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

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

20 THIS DOCUMENT RELATES TO:

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

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

**EPIC GAMES, INC.’S RESPONSE TO
VERDICT FORM QUESTION**

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

1 Google proposes that Epic’s unreasonable restraint of trade claim challenging the payment-
2 related terms of the Developer Distribution Agreement (“DDA”) and Developer Program Policies
3 (Count 7 of Epic’s Second Amended Complaint (Dkt. 378)) be dropped from the Verdict Form and
4 treated as coterminous with Epic’s tying claim (Count 8), citing the supposed “risk of an inconsistent
5 verdict and juror confusion”. (Dkt. 853 at 3-4.) There is no such risk, and Google’s request is
6 improper. Epic’s unreasonable restraint of trade and tying claims are legally and factually separate,
7 and the Court’s proposed Verdict Form appropriately allows the jury to make an independent decision
8 regarding each claim. Google’s request should be rejected for what it is—a transparent effort to strike
9 one of Epic’s claims through the guise of a technical change to the Verdict Form.

10 *First*, as a threshold matter, Google is wrong as a matter of law to suggest that the same
11 conduct cannot be challenged under two legal theories. It is well established, for example, that “[t]he
12 same acts may constitute both an unreasonable restraint of trade and monopolization.” *Pac. Coast Agr.*
13 *Export Ass’n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1205 n.11 (9th Cir. 1975). Google has not cited
14 any authority or advanced any argument that this principle should not hold for tying and unreasonable
15 restraint of trade claims.

16 *Epic Games, Inc. v. Apple Inc.*, which Google cited in its position statement on its proposed
17 verdict form, is in accord. After resolving Epic’s unreasonable restraint of trade claims under the rule
18 of reason, the Ninth Circuit separately analyzed Epic’s tying claim. *See Epic Games, Inc. v. Apple,*
19 *Inc.*, 67 F.4th 946, 994 (9th Cir. 2023). Google simply mischaracterizes the opinion when it claims the
20 Ninth Circuit “declin[ed] to consider [an] alleged tie under both a generic Section 1 theory and a tying
21 theory”. (Dkt. 832 at 16.) Instead, the Ninth Circuit considered both claims separately and rejected
22 them based on the same factual findings. It laid out the legal standard for tying, *id.* at 995; held that
23 “the district court erred as a matter of law when it concluded that IAP [Apple’s in-app payment
24 solution] was not separate from app distribution”, *id.* at 996; analyzed whether the tying arrangement
25 was lawful under the rule of reason, *id.* at 996-98; and concluded that “Epic failed to carry its burden
26 of proving that Apple’s structure of the iOS ecosystem is unreasonable”, *id.* at 998.

27 *Second*, tying and unreasonable restraint of trade are different causes of action with different
28 elements. Tying requires proof that a defendant “with market power in one product market [has]

1 extend[ed] its market power to a distinct product market” by “condition[ing] the sale of one product
2 (the tying product) on the buyer’s purchase of a second product (the tied product).” *Cascade Health*
3 *Sols. v. Peacehealth*, 515 F.3d 883, 912 (9th Cir. 2008). Specifically, for tying to be unlawful, (i) “the
4 arrangement must, of course, involve two (or more) separate products”, and (ii) “the seller must also
5 *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might
6 have preferred to purchase elsewhere on different terms.” *Epic*, 67 F.4th at 995 (quotation marks and
7 citation omitted). Neither of those elements is a component of a claim for unreasonable restraint of
8 trade, which asks instead (i) “whether there is a contract, combination, or conspiracy”, and
9 (ii) “whether it is unreasonable”. *Id.* at 981. Google’s request that “the DDA should only be put to the
10 jury once—as a tying claim—and the verdict form should ask the jury about the elements of tying
11 claim” (Dkt. 853 at 3-4), would improperly hold Epic’s unreasonable restraint of trade claim to the
12 wrong legal standard. It would be legal error, for example, to require that the jury find that the Google
13 Play Store and Google Play Billing are separate products for it to conclude that Google’s anti-steering
14 provisions (in combination with the other DDA provisions) unreasonably restrain trade.

