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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**
13

14 **IN RE GOOGLE PLAY STORE**
15 **ANTITRUST LITIGATION**
16

17 THIS DOCUMENT RELATES TO:

18 *Epic Games Inc. v. Google LLC et al.*, Case
19 No. 3:20-cv-05671-JD
20

Case No. 3:21-md-02981-JD

21 **NOTICE OF MOTION AND MOTION**
22 **FOR LEAVE TO FILE BRIEF OF**
23 ***AMICUS CURIAE* FEDERAL TRADE**
24 **COMMISSION**

Hearing: August 14, 2024

Time: 10:00 am

Courtroom: 11

Judge: Honorable James Donato
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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that the Federal Trade Commission (“FTC”) hereby moves the
4 Court for leave to file a brief as *amicus curiae*. The proposed *amicus* brief is attached to this
5 motion as Attachment A. A proposed order granting this motion is attached as Attachment B.
6 Counsel for Plaintiff Epic (“Epic”) has consented to the FTC’s filing of an *amicus* brief. Counsel
7 for Defendant Google (“Google”) does not consent.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 The Federal Trade Commission respectfully moves for leave to file an *amicus curiae*
10 brief in the above-captioned matter in connection with the Remedy Hearing set for August 14,
11 2024. *See* ECF. No. 21-md-02981, runner dated 5/24/2024.

12 Following a trial, the jury determined that Google willfully acquired and/or maintained
13 durable monopolies in the markets for Android App Distribution and Android In-App Payment
14 Solutions for digital goods and services transactions, entered into a variety of agreements that
15 unreasonably restrained trade in those markets, and unlawfully tied the use of the Google Play
16 Store to the use of Google Play Billing. *See* Verdict Form (ECF No. 606). In light of that verdict,
17 Epic proposed a permanent injunction to “open up to competition the two markets found by the
18 jury: the market for the distribution of Android apps and the market for Android in-app billing
19 services for digital goods and services transactions, to the benefit of developers of Android apps,
20 developers of payment solutions for use in Android apps and users of Android mobile devices.”
21 Epic’s Proposed Permanent Injunction, at 1 (ECF No. 653). Google has objected to Epic’s
22 proposed injunction. *See generally* Google’s Objections to Epic’s Proposed Injunction (ECF No.
23 958); Google’s Proffer Regarding Epic’s Proposed Remedies (ECF No. 981). On May 23, 2024,
24 this Court held an “evidentiary hearing in aid of determining a conduct remedy.” Mar. 21, 2024
25 Order (ECF No. 951).

1 The FTC seeks leave to submit a brief as *amicus curiae* to discuss fundamental principles
2 related to injunctive relief to aid the Court’s consideration of the remedy for Google’s antitrust
3 violations.

4 The FTC is an independent agency charged by Congress with protecting the interests of
5 consumers by enforcing competition and consumer protection laws. 15 U.S.C. §§ 41-58. As a
6 federal agency empowered by Congress to enforce federal antitrust laws, *see* 15 U.S.C. § 45, the
7 FTC has expertise in ordering remedies in proven antitrust violations and vindicating the public
8 interest. *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428-29 (recognizing the FTC is an expert body
9 with wide latitude to design remedies); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946)
10 (same).

11 The agency routinely analyzes potential remedies to address competitive harms in its
12 investigations and enforcement actions across a wide range of industries. The FTC’s unique
13 perspective as a government agency that fashions effective antitrust remedies may aid the Court
14 in its analysis of the remedy issues in this case.

15 **I. District Courts Have Broad Discretion to Appoint an *Amicus Curiae***

16 “[A] district court has broad discretion in the appointment of *amici curiae*.” *California v.*
17 *U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM-DAD, 2014 WL 12691095, at *1 (E.D. Cal. Jan.
18 14, 2014) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other*
19 *grounds by Sandin v. Conner*, 515 U.S. 472, 487 (1995)). Because there is “no statute or rule
20 which provides standards as to when a party should be granted leave to appear as *amicus curiae*
21 at the district court level,” *Dible v. City of Chandler*, No. CV 03-00249-PHX-JAT, 2004 WL
22 7336848, at *1 (D. Ariz. Dec. 23, 2004) (citing *United States v. Gotti*, 755 F. Supp. 1157, 1158
23 (E.D.N.Y. 1991)), some district courts in the Ninth Circuit have turned to the Federal Rules of
24 Appellate Procedure for guidance. *See, e.g., id.* Rule 29 of the Federal Rules of Appellate
25 Procedure distinguishes between *amicus* briefs filed by federal government agencies and those
26 filed by private parties. Unlike private *amici* briefs, *see* Fed. R. App. P. 29(a)(2), *amicus* briefs
27

1 from federal agencies are accepted by Courts of Appeals as a matter of right. *See* Fed. R. App. P.
2 29(a)(2). *Amici* from federal agencies offer a distinctive perspective because “governmental
3 bodies, acting as *amicus curiae*, possess unparalleled institutional expertise and constitute a
4 valuable means of determining how the court’s decision may affect the world outside its
5 chambers.” Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin*
6 *After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1261-62 (1992) (citing Comment, *The*
7 *Amicus Curiae*, 55 NW. U. L. REV. 469, 480 (1960)).

