IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03010-APM HON. AMIT P. MEHTA
STATE OF COLORADO, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03715-APM HON. AMIT P. MEHTA

PLAINTIFFS' RESPONSE TO THE NEW YORK TIMES COMPANY'S
MOTION FOR ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS

Public access to judicial records is fundamental to the rule of law. As they did at trial, Plaintiffs fully support the purpose behind The New York Times Company's (The Times) Motion for Access to Judicial Records and Proceedings. There is a strong presumption for public access to judicial records and proceedings, especially in this matter when the Federal government and its state government partners are parties.

However, Plaintiffs are mindful of the need to balance the presumption of public access with the forward-looking nature of evidence that the parties will offer at the remedies hearing and the related need to protect competitively sensitive information. Indeed, the Court and the

parties worked diligently during the liability trial to establish a framework that would balance these important interests without negatively impacting trial preparation and presentation. To that end, the Court's previous orders governing confidentiality—which set reasonable timeframes and make the confidentiality process manageable for the parties, non-parties, and the Court while preserving the interest in public access—should similarly govern remedies in this bifurcated proceeding. *See*, *e.g.*, Order on Posting Trial Materials, ECF No. 725 (hereinafter ECF 725); Supplemental Order on Posting of Trial Materials, ECF No. 750 (hereinafter ECF 750); Minute Order, Oct. 18, 2023 (establishing procedure for proposed closed-session testimony).

For the reasons demonstrated below, the Court should not amend or overturn its process governing public access to judicial records and proceedings that was implemented during the liability phase following careful consideration and sufficient experience. The Plaintiffs furthermore support The Times's position with respect to public access to the courtroom and proceedings.

BACKGROUND

The Court previously engaged in a reasoned process, with input from all parties and The Times, to establish a governing framework for public and press access in this case. On September 28, 2023, the Court issued an order on posting trial materials. ECF No. 725. That order permits a party to post on the internet or otherwise disseminate to the public an admitted exhibit or demonstrative that was used in open court. *Id.* It also sets forth a specific procedure that a posting party must follow before posting an exhibit or demonstrative. *Id.* Then, on October 25, 2023, the Court issued a supplemental order on the posting of trial materials, which further established that a designated press representative could request exhibits used during the liability trial. ECF No. 750. That order established a process whereby the parties would release portions

of an exhibit, used in open court, within two to four business days, depending on whether it was a party or a non-party document and was cleared for confidentiality purposes. *Id.* Finally, the Court instituted a procedure for closed sessions that required a party to notify the Court by the end of the trial day immediately prior to the day of an expected closed session to permit representatives from the media to object. Minute Order, Oct. 18, 2023 (establishing procedure for proposed closed-session testimony).

Collectively, these orders enabled the public and press to access judicial records and proceedings during the liability phase.

ARGUMENT

I. The Timeframe Requested for Contemporaneous Access to Exhibits Used at the Remedies Hearing Is Inconsistent with the Court's Prior Orders.

The Times now requests that the release of hearing exhibits "should be truly contemporaneous" and made "publicly available as soon as possible, and certainly by the evening of each hearing day" because it will only "take a few minutes at the end of each hearing day to release the exhibits." Mem. of P. & A. in Supp. of The New York Times Company's Mot. for Access to Judicial Records and Proceedings, ECF No. 1192-1 at 5 (hereinafter ECF No. 1192-1). Plaintiffs disagree. Although hearing exhibits should be made publicly available as soon as possible, the Court's prior Order, ECF No. 750, continues to be the best approach for releasing hearing exhibits, because it provides the parties a fulsome opportunity to address important confidentiality issues while providing the public and press with timely access to the exhibits themselves.

A. The Cases Cited by The Times Do Not Necessitate a Change to the Court's Prior Orders.

The two cases The Times cites are readily distinguishable on their facts and do not support changing the Court's orders regarding when hearing exhibits are released to the public.

