UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, **Plaintiffs,** **v.** **GOOGLE LLC,** **Defendant.**	**Case No. 20-cv-3010 (APM)**
STATE OF COLORADO, *et al.*, **Plaintiffs,** **v.** **GOOGLE LLC,** **Defendant.**	**Case No. 20-cv-3715 (APM)**

MEMORANDUM OPINION

I. INTRODUCTION

Google LLC operates the largest Internet general search engine in the United States. Its brand name has become so ubiquitous that dictionaries recognize it as a verb.[1]

A Google search can be performed in a variety of ways—through (1) web browsers, like Apple's Safari, Microsoft's Edge, Mozilla's Firefox, and Google's Chrome; (2) search widgets

[1] *See, e.g.*, *Google*, DICTIONARY.COM, https://www.dictionary.com/browse/google (last visited July 31, 2023) ("to search the internet for information about (a person, topic, etc.)"); *Google*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/google_v2?tab=meaning_and_use#10568538 (last visited July 31, 2023) ("To use the Google search engine to find information on the internet."); *Google*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/google (last visited July 31, 2023) ("to use the Google search engine to obtain information about (someone or something) on the World Wide Web.").

that appear on the face of Android devices; (3) the Google Search application, available through various app stores; and (4) Google's webpage. Users can search using Google on a host of devices, including personal computers, mobile phones, tablets, and Internet-of-Things ("IoT") devices such as smart speakers, home appliances, and cars.

There are other search engines, of course: Microsoft's Bing, Yahoo!, and DuckDuckGo, to name a few. But their market penetration pales in comparison to Google's. In 2020, Google's share of the U.S. general search services market was nearly 90%, and even higher on mobile devices. The market share of Google's closest competitor, Bing, was roughly 6%.

Google, like most search engines, generates revenue from digital advertising. Digital advertising is incredibly lucrative. Advertisers spend over $80 billion annually just to reach general search users (and billions more on other forms of digital advertising). Not surprisingly, because of its large market share in general search services, Google also holds a superior market position in various search-related advertising markets.

A dominant firm like Google does not violate the law, however, merely because it occupies a monopoly market position. It must act in a manner that produces anticompetitive effects in the defined markets. That is, a company with monopoly power acts unlawfully only when its conduct stifles competition.

In these consolidated cases, the United States and the Attorneys General of 38 states have accused Google of doing just that. They contend that Google has violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by unlawfully maintaining monopolies through exclusionary practices in four relevant markets. The United States and Attorneys General jointly allege anticompetitive conduct in the markets for (1) general search services and (2) general search text advertising. The United

States identifies another relevant market for (3) search advertising, and the Attorneys General assert one more, (4) general search advertising.[2]

Both sets of plaintiffs allege that Google has unlawfully maintained its monopoly power through a set of exclusive contracts. These agreements make Google the default search engine on a range of products in exchange for a share of the advertising revenue generated by searches run on Google. Google has such agreements with (1) web browser developers, most notably Apple and Mozilla, and (2) original equipment manufacturers (like Samsung) and wireless carriers (like Verizon) who sell Android devices. So, for example, when a purchaser buys a new iPad, Google will be the out-of-the-box default search engine on Apple's Safari web browser. Similarly, if a user prefers Android devices, the search widget that appears on the home screen typically is preloaded with Google's search engine. Occupying the default search engine position on these products, Plaintiffs contend, is exclusionary conduct that unlawfully prevents Google's rivals from effectively competing in the relevant markets.

The Attorneys General also charge Google with two other forms of anticompetitive conduct, which they contend reinforce Google's monopolies. First, the Attorneys General claim that Google's conduct has weakened Specialized Vertical Providers ("SVPs"), which are companies focused on niche markets—like Expedia or Tripadvisor for travel, OpenTable for restaurant reservations, and Amazon or eBay for shopping. Google has harmed SVPs, the Attorneys General allege, by (1) limiting the visibility of SVPs on Google's Search Engine Results Page, and (2) demanding that SVPs make their data available to Google on terms no less favorable than it does to others. The weakening of SVPs, the Attorneys General say, harms competition in the general search and general search-related advertising markets.

[2] The relevant markets are discussed in Section III.A.

Second, the Attorneys General claim that Google uses its proprietary search engine marketing tool—SA360—to thwart competition. Buyers use SA360 to purchase digital advertisements across multiple platforms, including on Google (through Google Ads) and its closest rival Bing (through Microsoft Ads). The Attorneys General accuse Google of harming competition by delaying the implementation of various SA360 product features for Microsoft Ads that have long been available for Google Ads, thus harming Microsoft's ability to compete.

Before the court are Google's motions for summary judgment as to all claims in both cases. At this stage, Google is not contesting the markets as Plaintiffs have defined them. Nor does it dispute that it possesses monopoly power in those markets. What Google challenges is the accusation that its alleged conduct has harmed competition in the relevant markets.

After having considered the parties' briefing and the extensive record, and for the reasons explained below, the court grants Google's motions in part and denies them in part. With respect to the complaint filed by the United States, and joined by the Attorneys General, the court denies summary judgment as to the claim that Google's alleged exclusive dealing arrangements violate Section 2 of the Sherman Act. There remain genuine disputes of material fact that warrant a trial. Google's motion is granted, however, insofar as the United States' claims rest on (1) Google's Android Compatibility Commitments and Anti-Fragmentation Agreements; (2) Google's agreements relating to Google Assistant and IoT devices; and (3) Google's management of its Android Open Source Project. Plaintiffs have not offered any opposition as to those three parts of their claims.

As for the Attorneys General's additional claims, the court grants judgment in favor of Google insofar as those claims rely on Google's alleged weakening of SVPs. With respect to those allegations, Plaintiffs have not demonstrated the requisite anticompetitive effect in the relevant

markets to make out a Section 2 *prima facie* case. However, there remains a genuine dispute of material fact with regard to the anticompetitive effect of Google's disparate development of SA360's ad-buying features. Summary judgment is therefore denied as to that part of the Attorneys General's claims.

II. PROCEDURAL HISTORY

On October 20, 2020, the United States Department of Justice ("DOJ") and the Attorneys General of eleven states[3] (collectively, "DOJ Plaintiffs") filed a complaint ("DOJ Action") against Google asserting violations of Section 2 of the Sherman Act. DOJ Compl., ECF No. 1. The DOJ Plaintiffs accused Google of unlawful monopoly maintenance "in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices." *Id*. at 2. Its Complaint contained three Section 2 claims, each corresponding to one of the alleged markets. *Id.* ¶¶ 173–193.

Two months later, the Attorneys General of 38 states and territories,[4] led by the State of Colorado ("Colorado Plaintiffs"), filed a separate complaint ("Colorado Action") against Google alleging unlawful monopoly maintenance in the markets for "general search services, general search text advertising, and general search advertising in the United States." Compl., *Colorado v. Google*, No. 20-cv-3715 (APM) (D.D.C.) [hereinafter *Colorado* Docket], ECF No. 3 [hereinafter Colorado Compl.], ¶ 1. The Colorado Action incorporated "[t]he search advertising market defined in the DOJ Complaint" and the claims made by the DOJ Plaintiffs, *id.* at 22 n.3, and "allege[d] additional facts demonstrating a broader pattern of Google's anticompetitive conduct,"

[3] The 11 states that initially joined DOJ are Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas. *See* DOJ Compl. at 1–2.
[4] The 38 states and territories in the Colorado Action are Colorado, Nebraska, Arizona, Iowa, New York, North Carolina, Tennessee, Utah, Alaska, Connecticut, Delaware, the District of Columbia, Guam, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming. Colorado Compl. at 4–5.

id. ¶ 58. The Colorado Plaintiffs also asserted three Section 2 claims, each corresponding to one of the alleged markets. *Id.* ¶¶ 212–232.

On January 7, 2021, the court consolidated the two cases under Federal Rule of Civil Procedure 42(a) "for pretrial purposes, including discovery and related proceedings." Order Granting in Part and Denying in Part Pls.' Mot. to Consolidate, *Colorado* Docket, ECF No. 67, at 1; *see* FED. R. CIV. P. 42(a)(1). On January 15, 2021, the DOJ Plaintiffs filed an Amended Complaint, adding California, Michigan, and Wisconsin as plaintiffs. DOJ Am. Compl., ECF No. 94, at 2.

After a rigorous period of discovery, Google moved for summary judgment as to all claims in both cases. Def.'s Mot. Summ. J., ECF No. 421 (DOJ Action); Def.'s Mot. for Summ. J., ECF No. 426 (Colorado Action).

III. BACKGROUND

The following recitation of background facts is largely undisputed by the parties.

A. Relevant Markets

General Search Services. The general search services market consists of "general search engines, which are 'one-stop shops' consumers can use to search the internet for answers to a wide range of queries." Pls.' Mem. in Opp'n to Def.'s Mot., ECF No. 476 [hereinafter DOJ Opp'n], Pls.' Ctstmt. of Mat. Facts, ECF No. 476-2 [hereinafter DOJ CSMF], ¶ 400. Google and Bing are the two leading general search engines in the United States. Smaller players in the market include Yahoo!, DuckDuckGo, Brave, Ecosia, and Neeva. *Id.* ¶ 405.

General Search Text Advertising. The general search text advertising market is a subset of the general search advertising market described below. It consists of a specific type of advertisement sold by general search engines that are "typically placed just above or below the

organic search results on a Search Engine Results Page ("SERP"), and resemble the organic results that appear on a general search engine's SERP, with a subtle notation that they are 'ads' or 'sponsored.'" DOJ Am. Compl. ¶ 101. Figure 1 is an example of a general search text ad.

Figure 1

General Search Advertising. The general search advertising market includes all advertisements sold "by a general search engine in connection with a general search query." Colorado Compl. ¶ 82. Only the Colorado Plaintiffs allege unlawful monopoly maintenance in this market. *Id.* ¶ 59.

The general search advertising market encompasses not only search text ads, but other types of ads that appear on Google's SERP, such as "vertically-focused search ads" and "universals." Pl. States' Mem. in Opp'n to Def.'s Mot., ECF No. 465, Pl. States' Stmt. of Mat. Facts as to Which There is No Genuine Issue, ECF No. 465-1 [hereinafter Colorado SMF], ¶¶ 23–26. Vertically focused search ads include product listings, local search ads, and hotel ads. *Id.* ¶ 25. Google also has universals for hotels, flights, shopping, and vacation rentals, to name a few. *Id.* ¶ 26. Figure 2 illustrates the different types of general search ads.

Figure 2

"Google has also developed its own specialized vertical sites that are separate but reachable from the SERP, such as immersive and business listing . . . pages." *Id.* ¶ 27. An immersive page can be reached by clicking on the search universal. *Id.* ¶ 29. An example of a Google immersive page for a hotel search in New York City is included below as Figure 3.

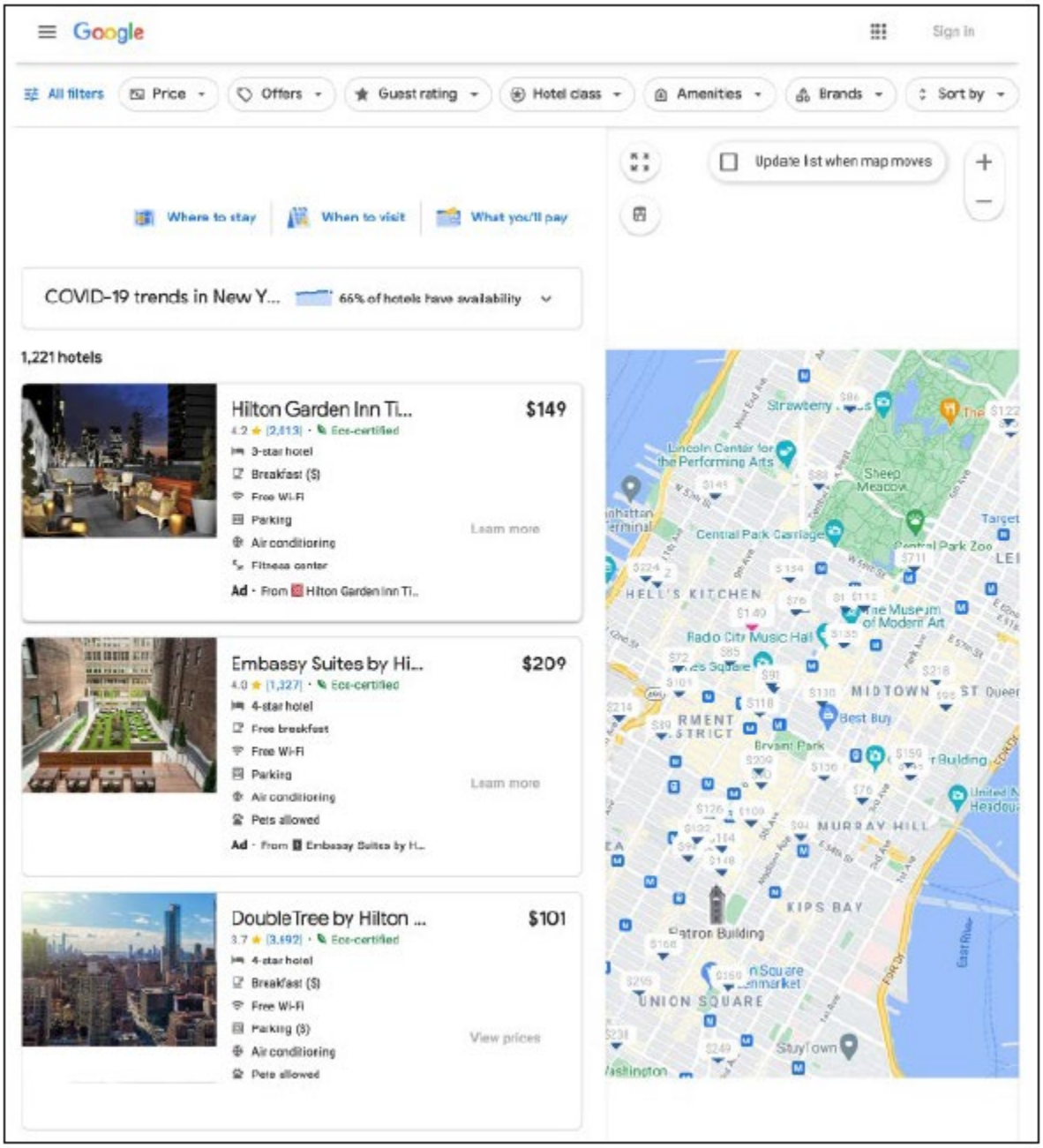

Figure 3

Search Advertising. "The search advertising market consists of all types of ads generated in response to online search queries, including general search text ads (offered by general search engines such as Google and Bing) and other, specialized search ads (offered by general search engines and specialized search providers such as Amazon, Expedia, or Yelp)." DOJ Am. Compl.