8 District courts in this Circuit “frequently welcome *amicus* briefs from non-parties
9 concerning legal issues that have potential ramifications beyond the parties directly involved or
10 if the *amicus* has ‘unique information or perspective that can help the court beyond the help that
11 the lawyers for the parties are able to provide.’” *NGV Gaming, Ltd. v. Upstream Point Molate,*
12 *LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d
13 59, 62 (D.D.C. 2003)); *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F.
14 Supp. 2d 919, 925 (N.D. Cal. 2003) (quoting *Cobell*, 246 F. Supp. 2d at 62). “Even when a party
15 is very well represented, an *amicus* may provide important assistance to the court.” *Jamul Action*
16 *Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 WL 3853148, at *6 (E.D. Cal. Aug. 5,
17 2014) (quoting *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito,
18 J.)). “The touchstone is whether the *amicus* is ‘helpful,’ and there is no requirement ‘that *amici*
19 must be totally disinterested.’” *California*, 2014 WL 12691095, at *1 (quoting *Hoptowit*, 682
20 F.2d at 1260); *see also Funbus Sys., Inc. v. State of Cal. Pub. Utils. Comm’n*, 801 F.2d 1120,
21 1125 (9th Cir. 1986) (noting that there is no requirement for *amici* to “be totally disinterested”).

22 **II. This Court Should Exercise Its Discretion to Accept the FTC’s *Amicus* Brief**

23 This Court should exercise its discretion to accept the FTC’s *amicus* brief because (1) the
24 Court’s decision on the appropriate remedy here has potential ramifications for competition in
25 digital markets; and (2) the FTC’s extensive experience analyzing remedies to address
26 competitive harms give it a unique perspective that can help the Court beyond that of the parties’

1 counsel. Determining the appropriate remedy is an important issue in many antitrust cases,
2 including cases brought by the government on behalf of the public. Correctly interpreting the
3 appropriate scope of remedial proscriptions is essential for the vibrancy of competition in digital
4 markets.

5 As a government agency charged by Congress with enforcing competition laws on behalf
6 of the public, the FTC has a special interest in the interpretation and application of the legal
7 principles governing remedies for established antitrust violations. The FTC’s interest, and the
8 interest of consumers in general, may not be adequately represented by the private parties to this
9 litigation because each of the parties is charged with representing its own interests. Unlike the
10 parties, whose interests are focused on the outcome of this particular case, the FTC has broader
11 interests in the application of antitrust law and the consideration of appropriate remedies due to
12 the potential ramifications related to the public interest.

13 Finally, while the FTC is interested in the development of the law in this area, it takes no
14 position on Epic’s specific remedy proposals or the evidence cited by the parties in support or
15 opposing them. The FTC’s *amicus* brief is based entirely on its views of the relevant legal
16 principles and practical considerations in choosing among available potential remedies. While
17 the FTC is “partial” in the sense of its clearly expressed interest in protecting competition and
18 consumers, it is not partial in the sense of expressing a view on which party’s position should
19 ultimately prevail.

20 **Conclusion**

21 The FTC respectfully requests that the Court grant the FTC leave to file an *amicus curiae*
22 brief.

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24 Dated: August 12, 2024

Respectfully submitted,

25 SHAOUL SUSSMAN
26 *Associate Director for Litigation,*
27 *Bureau of Competition,*
28 *Federal Trade Commission*

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/s/ Kelly Ortiz

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CERTIFICATE OF SERVICE

On this 12th day of August, 2024, I hereby certify that I caused the foregoing document entitled Notice of Motion and Motion for Leave to File Brief of *Amicus Curiae* Federal Trade Commission to be filed via the court’s CM/ECF system, which shall send notice to the counsel of record for the parties.

Dated: August 12, 2024

Respectfully submitted,

/s/ Kelly Ortiz

KELLY ORTIZ
Bureau of Competition

*Attorney for Amicus Curiae Federal Trade
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