. And in 2023, Apple made it possible for users to select a search engine for private browsing different from the search engine for standard browsing. *Id.* at 270–71.

<sup>171</sup> The hypothetical world of unrestrictive revenue sharing contracts resembles the facts of two cases in which courts held that monopolies were unlawfully maintained through means that enforced exclusivity without contractual requirements. *See* *McWane, Inc. v. FTC*, 783 F.3d 814, 833–34 (11th Cir. 2015); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 193–94 (3d Cir. 2005). *McWane* temporarily cut off distributors that stocked rivals' products, and *Dentsply* terminated them.

## IV. Predictions

### A. Plaintiffs' initial burden

Judge Mehta would be amply justified in finding that Google possesses monopoly power. Although the record does not dispel all doubts, the standard is preponderance of the evidence, and Plaintiff should prevail because there was little dispute about several critical facts.<sup>172</sup>

Google Search has long offered users higher quality search than any rival search engine,<sup>173</sup> and Google has gotten nearly 90 percent of US search queries. Entry occurred, but it was unsuccessful.<sup>174</sup> And Google faced competition for advertising dollars, but even monopolists face competition. In finding that Google possesses monopoly power, Judge Mehta would merely confirm Google's enduring success.

The next question for Judge Mehta is whether its partnerships had the potential to be exclusionary in that they "foreclosed" a substantial part of the relevant market. And Judge Mehta seems highly likely to hold that Google's partnerships "foreclosed" enough of the market to warrant further examination.

Google Search has been the default search engine in Google Chrome, Apple Safari, Mozilla Firefox (except for 2014–17), and other browsers. Relatively few users have switched away from Google Search in these browsers, although doing so was easy. One reason for the lack of switching was that users prefer Google Search. But Plaintiffs presented substantial evidence on what they called "the power of defaults,"<sup>175</sup> and Google obviously got something for the billions it paid partners every year.

Google's brand recognition and high quality evidently caused it to benefit from defaults in ways that rivals did not. When Yahoo! was Firefox's default search engine, only 23 percent of Firefox searches were conducted using the default, while 69 percent used Google.<sup>176</sup> And users unhappy with the browser and search engine that Windows provided often switched: From 2013 to 2021, 78 percent of searches on Windows PCs used Google Search although the PCs were preloaded exclusively with Microsoft's browser, which defaulted to its search engine.<sup>177</sup>

Judge Mehta will apply the law as articulated by the DC Circuit in *Microsoft*, which held that "to be condemned as exclusionary," challenged conduct must have an "anticompetitive effect,"

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<sup>172</sup> Google disputed Plaintiffs' relevant markets: For many queries, a user has no good substitute for a general search engine, but those queries do not generate search advertising, which is the source of revenue. Queries that generate search advertising potentially relate to purchasing, and for such queries, a user does have good substitutes for a general search engine, e.g., Amazon and Travelocity. Moreover, advertisers shift internet advertising dollars between search and these substitutes. Def.'s Post-Trial Br. at 5–6, 8–18. While all this is true, the evidence showed little price-induced substitution at the margin. Pls.' Proposed Findings of Fact at 300–24.

<sup>173</sup> The parties disputed several issues related to quality, but not whether Google provided higher search quality than rivals (especially on mobile devices). *Compare id.* at 199–200, 340–43 with Def.'s Proposed Findings of Fact at 51, 55–56, 119–22, 404–05. Google had ten times as many engineers working to improve search quality as Microsoft. *Id.* at 52, 115–16.

<sup>174</sup> Neeva, which entered in 2020, shut down shortly before the trial began, and its story was made part of the trial record. *See supra* note 14. In a case with similar facts decades ago, the entrant's eventual failure was not well established in the trial record, and an appellate court held that the fact of its entry proved that entry was easy. *See United States v. Syfy Enters.*, 903 F.2d 659, 665 (9th Cir. 1990) (merger to monopoly challenged under Section 2 as well as under Section 7 of the Clayton Act).

<sup>175</sup> Pls.' Proposed Findings of Fact at 300–24.

<sup>176</sup> Def.'s Proposed Findings of Fact at 191, 433.

<sup>177</sup> *Id.* at 191.

i.e., “it must harm the competitive process.”<sup>178</sup> But the court did not clearly define the plaintiff’s burden. If Judge Mehta imposes a substantial burden, he almost surely will hold that Plaintiffs failed to carry it. If he imposes a much lighter burden, he almost surely will hold that Plaintiffs carried their initial burden, and Google then assumed the burden.