¶ 97; *see also* DOJ CSMF ¶ 413 ("There is a search ads market that consists of advertising that is displayed on the SERP that general or specialized search engines return in response to consumer real-time queries."). Only the DOJ Plaintiffs allege that Google unlawfully monopolizes the search advertising market. DOJ Am. Compl. ¶ 108; Colorado Compl. ¶¶ 59–89.

B. Distribution Agreements

Both the DOJ Plaintiffs and Colorado Plaintiffs contend that "Google has unlawfully maintained its monopolies by implementing and enforcing a series of exclusionary agreements with distributors over at least the last decade." DOJ Am. Compl. ¶ 112; Colorado Compl. ¶ 58. Plaintiffs[5] take issue with two types of contracts: Browser Agreements and Android Agreements. The court provides a brief summary of these agreements before discussing them in detail.

Browser Agreements are between Google and web browser developers, primarily Apple and Mozilla. Under these arrangements, the developers have agreed to make Google the default search engine for all search access points on their browsers in exchange for a share of the search advertising revenue generated by Google. The Browser Agreements do not, however, prohibit a user from changing the default to a different search engine. So, a user who types a query into Safari's integrated search bar will search the Internet using Google, unless the user changes the default setting. The same is true on Firefox.

Android Agreements are between Google and original equipment manufacturers ("OEMs") of Android devices, like Samsung, or phone carriers that sell Android devices, like Verizon. These contracts—there are two—(1) require OEMs that choose to pre-install any of Google's proprietary apps to pre-install 11 Google apps (including Google Search and Chrome)

[5] References to "Plaintiffs" when discussing the Distribution Agreements in Section III.B. and V.A. refer to both the DOJ Plaintiffs and the Colorado Plaintiffs. References to "Plaintiffs" when discussing allegations in the Colorado Action in Section III.C. and V.B refer to the Colorado Plaintiffs only.

and place the Google search widget on the device's home screen; and (2) as part of a separate revenue share agreement, prohibit OEMs and carriers from preinstalling or otherwise promoting an alternative general search engine. As a result of these agreements, an Android device user that enters a search query on a new device will default to Google, unless the user first changes that setting.

1. Browser Agreements

Web browsers, like Apple's Safari and Mozilla's Firefox, have built-in search access points that automatically route user queries to a default search engine. In Plaintiffs' view, "[b]eing the preset default search engine for a search access point on a preinstalled and prominently placed app is the most efficient and effective way for a search engine to reach users." DOJ CSMF ¶ 445.

Apple. In 2005, Google and Apple entered into an agreement where, in exchange for Apple setting Google Search as the default search engine on all Safari search access points, Google paid Apple $15 million and a share of the revenue Google generated from search traffic originating from the Safari search box. Def.'s Stmt. of Mat. Facts as to Which There is No Genuine Issue in Supp. of Mot., ECF No. 423 [hereinafter Google DOJ SMF], ¶ 14; *see* Google 429 Exs.,[6] ECF No. 429, Ex. 7, ECF No. 429-7 [hereinafter Apple Agreement]. Importantly, Safari is the only web browser that is pre-installed on Apple devices. *See* Google 429 Exs., Ex. 2, ECF No. 429-2, at 126:3–17. Thus, under the Browser Agreement with Apple, "Google will automatically be used for the web search [on all Apple devices through Safari] unless the user selects another search provider." Apple Agreement at 4.[7] Since 2005, "the revenue share percentage and related financial terms have changed several times." Def.'s Mem. of P. & A. in Supp. of Def.'s Mot. for

[6] Citations to "Google 429 Exs." refer to Google's exhibits filed under ECF No. 429. Similarly, citations to "Colorado 470 Exs." refers to Colorado Plaintiffs' exhibits filed under ECF No. 470. This citing convention will be used for exhibits throughout the Memorandum Opinion.
[7] ECF pagination is used for all exhibits.

Summ. J., ECF No. 422 [hereinafter Google DOJ Mot.], at 9. "With the exception of the one-time payment in 2005, all of the payments Google has made to Apple pursuant to these agreements have taken the form of a share of net advertising revenue." *Id.*

Mozilla. The year before it entered into a browser agreement with Apple, Google reached a similar agreement with Mozilla. Under that contract, Mozilla agreed to preset Google as the default search engine for all search access points on its Firefox browser in exchange for a share of search advertising revenue "that resulted from queries sent to Google from Firefox's integrated search box or default home page." Google DOJ Mot. at 14; Google DOJ SMF ¶ 109; Google 430 Exs., ECF No. 430, Ex. 32, ECF No. 430-7. In 2014, Mozilla decided to change the default search engine on its Firefox web browser in the United States from Google Search to Yahoo!. *See* Google 430 Exs., Ex. 31, ECF No. 430-6, at 69:12–19. Two years later it switched back to Google. *Id.*, Ex. 39, ECF No. 430-14. As with Google's agreements with Apple, the contract with Mozilla did "not limit or preclude" users from changing the default search engine. *Id.* at 3.

Smaller Web Browser Developers. Google also has agreements with two smaller browser developers, Opera and UCWeb, which "provide revenue-share payments in exchange for being the default search engine upon first use, without preventing the promotion of rival search services or user's ability . . . to change the default." Google DOJ Mot. at 18–19.

2. Android Agreements: MADAs and RSAs

The Android Operating System ("Android OS") is a mobile phone operating system that Google acquired in 2005. DOJ CSMF ¶ 570. It is now the "second most widely used mobile phone operating system in the U.S." behind Apple's iOS. Google DOJ SMF ¶ 198. Unlike iOS, which can only be used on Apple devices, Android OS is open source, meaning that numerous OEMs can use Android OS on their smartphones and other devices. *Id.* ¶ 199. In the United

States, "consumers purchase Android devices directly from OEMs (such as Samsung or Motorola) as well as from carriers (such as Verizon or AT&T)." *Id.* ¶ 223.

The DOJ and Colorado Plaintiffs take issue with two types of agreements between Google and OEMs/carriers—Mobile Application Distribution Agreements ("MADAs") and Revenue Share Agreements ("RSAs").

MADAs. Google has entered into MADAs with OEMs, whereby Google provides the OEMs a non-exclusive, royalty-free license to 11 proprietary Google applications. *Id.* ¶¶ 212–13.[8] If an OEM chooses to download any of the proprietary apps, absent an exemption, the OEM must "(i) preload on that device [the 11] applications licensed pursuant to the MADA and (ii) place on the device's default home screen the Google Search widget, the Google Play application, and a folder containing the other MADA applications." *Id.* ¶ 217. Among the 11 applications are the Google Search App and Chrome browser. DOJ CSMF ¶ 584. The MADA prohibits OEMs from "encouraging, teaching, or helping end users to change an Android device's out-of-the-box default settings if Google apps are preinstalled on the device." *Id.* ¶ 585. MADAs do not, however, "restrict an OEM from preloading a search application, widget, or browser provided by a search engine other than Google on any of its devices, including devices on which it chooses to install the MADA applications." DOJ Opp'n, Pls.' Stmt. of Genuine Issues, ECF No. 476-1, [hereinafter DOJ SGI], ¶ 219.

RSAs. Under its RSAs with "carriers and OEMs, Google makes monthly payments to the counterparty in exchange for Google being (1) the exclusive general search engine preinstalled on Android devices covered by the RSA, as well as (2) the search default for all search access points

[8] The 11 applications are Google Search, Google Play Store, Google Chrome, YouTube, Google Maps, Gmail, Google Photos, YouTube Music, Google Duo, Google Drive, and Google Play Movies and TV. DOJ 480 Exs., ECF No. 480, Ex. 160, ECF No. 480-12, at 21.

on such devices." DOJ CSMF ¶ 602. That generally includes search access points on non-Chrome browsers. *Id.* ¶ 605. The RSA prohibits the carrier or OEM from preinstalling or otherwise including a search engine substantially similar to Google's. *Id.* ¶ 604. Some RSAs permit the party to earn Google revenue share on a device-by-device basis,[9] [redacted]. *Id.* ¶ 610. OEMs and carriers can choose among multiple tiers that provide varying levels of "promotion" of Google Search. DOJ SGI ¶ 227.[10] "Except for a small number of Android devices . . . the overwhelming majority of Android devices sold in the United States are subject to the search default rules established in Google's RSAs." DOJ CSMF ¶ 611.

C. The Colorado Plaintiffs' Allegations: SVPs and SA360

The Colorado Plaintiffs' claims against Google overlap with the DOJ Plaintiffs' claims with respect to the Browser and Android Agreements, but also involve two additional types of alleged exclusionary conduct. That conduct concerns Specialized Vertical Providers ("SVPs") and Google's development of SA360—Google's search engine marketing tool.

1. Specialized Vertical Providers

SVPs are websites or applications that provide search results in a limited number of commercial segments that serve a common group of customers. Colorado SMF ¶ 127. For example, Amazon and Etsy are SVPs that sell products to shoppers, and Expedia and Booking.com are SVPs that sell airline, hotel, and car rental reservations. *Id.* ¶ 128. The commercial segments for which SVPs provide search results are referred to as "verticals." *Id.* ¶ 127. So, Amazon and

[9] A device-by-device agreement means that Samsung, for example, can have different out-of-the-box configurations under its RSA for the Samsung Galaxy Note20 and Samsung Galaxy S10, if it so chooses.
[10] For example, [redacted] Google DOJ SMF ¶ 228.

Etsy are part of the "shopping vertical," while Expedia and Booking are part of both the "flight vertical" and "hotel vertical." SVPs differ from general search engines "because of their much narrower commercial focus and because many of them afford users the convenience of completing transactions on their websites, such as purchasing a pair of shoes (Amazon) or reserving a hotel room (Booking)." *Id.* ¶ 129.

Limited Visibility in Google's SERP. To understand the Colorado Plaintiffs' theory of how Google's monopoly power affects SVPs, it is critical to understand how Google designs its Search Engine Results Page ("SERP"). Google's SERP includes three types of search results that appear in response to a query: (1) organic web results, which are the blue "plain text hyperlinks to webpages for which Google does not receive any payment, ranked according to relevancy and quality"; (2) search text ads, which look like the organic web results but are actually "paid advertisements relevant to a query that has been entered"; and (3) specialized search results in various commercial segments ("universals" or "verticals"), including "'vertical' units for certain categories of information." Def.'s Stmt. of Mat. Facts as to Which There is No Genuine Issue in Supp. of Def.'s Mot., ECF No. 428 [hereinafter Google Colorado SMF], ¶¶ 3–5, 8.

The third category, specialized vertical units, refers to results organized around a particular search query. For example, when a user searches for "hotels in Washington, DC," in addition to organic web results and search text ads, Google "offers a hotels unit organized around hotel listings in a specified location in response to the query." *Id.* ¶ 6; *see* Figure 4. "Unlike text ads, vertically-focused search ads look less like algorithmic results and may include photos and information such as prices, customer ratings, and business hours." Colorado SMF ¶ 24. "Google has universals that can appear on its SERP for hotels, flights, shopping, and vacation rentals, among others." *Id.* ¶ 26. "Over time, Google has altered its SERP for commercial queries to increasingly display Google's

own search universals above the unpaid blue links," and the blue links often appear "below the fold" requiring users to scroll down to see them. *Id.* ¶¶ 33–34.

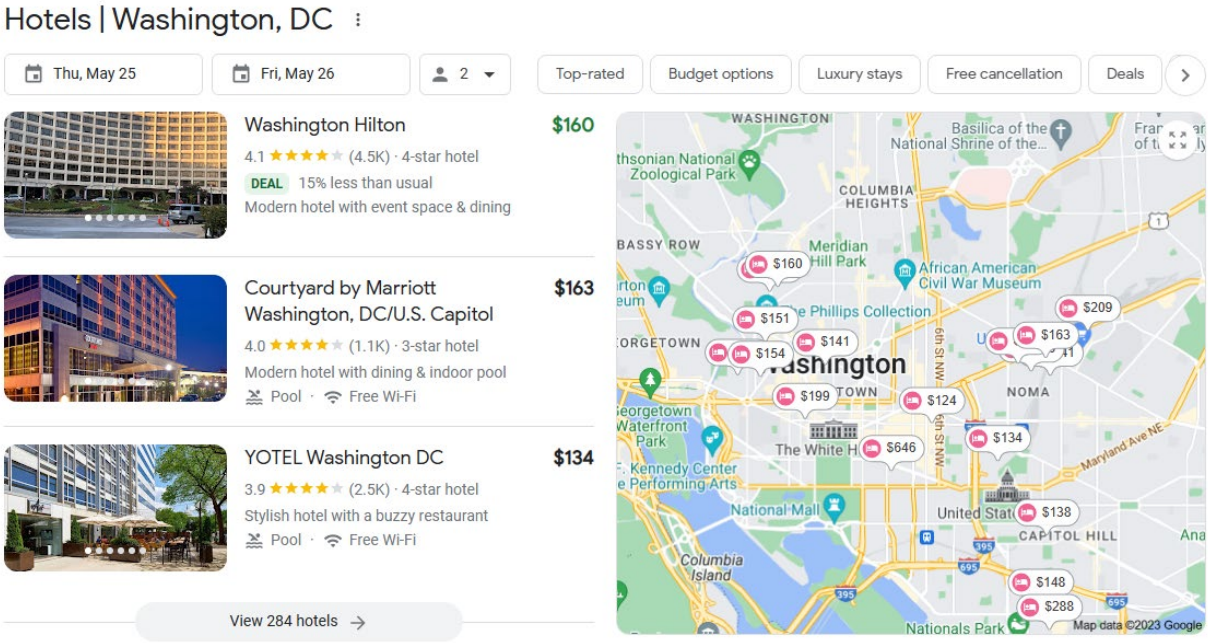

Figure 4

Plaintiffs take issue with Google's imposition of "visibility restrictions on SVPs" in certain commercial segments. Errata Pl. States Mem. in Opp'n to Def.'s Mot., ECF No. 491 [hereinafter Colorado Opp'n], at 18. For example, "SVPs cannot appear in results in the free listings in Google's hotel universal, flights universal, or in the local universal triggered by searches for nearby businesses" and "cannot purchase ads in their own name" or "appear prominently in the tile of local services ads on Google's SERP." *Id.*; *see* Figure 4. However, SVPs can and do appear in other universals, like vacation rentals. Colorado SMF ¶ 154; *see* Figure 5 (listing SVPs Vio.com, Evolve, and Sojourn).

