

Plaintiffs' Closing Argument



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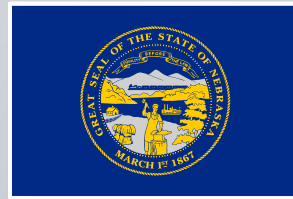
ILLINOIS



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WEST VIRGINIA

Plaintiffs'
Demonstrative U
1:23-cv-00108

Google Wants to Keep Its Monopolies Intact



Dr. Andres Lerner

ECONIC PARTNERS

Q. You believe in the but-for world without anticompetitive conduct, **Google would still have monopoly power in the ad exchange market**; is that right?

A. Yes.

...

Q. [Y]ou also believe that in the but-for world, **Google likely would have monopoly power in the publisher ad server market**; is that right?

A. Yes.

Rem. Tr. at 114:10-23 (10/2 AM)



Tim Craycroft



Q. [W]ould Google commit to reduce its AdX take rates below 20 percent?

A. I don't think we're ready to do that.

Q. So you want to keep it at 20 percent?

A. I just said I don't think we could commit at this stage to do anything differently.

Rem. Tr. at 142:20-25 (9/25 PM)

The Remedy Must Satisfy Four Objectives

- 1 “unfetter the market from anticompetitive conduct”
- 2 “terminate the illegal monopoly”
- 3 “deny the defendant the fruits of its . . . violation”
- 4 “ensure . . . no practices likely to result in monopolization in the future.”

The Remedy Must Completely Terminate Illegal Monopolies

“[I]t is the duty of the court to prescribe relief which will terminate the illegal monopoly,” *i.e.*, “to assure the complete extirpation of the illegal monopoly.”

United States v. United Shoe Mach. Corp., 391 U.S. 244, 250-51 (1968)

A remedy must “completely eliminat[e]” the “old trappings of **monopoly** and restraint.”

Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 261 (1959)

The Remedy Must Be Sure

A remedy must “**assure the complete extirpation**” of illegal monopoly.

A remedy must “**ensure**” no likely “**monopolization in the future.**”

United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968)

A remedy must “**assure the public freedom**” from ills of illegal conduct.

United States v. U.S. Gypsum Co., 340 U.S. 76, 88 (1950)

A remedy must “**assure effective relief.**”

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961)

A remedy must provide “**effective assurance**” that there will be “**no . . . opportunity**” for re-monopolization.

United States v. Crescent Amusement Co., 323 U.S. 173, 190 (1944)

Cumbersome Conduct Remedies Are Disfavored

“[C]onduct remedies are disfavored because they risk **excessive government entanglement in the market.”**

Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 720 (4th Cir. 2021) (cleaned up)

“[C]ourts must have a **healthy respect for the practical limits of judicial administration: An antitrust court is **unlikely to be an effective day-to-day enforcer of a detailed decree.**”**

“[J]udges make for **poor central planners and should never aspire to the role.”**

NCAA v. Alston, 594 U.S. 69, 102-03 (2021)

The Remedy Should Avoid Central Planning

The “protection of the public interest” should not “**depend solely on that somewhat cumbersome procedure**” of a behavioral injunction “when another effective [remedy] is available.”

United States v. Crescent Amusement Co., 323 U.S. 173, 190 (1944)

“**The judiciary is unsuited to affairs of business management . . .**”

United States v. Paramount Pictures, 334 U.S. 131, 163 (1948)

“**[T]he policing of an injunction would probably involve the courts and the Government in regulation of private affairs** more deeply than the administration of a simple order of divestiture.”

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326, 334 (1961)

The Law Prefers Simple, Elegant Antitrust Remedies



Tim Craycroft



THE COURT: So if the decision were to just wipe out AdX, it doesn't get sold, you just can't use it anymore, can't your publishers get just about the same benefit, then, from Prebid, assuming that AdWords can then direct their interest through –

THE WITNESS: Yeah, the natural thing that we would do on the advertiser side of Google would be to integrate with Prebid.

THE COURT: Why is that not a very simple and elegant solution to that portion of the case?

THE WITNESS: It could be, potentially. . . .

Rem. Tr. at 115:23-116:8 (9/25 PM) (Craycroft)

What Are the Necessary Elements of Effective Relief?

