

THE AM LAW LITIGATION DAILY

Litigators of the Week: Cravath and Fortnite Maker Hit Google With Antitrust Jury Verdict in App Store Fight

By Ross Todd

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Of course, Epic Games, the maker of Fortnite, would be up for a fight. More than three years ago, Epic attempted to bypass fees that Google charges its users for in-app purchases. That move got Fortnite the boot from the Android app store.

Score one hit for Google.

This week with a trial team at **Cravath, Swaine & Moore** representing Epic, federal jurors in San Francisco found that Google illegally wielded monopoly power on Android app distribution and in-app payments.

Score a whopping hit for Epic.

Next round? U.S. District Judge James Donato is set to conduct a hearing on possible remedies early next year.

Our litigators of the week are Cravath's **Gary Bornstein**, **Yonatan Even** and **Lauren Moskowitz**. Bornstein answered the Litigation Daily's questions on their behalf.

Litigation Daily: How did Epic Games come to you and the firm as a client?

Gary Bornstein: Epic came to Cravath in 2020 to discuss their concerns about Google's Play Store practices—and what they believed to be anticompetitive conduct.

Cravath has a long track record of success in high-stakes antitrust litigation, and we worked quickly alongside the Epic team in developing the legal side of their broader strategy to address the problems they saw affecting Epic and other developers of mobile apps, the users of those apps, and potential competing app stores and payment providers.

How would you describe what was at stake here?

From Epic's perspective, the issue at stake is the future of how people access content on mobile devices and whether it will be open, or will be intermediated by a few corporate gatekeepers. Epic has been an advocate for



Courtesy photos

L-R: Gary A. Bornstein, Lauren A. Moskowitz, and Yonatan Even of Cravath Swaine & Moore.

open platforms for many years. As Epic's founder Tim Sweeney testified at trial, he started the company over 30 years ago and was able to build a business on personal computer operating systems that allowed developers to distribute their games without artificial restrictions or fees.

Epic has a history of breaking barriers in the industry that allow for more openness. When Fortnite was first launched on game consoles, people with an Xbox couldn't play Fortnite or any other game with their friends that had a PlayStation. That wasn't a limitation in the software; it was a commercial restriction imposed by the console makers. Epic successfully pushed to have that restriction eliminated—for Fortnite, and for all other games, too. The result has been good for users, for developers and even for the console makers themselves.

Epic is focused on achieving a similar breakthrough for openness here—and believes it will ultimately be good for users, for developers and even for Google.

Who was on the trial team and how did you divide the work?

The core trial team in court day in and day out was the three of us—Yonatan, Lauren and me. But there was obviously a much broader group involved, including **Tim Cameron, Justin Clarke, Michael Zaken** and **Brent Byars** from Cravath, **John Hueston** from **Hueston Hennigan** and lawyers from **Wiggin & Dana**.

We were a very integrated team without separate silos for different subject matters, which reflects Cravath's long-standing commitment to training generalist lawyers who can see the big picture. I think that was a major benefit to us at trial because each of us had a holistic view of the case and a deep knowledge of the record that kept our presentations accurate, consistent and coordinated.

What were your major trial themes and how did you drive them home with the jury?

As we laid out in the opening and closing statements, this was a case about abuse of power. We did not challenge the formation of Android or its success as a mobile operating system, but we presented evidence that after Android had become effectively the only operating system available for license to smartphone makers, Google used the power it had attained to cement the monopolies we challenged, in app distribution and payment solutions.

Presenting that to the jury was straightforward because there were a lot of documents laying out Google's various strategies. Just letting the jury see what Google had said contemporaneously was very powerful, especially when it didn't match what Google was presenting after the fact in court or what their witnesses were saying when questioned on the stand.

A couple of years ago you and your colleagues tried a similar case for Epic against Apple in a bench trial across the Bay before Judge Yvonne Gonzalez Rogers in Oakland. With both sides seeking Supreme Court review in the Apple case and the remedies phase in this case pending, I know you're somewhat limited in what you can say about the contrasting trials and outcomes. But as a trial lawyer, how did the two experiences compare?

They may have been right across the Bay from each other, but they felt like worlds apart. Obviously, trying a case to a judge is an entirely different enterprise than trying it to a jury. Also, the Apple trial was deep in the midst

of the pandemic. It was right after we'd all first received vaccinations, and we wore masks and face shields in court. I remember cross-examining Tim Cook through four layers of plexiglass. This trial was much more what I'm accustomed to, with more human interaction, which made it much more fun, too.

I've read that Judge Donato called the cross your partner Lauren Moskowitz did of Google CEO Sundar Pichai a "rocking 75 minutes." What stands out about that exchange to you?

Every one of Lauren's cross-examinations was rocking! She is a superstar. My favorite moment of that exam was when Lauren was probing on how Google treats all apps distributed outside the Google Play Store as identical security risks, and she had him agree that Google treats an app from Amazon exactly the same as an app from the fictitious *illstealyourinfo.com*. Yonatan's examinations were great too, including a surgical strike on the core opinions of one of Google's economists. They are both examples of the tremendous talent I get to work with every day at Cravath—and that includes our amazing associates, too, who were absolutely key to this effort.

What comes next here? What will the remedies face before Judge Donato next month look like?

We'll be back in court on January 11th regarding next steps.

Random question: Have you ever played Fortnite? If so, what do you think of it? If not, why not?

Of course. It's an amazing experience—but my son tells me I'm "trash" at it.

What will you remember most about getting this win for Epic Games?

There are a lot of things I'll take with me. Working with such a principled and thoughtful client, and the opportunity to put Tim [Sweeney] on the stand and let him tell Epic's story. How attentive our jury was throughout a complicated case, and how respectfully the judge treated the members of the jury. Talented counsel on the other side. The extraordinarily friendly and professional security staff at the courthouse. The challenges of being away from home for so long.

As a trial lawyer, though, what I'll remember most is the team that I had the great pleasure to work with—both inside and outside counsel. We worked hard, but our trial site was such a positive place, where we worked together with common purpose. Yonatan, Lauren and I had the fun of being the face of the case to the jury, but we were only one part of a truly extraordinary team I will never forget.