

CAUSE NO. \_\_\_\_\_

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
GOOGLE INC.	§	
	§	JUDICIAL DISTRICT

**PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE STATE OF TEXAS, acting by and through its Attorney General, Greg Abbott, complaining of GOOGLE INC., and in furtherance thereof would respectfully show the Court as follows:

**I. INTRODUCTION**

1.1 This is an action to enforce two Civil Investigative Demands (“CIDs”) served on Google Inc. (“Google”) by the Antitrust Division (now the Antitrust Section) of the Texas Attorney General’s Office. While Google has produced a significant volume of documents in response to the CIDs, Google has withheld a large volume of documents based on assertion of the attorney-client privilege and has claimed that certain documents that were produced are, in fact, privileged, and should be destroyed or returned to Google. Google has not met its burden of demonstrating that the privilege is applicable to many of the documents in question. The Attorney General’s Office brings this action seeking a Court order compelling Google to produce all documents that are not subject to attorney-client privilege.

**II. DISCOVERY CONTROL PLAN**

2.1 The discovery in this case is intended to be conducted under Level 2 pursuant

to Texas Rule of Civil Procedure 190.3.

### III. PETITIONER

3.1 Petitioner is the State of Texas, which is represented by its Attorney General, Greg Abbott. Section 15.10(h)(1) of the Texas Business and Commerce Code authorizes the Attorney General to petition this Court for an order compelling Google to comply with Civil Investigative Demands duly served on it, as set forth in greater detail below.

### IV. RESPONDENT

4.1 Respondent Google Inc. is a Delaware corporation with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043. Respondent maintains an office in, and transacts business in, Travis County. Respondent may be served through its registered agent for service of process: CSC – Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

### V. JURISDICTION AND VENUE

5.1 Jurisdiction and venue are proper in this Court pursuant to Article 5, Section 8 of the Texas Constitution and Sections 15.10 and 15.26 of the Texas Business and Commerce Code.

### VI. FACTUAL BACKGROUND

#### **The Investigation**

6.1 The Attorney General's Office is conducting an investigation to determine whether Google has violated state and federal antitrust laws. Specifically, the Attorney General's Office is investigating whether Google has used its monopoly power in general ("horizontal") internet search to foreclose competition from rival "vertical search" web sites

that specialize in areas such as shopping, local businesses, and travel. The conduct under investigation includes alleged preferential placement of Google vertical search services, demotion of rivals in Google's search results rankings, and the unauthorized use of user reviews, star ratings, and other content that Google scrapes from competing vertical search sites. In addition, this office is investigating whether exclusivity provisions in Google's contracts with web site publishers unlawfully foreclose competition for search advertising syndication deals. If Google is maintaining its monopoly in horizontal search through exclusionary conduct directed at vertical search competitors, or monopolizing the search advertising market through exclusive contracts, the Attorney General's Office may bring an enforcement action against Google for monopolization in violation of Texas Business and Commerce Code § 15.05(b) and/or Section 2 of the Sherman Act, 15 U.S.C. § 2. In order to bring this investigation to fruition, it is important that the Attorney General's Office obtain all non-privileged documents responsive to its CIDs.

6.2 Pursuant to Texas Business and Commerce Code § 15.10, the Attorney General issued two CIDs to Google, on July 29, 2010 and May 27, 2011. True and correct copies of these CIDs, which sought answers to written interrogatories and the production of documents, are attached hereto as Exhibits A and B and are incorporated by reference herein.<sup>1</sup> These CIDs were issued as part of the ongoing investigation described above.

6.3 In response to the document requests included in the CIDs, Google produced several hundred thousand documents to the Attorney General's Office, on a rolling basis beginning in August 2010. Google also produced privilege logs describing approximately

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<sup>1</sup> The CIDs, unlike documents produced in response thereto, are public information under the Texas Public Information Act, Ch. 552 of the Texas Government Code. The May 27, 2011 CID has been redacted to remove references to information contained in Google's response to the July 29, 2010 CID. An unredacted version will

14,500 documents that were withheld from Google's production on the grounds of attorney-client and/or work-product privilege.

**“Inadvertently Produced” Documents**

6.4 On April 13, 2012, counsel for Google identified a document (Bates number GOOG-Texas-1039527 through -29) containing an email that Google claims is subject to the attorney-client privilege and had been produced inadvertently. On May 3, 2012, Google's counsel wrote a letter to the Attorney General's Office identifying eleven other documents containing versions of the allegedly privileged email and requesting that the Attorney General delete all copies of these documents.<sup>2</sup> The email in question is from one Google Vice President to his superior. Though the email begins with a header noting that it purports to be “Attorney Client Priveleged [sic],” neither the author nor the recipient is an attorney, and the content of the email makes no reference to legal advice. Six other Google employees, including one in-house Google attorney, are copied on the email.<sup>3</sup>

6.5 The email at issue is a communication between non-lawyer Google executives discussing their recommendation to change how Google uses review content taken from competing sites and the process for presenting this recommendation to Google's management for discussion and decision. The bulk of the communication reflects the views of other Google executives (non-lawyers) on purely business matters. Nowhere in this communication does the author reference any previous or intended future conversations with counsel, nor does the communication reflect any legal analysis of Google's actions, potential

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be made available to the Court.