- Determine the “**necessary element[s] of effective relief.**”
- “**Economic hardship** can influence choice only as among **two or more effective remedies.**”
- “**All doubts** as to the remedy are to be **resolved in the Government’s favor.**”

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327, 334 (1961) (cleaned up)

The Court should order the “**equitable remedy [that] would best promote competition,**” not “the remedy least burdensome to the defendant.”

Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 720-21 (4th Cir. 2021)

Google Refuses to Accept the Court's Liability Ruling

The Court ruled:

“Google has violated Section 2 of the Sherman Act by **willfully acquiring and maintaining monopoly power . . .**”

“Google has **willfully engaged in a series of anticompetitive acts to acquire and maintain monopoly power** in the publisher ad server and ad exchange markets for open-web display advertising.”

Google's illegal conduct “**enabled the company to establish and protect its monopoly power** in these two markets.”

Op. 1, 114

Google argues:

“**AdX's monopoly power** derives from **Google's success** in Search and AdWords, both of which are **lawful sources of power.**”

DFP's “**monopoly power** is attributable to the **lawful** DoubleClick acquisition, Search and AdWords demand; and **innovations.**”

Google Post-Trial Br. (ECF No. 1811) at 20 n.16

“Google's **acquisition of power** in the relevant markets is attributed to reasons **unrelated to the conduct this Court found to be anticompetitive.**”

Google Mem. re: Legal Framework (ECF No. 1664) at 22

Harms That Must Be Cured

- 1 Depriving Google's rivals of scale and data
- 2 Making it hard or impossible for customers to do business with Google's rivals
- 3 Impeding entry and forcing exit
- 4 Excessive ad exchange take rates

Plaintiffs' Remedies Restore Publisher Ad Server Competition

Barriers



Costly to Enter

Costly to Switch

Lack of Business Confidence

AdX Divestiture

Open-Source Auction

Data Portability

Escrow Fund

Lowers Entry Barriers

Lowers Switching Costs

Instills Business Confidence

Entry

Innovation

Investment

Switching

Effects of Plaintiffs' Proposed Remedies

Plaintiffs' Remedies Restore Ad Exchange Competition

Barriers



**AdWords Demand
Limitations**

**DFP Final Auction
Manipulations**

**Lack of Business
Confidence**

Effects of Plaintiffs' Proposed Remedies



Only Structural Relief Is Sure



Matthew Wheatland
DailyMail.com

Behavioral-only remedies “create[] friction” and “gray area,” which “would make it harder for us to switch publisher ad servers” because we can’t “be sure it’s operating fairly.”

Rem. Tr. at 45:2-46:9 (10/6) (Wheatland (Daily Mail))

Divestiture is “the only way to ensure . . . a fair competitive market for ad servers . . .” “I think divestiture is the only way to guarantee there’s no preferential treatment.”

Rem. Tr. at 26:5-12, 42:1-2 (9/23 AM) (Avery (Kevel))



James Avery
kevel



Andrew Casale
Index
Exchange

“[I]t would bring a level of certainty to bear if there was a separation of the assets,” and behavioral remedies “do not provide guaranteed certainty.”

Rem. Tr. at 70:6-19 (9/22 PM) (Casale (Index))

Broad Industry Agreement: Only Structural Relief Is Sure

All parts of the industry agree: Only structural relief will be effective.

Publishers



Grant Whitmore
ADVANCE
LOCAL



Stephanie Layser
News Corp



Matthew Wheatland
Daily Mail.com

Advertisers



Jay Friedman
goodway group



Luke Lambert
OMP

Publisher Ad Servers



James Avery
kevel



Arnaud Créput
EQUATIV

Prebid



Michael Racic
Prebid

Ad Exchanges



Rajeev Goel
PubMatic



Andrew Casale
Index Exchange

Demand Side Platform



Jed Dederick
theTradeDesk

See, e.g., Rem. Tr. at 51:6-19, 54:24-55:12, 68:23-69:23 (9/22 AM) (Whitmore); id. at 49:3-50:9, 62:24-63:12, 69:18-70:19 (9/22 PM) (Casale); id. at 13:16-14:3, 26:5-12 (9/23 AM) (Avery); id. at 89:20-91:3 (9/23 AM) (Lambert); id. at 8:16-9:11, 10:11-19, 12:11-25 (9/23 PM) (Friedman); id. at 86:22-87:17, 90:23-91:19 (9/23 PM) (Dederick); id. at 51:11-52:19, 85:3-20 (9/26) (Racic); id. at 17:4-13, 18:21-19:1, 24:5-21 (9/29 AM) (Créput); id. at 10:2-12:3, 20:5-13, 20:22-21:6 (9/30 PM) (Goel); id. at 42:23-43:23 (10/3 AM) (Layser); id. at 11:3-19, 18:22-19:24, 36:23-37:11 (10/6) (Wheatland).