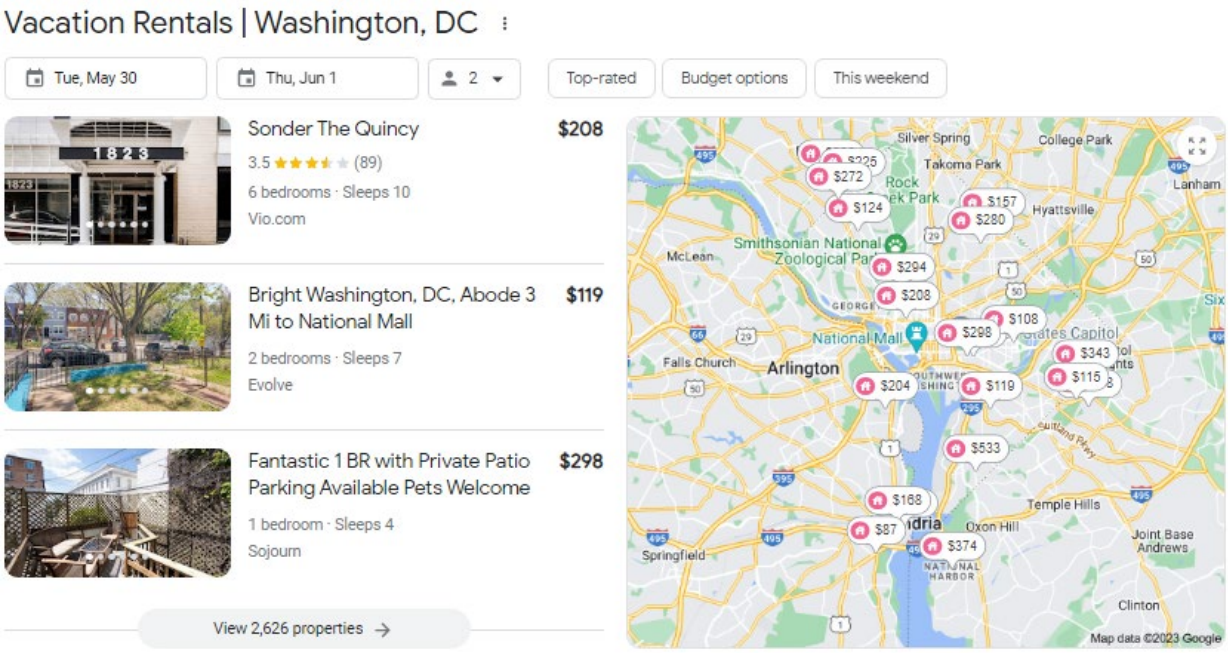

Figure 5

Data-acquisition Agreements. The Colorado Plaintiffs' allegations concerning SVPs also center on how Google obtains data from them. Google collects information in two primary ways: (1) "by crawling and indexing websites throughout the internet," Colorado SMF ¶ 6, and (2) by acquiring "structured data" (such as flight availability on a given day or a restaurant's hours of operation) from third parties, information that "is not otherwise available through Google's internet crawling and indexing." *Id.* ¶¶ 7, 173.

Google acquires "structured data" from SVPs. "[A]s a condition of participating in its vertically-focused search advertising, Google requires certain SVPs to provide access to their data." *Id.* ¶ 175. "Google uses SVP data for its own purposes in its hotels, flights, and local universals, in local services ads, and in the hotel and flights immersive pages." *Id.* ¶ 180. SVPs who share data with Google are not restricted from providing that same data to Google's rivals. *Id.* ¶ 183. However, SVPs are required to give Google "data equivalent to any competitor." *Id.*

2. SA360

The Colorado Plaintiffs' claims also concern Google's development and use of its search engine marketing ("SEM") tool, SA360. Advertisers can purchase online advertisements in a variety of ways. The three most notable are: (1) directly from online content publishers, like *The New York Times*, (2) directly from online platforms like Google, Amazon, Facebook, and Microsoft through "native tools" or "interface tools," and (3) through an SEM tool. *See* Google Colorado SMF ¶ 243. Native advertising tools allow advertisers to place ads directly on a single general search engine or platform. Colorado SMF ¶ 75. For example, an advertiser could use Google's native tool—Google Ads—to place an ad on Google, and Microsoft's native tool—Microsoft Ads—to place an ad on Bing. *Id.* Alternatively, advertisers can use SEM tools, which "allow advertisers to plan and manage search advertising campaigns across multiple" general search engines. *Id.* ¶ 76.

"SEM tools are popular because they save advertisers time and effort by allowing them to use a single product to manage and compare ad campaigns across multiple native tools, evaluate the relative performance of ad campaigns across multiple platforms, and use powerful tools to assist with ad placement and bidding strategies." *Id.* ¶ 81. Google's SEM tool—SA360—is the most used SEM tool, accounting for 76% of general search ad revenue among ads placed through SEM tools. *Id.* ¶ 80. Rival SEM tools include Skai, Marin, and Adobe. Google Colorado SMF ¶ 253.[11] "When an advertiser places ads through an SEM tool, including SA360, the tool earns a commission on the dollar it manages." Colorado SMF ¶ 78.

[11] SA360 allows advertisers to place ads across multiple search engines, including Google, Bing, Yahoo! Japan, and Baidu. Google Colorado SMF ¶ 252. Some SEM tools like Skai, Marin, and Adobe "allow advertisers to buy ads on search engines, social media, and other sites, and, unlike SA360, integrate not just with search engines like Google and Bing, but also with sites like Amazon, Facebook, Twitter, and Pinterest." Google Colorado Mot. at 13; Google Colorado SMF ¶ 254.

Feature Parity. SEM tools offer various features that make ad buying campaigns more efficient, such as "language targeting" and "location search specific targeting." Google 436 Exs., ECF No. 436, Ex. 87, ECF No. 436-7 at 5 [hereinafter Google Ex. 87]. Historically, SA360 has supported more features on Google Ads than Microsoft Ads, meaning users of SA360 could buy ads more efficiently on Google Ads than Microsoft Ads. Colorado SMF ¶¶ 117, 125. The absence of "feature parity"—which "refers to parity between Google Ads features and Microsoft Ads features offered by SA360," Google Colorado SMF ¶ 268—is not unique amongst SEM tools. "SA360, Marin, Skai, and Adobe offer differing levels of support for Microsoft Ads and other ad platforms." *Id.* ¶ 250.

In November 2019, Microsoft identified 27 features that "SA360 supports for Google Ads, but not for Microsoft Ad[s]." Google Ex. 87 at 3. Microsoft explained that "[i]t is important for our clients that use [Google's SA360] platform to have the same level of access to Microsoft Advertising features that they have to Google Ads features." *Id.* at 2. To that end, Microsoft made two requests. First, for the 27 features that SA360 did not support on Microsoft Ads, Microsoft requested that Google "commit[] to work down the disparity." *Id.* Second, in the future, "for new [SA360] features that are aligned with Google Ads" but not Microsoft Ads, Microsoft requested that Google commit to supporting those features with Microsoft Ads within 90 days. *Id.* Plaintiffs' Complaint identifies five of the 27 SA360 features that "Google either delayed support for, or failed to support: auction-time bidding, call extensions, dynamic search ads, responsive search ads, and local inventory ads." Google Colorado SMF ¶ 272; *see also* Colorado Compl. ¶¶ 152, 160.

A new version of SA360 launched in February 2022, less than two years after Plaintiffs filed the instant complaint. Google Colorado SMF ¶ 291. The new version supported four of the five features for Microsoft Ads that Plaintiffs had identified as lacking: "call extensions, dynamic

search ads, responsive search ads, and local inventory ads." *Id.* Google began working on developing the fifth feature—auction-time bidding—in early 2021, and it "is currently in the testing phase." Google Colorado SMF ¶ 308–09; Hr'g Tr., ECF No. 580, at 180:15–181:18 (counsel for the Colorado Plaintiffs conceding that "it is undisputed that Google is going to install the very auction time bidding that [Plaintiffs] have complained" of).

IV. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. A material fact is one that is capable of affecting the outcome of the litigation, and a genuine dispute exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

B. Monopolization: *Microsoft* Burden-Shifting Framework

Section 2 of the Sherman Act makes it unlawful for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons[] to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. The offense of monopolization has two elements: (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power" through "exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic

accident.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 50, 58 (D.C. Cir. 2001) (per curiam) (internal quotation marks omitted) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). For purposes of summary judgment, Google does not contest element one—monopoly power in the relevant markets. Hr'g Tr. at 6:11–12. The sole issue for the court to resolve is whether Google has maintained monopoly power in the relevant markets through "exclusionary conduct" as opposed to procompetitive means. *Microsoft*, 253 F.3d at 58.

The D.C. Circuit in *Microsoft* established a burden-shifting framework for determining "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition." *Id.* First, the plaintiff bears the burden of establishing a *prima facie* case that the monopolist's conduct has an "anticompetitive effect." *Id.* at 58–59. "That is, [the alleged conduct] must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more competitors will not suffice." *Id.* at 58; *id.* at 59 (stating that the plaintiff "must demonstrate that the monopolist's conduct harmed competition, not just a competitor").

Second, "if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." *Id.* Conduct is procompetitive if it "is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Id.* If the defendant offers a procompetitive justification, the burden shifts back to the plaintiff to rebut it. *Id.*

Finally, "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* In carrying out this balancing, which resembles a "rule of reason" analysis, courts must focus "upon the effect of [the] conduct, not upon the intent behind it." *Id.*

Evidence of intent is relevant only insofar as it bears on the "likely effect of the monopolist's conduct." *Id.*

Google's motion for summary judgment targets the first step of the burden-shifting framework. Hr'g Tr. at 13:6–12. In other words, it has not asked the court to evaluate the procompetitive justification for its alleged conduct nor rule that any procompetitive benefit outweighs the anticompetitive harm. Its argument is simply that "plaintiffs have not made out their *prima facie* case." *Id.*

Though the *Microsoft* burden-shifting framework would seem straightforward, the parties disagree on precisely how to apply it. They contest two points: (1) the constituent elements of the *prima facie* case, and (2) whether the challenged conduct should be considered in the aggregate or independently. The court addresses each in turn.

1. Prima Facie *Case*

The parties disagree about what the *prima facie* case entails. Google contends that establishing a *prima facie* case is a "two-step process." *Id.* at 14:19–25. First, Plaintiffs must show that the conduct is by nature anticompetitive, as opposed to conduct that is "competition on the merits." *Id.* Second, Plaintiffs must proffer evidence of substantial anticompetitive effects in the relevant market. *Id.* Plaintiffs disagree with Google's bifurcation of the *prima facie* burden. *Id*. at 50:3–51:5. In their view, establishing a *prima facie* case is a one-step inquiry that considers only whether the conduct at issue has an anticompetitive effect in the relevant market. *Id.*

Despite their apparent differences, there is not much daylight between the parties on what the *prima facie* showing requires. All parties agree that there are categories of conduct that generally do not harm competition. *Id.* at 51:1–22 (DOJ counsel agreeing that "[t]here are certain things that generally don't harm competition" like "cutting your price or improving your product,"

and "[s]ome conduct is generally not problematic"); Def.'s Mem. of P. &. A in Supp. of Def.'s Mot., ECF No. 427 [hereinafter Google Colorado Mot.], at 20 ("[I]f a product design change improves a product, the conduct reflects 'competition on the merits,' and cannot [standing alone] form the basis for an antitrust violation."). Where they part ways is that Plaintiffs contend that even conduct that is typically thought of as competition on the merits still could be anticompetitive depending on the circumstances. *See* Hr'g Tr. at 51:15–22. For example, price cutting, though ordinarily procompetitive, can be anticompetitive if done for a predatory purpose. So, Plaintiffs say, the court must determine whether there are anticompetitive effects regardless of the "nature" of the conduct.

Whether conceived as a one-step or two-step inquiry, the *prima face* case boils down to one fundamental question: Has the plaintiff shown that the monopolist's conduct harmed competition? Plaintiffs are not required to make a further showing that the challenged conduct by its nature is anticompetitive.

2. Individual v. Aggregation of Harm

The parties' more significant disagreement is over how the court should go about determining whether Google's "conduct indeed has the requisite anticompetitive effect." *Microsoft*, 253 F.3d at 58–59. Google maintains that the court should not "consider[] the challenged conduct in the aggregate without first considering whether each category of conduct is exclusionary and in fact has some anticompetitive effect on its own." Reply in Supp. of Def.'s Mot., ECF No. 523 [hereinafter Google Colorado Reply], at 6.

