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Litigators of the Week: Susan Creighton of Wilson Sonsini Goodrich & Rosati; John Schmidlein of Williams & Connolly; and John Harkrider of Axinn Veltrop & Harkrider



By Jan Wolfe
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UPDATE: This piece has been updated to reflect that strategic advisor Jeff Blattner of Legal Policy Solutions LLC represented Google.

After coming out guns-a-blazing in its antitrust showdown with Google Inc., the Federal Trade Commission largely retreated on Jan. 3. As one FTC commissioner put it, "after promising an elephant more than a year ago, the commission instead has brought forth a couple of mice." Some observers say the FTC is asleep at the wheel. Others say the agency just did its job and followed the evidence. Whatever the case, we suspect Google is pretty pleased with its small army of outside lawyers, led by Susan Creighton of Wilson Sonsini & Goodrich; John Schmidlein of Williams & Connolly; and John Harkrider of Axinn Veltrop & Harkrider.

The FTC commissioners voted 5-0 to close the agency's two-year-old antitrust investigation into claims that Google favored its own services in its search results and unlawfully harmed rivals. Google did agree, however, to some relatively mild reforms. It will give online advertisers more freedom to arrange ad campaigns with rival web sites, and it will stop seeking injunctions against rival gadget-makers on the grounds that they infringe Google's standard-essential patents.

"[O]n balance we do not believe that the evidence supported a FTC challenge," said FTC chairman John Leibowitz at a press conference. "Anyone in charge of an antitrust agency would like to bring the big case. But more important than that is faithfully executing the law."

Google rivals like Microsoft Corporation, which owns the search engine Bing, have long argued that Google's practice of manipulating search results harms competition. Web companies like Yelp Inc. and Expedia Inc. also complained about Google "scraping" their content without sending web traffic their way. To their relief, the FTC opened an investigation into Google's search practices with much fanfare in June 2011, signaling the seriousness of the probe by hiring Beth Wilkinson of Paul, Weiss, Rifkin, Wharton & Garrison as outside counsel. The FTC also launched an investigation into Google's use of standard-essential patents in lawsuits against smartphone rivals like Apple Inc. and Microsoft.

To defend against the search bias claims, Google brought on Wilson Sonsini, its longtime go-to antitrust firm. Creighton, an FTC alum, led

the firm's defense effort. As Reuters reported here, Google also tapped Jeff Blattner, a former Department of Justice attorney who prosecuted Microsoft for antitrust violations during the 1990s. A former Hogan Lovells partner, Blattner now serves as strategic consultant at Legal Policy Solutions LLC. Google later added a Williams & Connolly team led by Schmidlein, which was slated to try the case if it went to trial. Hogan Lovells also advised Google on an intriguing First Amendment question that might have come up a trial--namely, whether Google's search results are free speech. (Law Professor Tim Wu recently delved into that question in a New York Times blog post.)

Meanwhile, a team at Axinn Veltrop led by Harkrider handled the patent misuse claims. Matthew Warren, one of Google's go-to patent lawyers at Quinn Emanuel Urquhart & Sullivan, also advised on the patent component of the investigation.

When the FTC made its anticlimactic announcement last Thursday after 17 months of closed-door negotiations, Creighton, Schmidlein, Harkrider and their colleagues were quickly anointed winners in the press. The Times called the result a "major victory" for Google. Less diplomatically, New York Law School professor James Grimmelmann wrote that the settlement is "a giant middle finger extended in the direction of the Google critics." One of those critics said he's "never seen a more unprofessional, incomplete, incompetent investigation."

The FTC, to its credit, got Google to agree to change its use of standard-essential patents. But the concessions may not be all that painful for Google. So far, no smartphone maker has been able to secure an injunction against a rival based on infringement on SEPs. U.S. judges, led by the influential Richard Posner, have said that such a result would be profoundly unfair. In many ways, the FTC's decree just cements a status quo that the industry was moving toward on its own.

Creighton, Schmidlein, and Harkrider all declined to comment. They didn't really need to gloat, though. When regulators are forced to defend an outcome as soon as it's announced, and when your client's detractors are fuming with anger, you know you've done something right.