<sup>2</sup> A true and correct copy of the May 3 letter, redacted to remove confidential information, is attached hereto as Exhibit C. An unredacted copy will be made available to the Court.

<sup>3</sup> Because Google maintains that the email in question is privileged, the Attorney General's Office has not attached it to this petition. The Attorney General's Office respectfully requests that the Court review the email *in camera*, as set forth more fully below.

liability for misappropriating content, or responsibilities to the content provider. The document is highly relevant to the conduct being investigated by the Attorney General's Office.

6.6 On May 15, 2012, Google's counsel submitted to the Attorney General's Office redacted versions of the purportedly privileged documents, as well as a privilege log with a description of each version of the email. On each of the redacted versions, the email in question -- comprising approximately one and-a-half single-spaced pages -- was redacted in its entirety. The log described the email as "Email seeking legal advice of [Google in-house attorney] Stuart Teng re proposed changes to Place Pages and work to be performed in connection therewith."

6.7 Later on May 15, 2012, the Attorney General's Office wrote to Google's counsel, explaining why Google's assertion of attorney-client privilege with respect to this email was not supported based on the content of the email and the description in the privilege log.<sup>4</sup> Google's counsel indicated in a subsequent phone call that the description of the email in the privilege log, to the extent the email is described as "seeking" legal advice, is erroneous, and that the claim of privilege is based on an assertion that the email "reflects" legal advice previously conveyed in an "offline" discussion. However, Google has not amended its privilege log.

6.8 On May 21, 2012, Google's counsel sent a letter to the Attorney General's Office renewing the request that the documents in question be returned or destroyed.<sup>5</sup> Absent any further information justifying a claim of privilege, the Attorney General's Office

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<sup>4</sup> A true and correct copy of the May 15 letter to Google's counsel, redacted to remove confidential information, is attached as Exhibit D. An unredacted copy will be made available to the Court.

<sup>5</sup> A true and correct copy of the May 21 letter from Google's Counsel is attached hereto as Exhibit E.

has not agreed to return or destroy the documents in question.

### **Privilege Log Dispute**

6.9 The May 15 letter from the Attorney General's Office also identified broader concerns about Google's privilege claims based on a review of its privilege logs. The Attorney General's Office has identified at least four categories of deficiency in Google's privilege log, casting doubt on the propriety of withholding certain documents:

- (1) The log details that many communications between non-lawyers have been withheld as privileged based on the assertion that they "reflected" legal advice, rather than "contained" legal advice;
- (2) The log details that many documents identified as either draft or final "presentations," "spreadsheets," or the like have been withheld despite the lack of any indication that they were prepared or reviewed by an attorney;
- (3) The log details that many business-related communications have been withheld when an attorney was merely a "cc" recipient on the communication, rather than a participant in it; and
- (4) Many of the log entries do not identify a particular attorney, but rather assert only that the advice "reflected" in the documents came from the "Google Legal Department."

The Attorney General's Office requested that Google's counsel review the documents listed on the log, produce those that were not properly withheld, and amend the log descriptions as necessary to demonstrate the application of the privilege as to those it maintained were indeed privileged.

6.10 Since this dispute arose, Google has not produced any documents previously

withheld nor amended its privilege log to address the concerns raised by the Attorney General's Office.

## VII. APPLICABLE LAW

7.1 Google's claim that the email communication contained in the document Bates stamped GOOG-Texas-1039527 through -29 is privileged is not supported by the applicable law. The privilege protects only "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1); *see also Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996). Communications made for other purposes, such as business purposes, are not privileged. *See, e.g., Clover Staffing, LLC v. Johnson Controls World Servs., Inc.*, 238 F.R.D. 576, 581-82 (S.D. Tex. 2006) (applying Texas law and rejecting claim of privilege where evidence did not show that documents were "communications made for the purpose of obtaining legal advice, as opposed to communications about possible business solutions to business problems").