Plaintiffs take a different view. They insist that "anticompetitive effects are analyzed contextually, not through the formalistic granularity proposed by Google." DOJ Opp'n at 17. Plaintiffs ask the court to instead aggregate the anticompetitive effects of Google's conduct—

including conduct that is not anticompetitive on its own—when determining whether the conduct has an overall anticompetitive effect. *See id*. at 20 n.10 ("Google's agreements are anticompetitive when the effects of each type of agreement are viewed in light of each other and cumulatively. They are mutually reinforcing, not discrete acts that should be 'isolatedly viewed.'") (internal citations omitted); Colorado Opp'n at 24 ("Google wants to rewrite the States' Complaint to assert three independent claims, thus sidestepping and leaving unchallenged the States' assertion that the totality of conduct harms competition."); Hr'g Tr. at 52:18–53:25 (DOJ Plaintiffs' counsel asserting in response to a hypothetical that the court *would* be required to consider the Apple Browser Agreement in assessing anticompetitive effect, even if the court were to conclude that the agreement on its own is not anticompetitive).

The Colorado Plaintiffs, in particular, insist that their SA360 and SVP allegations cannot be viewed independently of each other or the exclusive distribution agreements. "[T]aken together," they assert, "Google's SA360 and SVP tactics weaken its rivals, amplifying Google's ability to secure distribution agreements, and creating [a] monopoly feedback loop." Colorado Opp'n at 27.

Not surprisingly then, the parties offer different interpretations of how the D.C. Circuit measured anticompetitive harm in *Microsoft*. Plaintiffs contend that "the *Microsoft* Court illustrated in its careful review of the multiple forms of conduct" that trial courts must conduct "a fact-intensive inquiry that considers whether 'the monopolist's conduct on balance harms competition.'" *Id.* at 22 (quoting *Microsoft*, 253 F.3d at 59). *Microsoft* "analyzed five forms of conduct that together constituted the offense of monopoly maintenance under Section 2 of the Sherman Act," and "[i]n assessing liability, the Court examined the interaction among different contracts and categories of conduct." *Id.* at 21–22. In Plaintiffs' view, "the D.C. Circuit did not

analyze each of Microsoft's acts in isolation; instead, it examined them in light of each other" and "in light of market realities, including the role that scale played in reinforcing [Microsoft's] operating systems monopoly." DOJ Opp'n at 17–18. As an example, Plaintiffs point to the court's analysis of Microsoft's agreements with independent software vendors (ISVs). *Id.* at 17. ISVs represented "a relatively small channel for browser distribution" but Microsoft's agreements with ISVs were nevertheless found anticompetitive because "Microsoft had largely foreclosed the two primary channels [for browser distribution] to its rivals," *Microsoft*, 253 F.3d at 72, and thus "the anticompetitive effect of the ISV agreements took on 'greater significance'" and "amplified the effect that Microsoft's conduct had on distorting the competitive process," DOJ Opp'n at 17–18 (quoting *Microsoft*, 253 F.3d at 72).[12]

Google responds that "the *Microsoft* court did not, as Plaintiffs do here, lump together both exclusionary and non-exclusionary conduct in assessing whether there was an anticompetitive effect," and "expressly *rejected* the approach Plaintiffs urge here." Google Colorado Reply at 6–7. When "assessing whether the [*Microsoft*] plaintiffs had met their *prima facie* burden of showing harm to competition," Google argues, "[t]he court considered only" the particular exclusionary conduct. *Id.* at 7. Google points to the "range of challenged conduct in the [Internet Access Provider (IAP)] distribution channel" and argues that the D.C. Circuit "analyzed the conduct separately to determine whether it was competitive or exclusionary, and effects from competitive acts were thereafter excluded from the analysis." *Id.* at 7.

[12] In *Microsoft*, the trial court had found that Microsoft, through various anticompetitive means, had maintained its monopoly in personal computer operating systems (Windows) by suppressing competition with Netscape's Navigator web browser. *See* 253 F.3d at 50. Among other things, Microsoft sought to block distribution channels for Navigator through various agreements. The most cost-effective of those were exclusive agreements with OEMs to install Microsoft's Internet Explorer as the default web browser. *Id.* at 60. The second prominent agreement involved bundling its browser with internet access software distributed by Internet Access Providers, like America Online. *See id.* at 67–68. These two exclusionary arrangements "largely foreclosed the two primary channels [of distribution] to its rivals." *Id.* at 72. The third, and smallest, of the distribution channels was through ISVs. *Id.* It is in this context that the court held the exclusive arrangements with ISVs "amplified" Microsoft's monopoly power. *Id.*

The court agrees with Google that, under *Microsoft*, courts must evaluate whether each type of alleged exclusionary practice has the requisite anticompetitive effect. In other words, when determining whether plaintiffs have met their *prima facie* burden, courts can only aggregate conduct that is itself deemed anticompetitive (even if only minimally so). This approach is best illustrated, as Google notes, by the D.C. Circuit's evaluation of IAP distribution channels in *Microsoft*. The district court had "condemned as exclusionary Microsoft's agreements with various IAPs," and had determined that five challenged "actions" were anticompetitive. *Microsoft*, 253 F.3d at 67–68. On appeal, the Circuit analyzed each of the five actions separately and held that only one—an exclusive dealing arrangement—was anticompetitive. *Id.* at 67–71. And, only as to that conduct did the burden shift to Microsoft "to defend its exclusive dealing contracts with IAPs by providing a procompetitive justification for them." *Id.* at 71. Notably, the Circuit did *not* evaluate whether the practices deemed separately not to violate Section 2 were in fact anticompetitive when viewed alongside the exclusive dealing arrangement. The other four allegations—which the Circuit found did not harm competition—were not considered further.[13]

Plaintiffs' reliance on the D.C. Circuit's analysis of Microsoft's agreements with ISVs is misplaced. DOJ Opp'n at 17–18. In those agreements, Microsoft "promised to give preferential support" to ISVs that agreed to, among other things, "use Internet Explorer as the default browsing software." *Microsoft*, 253 F.3d at 71. The D.C. Circuit found that these were "exclusive deals," and when determining "what share of the market for browser distribution the exclusive deals with the ISVs foreclose[d]," the Circuit reasoned that "[a]lthough the ISVs are a relatively small channel

[13] The D.C. Circuit's analysis of "course of conduct" liability is also instructive. *Microsoft*, 253 F.3d at 78. Under this theory, a plaintiff must "point to any series of acts, each of which *harms competition only slightly* but the cumulative effect of which is significant enough to form an independent basis for liability." *Id.* (emphasis added). Thus, even "course of conduct" liability must be premised on forms of conduct that are, at least, "slightly" anticompetitive. *Id.* *Microsoft* did not suggest that conduct deemed procompetitive could be included in that calculus. The court notes that the Colorado Plaintiffs have eschewed a course-of-conduct theory. *See* Colorado Opp'n at 25 n.9 ("So, there is no need to consider a separate 'course of conduct.'").

for browser distribution, they take on greater significance because, as discussed above, Microsoft had largely foreclosed the two primary channels to its rivals." *Id.* at 72. In other words, the court held that, although the ISV market foreclosure on its own was not significant, the exclusive arrangements with the ISVs were anticompetitive when aggregated with the foreclosure occurring through the two main channels of browser distribution.

Microsoft's aggregation of harm—which aggregates *foreclosure* in the exclusive dealing context—is different than what Plaintiffs, most notably the Colorado Plaintiffs, have asked the court to do here. They argue that three different *types* of monopolistic conduct—exclusive distribution agreements, denied or delayed functionality of SA360, and the suppression and exploitation of SVPs—must effectively be viewed as one in order to evaluate harm in the relevant markets. Colorado Opp'n at 25–28. But that is not the approach the *Microsoft* court took, and it is contrary to how other appeals courts generally have proceeded. *See, e.g.*, *Covad Commc'ns Co. v. Bell Atl. Corp.,* 398 F.3d 666, 672 (D.C. Cir. 2005) (evaluating separately "five types of conduct" alleged to have violated the Sherman Act); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 982 (10th Cir. 2022) (When "[r]eal-world monopolists . . . engage in allegedly exclusionary conduct which does not fit within a single paradigm[,] . . . the courts disaggregate the exclusionary conduct into its component parts before applying the relevant law."; "For the sake of accuracy, precision, and analytical clarity, we must evaluate [the defendant's] allegedly exclusionary conduct separately. Only then can we evaluate the evidence in totality to see if any synergistic effect saves [the plaintiff's] case.") (internal quotation marks omitted); *Retractable Techs., v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) (stating that a jury's finding of anticompetitive conduct that rested on "three types of 'deception'" "must be separately analyzed in light of settled principles of antitrust law").

The Supreme Court's decision in *Continental Ore*, on which the Colorado Plaintiffs rely, is inapposite. Colorado Opp'n at 24. In *Continental Ore*, six defendants were accused of "conspiring to restrain, by monopolizing, and by attempting and conspiring to monopolize, trade and commerce" in the vanadium industry. *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 693 (1962)). The court of appeals had "examined seriatim" the conduct of various defendants and "ruled separately upon [each defendant's] alleged damage to Continental." *Id.* at 698. The Supreme Court found this analysis "improper," explaining—in language that the Colorado Plaintiffs highlight in their opposition—that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore*, 370 U.S. at 699; *see* Colorado Opp'n at 24.

But the Colorado Plaintiffs fail to cite both what precedes that quotation—"In cases such as this"—and what follows it—"The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore*, 370 U.S. at 699 (cleaned up). The full context thus shows that the Court's statement concerned proof of antitrust conspiracy, not, as here, an alleged monopolist's "unilateral conduct." *Eatoni Ergonomics, Inc. v. Rsch. In Motion Corp.*, 826 F. Supp. 2d 705, 710 (S.D.N.Y. 2011); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366–67 (Fed. Cir. 1999) ("*Continental Ore* did not hold . . . that the degrees of support for each legal theory should be added up. Each legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts.") (citing *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("Even though many of the issues the municipalities raise are interrelated and interdependent, however, we must, like the municipalities' briefs, analyze the various issues individually.")).

The other out-of-circuit cases cited by the Colorado Plaintiffs (*Conwood*, *Actavis*, and *LePage's*) do not instruct otherwise. Colorado Opp'n at 24–25. In *Conwood Company v. United States Tobacco Company*, the Sixth Circuit determined that the defendant "began a systematic effort to exclude competition" and "sought to achieve its goals of excluding competition and competitors' products by numerous avenues." 290 F.3d 768, 783 (6th Cir. 2002). The court evaluated the various kinds of anticompetitive conduct and, in so doing, cited to an earlier Sixth Circuit decision, *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979). *See Conwood*, 290 F.3d at 784. In *Byars*, the Sixth Circuit observed that, "[i]n a § 2 case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful." *Byars*, 609 F.2d at 860.

In *New York v. Actavis*, the Second Circuit affirmed that "when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive under the Sherman Act." *N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 654 (2d Cir. 2015) (internal citations omitted). There, the defendant company had introduced a new product and withdrawn the old one relatively close in time. *Id.* While acknowledging that "neither product withdrawal nor product improvement alone is anticompetitive," the Second Circuit reasoned that the combination of the two created a singular "hard switch" that resulted in anticompetitive effects in the relevant market. *Id.* at 653–54.

And in *LePage's v. 3M*, while the Third Circuit did state that "[t]he relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together," it did so only after separately finding that 3M's bundled rebates and exclusive dealing practices were themselves anticompetitive. 324 F.3d 141, 157, 159, 162 (3d Cir. 2003).

None of these cases support the proposition that the court must combine the anticompetitive effects across different types of monopolistic behavior, when deciding whether any particular type of conduct has anticompetitive effects. Rather, the court must "disaggregate the exclusionary conduct into its component parts before applying the relevant law." *EpiPen*, 44 F.4th at 982.

V. DISCUSSION

A. Joint Claims: Browser Agreements & Android Agreements

Having established the proper framework, the court first addresses Plaintiffs' allegations concerning Google's Browser Agreements and Android Agreements. Recall, Plaintiffs claim that both agreements are exclusive contracts that foreclose a substantial part of the relevant markets. DOJ Opp'n at 18–19. Google concedes that the Android RSAs are exclusive but contests the exclusive nature of the Browser Agreements and the Android MADAs. Google DOJ Mot. at 26, 39. Additionally, the parties disagree on how to measure "substantial foreclosure" and the extent of foreclosure. Google Reply in Supp. of Google Mot., ECF No. 522, at 22–25. The court first addresses whether the Browser Agreements and MADAs are exclusive or *de facto* exclusive agreements, and then turns to the proper measure of substantial foreclosure.

1. Exclusive Dealing

"An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). "Despite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws." *E. Food Servs., Inc. v. Pontifical Cath. Univ. Servs. Ass'n*, 357 F.3d 1, 8 (1st Cir. 2004). In many circumstances, exclusive dealing contracts are understood to "pose no competitive threat at all." *Id.*; *see also Microsoft*, 253 F.3d at 70 ("[I]mposing upon a firm with market power the risk of an antitrust suit

every time it enters into [an exclusive dealing] contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm."). Such contracts, however, "are of special concern when imposed by a monopolist." *ZF Meritor*, 696 F.3d at 271; *Microsoft*, 253 F.3d at 70 (acknowledging that a lower foreclosure rate may give rise to a Section 2 violation by a monopolist). The primary worry is that the monopolist might use such agreements "to strengthen its position, which may ultimately harm competition." *ZF Meritor*, 696 F.3d at 270.

"The legality of [an exclusive] arrangement ultimately depends on whether the agreement foreclosed a substantial share of the relevant market such that competition was harmed." *Id.* at 283 (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326–28 (1961). "The share of the market foreclosed is important because, for the contract to have an adverse effect upon competition, 'the opportunities for other traders to enter into or remain in that market must be significantly limited.'" *Microsoft*, 253 F.3d at 69 (quoting *Tampa Elec.*, 365 U.S. at 328). The D.C. Circuit has not conclusively determined what constitutes substantial foreclosure under § 2 of the Sherman Act, but in *Microsoft* said that "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Id.* at 70. Plaintiffs "must both define the relevant market and prove the degree of foreclosure." *Id.* at 69.

a. Browser Agreements

Google's Browser Agreements require the developers to set Google as the default search engine on their web browsers but allow end users to change the default. *See e.g.*, Apple Agreement at 4. Still, Plaintiffs contend the agreements constitute exclusive dealing because they make Google "the *de facto* exclusive general search engine." DOJ Am. Compl. ¶ 119. Plaintiffs' argument centers on the "stickiness" of the default position—they argue that "[b]eing the default

search engine on a preinstalled and prominently placed app is *by far* the most efficient and effective way for a general search engine to reach users." DOJ Opp'n at 8. "Even where search users might want to switch defaults, the effort and knowledge required to make that change biases them towards sticking with the default option," and "[d]efaults are particularly powerful on mobile devices." *Id.* at 9.