Only Structural Relief Is Complete

- 1 Satisfies all four objectives of an antitrust decree
- 2 Prevents all similar forms of future monopolization

Structural Relief Closes All Untraveled Roads to Monopoly

The Court should not assume “that a violator of the antitrust laws will relinquish the fruits of his violation **more completely than the court requires him to do . . . [I]t is not necessary that all of the untraveled roads to that end be left open** and that only the worn one be closed.”

Int'l Salt Co. v. United States, 332 U.S. 392, 400 (1947)



Prof. Robin Lee



“It’s not as necessary . . . to specify all those ways [of re-monopolization] if Google’s ability and incentive to engage in those ways were not there in the first place. And that’s why, as an economic matter, addressing abilities and incentives are one of the most effective ways of preventing future monopolization.”

Rem Tr. at 19:24-20:8 (9/24 AM) (Lee)

Structural Relief Is the Cleaner, Less Risky Option

- 1 Ensures competition is restored
- 2 Respects the practical limits of judicial administration

A Behavioral Decree Would Be Cumbersome

“Google shall not **intentionally introduce** any additional latency that does not otherwise exist as a **technical reality . . .**”

Google Revised PFJ ¶¶ III(1)(e), III(3)(b)

Could a monitor **detect** the additional latency?

Ongoing proceedings to adjudicate **Google justifications**:

- Was the latency “intentional[]”?
- Is the latency “a technical reality”?

A Behavioral Decree Would Be Cumbersome

AdWords and DV360 shall not “**prioritize** bidding on AdX” unless AdX provides “**more effective** information, access to **higher quality** Impressions, **better** fraud protection, or **better** privacy protection than a rival Ad Exchange provides.”

Google Revised PFJ ¶¶ III(7)

Ongoing proceedings to adjudicate **Google justifications**:

- Does AdX provide “more effective information”?
- Does AdX provide “higher quality Impressions”?
- Does AdX provide “better fraud protection”?
- Does AdX provide “better privacy protection”?

The Role of Behavioral Remedies

- 1 Interim measures until structural remedies can take hold
- 2 Ongoing measures to complement structural remedies

Structural Relief Is Feasible

- 1 Multiple ways to implement
- 2 Reliable process for specifying details
- 3 Alternative approval processes available

Courts Have Repeatedly Ordered Structural Relief

Ford Motor Co. v. United States, 405 U.S. 562 (1972)

United States v. Grinnell Corp., 384 U.S. 563 (1966)

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961)

Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959)

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)

Schine Chain Theatres v. United States, 334 U.S. 110 (1948)

United States v. Crescent Amusement Co., 323 U.S. 173 (1944)

Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690 (4th Cir. 2021)

United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982)

United States v. Pullman Co., 53 F. Supp. 908 (E.D. Pa. 1944)

Courts Have Ordered Structural Relief in Similar Circumstances

Divest Lawfully Acquired Assets		<i>Paramount Pictures Crescent Amusement International Boxing Schine Chain AT&T</i>
Divest Assets Used in Other Markets		<i>International Boxing Grinnell</i>
Divest an Entire Business and/or Prohibit Defendant from Competing		<i>Ford Motor Pullman Paramount Pictures* AT&T</i>
Divestiture for Tying or Similar Conduct		<i>Paramount Pictures Crescent Amusement International Boxing Schine Chain AT&T</i>

* On remand, *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949)

Google Concluded “Open Sourcing the Final Auction” Is Feasible

DFP Redesign

Redacted

In 4 years, will structurally remove the ability for PCAS to decide which ad to serve across direct and indirect demand by open sourcing the final auction

PRX050 at -325

Q: Would it be technically feasible to do the open source proposal with the final auction logic defined by the plaintiffs?

A: I believe it would be technically feasible to build what [Plaintiffs] are proposing. . . .