In *Washington Post v. Robinson*, the D.C. Circuit reviewed a magistrate judge's decision to partially seal a plea agreement and related documents. 935 F.2d 282, 284–85 (D.C. Cir. 1991). The court noted that "*contemporaneous* access" to a specific type of document—a plea agreement—was important because of "the public's role as overseer of the criminal justice process." *Id.* at 287.[1] The decision in *Robinson* focuses on a specific type of document, in a certain type of case—a plea agreement in a criminal matter—which is not present here. Unlike *Robinson*, this matter involves hundreds of exhibits that touch on current or forward-looking matters of competition, which potentially involve several third parties (and, thus, require a careful review before making public).

The Times also cites *In re Associated Press* to suggest that even where "timely public access entails some degree of administrative burden on the court or the parties, courts have not found a justification for denying or seriously delaying public access." ECF No. 1192-1 at 5 (citing *In re Associated Press*, 172 F. App'x 1, 6–7 (4th Cir. 2006)). In that case, petitioners sought same-day access to documentary exhibits and contemporaneous access to transcripts of bench conferences in the criminal trial of an accused terrorist. *In re Associated Press*, 172 F. App'x at 2–3. The court determined that administrative concerns were insufficient to "*justify a complete denial of access*," not a temporary delay in access—which is the most that has occurred under this Court's current orders. *Id.* at 5 (emphasis added).[2]

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[1] The facts in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), which the *Robinson* court cites are also distinguishable. The question presented there related to the right of the public and press to attend criminal trials, not whether the press should receive same-day access to exhibits. *Richmond Newspapers*, 448 U.S. at 564.

[2] That court highlighted ways to ease administrative concerns such as "providing access to one copy of an exhibit…and requiring the media to make additional copies at their own expense." *In re Associated Press*, 172 F. App'x at 6. The Court adopted this approach during the liability trial and should continue that approach for the remedies hearing. *See* ECF No. 750.

The Fourth Circuit ultimately directed the district court in that case to provide "the media with one copy of each documentary exhibit that has been admitted into evidence and fully published to the jury… as soon as is practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury, or, in the case of an exhibit that is published to the jury in parts, after all parts of the exhibit have been published." *Id.* at 6. Although this decision, from a neighboring jurisdiction, indicates same-day access to hearing exhibits may be appropriate in some instances, precedent from this circuit gives this Court the leeway to consider the potential administrative burden on the parties and provide a timeframe for the release of hearing exhibits that minimizes potential burden.

In *Leopold v. United States*, the D.C. Court of Appeals noted that "[i]t is undisputed… that in considering the legitimate interests identified in *Hubbard*, a court may reasonably find that the administrative burden of protecting those interests should affect the manner or timing of unsealing." 964 F.3d 1121, 1133 (D.C. Cir. 2020). Though the number of confidential materials at issue in *Leopold* may be greater than the ultimate number of exhibits introduced during the remedies hearing, this case involves complex and current forward-looking exhibits. This Court is permitted to—and should—assess the administrative burden facing the parties and non-parties to determine when to release hearing exhibits. The release of full hearing exhibits, as requested here, would not take "a few minutes" because, as the Court knows, the parties and non-parties only clear, for confidentiality purposes, portions of documents to be used in open court. Thus, the Court properly considered the administrative burden and articulated a reasonable approach in its prior order. *See* ECF No. 750.

B. Neither Recent Experience from the Eastern District of Virginia nor the Date of The Times's Motion Should Change the Court's Prior Orders.

