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Google Attys' 'Fake Privilege' Comments Cited In Search Suit

By **Dorothy Atkins**

Law360 (February 28, 2024, 4:52 PM EST) -- The U.S. Justice Department and states accusing Google of monopolizing the online-search market have asked a D.C. federal judge to consider internal chats disclosed in Epic Games' antitrust lawsuit that revealed Google's lawyers discussing "fake privilege" — a practice of unnecessarily involving a lawyer to make an exchange confidential.

In a motion filed Tuesday, the Justice Department and states asked U.S. District Judge Amit P. Mehta to take judicial notice of the two Google-written exhibits that **were produced** in Epic Games litigation in November in a jury trial challenging Google's app store commissions.

The DOJ and states argued that the exhibits should be considered by the court for the limited purpose of determining whether Google abused privilege and hid documents relevant to the antitrust issues in the government's litigation against the tech giant by making bogus privilege assertions.

"The two Epic trial exhibits for which plaintiffs seek the court to take judicial notice are directly related to the proposed findings of fact in this case and neither were produced in this litigation," the motion said. "The court's taking judicial notice of the existence and content of these records may assist the court in evaluating plaintiffs' claims regarding Google's use of privilege."

The motion noted that Google has indicated that it plans to oppose the request, and said that although the government doesn't seek to specifically add the exhibits as evidence in the case, the court should still take judicial notice of their existence and contents — "namely, that Google's own inside counsel used the term 'fake privilege' when referring to an email on which she was copied and which discussed Google business."

The two exhibits include a chat exchange between Google in-house attorneys, Emily Garber and Tristan Ostrowski, in January 2021 in which Garber discusses an email on which she was "looped [in] for fake privilege" regarding a conflict between the Google Play team and the Google Ads team, according to the brief.

The other exhibit is a March 2022 exchange in which Garber again refers to "fake privilege" in relation to Google lawyers during a longer discussion with Ostrowski, the brief said, adding that the documents weren't produced in the current litigation because Garber is not a Google custodian in the case.

The motion comes three months after the high-stakes, 42-day trial against Google wrapped in November, with Judge Mehta setting closing arguments for May, allowing the parties to submit over 1,000 pages of post-trial briefs and saying he had "**no idea**" how he would ultimately rule.

The government's claim that Google's agreements with smartphone manufacturers and web browsers — through which it has paid billions of dollars to ensure that it's the default search engine on Apple devices and browsers Firefox and Safari — illegally ensured its market dominance and boxed out would-be competitors like Bing and DuckDuckGo.

But Google argued in its defense that those agreements date back to Android's infancy as a mobile operating system and when Apple and Mozilla first released their Safari and Firefox browsers, respectively. At the time, the company **argued in its closing brief**, "only a tiny fraction of online search queries originated from these browsers and devices."

The other litigation against Google was launched by Fortnite game-maker Epic Games Inc. in 2020, accusing Google and Apple in **separate lawsuits** of violating antitrust laws by restricting app stores and charging up to 30% commissions on app and in-app purchases.

Epic Games' case went to a jury trial last year, and in December jurors in San Francisco dealt Google a **devastating blow** after just hours of deliberations, ruling that the search giant illegally restrained trade in the market for Android app distribution and billing services, and setting the stage for a possible court-ordered injunction.

Google has since **vowed to fight the verdict** in post-trial motions and on appeal, but evidence disclosed at trial offered a rare glimpse into the tech company's **internal preservation practices**.

Before the Epic Games trial wrapped in December, U.S. District Judge James Donato, who has presided over the antitrust litigation in California, told counsel that he's **concerned** Google's willful destruction of evidence and "bogus" privilege assertions constitute a "frontal assault on the administration of justice" and that jury instructions in the newly wrapped trial will reflect the company's "deeply disturbing" behavior.

Google declined to comment Wednesday, and representatives for the government didn't immediately respond to requests for comment.

The government is represented by Kenneth M. Dintzer, Karl E. Herrmann and Erin Murdock-Park of the U.S. Department of Justice's Antitrust Division.

The states are represented by their respective attorneys general and William F. Cavanaugh Jr. of Patterson Belknap Webb & Tyler LLP.

Google is represented by John E. Schmidlein, Benjamin M. Greenblum and Colette T. Connor of Williams & Connolly LLP, Wendy Huang Waszmer, Susan Creighton and Franklin M. Rubinstein of Wilson Sonsini Goodrich & Rosati PC and Mark S. Popofsky and Matthew L. McGinnis of Ropes & Gray LLP.

The D.C. antitrust cases are U.S. et al. v. Google LLC, case number 1:20-cv-03010, and Colorado et al. v. Google LLC, case number 1:20-cv-03715, in the U.S. District Court for the District of Columbia. The California antitrust cases are In re: Google Play Store Antitrust Litigation, case number 3:21-md-02981, and Epic Games Inc. v. Google LLC et al., case number 3:20-cv-05671, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger, Brian Koenig and Jared Foretek. Editing by Rich Mills.