Rem. Tr. at 118:2-6 (9/29 PM)



Glenn Berntson



Tim Craycroft

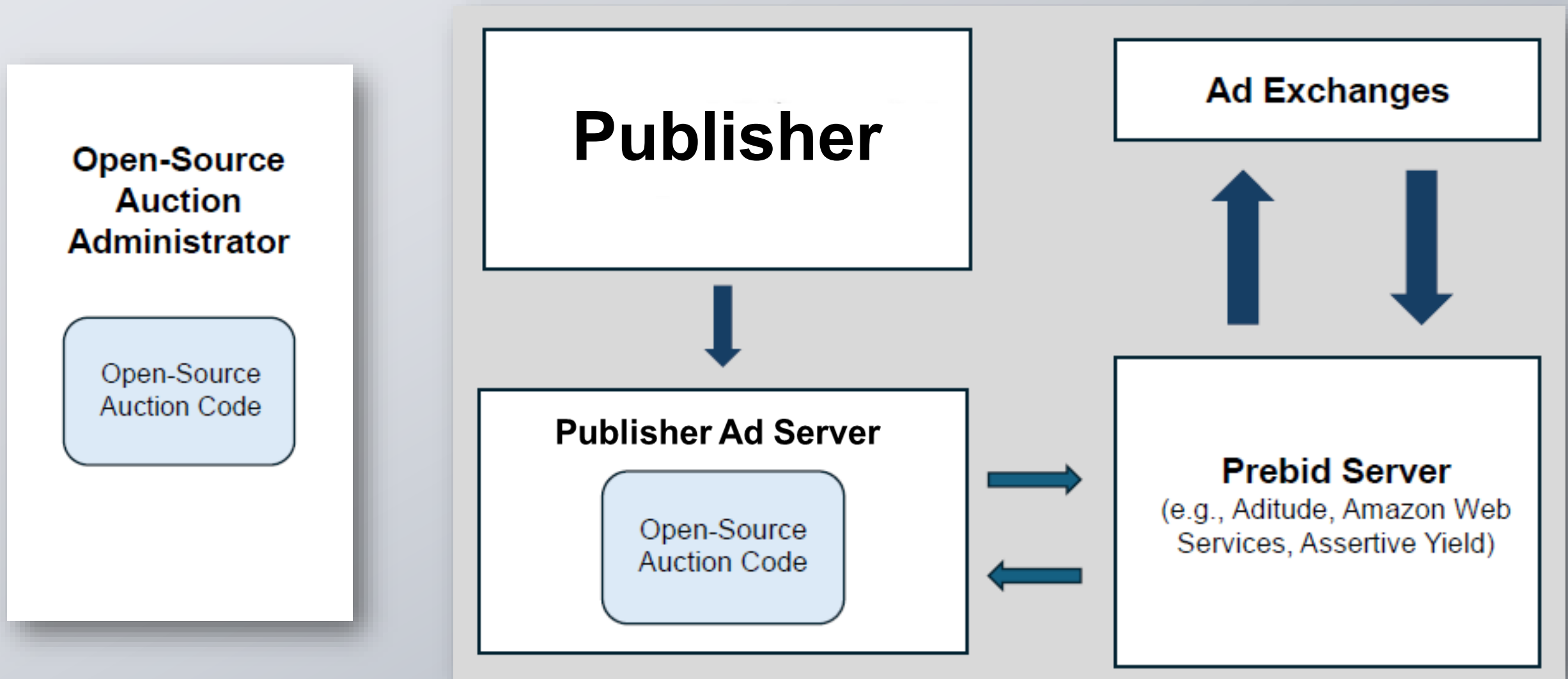


Q: [I]s the bottom line that Google estimated it would take an outer bound of four years to open source DFP’s final auction logic?