The Times also argues that recent litigation in the Eastern District of Virginia involving Google and some of the same Plaintiffs here supports the notion that "contemporaneous access to trial evidence is workable." ECF No. 1192-1 at 6. There, Judge Brinkema required the parties "to publish on a publicly available website all exhibits that have been entered into evidence at trial (and are not otherwise sealed by Order of the Court) no later than 10:00 a.m. the day following an exhibit's admission into evidence." Order at 1–2, *United States et al. v. Google LLC (Google Adtech)*, No. 1:23-cv-108 (E.D. Va. Aug. 9, 2024), ECF No. 1147 (citation omitted).[3]

The situation faced by Judge Brinkema is quite different than the one faced by this Court for two reasons. First, Judge Brinkema outlined the procedures regarding public access to trial exhibits on June 7, just over two months before the start of trial, and ultimately entered an order on August 9 reflecting the same position she articulated from the bench on June 7. *See* Minute Entry, *Google Adtech*, ECF No. 744; Minute Entry, *Google Adtech*, ECF No. 1312 (indicating trial started on September 9, 2024). This provided the parties sufficient time to designate confidential information, negotiate redactions, and resolve disagreements. It also provided Judge Brinkema with the time needed to resolve confidentiality disagreements before trial. This resulted in very few confidentiality issues that arose during trial days. Here, the parties are operating under a compressed schedule and may need to resolve confidentiality issues on hearing days. Thus, two to four business days, consistent with the Court's prior orders, is a reasonable

[3] At a hearing on June 7, 2024, Judge Brinkema noted that "it's the obligation of the party who moved the exhibit in to make it available on a website that you've set up so that the public can get pretty quick access to it." Hr'g Tr. at 37:18–38:18, *Google Adtech*, ECF No. 747.

period for the release of hearing exhibits given the additional daily preparation and after-hours work that will occur during the remedies hearing.

Second, unlike in *Google Adtech*, the parties here are focused on remedies and therefore will likely use either current or future-looking documents—the type of evidence that often draws confidentiality concerns. The Court acknowledged this point at the March 10 hearing, suggesting that confidentiality issues may play a larger role during the remedies hearing. Hr'g Tr. 40:7–11, Mar. 10, 2025, ECF No. 1189. In contrast, the *Google Adtech* trial dealt with liability issues, and consistent with this Court's intuition, there are likely to be fewer disputes regarding confidentiality during the liability phase of a litigation compared to the remedies phase. Thus, given that confidentiality issues are likely to be more numerous at the remedies hearing, the Court does not need to change its orders and should reject The Times' attempt to impose more strenuous timeframes than those in the liability phase.

Finally, The Times argues that the Court should grant its motion because, unlike the liability phase, The Times has raised its confidentiality concerns well before the remedies hearing. Plaintiffs note, however, that the parties are less than four weeks from the remedies hearing and are in the midst of expert discovery, deposition designations, and exhibit list preparation. Thus, the parties unfortunately are restricted in terms of time and resources to complete the thorough pre-trial confidentiality process that The Times envisions.

C. The Times's Additional Requests Are Either Already Addressed by the Court's Prior Orders or Unduly Burdensome.

The Times's motion makes two additional requests regarding access to exhibits, both of which are unpersuasive. First, The Times requests that the parties provide non-parties advance notice of what portions of documents may be used at the remedies hearing to either resolve what portions of the exhibit should be sealed or raise the dispute with the Court. Under the Court's

previous orders, however, this process is already in place. For example, the Court has ordered that

> If during trial a Party or non-Party receives notice of a Party's intention to publicly disclose information previously identified as confidential information during the discovery phase, the Party or non-Party claiming that the information is confidential information must, within 48 hours, either reach agreement with the Party seeking to disclose the information or raise the issue before the Court.

Stipulated Order on the Use of Confidential Information at Trial, ECF No. 647 at 2. Further, the parties have met and conferred and jointly proposed to follow this approach during the remedies hearing to ensure "that disputes about sealing are resolved before an exhibit is used at the hearing." *See* ECF No. 1192-1 at 6; Joint Status Report, ECF No. 1196 at 4 (Confidentiality Designations During the Evidentiary Hearing) (hereinafter ECF No. 1196). The Court should follow the orders in place during the liability phase, which is consistent with the parties' recent joint proposal on confidentiality.