Google responds that their "agreements with browser developers such as Apple and Mozilla are ***not*** 'exclusive' or '*de facto* exclusive' under any established meaning of those concepts" for two reasons: (1) the agreements "have never prevented [Apple, Mozilla, and other browser developers] from promoting rival search engines to consumers in the same browsers," and (2) web browser developers "have decided to design their browsers with a single search engine set as the default upon first use" and Google simply "supplied a superior product in response to a customer's product design demands." Google DOJ Mot. at 26–27. Alternatively, even if the Browser Agreements were exclusive, Google argues that they "are the product of customer-driven 'competition on the merits,' which antitrust law protects rather than condemns," and therefore could not result in any anticompetitive effect. *Id.* at 27.

Exclusivity. The court first addresses Google's argument that the Browser Agreements are not *de facto* exclusive because the agreements do not restrict web browser developers from promoting rival search engines. Google asserts that, "[g]enerally speaking, '[e]xclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor.'" Google DOJ Mot. at 28 (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010)). Plaintiffs' claims regarding the Browser Agreements "fail at the threshold," Google maintains, "because the contracts indisputably do ***not*** prevent Apple, Mozilla, or other browser developers from integrating

and promoting any other search engine, or users from otherwise accessing search rivals via these browsers." *Id.* In Google's view, "agreements 'are not exclusive dealing arrangements, de facto or actual, *unless they prevent the buyer from purchasing a given good from any other vendor*.'" *Id.* (quoting *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1004 (9th Cir. 2020)). "Apple and Mozilla not only are permitted to promote other search engines under the terms of their agreements with Google, but ***actually do*** promote rival search engines in Safari and Firefox in exchange for revenue-share payments from those rivals." *Id.* at 28–29. Furthermore, they "have ***no*** obligation to ensure that any particular volume of search traffic flows to Google, and the revenue share percentage that Google pays does ***not*** vary based on the number or percentage of queries submitted to Google instead of rival search engines." *Id.* at 30.

Plaintiffs respond that "an agreement need not close off *all* channels of distribution to be considered exclusive." DOJ Opp'n at 45. In Plaintiffs' view, the Browser Agreement with Apple is "exclusive because it requires Apple to make Google the preset default search engine on the only preinstalled search access point on its devices—the address bar in Safari—until at least [redacted]" and "no rival can become the preset default search engine in Safari's address bar, and no rival search bar can be added to Safari." *Id.* at 44. Google's Browser Agreements with browser developers Mozilla, Opera, and UCWeb—"which require [them] to make Google the preset default search engine [on their browsers] and cover nearly all search access points on nearly all versions of third-party browsers in the United States"—are also *de facto* exclusive for the same reason. *Id.* at 47. At a minimum, Plaintiffs contend, "Google's argument that its distribution agreements are not exclusive . . . raises factual disputes about whether these agreements are actually or de facto exclusive." *Id.* at 44.

The court finds that there is a genuine dispute of material fact as to whether Google's Browser Agreements are, at least, *de facto* exclusive. Google is, of course, correct that its Browser Agreements do not prevent users from switching the default search engine, and do not prohibit browser developers from promoting and entering into revenue-share agreements with other search engines. In fact, developers have entered into such agreements. *See* Google DOJ SMF ¶ 64. But that is not dispositive. "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). And "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992).

The Browser Agreements do lock in Google as the default search engine for years at a time. In the case of Apple products, that means Google is a purchaser's out-of-the-box search engine. That is arguably a form of exclusivity—rivals are prevented from occupying default position in the browser's integrated search bar at the time of purchase. *Cf. Microsoft*, 253 F.3d at 68 (finding that Microsoft's arrangement with AOL that required AOL not to "promote any non-Microsoft browser, nor provide software using any non-Microsoft browser *except at the customer's request*" qualified as an exclusive contract) (emphasis added);[14] *ZF Meritor*, 696 F.3d at 283 ("[W]e decline to adopt [the defendant's] view that a requirements contract covering less than 100% of the buyer's needs can *never* be an unlawful exclusive dealing arrangement.").

Critically, the competitive effects of holding default status, when combined with Google's scale advantage, is a hotly disputed issue in this case. Even Google's own positions reflect that

[14] The court acknowledges that there are differences between the Browser Agreements and Microsoft's agreement with AOL. The Browser Agreements do not, for example, foreclose the browser developers from entering into promotional arrangements with other search engines. *See e.g.*, Google DOJ SMF ¶ 61. In fact, they permit it. *Id.* ¶ 64 However, the legal significance of that factual distinction is a matter left to resolve after a trial.

dispute. *Compare* Redacted Reply in Supp. of Google's Mot., ECF No. 560, Google's Resp. to DOJ CSMF, ECF No. 560-1 [hereinafter Google DOJ CSMF], ¶ 445 (Google denying that "[b]eing the preset default search engine for a search access point on a preinstalled and prominently placed app is the most efficient and effective way for a search engine to reach users."), *with id.* ¶ 454 (Google agreeing that "search defaults can increase search volume for the default search provider."). It is best to await a trial to determine whether, as a matter of actual market reality, Google's position as the default search engine across multiple browsers is a form of exclusionary conduct.

Google's second argument against exclusivity fares no better. The fact that the single-preset default search "is a consequence of Apple, Mozilla, and other companies having ***chosen to design*** their browsers with a single search engine set as the default upon first use," Google DOJ Mot. at 32, does not change the fact that Google has *exclusive* rights to the default across multiple web browsers. A purchaser of an Apple device is not, for example, given the out-of-the-box option to select a default search engine. Google occupies that space by agreement. Again, the competitive market effects of holding the default is a disputed issue. Accordingly, the court finds that Google has not shown as a matter of law that the Browser Agreements are not exclusive contracts.

Competition for the Contract. In the alternative, Google says that, even if the Browser Agreements are exclusive or *de facto* exclusive, they are lawful because they are "'merely a form of vigorous competition' that the antitrust laws encourage rather than condemn." *Id.* at 38 (quoting *Microsoft*, 253 F.3d at 58). Google contends that it "has prevailed in the ongoing competition to be the default search engine in most third-party browsers in the U.S. since the mid-2000s because companies such as Mozilla and Apple have repeatedly determined it is the best option for creating a compelling search experience for their customers." *Id.* at 36. Rival search engines "can and do

compete with Google to be the default search engine in Safari, Firefox, and other third-party browsers," and "[w]hen Google wins this competition, it has done so on the merits as established and judged by its customers, not through anticompetitive or exclusionary conduct." *Id.* at 35. Google cites the example of Mozilla, which in 2014 switched to Yahoo! as the default search engine for Firefox, only to return to Google soon after. *Id.* at 37. "Any 'concern' that may potentially arise under other circumstances involving allegations of 'exclusive dealing' is wholly absent here," Google argues, "as there is no evidence of coercive conduct, and Google has won based on considerations of quality and price." *Id.* at 38.

Plaintiffs respond that "[t]he existence of multiple bidders does not transform an anticompetitive agreement into a permissible one." DOJ Opp'n at 27. Under Google's approach, Plaintiffs warn that "a monopolist could enter into *any* contract—no matter its effects on competition—so long as one rival existed and made some feeble attempt to secure the business, or the buyer had another option," and would be insulated from any "Section 2 challenge[] to [an] exclusionary agreement[] until the dominant firm had managed to wipe out all vestiges of present or future competition." *Id.* at 27–28. "What matters here is whether the terms of Google's contracts harm competition, not whether Google beat out a rival in imposing those terms," and "competitors are at a distinct disadvantage relative to a monopolist in the bidding process, which means that a monopolist's offer will often be the winning bid." *Id.* at 28. Finally, Plaintiffs contend that "Google fails to cite a single case supporting the proposition that a showing of 'competition for the contract' is sufficient to warrant summary judgment against a claim that the contract is exclusionary." *Id.*

The court thinks that Google's "competition for the contract" defense cannot be resolved on summary judgment at the *prima facie* stage and is better left for the procompetitive prong of

the *Microsoft* analysis. *See Microsoft*, 253 F.3d at 59 (describing a procompetitive justification as "a nonpretextual claim that [the monopolist's] conduct is indeed a form of competition on the merits because it involves, for example, . . . *enhanced consumer appeal*") (emphasis added).

Microsoft is instructive here. The D.C. Circuit encountered three types of agreements that were either explicitly exclusive or "exclusive as a practical matter"—Microsoft's deals with ISVs (independent software vendors), IAPs (internet access providers), and Apple. *Id.* at 71, 76. For each exclusive agreement, at the *prima facie* stage, the Circuit simply determined whether the exclusive agreement foreclosed a substantial share of the market. *Id.* at 71–74. If it did, the court looked to Microsoft to provide a procompetitive justification. *Id.* For instance, when it analyzed the exclusive agreements between Microsoft and ISVs, the D.C. Circuit held that the plaintiff had met its *prima facie* burden because "Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market" and "in preserving Microsoft's monopoly." *Id.* at 72. Similarly, the Circuit held that Microsoft's exclusive contract with Apple "ha[d] a substantial effect upon the distribution of rival browsers," and because it "serve[d] to protect Microsoft's monopoly, its deal with Apple must be regarded as anticompetitive." *Id.* at 73–74. The analysis was the same for IAPs. *Id.* at 71.

At no point did the D.C. Circuit, at the *prima facie* stage, consider whether the exclusive agreements were the result of a lawful "competition for the contract" or something akin to that. *Id.* at 71–74. Only after satisfying itself that these agreements were anticompetitive did the court turn to asking whether there was a procompetitive justification for the exclusive arrangements. *See id.* at 71 (IAPs), 72 (ISVs), 74 (Apple). Because Microsoft had offered none, the agreements were deemed exclusionary and therefore violated Section 2. *Id.* Here, Google will have the

opportunity to proffer a procompetitive justification and show that the Browser Agreements resulted from "competition for the contract"—it will just have to wait until trial.

The out-of-circuit cases Google cites (*Menasha*, *Balaklaw*, *Race Tires*, and *EpiPen*) do not entitle it to judgment as a matter of law at this stage. Google DOJ Mot. at 35–38. Google quotes *Menasha* to argue that "competition for the contract" is "a vital form of rivalry . . . which the antitrust laws encourage rather than suppress." *Id.* at 35 (quoting *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004)). *Menasha*, however, merely confirms that exclusive agreements are not *per se* anticompetitive. *Menasha*, 354 F.3d at 663 ("In the district court Menasha argued that these contractual devices, which it deems exclusionary, are unlawful *per se.* That argument has been abandoned on appeal—sensibly so, as competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."). In *Balaklaw*—a Section 1 case—the Second Circuit did state that exclusive agreements "may actually encourage, rather than discourage, competition," but clarified that "[t]his is not to say that under proper pleading and proof exclusive-dealing contracts could not still be scrutinized under the antitrust laws." *Balaklaw v. Lovell*, 14 F.3d 793, 799–800 (2d Cir. 1994). And in *Race Tires*, the Third Circuit observed that "[i]t is well established that competition among businesses to serve as an exclusive supplier should actually be *encouraged*," but emphasized that "such exclusive agreements are not exempt from antitrust scrutiny." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76, 83 (3d Cir. 2010).

Google also cites to *EpiPen* to argue that customer-instigated exclusive dealing eases "any anticompetitive concern arising from a monopolist's use of exclusive dealing contracts," and that "rival search engines need only 'offer a better product or a better deal to reverse'" Google's default status in Safari, Firefox, and other third-party browsers. Google DOJ Mot. at 38 (quoting *EpiPen*,

44 F.4th at 995). While *EpiPen* does state that customer-instigated exclusivity "*sometimes* eases any anticompetitive concern arising from a monopolist's use of exclusive dealing contracts," it caveated that observation: "This does not mean that exclusive dealing arrangements instigated by the monopolist cannot be procompetitive or that exclusive dealing arrangements instigated by the customer cannot be anticompetitive." *EpiPen*, 44 F.4th at 995 n.14 (emphasis added). Ultimately, the Tenth Circuit made clear that to "analyze the legality of exclusive dealing contracts, we apply the rule of reason," and under that approach, courts must "conduct a fact-specific assessment of market power and market structure to assess the challenged restraint's actual effect on competition." *Id.* at 983–84 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)) (internal quotation marks omitted); *see also Menasha*, 354 F.3d at 663 (stating that even exclusive deals preferred by retailers and manufacturers must be subject to a rule-of-reason analysis). That is an inquiry better left for trial.

Accordingly, Google cannot prevail at this stage based on a "competition for the contract" theory. Importantly, the court is not taking the position that Google's "competition for the contract" argument is irrelevant to the ultimate Section 2 question. Rather, as stated, the argument is better suited for the procompetitive prong of the *Microsoft* analysis.

Having determined that Plaintiffs have carried their burden of showing that the Browser Agreements are, at least, *de facto* exclusive contracts, they still must be subject to a market foreclosure analysis to determine whether they are anticompetitive. *See Microsoft*, 253 F.3d at 69 ("Following *Tampa Electric*, courts considering antitrust challenges to exclusive contracts have taken care to identify the share of the market foreclosed."). The court addresses foreclosure in Section V.A.2.

b. Android Agreements

The court now considers the Android MADAs and whether they are exclusive dealing arrangements. Plaintiffs argue that Google's Android Agreements—MADAs and RSAs—are exclusive because they work together as a "belt and suspenders" in order to "guarantee Google is the only preset default search engine on any Android preinstalled search access point." DOJ Opp'n at 45. "[A]lmost all Android devices sold in the United States" are subject to a MADA, *id.* at 30, and Plaintiffs argue that "[m]arket realities require OEMS to sign MADAs" because, "[f]or an Android mobile device to be successful in the United States, it must have proprietary Google Software preinstalled," like the Google Play Store, which is only available to MADA signatories. DOJ SGI at 132. MADAs require OEMs to preinstall the Google Search App and Chrome browser, and to place Google's search widget on the device home screen, all of which default to Google Search. DOJ Opp'n at 32. The RSA then "ensures that all preinstalled search access points will have Google as the preset default and no rival search will be preinstalled." *Id.* at 46. "When viewed collectively," Plaintiffs say, "the MADAs and Android RSAs ensure all roads on Android lead to Google. That is exclusivity." *Id.* at 47.