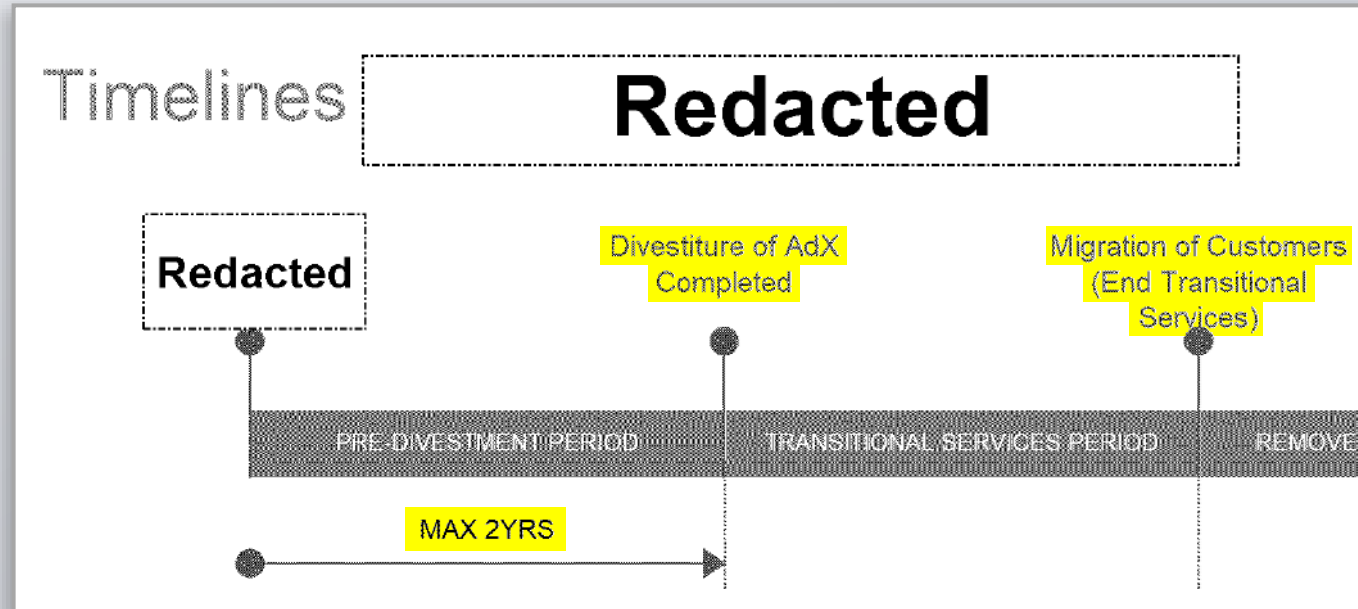
A: Yes.

Rem. Tr. at 83:1-4 (9/25 PM)

How the Open-Source Auction Would Work



Google Concluded “Divestiture of AdX” Is Feasible



PRX050 at -298

Q. Now, I want to keep focusing on just the **AdX divestiture** part. Would it be technically feasible to do?

A. **It would be technically feasible to do, yes.**

Rem. Tr. at 116:18-20 (9/29 PM)