### ***B. Competing narratives***

The parties offered divergent narratives on the competitive process. The theme of Plaintiffs’ narrative was that Google’s partnerships put so many users out of reach to rival search engines that they lost the incentive to compete. But Plaintiffs did not undertake to prove that the rivals were willing and able to compete before the partnerships. Nor did Plaintiffs undertake to prove that Google is responsible for its partners’ decisions to preference a single search engine.

Judge Mehta asked Plaintiffs’ counsel what Google should have done differently. The reply was that it should have entered into agreements leaving important decisions, such as the default search engine, to the partners’ discretion.<sup>179</sup> But Plaintiffs provided no basis for concluding that an “unconditional revenue sharing agreement” would have been materially more congenial to competition.

If Judge Mehta were to find Plaintiffs’ narrative entirely unconvincing, he would have no choice but to rule against them, since they bore the burden of proving that Google harmed the competitive process. If instead he were to find that Plaintiff’s narrative shaky, he would have considerable discretion. He could stress what Plaintiffs did show and find it sufficient.

How Judge Mehta rules is apt to depend as much on how he responds to Google’s counternarrative as on how he responds to Plaintiffs’ narrative. Google’s narrative was that it was competing on the merits and that competition among search engines was thriving. The former part of the narrative had greater merit than the latter.

Google argued that the billions it “pays each year to search partners is a textbook example of a thriving competitive marketplace.”<sup>180</sup> But Google did not present economic testimony on the relationship between the share of advertising revenue that Google pays its partners and the intensity of search-engine competition. The 36 percent share Google pays Apple actually suggests rather weak competition.

With strong competition between equivalent search engines, a browser developer would get a revenue share approaching 100 percent. Weak competition works to the browser developer’s advantage but results in a much lower revenue share for a browser developer. And Google might pay billions even with no competition. Google would enter into partnerships that boost usage and would split the incremental advertising revenue.

Some aspects of Google’s narrative were compelling: The company began with two students working in a garage and blossomed through aggressive hiring of the top talent from around the world. Within a decade, innovation allowed Google to surpass the original internet titans—Alta Vista, Microsoft, and Yahoo!.<sup>181</sup> Google foresaw the revenue possibilities of search advertising,

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<sup>178</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (emphasis omitted); *see also supra* note 86 and accompanying text.

<sup>179</sup> Tr. Bench Trial Closing Arg. Proceedings at 161–63.

<sup>180</sup> Def.’s Post-Trial Br. at 3. In Google’s narrative, the partnerships that Plaintiffs complain about are the product of vigorous competition on the merits among search engines. Def.’s Proposed Conclusions of Law at 31–33, Def.’s Proposed Findings of Fact at 16–18.

<sup>181</sup> *Id.* at 1–10, 18–55.



and aggressively sought to boost the use of its search engine by developing the Chrome browser and the Android mobile device operating system.<sup>182</sup>

Judge Mehta surely will accept Google's narrative about its first decade or so, but the case is about what followed. Google portrays its partnerships as part of efforts to increase the use of Google Search and the associated advertising revenue. In an important sense, that surely is true. Google contended that it only competed on merits,<sup>183</sup> and it is concerning that Judge Mehta did not explore that contention during the closing arguments.

### **C. Competition on the merits**

As one court observed, "Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits."<sup>184</sup> Plaintiffs have prevailed in cases under Section 2 of the Sherman Act by convincing courts that the defendants took customers from rivals through illegitimate means. The *Google* Plaintiffs, however, made a rather different argument.

The longest section of their posttrial brief purported to explain how Google's conduct harmed the competitive process.<sup>185</sup> And its longest subsection argued that (1) Google's partnerships are de facto exclusive dealing because defaults are powerful and (2) Google's de facto exclusive dealing forecloses a substantial portion of the market.<sup>186</sup>

Judge Mehta likely will accept both of these arguments, but his questions at the closing arguments indicated that he will rule that more is required to establish harm to the competitive process. He quoted *Microsoft* to that effect and pushed Plaintiffs to confirm their contrary reading of *Microsoft*.<sup>187</sup>

Plaintiffs did make several additional arguments regarding harm to the competitive process. One was that Google's partnership with Apple disincentivized the building of a competing search engine, but this argument fails logically, factually, and legally.

The logical fault is that Plaintiffs' asserted less restrictive alternative produces the same disincentivizing effect as the challenged conduct: Had Google entered into an unconditional revenue sharing agreement with Apple, Google would have paid Apple only if Apple did not supply Safari's search engine.<sup>188</sup> Plaintiffs cannot assert both that the disincentivizing effect was harm to the competitive process and that unrestricted revenue sharing was a less restrictive alternative.

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<sup>182</sup> *Id.* at 222–36.