Google concedes that RSAs are exclusive but argues that MADAs are not because "MADA licensees can preinstall other browsers and search apps and set them as the default upon first use." Google DOJ Mot. at 39. "Any purported 'exclusivity' arguably arises only if an OEM or wireless carrier choose to earn revenue from Google on its Android device by signing an RSA." *Id.* And, like the Browser Agreements, nothing in the MADA or the RSA prevents the end user from downloading a rival's search engine from the Google Play Store or changing the default search engine on the preinstalled Chrome browser. *Id.* at 40.

The court finds that although, by its terms, the MADA is not an exclusive contract, there is a dispute of fact as to whether market realities make it one. For instance, Google's expert Dr. Kevin Murphy admits that OEMs "can't sign an RSA unless [they have] also signed the MADA," therefore "thinking about the advantages of the RSA would be relevant for deciding whether to sign a MADA." DOJ 478 Exs., ECF No. 478, Ex. 87, ECF No. 478-22, at 220:19–22. Indeed, it would seem contrary to an OEM's economic self-interest to sign a MADA but not an RSA. Further, Google admits that, "[i]n the past three years, no manufacturer has sold an Android phone into the United States, preinstalled with Google's search widget and an additional search widget for a different search engine." Google DOJ CSMF ¶ 591. So, even though the MADA permits an OEM to install a second search widget, OEMs have declined to do so. Google says that is by choice, but it may be that market realities are such that once Google occupies the default search widget, a rival cannot realistically hope to compete for another place on an Android device's home screen. So, as with the Browser Agreement, the mere fact that the MADA does not prohibit an OEM from engaging with competitors does not mean the MADA is not an exclusive agreement.

2. Substantial Foreclosure

As discussed, the Sherman Act does not make it per se unlawful for a monopolist to secure an exclusive contract. *Microsoft*, 253 F.3d at 70. To determine whether such a deal is anticompetitive, courts must ask how much of the relevant market the agreement forecloses from competition. *Id.* at 69. In other words, courts must "identify the share of the market foreclosed." *Id.* "[W]hat is 'significant' may vary depending upon the antitrust provision under which an exclusive deal is challenged." *Id.* The *Microsoft* decision declined to adopt a rigid test of what degree of foreclosure is required for a successful Section 2 challenge but observed "that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation

even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Id.* at 70. Plaintiffs have the burden of proving "a significant degree of foreclosure." *Id.* at 69. The court therefore must inquire whether Plaintiffs here have met their burden, as part of their *prima facie* case, of showing that the Browser Agreements and Android Agreements have caused "a significant degree of foreclosure." *Id.*

Plaintiffs contend that substantial foreclosure "is measured by looking at the percentage of the market that is 'tied up' by the exclusive-dealing contract, and thus by considering how much of the market is available to rival sellers." DOJ Opp'n at 47 (quoting 7D-2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 768b4 n.39 (5th ed. 2022)). In other words, "the foreclosure created by exclusive contracts is equal to the percentage of the market those contracts cover." *Id.* So, Plaintiffs ask the court to aggregate the foreclosure numbers resulting from the Browser Agreements and Android Agreements. Their expert's analysis shows that the Browser Agreements and Android Agreements "cover almost 50% of all U.S. general search traffic . . . 45% of U.S. general search text ads, and 36% of U.S. search ads." *Id.* at 47–48. "These coverage numbers—especially when viewed in light of the 22% of searches controlled by the Google default on Chrome for Windows and Apple devices—easily qualify as 'significant foreclosure' under *Microsoft*." *Id.* at 48 (internal citations omitted).[15]

Google's foreclosure argument focuses only on the Android Agreements. *See* Google DOJ Mot. at 40–43; Hr'g Tr. at 39:8–18 (Google counsel clarifying that a foreclosure analysis was done

[15] Google rejects Plaintiffs' attempt to include in the foreclosure analysis any Google searches made through Chrome on Windows and Apple devices, because the default browser on Windows devices is Edge and on Apple devices is Safari. Hr'g Tr. at 41 ("Our getting search[es] from Chrome on Windows should be counted in a foreclosure analysis? That's crazy. Or Chrome on Apple devices. We're not preloaded on Apple devices any more than Apple is not preloaded on Android devices."). Plaintiffs seem to implicitly concede that the foreclosure analysis should not include searches through Chrome on Windows and Apple devices, *id.* at 56–60 (DOJ counsel stating that "generally speaking, doing what you want with your own products and making them better, that is not exclusionary conduct, and that's certainly not being challenged here"), but argue that "it's a market reality the Court needs to consider," *id.* at 97.

with respect to the Apple Agreement but noting that it wasn't "focused on" in the briefing). As to the Android Agreements, Google argues that the appropriate way to measure foreclosure is to identify "the impact of those agreements relative to a but-for world in which the alleged unlawful agreements do not exist." Google DOJ Mot. at 41. Plaintiffs' expert, Professor Whinston, "has offered no opinion about what a but-for world without Google's Android MADA or RSA agreements would look like," but he "has opined that if all Android OEMs and carriers were to choose to display a choice screen prompting their customers in the U.S. to select a default search engine from a list of options . . . Google would be selected more than 90% of the time." *Id.* at 41–42. "The estimated 'shift' from Google to other search engines in this mandatory choice screen world would ***total approximately 1%*** of all search queries in the U.S." *Id.* at 42. Google further argues that there is no evidence of substantial foreclosure even if a rival search engine were the "exclusive preinstalled default search engine on all search access points on Android devices in the U.S." because even Plaintiffs' expert estimated that, in that scenario, only "approximately 11.6% to 13.5% of total U.S. search queries may have shifted from Google to other general search engines." Google DOJ SMF ¶ 251; Google 430 Exs., Ex. 40, ECF No. 430-15, ¶ 905 (opining that between 18.2% to 21.2% of U.S. mobile phone queries may shift in such scenario).

As the above summary of the parties' positions shows, there is sufficient conflict about the extent of foreclosure—and, importantly, the proper way to measure it—to preclude a finding of summary judgment. Among the questions the court will have to consider at trial are: (1) what channels of distribution are included in the foreclosure analysis; (2) whether either the Browser Agreements or Android Agreements, or both, are part of the foreclosure calculus; and (3) whether a but-for approach is the appropriate way to measure foreclosure. Accordingly, Plaintiffs' claims regarding the Browser Agreements and Android Agreements survive summary judgment.

B. The Colorado Plaintiffs' Claims: SVPs & SA360

The court now turns to the allegations raised only by the Colorado Plaintiffs related to Google's treatment of SVPs and Google's development of SA360, which they contend has anticompetitive effects in three markets: general search services, general search text advertising, and general search advertising. Colorado Opp'n at 2 (citing Colorado Compl. ¶ 59).

1. Google's Conduct Directed at SVPs

"SVPs deal with Google in two ways." Colorado Opp'n at 16. "First, SVPs depend on Google as a source of customers, especially new customers, through unpaid results (like the blue links) and advertising." *Id.* "Second, SVPs are important suppliers to Google of structured data—proprietary information that SVPs create that is not available to be crawled on the web," such as hotel and flight availability and prices. *Id.* Plaintiffs take issue with Google (1) placing "visibility limitations" on SVPs, and (2) requiring SVPs to share data with Google to the same extent they share it with Google's rivals. *Id.* at 17–20.

Visibility Limitations. Plaintiffs argue that Google "imposes visibility restrictions on SVPs in certain strategically important commercial arenas such as hotels, flights, and local services." *Id.* at 18. For example, (1) "SVPs cannot appear in results in the free listings in Google's hotel universal, flights universal, or in the local universal triggered by searches for nearby businesses," (2) "SVPs cannot purchase ads in their own name and cannot appear prominently in the tile of local services ads on Google's SERP," and (3) "when a user clicks on an ad paid for by the SVP featuring the name of a supplier, the consumer is directed to another Google site, not the SVP's site." *Id.* Because Google "insert[s] the restricted universals in a prominent place on the SERP, typically above the fold, Google demotes the blue [organic web result] links, in which SVPs often appear, making it less likely users will click on them." *Id.* "The demotion of blue links magnifies

the impact of Google's visibility restrictions on SVPs that are excluded from its universals." *Id.* at 19. Plaintiffs allege that "Google's visibility-limitation practices, in combination with its demotion of the unpaid blue links, have raised customer acquisition costs for the affected SVPs, often by inducing them to purchase more advertising in an effort to restore their visibility." *Id.*

Data Sharing. Plaintiffs also contend that "Google abuses its monopoly power to acquire valuable proprietary data [from SVPs] that it cannot obtain by crawling the web." *Id.* at 42. "Google mandates that SVPs . . . provide it with data equivalent to what they provide to any of Google's competitors, robbing SVPs of control over their valuable assets and potentially foreclosing a differentiated data deal with a [general search engine] rival." *Id.* at 44. Furthermore, "Google uses SVP data within SERP features where SVPs are not permitted to appear, such as in the restricted universals on its SERP, and also uses data without attribution to SVPs in immersives that link to the SERP." *Id.* at 19.

Plaintiffs' theory of competitive harm in the relevant markets arising from these practices is as follows: (1) search-related advertising on Google is the primary way users get to SVPs because "Google's monopoly makes SVPs depend almost entirely on Google," Colorado Opp'n at 27; (2) because Google has reduced SVPs' visibility in key selected verticals in multiple ways—i.e., the anticompetitive conduct—SVPs have had to spend more on customer acquisition in the form of higher advertising costs, *see id.* at 16–19; (3) the limited visibility and increased customer acquisition costs weaken SVPs, *see id.*; (4) by weakening SVPs, Google discourages "stronger content partnerships and other arrangements" between its rivals and SVPs, *id.* at 45; (5) if there were there stronger partnerships between Google's rivals and SVPs, other search engines would be more attractive to end users, leading to greater competition in the search and general search-related ad markets, *id.* at 45; and (6) at the same time, Google's demand for parity, or "most favored

nation status," with respect to SVPs' data "disincentivizes SVPs from investing in the creation of valuable structured data," which forecloses "differentiated data deal[s]" with Google's rivals. *Id.* at 44. In Plaintiffs' view, "[u]nhampered growth of partnerships" between SVPs and Google's rivals would "facilitate competition in the Relevant Markets" and "aid the growth of innovative challengers to Google's monopoly." *Id.* at 45.

Google responds that Plaintiffs "cannot meet either element of their *prima facie* burden" for two primary reasons. Google Colorado Mot. at 23. First, Google argues that "the challenged [SVP] conduct is a genuine product improvement," *id.*, and where a "product design improve[s] [a] product . . . it is lawful procompetitive conduct and not exclusionary conduct as a matter of law," Google Colorado Reply at 12. Second, Plaintiffs fail to "raise a triable issue with respect to the requisite anticompetitive effects." Google Colorado Mot. at 23. "Plaintiffs have painted themselves into a corner by proposing markets fundamentally disconnected from the harms they allege," and because SVPs "are outside the proffered general search services and derivative [general-]search advertising markets," "[t]here is no basis to conclude that the alleged harm to SVPs harms competition in the alleged markets." *Id.* at 31–32. "Most fundamentally, Plaintiffs have no answer to the question at the core of their harm-to-competition theory: What basis is there to believe that ***stronger*** SVPs would somehow increase competition among general search engines?" Google Colorado Reply at 20.

The court agrees with Google's second argument.[16] Plaintiffs' theory of anticompetitive harm rests on a multi-linked causal sequence that relies not on evidence but almost entirely on the

[16] Because the court agrees that Plaintiffs' SVP claim fails due to the absence of factual dispute showing injury in any of the relevant markets, it does not reach the issue of whether a product design improvement is actionable under Section 2.

opinion and speculation of its expert, Professor Jonathan Baker. Plaintiffs cite Professor Baker's report for the following propositions:

- Google's conduct "make[s] SVPs less attractive and less valuable partners for general search firms." Colorado SMF ¶ 188 (citing Colorado 466 Exs., ECF No. 466, Baker Opening Rep., ECF No. 466-1, ¶ 325; *id.*, Baker Rebuttal Rep., ECF No. 466-2, ¶¶ 62–66).
- "Google's data requirements disincentivize SVPs from using their data to strike better deals with Google rivals by, for example, providing some of their data to only select [general search engines]." Colorado Opp'n at 45 (citing Baker Opening Rep. ¶¶ 324–25); *see* Colorado SMF ¶ 187 (citing Colorado 466 Exs, Baker Reply Rep., ECF No. 466-3, ¶ 165).
- "Google's data restrictions disincentivize SVPs from investing in their data further, as they cannot realize a meaningful return on these investments." Colorado Opp'n at 44 (citing Baker Opening Rep. ¶ 278; Baker Reply Rep. ¶ 163).
- "[B]y requiring SVPs to provide Google all data provided to any other [general search engine], these mandates appear to prevent SVPs from granting exclusive access to some data to Google's rivals." Colorado Opp'n at 44 (citing Colorado SMF ¶ 186 (citing Baker Reply Rep. ¶¶ 166–67)).

Remarkably, not one of Professor Baker's opinions, on which these fact assertions are based, cites to any record evidence.

Indeed, a closer inspection of Professor Baker's reports shows that he has largely theorized the anticompetitive effects in the relevant markets of Google's conduct towards SVPs.