Glenn Berntson



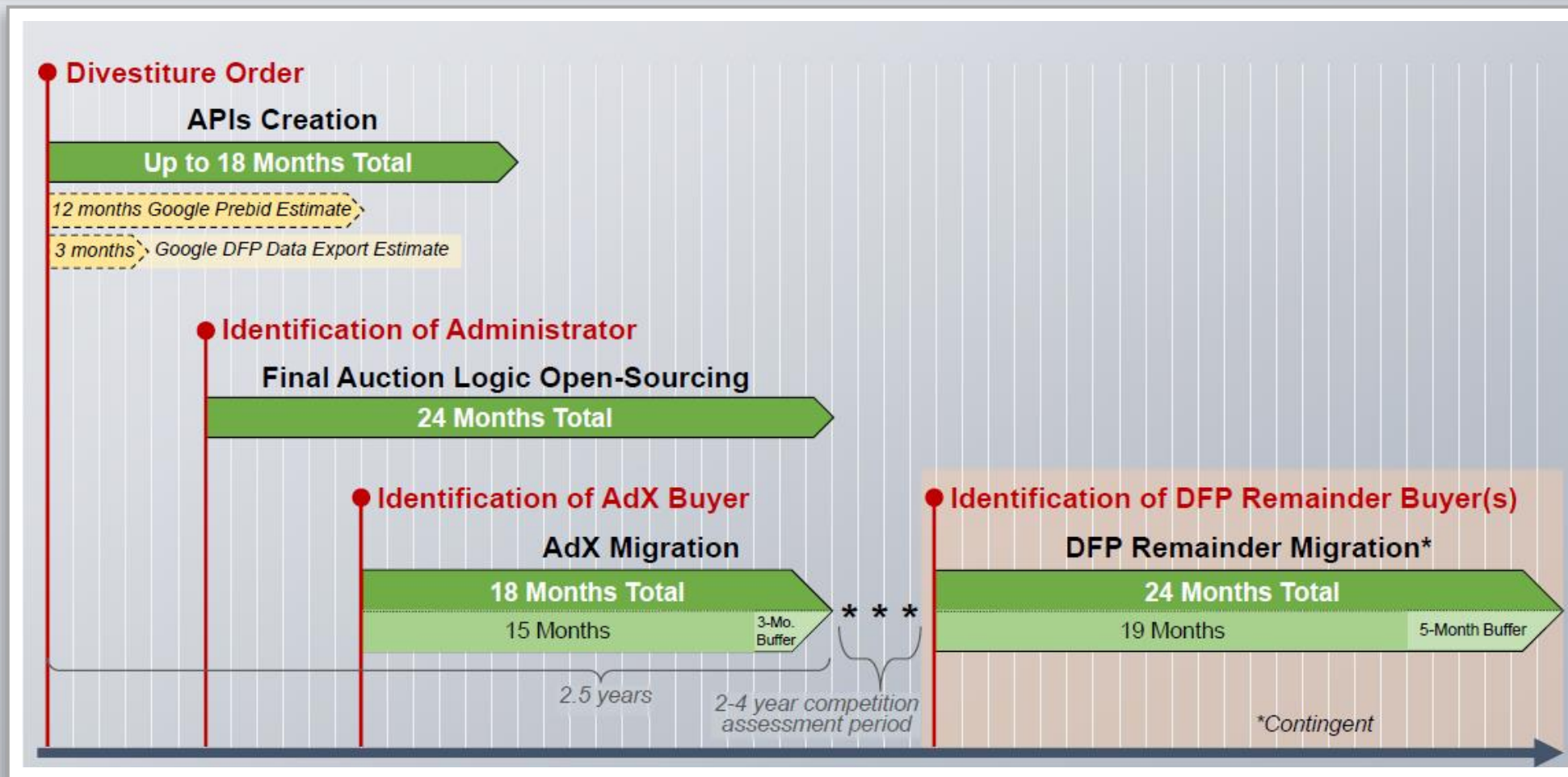
Tim Craycroft



We **did not identify technical barriers** under our control for a business **divestiture of AdX**

Rem. Tr. at 61:23-24 (9/25 PM)