<sup>183</sup> Def.'s Proposed Conclusions of Law at 30–31, Def.'s Post-Trial Br. at 36–37, 47–49. Judge Mehta had suggested in his summary judgment opinion that competing on the merits was a justification as to which Google bore the burden of proof. Mem. Op. at 37–39 (concerning Google's specific contention that the agreements with browser developers were the product of legitimate "competition for the contract").

<sup>184</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007).

<sup>185</sup> "Google's Exclusionary Conduct Has Harmed Competition In Each Relevant Market." Pl.'s Post-Trial Br. at 29.

<sup>186</sup> *Id.* at 35–51.

<sup>187</sup> *See supra* notes 86–87 and accompanying text.

<sup>188</sup> Plaintiffs objected to a clause in the ISA that states that Apple will not alter the design of its Suggestions feature in a manner that siphons off queries that otherwise would go to Google Search. Pls.' Proposed Findings of Fact at 382–86, *United States v. Google LLC*. Plaintiffs also objected to a clause in the ISA that gives Google the right of first refusal if it decided to sell advertising in its Spotlight search feature, which is used principally to search an Apple device. *Id.* at 387–88. If Judge Mehta found only these clauses unlawful, the likely remedy would be just to bar them and similar clauses. *See generally* *United States v. Microsoft Corp.*, 253 F.3d 34, 106–07 (D.C. Cir. 2001) (en banc).

The factual fault was that Plaintiffs’ proof established only that Apple would have considered building a search engine if unable to strike a satisfactory deal with Google. Nothing in the record indicated that Apple would have found building a search engine preferable to partnering with Microsoft or with another search-engine developer.<sup>189</sup> And unconditional revenue sharing surely would have been satisfactory to Apple.

The legal fault was that the disincentivizing effect was not the sort of predatory effect at which Section 2 is directed. Predatory conduct entails a profit sacrifice,<sup>190</sup> but Plaintiffs’ evidence was that the partnership was highly profitable to Google.<sup>191</sup> Moreover, Apple was contractually free to develop a search engine. Nor did Plaintiffs contend that Apple was paid so much that it made no sense to develop a search engine.

Antitrust cases with greatest resemblance to Plaintiffs’ incentivizing argument are the pay-for-delay pharmaceutical cases, in which monopoly producers of drugs coming off patent pay a prospective generic entrant to stay out of the market.<sup>192</sup> These cases involved allegations of collusion, but Plaintiffs did not make such allegations. Moreover, a court should view the Apple-Google partnership as a procompetitive collaboration rather than an agreement not to compete.

Plaintiffs’ remaining argument regarding harm to the competitive process was a centerpiece of their case. The argument was that Google’s partnerships deprived search-engine rivals of essential “scale,” i.e., the high volume of users needed to compete successfully on quality. This argument also had logical and legal infirmities.

The logical problem with the scale argument is that it proves too much. If a substantial scale difference necessarily translates into a major quality difference, the competition was over before any of the conduct Plaintiff’s complain about. Google’s innovations and investments allowed it to leapfrog well-established rival search engines, and nothing in the record indicates that they were working hard to catch up.

The legal problem with Plaintiffs’ scale argument also is that it proves too much. Essentially the same argument could have been made against plainly any procompetitive conduct, including the innovation and investment that allowed Google to leapfrog the competition. Thus, the scale argument provided no stand-alone basis for finding that Google harmed the competitive process.

Google did not make all of the foregoing points, but it did argue that, “Without exclusionary conduct, any Google scale advantage cannot serve as a predicate for imposing antitrust liability.”<sup>193</sup> And if Judge Mehta were to agree that the scale argument does not provide the essential proof of harm to the competitive process, he likely will rule in Google’s favor.

It would be very easy for Judge Mehta to write an opinion holding that Plaintiffs failed to carry their initial burden of proving harm to the competitive process, but Judge Metha has showed no inclination to do that in the closing arguments. And he specifically refused to do so in denying summary judgment.

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<sup>189</sup> Judge Mehta pointed this out during the closing argument. *See* Tr. Bench Trial Closing Arg. Proceedings at 113 (Apple executives testified “we don’t think it’s in Apple’s best interest to . . . develop our own search engines).

<sup>190</sup> *See* *Covad Comm’n’s Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005) (“in the vernacular of antitrust law, a ‘predatory’ practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor”).

<sup>191</sup> Pls.’ Proposed Findings of Fact at 254, *United States v. Google LLC*.

<sup>192</sup> *E.g.* *Impax Labs. v. FTC*, 994 F.3d 484 (5th Cir. 2021); *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016); *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388 (3d Cir. 2015).