15 Because the unreasonable restraint of trade and tying claims are different, a jury could make
16 different determinations with regard to each claim. Epic’s unreasonable restraint of trade claim asks
17 whether Google’s DDA is an agreement, and whether the challenged terms unreasonably restrain trade.
18 Epic’s tying claim, by contrast, asks whether Google uses its market power over Android app
19 distribution to force developers to use Google Play Billing. A jury could, for example, find that
20 Google’s contract terms unreasonably restrain trade in violation of Section 1 without also finding that
21 the Google Play Store and Google Play Billing are separate products for the purpose of the tying claim.

22 *Third*, Google is incorrect that the Court’s proposed Verdict Form would mean that “the same
23 conduct [would be] submitted to the jury twice.” (Dkt. 853 at 3.) The tying claim focuses only on
24 Google’s tie of Google Play Billing to the Google Play Store. The unreasonable restraint of trade
25 claim, by contrast, focuses on a broader set of conduct: the DDA’s requirement that developers
26 comply with the Google Play Store’s payments policy. While that policy includes the requirement that
27 developers use Google Play Billing, it also includes Google’s anti-steering restraints, which prohibit
28 developers from using their apps to inform users of payment options available outside the app. (*See*,

1 e.g., Trial Tr. (Simon) 295:12-20; Trial Tr. (Tadelis) 2557:21-2558:18.) The anti-steering restraints do
2 not turn on the legality of Google’s tie. The jury could find that no tie exists, but that Google
3 unreasonably restrained trade by prohibiting developers from using alternative payment solutions *and*
4 steering their users to payment options outside their apps. But if Google’s proposed revision were
5 implemented, the jury would no longer be able to make that finding.

6 *Finally*, there is no merit to Google’s assertion that “because there are no predicate market
7 definition questions (unlike Questions 2 and 6) or market power questions for the tying claim, there is
8 a risk that the jury will find tying without finding the DDA to be an unreasonable restraint of trade.”
9 (Dkt. 853 at 3.) Google does not explain why a reasonable jury could not make this finding given the
10 different elements of both claims. But, in any event, the structure of the verdict form presents no such
11 risk. The Court’s tying question asks whether Epic proved “*in accordance with the instructions given*
12 *to you*, that Google *unlawfully* tied the use of the Google Play Store to the use of Google Play Billing”
13 (Question No. 8).¹ (Dkt. 851 at 6.) The word “unlawfully” ensures that the jury cannot find a tie
14 without applying the tying standard set forth in the jury instructions, a concept explained in Instruction
15 No. 32. (Dkt. 850 at 42 (“Not all tying arrangements are unlawful. The essential characteristic of an
16 invalid tying arrangement is a seller’s exploitation of its market power over the tying product (app
17 distribution services) to force a buyer to purchase the tied product (in-app billing services) that the
18 buyer might have preferred to purchase elsewhere. I will now instruct you regarding how to determine
19 whether, if there was a tying arrangement, that alleged tying arrangement is unlawful.”). The
20 instructions that follow Instruction No. 32 repeat that point several times. (*See* Dkt. 850 at 43
21 (Instruction No. 33) (“Epic must prove . . . Google has sufficient market power with respect to the
22 Android app distribution services to enable it to restrain competition as to an alleged market for
23 Android in-app billing services”.); *id.* at 46 (Instruction No. 36) (similar)); *id.* at 47 (Instruction
24 No. 37) (similar).) Google’s suggestion that the elements of market definition and market power must
25 be repeated in the Verdict Form for the tying questions would create unnecessary redundancy.

26 The Court should reject Google’s request to modify the Verdict Form (Dkt. 853 at 3-4).

27
28 ¹ Epic notes that, while Google’s tie is bi-lateral, the alleged tie is of the use of Google Play Billing
to the use of the Google Play Store. Epic respectfully proposes revising Question No. 8 accordingly.

1 DATED: December 8, 2023

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11 Respectfully submitted,

12 By: /s/ Gary A. Bornstein

13 Gary A. Bornstein