7.2 Where an attorney participant in a communication is not acting in a legal capacity, communications are not protected. *See, e.g., Kelly v. Gaines*, 181 S.W.3d 394, 419-20 (Tex. App.—Waco 2005) (citations omitted), *rev'd on other grounds*, 235 S.W.3d 179 (Tex. 2007). This distinction is particularly important in the case of in-house counsel, who often perform both business and legal functions. *See Stoffels v. SBC Commc'ns, Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009) ("Thus, in such a setting [in-house corporate counsel], the attorney-client privilege attaches only to communications made for the purpose of giving or obtaining legal advice or services, not business or technical advice or management decisions."). Google asserts that the email is privileged because it "reflects" an earlier

conversation with Google's in-house attorney.<sup>6</sup> However, merely because a client seeks and obtains legal advice on a particular topic does not render all further discussion of the topic privileged. "[W]hen a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 809 (E.D. La. 2007); *see also Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (rejecting proposition that "the decision of a company to proceed with or forego a certain course of action is itself privileged where that decision is in whole or in part based upon legal advice on the apparent theory that the decision itself necessarily reflects the advice"). Even where a document references "requests from legal," if it does not contain legal opinions or attorney-client communications, it may not be privileged. *See Stoffels*, 263 F.R.D. at 416.<sup>7</sup>

7.3 The burden of demonstrating that a privilege applies, through the introduction of testimony, affidavits and/or the disputed documents themselves, rests with the party claiming the privilege. *See, e.g., In re Living Ctrs. Of Tex., Inc.*, 175 S.W.3d 253, 261-62 (Tex. 2005); *In re DuPont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex. 2004). Where review of the documents is necessary to a determination of the applicability of the privilege, the Court must conduct such a review. *See DuPont*, 136 S.W.3d at 223.

7.4 Under the applicable law, the email contained in the document Bates stamped GOOG-Texas-1039527 through -29 is not privileged. The Attorney General's Office respectfully submits that Google's claim of privilege should be rejected and the Court, after

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<sup>6</sup> As noted above, Google's counsel has stated that the privilege log description of the email as "seeking" legal advice is erroneous.

<sup>7</sup> Under Texas Rule of Evidence 503, communications between "representatives of a client," which can include non-attorney personnel, may be privileged. *See* TEX. R. EVID. 503(b)(1)(D). However, to be protected from disclosure, the communications must still be "made for the purpose of facilitating the rendition of professional legal services." *Id.* at R. 503(b)(1).



reviewing the documents *in camera*, should order Google to remove all twelve documents containing versions of the email from its privilege log.

7.5 As noted above, the Attorney General's Office has also raised broader concerns about Google's claims of privilege. Based on the descriptions of documents listed on Google's privilege logs, the Attorney General's Office suspects that there are many documents being improperly withheld based on assertions of privilege. While the Attorney General's Office does not expect the Court to review the many thousands of documents withheld on privilege grounds, courts often review representative samples in cases where the volume of documents is large. *See, e.g., Vioxx*, 501 F. Supp.2d 789. The Attorney General's Office has identified a representative sample of documents included on Google's privilege logs that the State believes may be examples of dubious privilege claims, falling into the four categories identified above. The Attorney General's Office believes that *in camera* review of these examples will likely demonstrate that Google has significantly overreached in its effort to prevent disclosure of documents responsive to the CIDs, and will provide the Court with the privilege log entries for these documents, and the redacted versions, as part of the *in camera* inspection process.

7.6 The Attorney General's Office respectfully requests that the Court review the documents identified by the Attorney General's Office *in camera* and, based on that review, issue an order compelling Google to produce those that are not privileged. The Attorney General's Office further requests that the Court order Google to review its privilege logs and the documents listed thereon and, guided by the Court's ruling on the documents identified by the Attorney General's Office, to reassess its claims of privilege, to produce to the Attorney General's Office all documents not protected by the attorney-client privilege, and to

produce to the Attorney General's Office revised privilege logs containing additional information where necessary to support a privilege assertion as to those documents it maintains are protected from disclosure.

#### VIII. PRAYER

**WHEREFORE**, Petitioner requests that Google be cited to appear and answer herein, and that, after notice and a hearing, the Court:

- a) order Google to produce for inspection *in camera* the document Bates stamped GOOG-Texas-1039527-29 and each of the other eleven documents containing versions of the allegedly privileged email contained therein;
- b) order Google to produce for inspection *in camera* Google's privilege logs and unredacted versions of the documents identified by the Attorney General's Office as examples of Google's improper privilege claims;
- c) after reviewing the documents referenced above, issue an order as to the applicability of the attorney-client privilege to each of those documents;
- d) order Google to produce to the Attorney General's Office all documents that the Court determines are not protected by the attorney-client privilege;
- e) order Google, in light of the Court's ruling on the documents inspected *in camera*, to review its privilege logs and the documents listed thereon and, guided by the Court's ruling, to reassess its claims

of privilege, to produce to the Attorney General's Office all documents not protected by the attorney-client privilege, and to produce to the Attorney General's Office revised privilege logs containing additional information where necessary to support its claims of privilege; and

- f) order such other and further relief as the Court deems just and proper.

Respectfully submitted,

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