Second, The Times's motion asks for the public release of entire documents entered in evidence, instead of just releasing the portions of documents used in open court during the remedies hearing.[4] This approach is inconsistent with the Court's procedure during the liability phase and would result in significant administrative burden.

As the Court will recall, the parties were able to "push into evidence" certain types of documents at the beginning of the liability trial. These documents did not need to go through the time intensive confidentiality process unless they were used live with a witness at trial. Given the

[4] Plaintiffs interpret The Times's motion, which states "[i]f a party does not consider portions of a document relevant to the case or otherwise does not want them in the evidentiary record, it should not present those portions to the Court and should instead redact or omit them," to suggest that the Court should require the parties and non-parties to complete a confidentiality review for an entire document, even those portions not used in open court during the remedies hearing. ECF No. 1192-1 at 7.

length of these documents, the parties agreed to review only the portion of an exhibit that a party would use live with a witness, along with several additional pages, so that the public and press could understand the context of the document. This process reduced the administrative burden for both parties and non-parties alike and helped ensure the press could get access to hearing exhibits in a timely manner. If the Court followed The Times's approach, the parties and non-parties would need to resolve confidentiality issues for thousands of pages that were never used in open court—a situation that would immensely burden the parties and non-parties. For this reason, the better approach is to follow the Court's previous practice—releasing the portions of documents used in open court and pushing documents into evidence at the start of the remedies hearing.

II. The Public Should Have an Opportunity to Object to any Courtroom Closure, and the Parties Should Provide Redacted Transcripts of Closed Sessions to the Court Within 72 Hours.

The Times also (1) seeks confirmation that the public and press will have an opportunity to object to any courtroom closure in advance and (2) requests the Court to require the parties and, where relevant, non-parties to provide the Court with redacted transcripts within 24 hours of the end of a closed court session. ECF No. 1192-1 at 8–9. The Times then asks the Court to independently review the proposed redactions and determine whether they comport with the *Hubbard* factors, ordering the release of any portions that do not. *Id*.

Plaintiffs agree with the Court that the courtroom should only be closed when "there is truly no other way to receive the evidence." Hr'g Tr. 40:23–41:5, Mar. 10, 2025, ECF No. 1189. To enable this, the parties have agreed, and the Court has ordered, to identify confidential information in exemplar documents and provide redactions for confidential information in deposition testimony for some witnesses to help identify, before the remedies hearing, what topics and witnesses could potentially require courtroom closure. ECF No. 1196 at 2–4; Order,

ECF No. 1200 at 1 ("The court adopts the process proposed by the parties in Part I.A.1.a (Redactions Prior to the Evidentiary Hearing) and Part I.A.1.c (Presentations and Examinations)."). Plaintiffs also agree with The Times that the public and press should have an opportunity to object to any courtroom closure in advance of such sessions. To accomplish this, the Court should follow the same procedure from the liability trial, as previously set forth by the Court. Minute Order, Oct. 18, 2023 (establishing procedure for proposed closed-session testimony).

Unfortunately, it is unlikely that the parties and non-parties could reasonably propose redactions to transcripts from closed sessions within 24 hours of the end of the closed session. First, the parties typically do not receive the hearing transcript until very late on the hearing day or the next business day. With this reality in mind, the parties and non-parties would be left with little time, under a 24-hour clock, to review a transcript and negotiate with the appropriate stakeholders about what testimony should or should not be redacted. Based on experience from the liability trial, the parties and non-parties were able to resolve a significant number of disputes after material was designated confidential but before the material was used in court. This approach, however, takes some additional time. For this reason, the Court should order the parties, and where relevant the non-parties, to provide redacted transcripts of closed sessions to the Court within 72 hours of receiving the hearing transcript from the court reporter.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court's existing orders governing judicial access remain in full effect.

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Respectfully submitted,

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