Google's Timelines Can Be "Pushed" Shorter



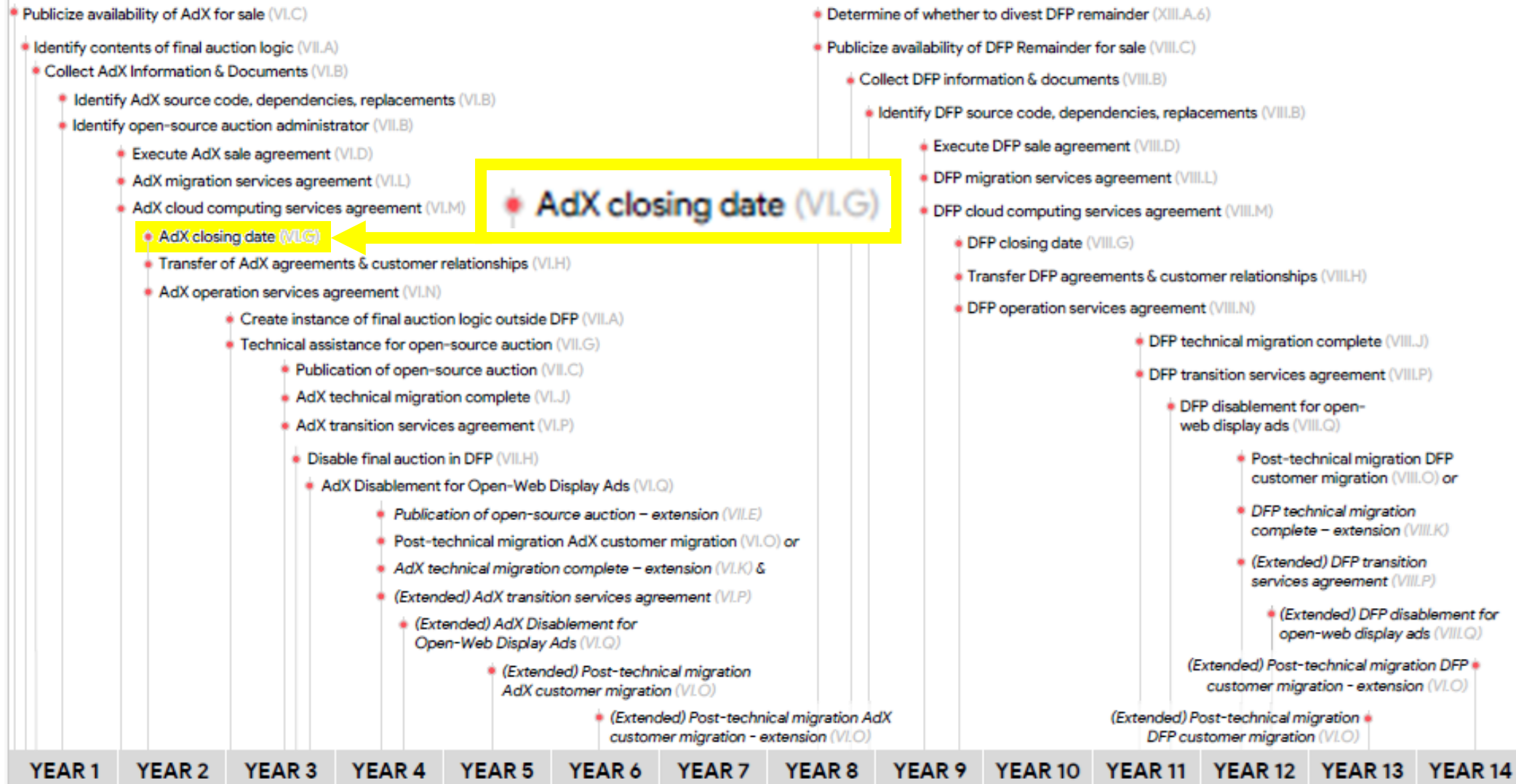
Pls.'
Demonstrative O
at 1

“[V]ery mindful that we are in the rocket docket, Google has pushed the engineers and we can commit to getting all of this very complex technological work done within a year.”







Rem. Tr. at 29:1–3 (9/22 AM) (Def.’s Opening Statement)

Timelines Can Be Deceiving

Plaintiffs' Remedies Proposal Stretches Out Beyond a Decade



A “Business Divestiture” Is a Divestiture

Plaintiffs’ AdX Divestiture	Google’s “Business Divestiture”
Transfer ownership/control to third party	 PRX050 at -298, -307; PRX060 at -505 Rem. Tr. at 65:23-66:1, 66:24-67:3 (9/25 PM) (Craycroft)
Transfer AdX reference source code	 PRX060 at -503, -505, -513 Rem. Tr. at 62:16-22, 63:14-25 (9/25 PM) (Craycroft) Rem. Tr. at 56:17-57:16 (9/30 AM) (Berntson)
Transfer employees	 PRX050 at -298 Rem. Tr. at 65:13-17 (9/25 PM) (Craycroft)
Transitional services period	 PRX050 at -298; PRX060 at -505 Rem. Tr. at 67:4-8 (9/25 PM) (Craycroft) Rem. Tr. at 53:3-5 (9/30 AM) (Berntson)
Customer migration	 PRX050 at -298 Rem. Tr. at 67:9-14 (9/25 PM) (Craycroft) Rem. Tr. at 51:13-23 (9/30 AM) (Berntson)
Operate AdX without Google infrastructure	 Rem. Tr. at 70:3-6 (9/25 PM) (Craycroft) Rem. Tr. at 51:24-52:3 (9/30 AM) (Berntson)

Google Concluded AdX Dependencies Could Be Replaced



Tim Craycroft



Q. And it was the expectation of this project that **the buyer would replace those [AdX] dependencies.** Correct?

A. **Yes.**

. . . .

Q: [W]ould the divestiture buyer **operate AdX themselves?**

A: **Yes.**

Rem. Tr. at 64:5-7, 70:3-6 (9/25 PM) (Craycroft)



Glenn Berntson



Q. [U]nder the concept that was evaluated here, **AdX would be running independent of Google's infrastructure;** correct?

A: **That is what was envisioned.**

Rem. Tr. at 51:24-52:3 (9/30 AM) (Berntson)

Potent and Decisive Action Is Needed Now



This Court has “jurisdiction to **prevent** and restrain violations of” the Sherman Act, “and it **shall be the duty** of” the United States “to institute **proceedings in equity to prevent** and restrain such violations.”

15 U.S.C. § 4 (Sherman Act)

“An ounce of prevention is worth a pound of cure.”

– Benjamin Franklin

