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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 **IN RE GOOGLE PLAY STORE**
18 **ANTITRUST LITIGATION**

19 THIS DOCUMENT RELATES TO:

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

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

EPIC GAMES, INC.'S PROPOSED
AMENDMENT TO PROPOSED VERDICT
FORM

Judge: Hon. James Donato
Trial Date: November 6, 2023
Time: 9:00 am
Place: Courtroom 11, 19th Floor

1 Epic Games, Inc. (“Epic”) respectfully proposes one modest amendment to the Court’s
2 Proposed Verdict Form (Dkt. 851) to conform it to Epic’s claims and theories of harm as well as the
3 evidence adduced during trial.¹ On page 4 of the Proposed Verdict Form, Question 5 describes the
4 Project Hug agreements challenged by Epic as “Agreements with Google’s alleged competitors or
5 potential competitors under Project Hug or Games Velocity Program”. Epic proposes that this
6 description be modified to “Agreements with app developers under Google’s Project Hug or Games
7 Velocity Program”.

8 Epic believes that this amendment is warranted because Epic’s Section 1 Rule of Reason claims
9 with respect to Project Hug do not depend solely on whether the counterparty app developer was an
10 actual or potential competitor to Google. Specifically, Epic advanced two theories of harm with
11 respect to Project Hug agreements. One theory of harm focused on Google entering agreements not to
12 compete with three Hug developers that had voiced an intent to open their own Android mobile
13 distribution platform—Activision Blizzard King, Riot and Supercell. (Dkt. 378 (Epic’s Complaint)
14 ¶¶ 199-205.) That theory of harm is reflected in the Proposed Verdict Form. Under its Rule of Reason
15 Section 1 claim, however, Epic also contended that Project Hug’s sim-ship and content parity
16 requirements, the existence of which Google does not dispute, prevent other Android app distribution
17 platforms from competing effectively with the Google Play Store by depriving them of the ability to
18 differentiate themselves through exclusive games and content from top developers. As explained in
19 Epic’s complaint, “Google’s agreements with top developers deprive competing Android app stores,
20 including the Epic Games Store if it were to launch on Android, of inputs critical for success as a
21 competing app distribution platform—for example, exclusive apps, content or other features from top
22 developers.” (Dkt. 378 (Epic’s Complaint) ¶ 213.)

23 Epic’s claim that the Project Hug Agreements have harmed Epic and other potential app store
24 competitors by depriving them of differentiating content was supported by ample evidence at trial:
25
26

27 ¹ Like Proposed Verdict Form Question 5, Jury Instruction No. 27 (Dkt. 850 at 36) describes the
28 Project Hug agreements as “alleged agreements with Google’s alleged competitors or potential
competitors (including Activision and Riot Games) under Google’s Games Velocity Program or
Project Hug”. Epic proposes that this description also be changed to “agreements with app developers
under Google’s Project Hug or Games Velocity Program”.

- 1 • Epic witnesses testified that obtaining exclusive titles is critical to an emerging app
2 store’s success. (Trial Tr. 231:22-25 (Allison) (“[I]t was really important for us to get
3 important games and strategic partnerships that players would be excited about
4 exclusively for a timed exclusive period.”); Trial Tr. 233:2-9 (Allison) (“[I]n order to
5 build the business and get our players spending money, we needed to have some content
6 you couldn’t get anywhere else [C]onsoles have used timed exclusives as a
7 business strategy to grow their platforms as well for decades, and we had never seen
8 that in PC. So we also decided to pursue a very similar strategy.”); Trial Tr. 236:6-12
9 (Allison) (“Q. If Steam had agreements in place with developers that prevented them
10 from entering into exclusivity agreements with the Epic Game Store, how do you think
11 that would have affected your ability to grow? A. Depending on the titles that those
12 deals were for, we may not have gotten some of the key titles that were really important
13 for our first couple of years.”).)
- 14 • Google witnesses testified that a goal of Project Hug was to prevent competing app
15 stores from obtaining exclusives. (Trial Tr. 442:23-443:15 (Koh) (“[Q. T]he developer
16 who signed a Project Hug agreement could not launch either first or exclusively on any
17 competing Android distribution platform; right? A. Yes. If they agreed to Project Hug,
18 yes. . . . Q. It could have given [a competing] store a leg up on Google Play to have an
19 exclusive popular game; right? A. Yes, and we could have lost – Google Play could
20 have lost a lot of consumers by not having that content available.”); *see also* Trial
21 Tr. 1376:10-14 (Pichai) (“Q. And another way an app store could try to attract users and
22 developers is to try to get exclusive content onto the store such that they are the only
23 place that that user can go to get that content? A. Yes.”); Trial Tr. 1105:16-20
24 (Kolotouros) (“[Q. [U]sers would switch to a new Android distribution channel if there
25 was a strong draw of exclusive titles and/or a sustained pricing advantage; right? A.
26 Yes.”).)
- 27 • Professor Bernheim testified that the Project Hug agreements harmed competition by,
28 among other things, preventing competing app stores from differentiating themselves

1 with exclusive content from key developers. (*See* Trial Tr. 2401:19-22 (“[T]he Project
2 Hug agreements have provisions in them that prevent the competing app stores from
3 obtaining or even developing in cooperation with developers exclusive content that they
4 could offer [to differentiate themselves].”).)

5 The proposed modified verdict form would allow the jury to consider both of Epic’s theories of
6 anticompetitive conduct with respect to Project Hug. Epic respectfully requests that the Court grant its
7 proposed modification.

1 DATED: December 7, 2023

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12 Respectfully submitted,

13 By: /s/ Gary A. Bornstein

Gary A. Bornstein

14 *Counsel for Plaintiff Epic Games, Inc.*

E-FILING ATTESTATION

I, Gary A. Bornstein, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Gary A. Bornstein
Gary A. Bornstein