- "Google's visibility restrictions *can reasonably be expected* to discourage investment by the affected SVPs." Baker Rebuttal Rep. ¶ 61[17] (emphasis added).
- "The terms on which Google often obtains access to structured data *can reasonably be expected* to discourage the SVPs that invest in assembling such data from using their data in ways that would aid their own expansion and growth." Baker Opening Rep. ¶ 51 (emphasis added); *see also id.* ¶ 278 (again stating that Google's terms of access to data can "reasonably be expected" to discourage SVPs' investment in such data); *id.* ¶ 324 (stating that Google's data requirements have "*likely discouraged* SVPs from using their data to aid their own expansion and growth") (emphasis added).
- Opining that, absent Google's "most favored nation" data provision, "an SVP specializing in hotels *might* reach an agreement with a search firm rival to Google by which the SVP makes available its lower-priced, lower-quality hotel room inventory through the rival only," and that "[c]ompetition of this form *could potentially* be discouraged by the type of contractual provision found in Google's contracts with Expedia." Baker Reply Rep. ¶ 167; *id.* at 88 n.463.

Speculation that Google's conduct "can reasonably be expected," "might," or "could potentially" degrade SVPs and make them less attractive partners to Google's rivals is not evidence of

[17] Professor Baker does provide some factual support for this opinion, but it is not a material fact. He cites to [redacted]. *See* Baker Rebuttal Rep. ¶ 61. But Professor Baker does not explain how [redacted] but not harm in the relevant product markets, because SVPs are not competitors in those markets. And, if there were harm, it would be a European market and thus outside the relevant geographic market in this case (the United States). *See* DOJ Am. Compl. ¶ 107.

anticompetitive effects in the relevant markets. Plaintiffs are required to show with proof "that the monopolist's conduct *indeed* has the requisite anticompetitive effect," and they have fallen well short. *Microsoft*, 253 F.3d at 58–59 (emphasis added).[18]

The Colorado Plaintiffs confirmed this state of evidence at oral argument. The court asked if there was "any evidence" that Google's conduct makes SVPs less attractive partners for rival search engines. Hr'g Tr. at 197–98 ("All you need is one SVP representative who says, 'Before Google made the change, we were a much more attractive partner to Microsoft. But since then, we have been degraded in the following ways that makes us less attractive to Microsoft [Bing], DuckDuckGo, or me or whoever it may be.'"). Plaintiffs identified none.[19] They did not point the court to any evidence showing that any of Google's rivals viewed SVPs as less desirable partners once SVPs became less visible on Google's SERP—and Plaintiffs do not dispute that there are

[18] Ironically, Professor Baker does offer record support for one material fact: "Some SVPs have shared data with Google's rivals, including Bing and DuckDuckGo, on terms *more favorable* to the SVPs than the terms that Google requires." Baker Opening Rep. ¶ 278 (emphasis added). That fact undermines the notion that Google's conduct has weakened the ability of SVPs to partner with Google's rivals, or diminished the incentives for SVPs to invest in structured data.

[19] In response to the court's question, Plaintiffs pointed to a quote from Jeff Hurst, the COO of Expedia, Hr'g Tr. at 198, who was asked, "what do you think would happen if there were more economically viable alternatives to replace traffic on Google?" Colorado 470 Exs., Ex. 187, ECF No. 470-27, at 245:20–22. Hurst responded that "[i]f there were equal-sized players, you know, in particular if there were multiple equal-sized players in [Search Engine Management], I think you'd have more likelihood that people would be, you know, potentially choosing to optimize more for a different search engine, you know, or spend more time partnering with a search engine on features or different types of development in a way where you might see more differentiation in the consumer experience." *Id.* at 246:5–14 (emphasis added). This answer does not say anything about how Google's *alleged conduct* towards SVPs has harmed competition in the relevant markets. Rather, it is simply a response to a hypothetical question that is unconnected to the actual alleged anticompetitive conduct targeting SVPs and, if anything, appears directed at the market for SEM tools.

The Colorado Plaintiffs' opposition also quotes a [redacted] Colorado Opp'n at 5 (citing Colorado 466 Exs., Ex. 14, ECF No. 466-14). But the [redacted] said no such thing. In response to a question about whether "[redacted]"). This testimony does not support the theory that Google's conduct towards SVPs had degraded SVPs so as to make them less desirable partners to Google's rivals.

many such partnerships. Nor have they cited any evidence that an SVP has reduced or altered in any way its investments in structured data as a result of Google's data demands, or that an SVP has sought a deal with a Google competitor based on unique structured data only to be stymied because it was also required to provide such data to Google. Simply put, there is no record evidence of anticompetitive harm in the relevant markets resulting from Google's treatment of SVPs.

That leaves Professor Baker, but Plaintiffs cannot survive summary judgment on his unsupported opinions alone. "To hold that Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than [the expert's] theoretical speculations would seriously undermine the policies of Rule 56." *Merit Motors, Inc. v. Chrysler Corp*., 569 F.2d 666, 673 (D.C. Cir. 1977). Put more simply, "[i]n this circuit, a party cannot avoid summary judgment when it offers an expert opinion that is speculative and provides no basis in the record for its conclusions." *Martin v. Omni Hotels Mgmt. Corp.*, 321 F.R.D. 35, 40 (D.D.C. 2017); *see also Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("[A] party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations."). Professor Baker's opinions do not rest on facts; only his ruminations about the market effects of Google's conduct.

Plaintiffs' various other arguments do not help establish a *prima facie* case. First, Plaintiffs assert that Google has a motive to diminish SVPs to prevent users from skipping over Google and going directly to the SVPs for specialized information. Colorado Opp'n at 38–39. Such consumer behavior would threaten "Google's monopoly revenues." *Id.* That argument does not, however, describe harm to competition in the relevant markets. If a user bypasses Google to go directly to

an SVP, the user would presumably also bypass a rival search engine. In other words, greater navigation directly to SVPs does not depress *competition* in the relevant markets because SVPs do not compete with Google in general search or the general search-related ad markets.

Second, Plaintiffs takes Google to task for failing to produce evidence showing that the visibility limits actually benefit users. Colorado Opp'n at 39–40. But that argument puts the cart before the horse. Google need only establish a procompetitive justification for the visibility limits if Plaintiffs first show them to be anticompetitive in the general search or the derivative general search advertising markets. *See Microsoft*, 253 F.3d at 59. They have not done so.

Third, Plaintiffs contend that Google's inclusion of SVPs in some verticals—Vacation Rentals and Shopping, for example—undercuts Google's claim of user benefit. Colorado Opp'n at 40–41. But differential treatment of SVPs among various verticals does not, once again, prove anticompetitive harm in the relevant markets.

Fourth, Plaintiffs point to documented complaints from SVPs about Google's data demands. *Id.* at 43–44. The court accepts these statements at face value. The relevant inquiry here, however, is not whether Google is leveraging its monopoly position to unfairly extract data from SVPs, but instead whether that practice harms competition in the marketplaces for general search services and general-search related advertising. Plaintiffs offer only Professor Baker's speculation that Google's "data requirements disincentivize SVPs from investing in the creation of valuable structured data," *id.* at 44, which in turn makes them "less attractive, and less valuable, as partners" to Google's rivals, *id.* at 45. They offer no proof to support those contentions or the chain of causation.

Fifth, Plaintiffs rely on the fact that Google requires SVPs to "provide it with data equivalent to what they provide to any of Google's competitors" to argue that this "rob[s] SVPs

of control over their valuable assets and potentially foreclosing a differentiated deal with a [general search engine] rival." *Id.* at 44. But, once more, Plaintiffs cite only to Professor Baker's hypothesis that this requirement translates into a weakening of competition in general search and the related general-search advertising markets. *Id.* Google may be acting heavy-handed with respect to SVPs' data, but the Colorado Action is not about competition in the marketplace for search advertising (which would include SVPs). Only the DOJ Plaintiffs allege a Section 2 violation in that market. DOJ Compl. ¶ 97.

Finally, Plaintiffs rely on two case studies to support their theory of harm, but neither move the dial. Plaintiffs point to internal Google communications about the "importance of developing strategic partnerships" with SVPs in Japan to compete with Yahoo! Japan. *Id.* at 45. From that evidence, Plaintiffs assert that "[j]ust as partnerships with SVPs facilitate Google's competition with Japanese rivals, so too would the unhampered growth of partnerships between SVPs and [general search engines] in the U.S. facilitate competition in the Relevant Market." *Id.* No one disputes, however, that partnerships with SVPs are "important." There is ample evidence that Google's rivals have entered into partnerships with SVPs. The question is whether Google's treatment of domestic SVPs has diminished their attractiveness to Google's general search rivals, and there is no proof to support that proposition.

Plaintiffs also cite the example of Branch Metrics, an application that allows mobile users to search for information across various applications, including those the user has not downloaded. *Id.* [redacted]." *Id.* at 46. Google does not dispute this factual assertion. *See* Google Colorado Reply, Def.'s Resp. to Colorado SMF, ECF No. 523-1 [hereinafter Google Colorado CSMF], ¶ 70.

Plaintiffs cite the Branch Metrics episode as an example of Google protecting its monopoly in search by impeding users from directly navigating to SVPs. Colorado Opp'n at 45–46. But again, conduct that discourages users from navigating directly to SVPs for information does not harm competition in general search and related general-search ad markets. As previously observed, if a user looks to an SVP for specialized information instead of Google, the user is not using Google's rivals, either.

In sum, the court holds that Plaintiffs have not shown that there is a genuine dispute of material fact that would warrant a trial to determine whether Google's treatment of SVPs has anticompetitive effects in the general search and related general-search ad markets. Accordingly, the court grants Google summary judgment as to those portions of the Colorado Plaintiffs' claims that rest on Google's conduct directed at SVPs. *See* FED. R. CIV. P. 56 (authorizing entry of summary judgment as to a "part" of a claim); *id.*, Committee Notes on Rules—2010 Amend. (stating that summary judgment may be requested not only as to an entire case but also as to each "claim, defense, *or part of a claim* or defense") (emphasis added).

2. Google's Conduct Directed at Rivals as it Relates to SVPs

Plaintiffs argue that Google degrades partnerships between SVPs and its rivals in another way. They write: "One cannot fully understand harm to competition without examining the continuing interrelationship among harmful acts. . . . Google's SVP conduct weakens SVPs, making them less attractive as partners to Google rivals. *In the other direction, Google's distribution agreements deprive its rivals of users, making them less attractive to SVPs.*" Colorado Opp'n at 28 (emphasis added); *see also id.* at 4 ("Consider the ripple effects of the distribution agreements. By pushing rivals to the edges of the marketplace, these agreements effectively

eliminate the ability of . . . SVPs to substitute Google rivals for Google as a way to attract users."). "Google has thus degraded both sides of the bargaining table." *Id.* at 28.

Plaintiffs' theory seems to be that (1) Google's distribution agreements limit its rivals' ability to attract users, (2) this weakens Google's rivals, and make *them* less attractive partners to SVPs, and (3) the inability to form better partnerships with SVPs depresses Google's rivals' ability to compete for general search users. There is arguably some evidence to support the theory. *See supra* note 19 (testimony from [redacted]).

Nevertheless, it remains unclear to the court whether Plaintiffs contend that this is a different form of exclusionary conduct, or it is merely a downstream effect of Google's distribution agreements. It would seem to be the later. Plaintiffs' papers do not give this theory much airtime, instead focusing on how Google's conduct allegedly weakens SVPs. The court therefore will defer ruling on what role, if any, this theory will play at trial.

3. SA360

The court now turns to the Colorado Plaintiffs' allegations regarding Google's development of SA360 and the lack of "feature parity" between Google Ads and Microsoft Ads.

Google argues that summary judgment is appropriate on Plaintiffs' SA360 theory because "[t]he record contains no support for Plaintiffs' only theory of anticompetitive harm—that SA360s feature design and development process has foreclosed advertisers from running campaigns on Microsoft Bing's search advertising platform." Google Colorado Mot. at 36–37.[20] "Plaintiffs

[20] Google further argues that "Plaintiffs have not even *attempted* to estimate the market foreclosure caused by Google's [SA360] feature development decisions, much less quantify it." Google Colorado Mot. at 37. Plaintiffs correctly note that Google's foreclosure argument "conflates exclusive dealing and exclusionary conduct," and that "[t]he 'substantial foreclosure' test applies only to exclusive dealing contracts." Colorado Opp'n at 36. "The difference

have identified *no* advertiser who was prevented or even dissuaded from buying search ads on Microsoft Ads because of SA360's feature (un)availability," Google argues, "[n]or can they show that any purported feature delay, individually or collectively, caused advertisers to buy less search advertising on Microsoft Ads, which is their theory of anticompetitive harm." *Id.* at 37. "There is literally no record evidence that any lack of specific features for Microsoft Ads on SA360 affects advertisers' ability or propensity to buy search ads. . . . Nor is there any evidence that advertising spend in the alleged markets would have increased on Microsoft Ads had SA360 developed features for Microsoft Ads ***sooner***." *Id.* at 38.

Plaintiffs respond that "by offering 'day zero support' for new SA360 features for Google Ads—but not for rival advertising platforms—[Google] makes ad campaigns more efficient on Google than on Bing (and other actual or potential competitors)," and thus "steers ad spend towards Google and away from its competitors." Colorado Opp'n at 34. "When advertisers cannot access Microsoft Ads features that would make their ad campaigns more efficient and productive, they spend less on Microsoft Ads, which widens the scale gap." *Id.* Furthermore, advertisers are compelled to use SA360 because "Google's undisputed general search monopoly makes Google Search a 'must have' for digital advertisers" and "all other advertising alternatives—such as using native advertising tools, switching SEM tools, or using multiple SEM tools—are costly and burdensome for advertisers that place ads on multiple online channels." *Id.* Plaintiffs argue that "Google's claim that advertisers can simply switch SEM tools or avoid SEM tools altogether ignores these market realities." *Id.*

between the traditional rule of reason and the rule of reason for exclusive dealing is that in the exclusive dealing context, courts are bound by *Tampa Electric*'s requirement to consider substantial foreclosure." *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 835 (11th Cir. 2015) (citing *Microsoft*, 253 F.3d at 69). Plaintiffs are not required to proffer evidence of substantial foreclosure resulting from Google's SA360 conduct because it is not an exclusive dealing contract.