<sup>193</sup> Def.’s Post-Trial Br. at 65–66. Google also contested the factual basis of the scale argument. *See id.* at 66–68.

If Judge Mehta holds that Plaintiffs met their initial burden, his rationale most likely would be simply that Google’s dominant market position and superior quality meant that competition for defaults inherently was not on the merits. The logic of such a rationale is questionable, but Judge Mehta would not be obliged to provide a complete exegesis.

#### **D. Justification**

Judge Mehta’s summary judgment ruling, as well as the way he blocked out the issues for closing arguments, suggested that he was inclined to hold that Plaintiffs met their initial burden. If he does so hold, he must then calibrate the burden of justification that the law imposes on Google. Although the *Microsoft* decision can be read to suggest that the burden of justification is light, the DC Circuit’s guidance was unclear, and there is no clear precedent on which Judge Mehta could draw.

*Microsoft* stated that the defendant can rebut a prima facie case with “nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”<sup>194</sup> The two examples might prompt a narrow reading; Judge Mehta could rule for Plaintiffs on the basis that Google failed to demonstrate greater efficiency or enhanced consumer appeal.

The most literal reading of Microsoft’s guidance, however, demands a contrary ruling. Plaintiffs claimed to have proved that defaults are the most efficient means of search-engine distribution, which is an essential element of competition. And Google must have competed on the merits if it did no more than avail itself of the most efficient means of distribution, which is what Google has argued all along.

Judge Mehta seems unlikely to hold that both Plaintiffs’ initial burden and Google’s burden of justification are light. To do so would effectively negate *Microsoft*’s burden-shifting framework. Moreover, Judge Mehta’s questioning during closing argument did not suggest that possibility.

Judge Mehta seemed to think that something went wrong, else Google would not have continued to dominate general search.<sup>195</sup> What went wrong per Google’s narrative is that its rivals did not work hard enough to keep up, but what went wrong per Plaintiffs’ narrative is Google’s partnerships. Explicitly or implicitly, Judge Mehta will adopt one of these narratives.

#### **E. Remedy**

Remedy was separated from liability in a pretrial ruling,<sup>196</sup> but remedy could weigh on Judge Mehta’s mind in deciding liability. Should he find Google liable, he would be obliged to “award relief coterminous with the ultimate redress of the wrongs.”<sup>197</sup> Hence, the articulated basis for liability would have a substantial impact on the appropriate remedy.

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<sup>194</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc).

<sup>195</sup> *See* Tr. Bench Trial Closing Arg. Proceedings at 140 (“wouldn’t the folks who wrote the Sherman Act be concerned about” the fact that it is nearly impossible “to dislodge Google as the default search engine” for Safari), 144 (“[I]t just seems odd . . . that you’ve got this marketplace where Google is making billions of dollars in profit” and yet “nobody is entering into the market to try and cut into that profit.”).

<sup>196</sup> Order to Bifurcate Proceedings, ECF No. 264, *United States v. Google LLC* (June 12, 2021).

<sup>197</sup> *United States v. Am. Tobacco Co.*, 221 U.S. 106, 185 (1911).

Judge Mehta has the “duty of giving complete and efficacious effect to the prohibitions of the statute,”<sup>198</sup> so finding that Google’s partnerships unlawful would lead him to end them and bar Google Search from default status in third-party browsers.<sup>199</sup> Such a remedy would be an immediate boon to Microsoft because Mozilla would have no choice but to make Bing the default search engine in Firefox and Apple likely would make Bing the default in Safari.

The long-term consequences of such a remedy are less clear. Firefox and Safari users could be unsatisfied with the Bing default and either change the default to Google Search or change the browser to Google Chrome. Google could end up with nearly as many users without paying for distribution.

Such a remedy could harm search-engine competition. Without the revenue from Google, Mozilla could discontinue support for Firefox, especially if Bing does not greatly improve with its immediate boost in scale. And if Apple developed its own search engine, it might maximize its search advertising revenue by making it more difficult to change the search-engine default in Safari and more difficult to install another browser.

Judge Mehta understands that the Sherman Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”<sup>200</sup> So he will not experiment with the economy without a deep conviction that Google’s partnerships harmed the competitive process. If Google competed on the merits, antitrust law allows it to enjoy its success.

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<sup>198</sup> *Am. Tobacco*, 221 U.S. at 185. See *Int’l Salt Co. v. United States*, 332 U.S. 392, 402 (1947) (“In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants’ illegal restraints.”).

<sup>199</sup> Modern antitrust decrees are not perpetual, and Judge Mehta would have to decide how long any restriction should be imposed on Google. A duration of more than ten years seems unlikely, as is a duration of less than five years.

<sup>200</sup> *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415–16 (2004).