The court finds that there is a genuine dispute of material fact as to anticompetitive effects in the alleged markets that precludes summary judgment. Specifically, Plaintiffs point to an internal Microsoft email as evidence that "Microsoft estimated that the feature disparity for auction-time bidding, dynamic search ads, and responsive search ads cost it as much as [redacted]" Colorado SMF ¶ 124; *see* Colorado 470 Exs., ECF No. 470, Ex. 168, ECF No. 470-8 [hereinafter Colorado Ex. 168], at 3; Colorado 466 Exs., ECF No. 466, Ex. 21, ECF No. 466-21, at 241:2–5 (testimony from [redacted]"). Google responds that Plaintiffs' "entire causation theory hangs on" this "back of the napkin" calculation, Hr'g Tr. at 145–46, and "none of the Microsoft witnesses who testified in this case . . . who sent the email containing the estimate . . . were able to account for the data or methodology behind . . . the estimate, including how much was attributable to SA360 alone." Google Colorado CSMF ¶ 124. Maybe so. But Google's effort to discount this evidence goes to its weight and, at this stage, the court must draw all reasonable inferences in Plaintiffs' favor. Summary judgment is not appropriate in the circumstances.

Google further contends that this "unsubstantiated claim of 'spend shift' from Bing to Google on SA360" is not relevant because "the antitrust laws were not designed to . . . protect particular competitors, as opposed to competition itself." Google Colorado Mot. at 39. Google is right that the antitrust laws are not meant to protect competitors, but that is not the salient issue here. The issue is whether Google's delayed rollout of SA360 support for Microsoft Ads inhibited or dissuaded advertisers from placing ads on its competitor's search engine, thereby harming competition in the general search advertising market. Plaintiffs offer some evidence that it has.

Colorado Ex. 168 at 3. The issue of whether advertiser spending actually shifted from Microsoft Ads to Google Ads due to the lack of full feature parity on SA360 is a disputed material fact that precludes a finding of summary judgment.

Finally, Google argues that, at most, Plaintiffs have established a "transitory delay" in providing parity of services in SA360 that does not rise to a Section 2 violation. Google Colorado Mot. at 45. It contends that "building complex features like automated bidding for Google Ads and Microsoft Ads takes substantial time and resources," and notes that "SA360's integration of Google Ads' auction-time bidding feature took at least three years to build." *Id.* at 44. Yet, Google admits to evidence suggesting that it was "technically feasible" for Google to have introduced auction-time bidding for Microsoft Ads sooner, but it did not do so because achieving parity was not a priority. Google Colorado CSMF ¶¶ 114–115. It also does not dispute that a smaller competitor was able to bring auction-time bidding on its platform within a shorter time period and that, once that feature became active, it had a material impact on "sales conversions." *Id.* ¶¶ 112–113. Thus, there remains a genuine dispute of material fact as to whether the time it took Google to create feature parity for Microsoft Ads on SA360 was a mere "transitory delay," or whether the delay was intended to harm competition. *See Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."). Accordingly, the SA360 component of the Colorado Plaintiffs' claims survive summary judgment.

C. Additional Theories of Anticompetitive Effect

Finally, Google asks the court to grant summary judgment as to those elements of Plaintiffs' claims related to Google's Android Compatibility Commitments ("ACCs") and Anti-

Fragmentation Agreements ("AFAs"), Google Assistant, Internet-of-Things ("IoT") Devices, and the Android Open-Source Project ("AOSP"). Google DOJ Mot. at 43–50.

1. ACCs and AFAs

Google's ACCs (previously known as AFAs) prohibit manufacturers from distributing devices that do not comply with Google's hardware and software specifications." *See* Google DOJ SMF ¶ 270 (ACCs specify that "'[a]ll devices based on Android that [an OEM] manufactures, distributes or markets will be Android Compatible Devices,' which are defined as devices that comply with the [Android Compatibility Definition Document]."). Plaintiffs allege that the ACCs and AFAs "restrict manufacturers' ability to build and distribute innovative versions of mobile phones . . . smart TVs, watches, and automotive devices" and "inhibit the development of an operating system based on an Android fork that could serve as a viable path to market for a search competitor." DOJ Am. Compl. ¶¶ 71, 126–32. Google argues that summary judgment is appropriate because Plaintiffs provide no evidence that "limitations on OEMs' marketing of incompatible Android devices has a substantial anticompetitive effect in a search or search advertising market." Google DOJ Mot. at 44.

Plaintiffs' opposition mentions ACCs and AFAs once in passing in a footnote, and simply states that "[o]n top of the MADA's own compatibility requirements, the MADA also generally requires OEMs to have signed either an Antifragmentation Agreement (AFA) or an Android Compatibility Commitment (ACC), which separately prevent OEMs from distributing Android devices (with limited exceptions) that do not comply with Google's [Compatibility Definition Document], regardless of whether the OEM preinstalls [Google's proprietary apps] or not." DOJ Opp'n at 13 n.7. Because Plaintiffs offer no evidence showing that ACCs and AFAs have an

anticompetitive effect in the relevant markets, summary judgment is granted with respect to those parts of the claims.

2. Google Assistant and IoT Devices

Plaintiffs' Complaint alleges anticompetitive conduct related to the promotion of Google Assistant in IoT devices, which are "internet-enabled devices such as smart speakers, home appliances, and automobiles." DOJ Am. Compl. ¶¶ 12, 139–41, 163. "Google's Assistant, like Apple's Siri or Amazon's Alexa, is a virtual assistant that can respond to voice commands" to perform various tasks. Google DOJ Mot. at 47. "Google's MADAs have recently included the Google Assistant and made it the out-of-the-box default assistant; and Google's Android RSAs with OEMs and carriers provide for forms of increased promotion for Google Assistant." *Id.*

Google argues that summary judgment is warranted on claims related to Google Assistant because "[n]one of Plaintiffs' experts opine on Google's IoT Agreements" and "Google's Assistant agreements lack any substantial anticompetitive effect in search." *Id.* at 47–48. Plaintiffs' opposition does not address the Google Assistant arguments. *See generally* DOJ Opp'n. Accordingly, summary judgment is granted to the extent Plaintiffs' claims rest on conduct relating to Google Assistant. *See Wilkins v. Jackson*, 750 F. Supp. 2d 160, 162 (D.D.C. 2010) ("It is well established that if a plaintiff fails to respond to an argument raised in a motion for summary judgment, it is proper to treat that argument as conceded."); *Sykes v. Dudas*, 573 F. Supp. 2d 191, 202 (D.D.C. 2008) ("[W]hen a party responds to some but not all arguments raised on a Motion for Summary Judgment, a court may fairly view the unacknowledged arguments as conceded.").

3. Android Open-Source Project (AOSP)

Finally, Google asks this court to grant summary judgment on the parts of Plaintiffs' claims relating to "Google's decisions regarding which Android apps to develop on an open-source or

proprietary basis." Google DOJ Mot. at 26. Plaintiffs' Complaint does not allege that Google's decision-making regarding the AOSP had an anticompetitive effect in the relevant markets. Plaintiffs do allege, however, that "[o]ver time, Google has chosen to include important features and functionality in Google's own ecosystem of proprietary apps and [application program interfaces], rather than the open-source Android code," DOJ Am. Compl. ¶ 73, and "as the functionality gap between open-source Android apps and Google's proprietary apps grows, developers are more dependent on [Google Play Services]," *id.* ¶ 75.

In their opposition brief, Plaintiffs repeat that "[o]ver time, Google has removed or deprecated many AOSP apps (e.g., calendar, camera, email) and placed newly developed features exclusively within its proprietary apps and services." DOJ Opp'n at 12. Yet, they offer no proof of any anticompetitive effect in the relevant markets. Accordingly, summary judgment is entered in Google's favor to the extent Plaintiffs' claims rest on AOSP development decisions.

VI. CONCLUSION

For the stated reasons, Google's Motion for Summary Judgment in the DOJ Action, ECF No. 421, is granted in part with respect to the parts of Plaintiffs' claims that rest on allegations relating to ACCs, AFAs, Google Assistant, IoT Devices, and AOSP. Google's Motion for Summary Judgment in the Colorado Action, ECF No. 426, is granted insofar as it is premised on Google's conduct directed against SVPs. Google's motions are otherwise denied.

Dated: August 3, 2023

Amit P. Mehta
United States District Judge

EXHIBIT D

From: Tim Sweeney <tim.sweeney@epicgames.com>
Subject: Consumer Choice & Competition
Date: June 30, 2020 at 4:00:09 PM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>

Dear Tim, Phil, Craig, Matt,

Because of restrictions imposed by Apple, Epic is unable to provide consumers with certain features in our iOS apps. We would like to offer consumers the following features:

1) Competing payment processing options other than Apple payments, without Apple's fees, in Fortnite and other Epic Games software distributed through the iOS App Store;

2) A competing Epic Games Store app available through the iOS App Store and through direct installation that has equal access to underlying operating system features for software installation and update as the iOS App Store itself has, including the ability to install and update software as seamlessly as the iOS App Store experience.

If Epic were allowed to provide these options to iOS device users, consumers would have an opportunity to pay less for digital products and developers would earn more from their sales. Epic is requesting that Apple agree in principle to permit Epic to roll out these options for the benefit of all iOS customers. We hope that Apple will also make these options equally available to all iOS developers in order to make software sales and distribution on the iOS platform as open and competitive as it is on personal computers.

As you know, Epic was required to accept your standard, non-negotiable contracts, like the Apple Developer Program License Agreement, in order to offer products on iOS devices through the iOS App Store. Epic is also required to comply with Apple's unilateral standards documents to obtain app approval, like Apple's App Store Review Guidelines. Apple's contracts and standards documents contain restrictive provisions that prohibit Epic from offering a competing app store and competing payment processing options to consumers. Apple would need to provide a side letter or alter its contracts and standards documents to remove such restrictions to allow Epic to provide a competing app store and competing payment processing option to iOS customers.

Please confirm within two weeks if Apple agrees in principle to allow Epic to provide a competing app store and competing payment processing, in which case we will meet with your team to work out the details including Epic's firm commitment to utilize any such features diligently to protect device security, customer privacy, and a high-quality user experience. If we do not receive your confirmation, we will

understand that Apple is not willing to make the changes necessary to allow us to provide Android customers with the option of choosing their app store and payment processing system.

Best Regards,

Tim Sweeney
Founder & CEO
Epic Games

EXHIBIT E

July 10, 2020

Via Email: canon.pence@epicgames.com

Canon Pence
General Counsel
Epic Games, Inc.
620 Crossroads Blvd
Cary, NC 27518

Dear Mr. Pence:

I am counsel in the Apple Legal Department and I am writing in response to Mr. Sweeney's email to Tim Cook, Phil Schiller, Craig Federighi, and Matt Fischer on June 30, 2020. The email was disappointing and requires a formal response.

The App Store is not simply a marketplace -- it is part of a larger bundle of tools, technologies and services that Apple makes available to developers to develop and create great applications for iPhone, iPad and other Apple products. We know Epic knows this. Epic has been a major beneficiary of this investment and support. Epic has made great use of Apple-provided tools, such as TestFlight, VOIP, Stickers, iCloud document storage, ARKit, Messages Extension, ReplayKit, and Push Notifications. To highlight one example, for years now, Epic has used Apple's groundbreaking graphics technology, Metal. When Apple launched Metal for Mac at WWDC in 2015, Mr. Sweeney's colleague Billy Bramer stood on stage and explained how Metal "revolutionized graphic design" and "enable[d] developers like us to create richer 3D worlds." *Apple – WWDC 2015*, Youtube (June 15, 2015), https://www.youtube.com/watch?v=_p8AsQhaVKI. Epic, like countless developers, continues to use Metal to make its games sharper, faster, and more responsive. Apple doesn't charge separately for the use of Metal or any of the other tools that Epic has used to develop great games on iOS.

Not only has Apple supplied tools and technologies for Epic to build its apps, but it also provided a marketplace—the App Store—to help make them a success. Because of the App Store, Epic has been able to get Fortnite and other apps into

the hands of millions instantly and at no cost, as Apple charges nothing upfront to distribute apps that are free to download. This exposure has earned Epic hundreds of millions of dollars from sales of in-app content, and brought with it lucrative brand partnerships and paid product placement. *See Fortnite Emerges as a Social Media Platform for Gen Z, AdAge* (June 10, 2019), https://adage.com/article/digital/fortnite-emerges-social-media-platform-gen-z/2176301. Of course, Epic could not have achieved this success without great apps, but it nonetheless underscores the value Apple brings to developers like Epic.

Still, Epic has many ways to reach consumers, including through Android stores, PC-based platforms, consoles (Xbox, Nintendo, Play Station) and its very own app marketplace. Public reports indicate that Fortnite alone "generated $1.8 billion in revenue in 2019," *Fortnite Creator Epic Games Raising $750M at $17B Valuation: Report*, The Street (June 15, 2020), https://www.thestreet.com/investing/fortnite-creator-epic-games-raising-750m-at-17b-valuation, or over seven times the $245 million yielded by App Store receipts for all Epic apps. Epic made its own decision to utilize the App Store as another one of its channels and can hardly be surprised that this entails acceptance of a license agreement and related policies since Epic's own developers must do the same. *See* Epic Online Services Developer Agreement https://dev.epicgames.com/en-US/services/terms/agreements ("If you do not or cannot agree to the terms of this Agreement, do not download or use the SDK or access any Services.").
Apple has hundreds of thousands of developers distributing apps on the App Store, and Apple is proud that it offers them all, from the student in her living room to some of the largest companies in the world, the same terms and opportunities.

That brings us to the demands in Mr. Sweeney's email. Epic requests the right to offer a "competing Epic Games Store app" through the App Store that would seemingly allow iOS device users to install apps from Epic directly. And Epic wants to offer "competing payment processing options" in Fortnite and other Epic apps instead of using Apple's in-app purchase (IAP) system. As you know, Apple has never allowed this. Not when we launched the App Store in 2008. Not now. We understand this might be in Epic's financial interests, but Apple

strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to provide a safe, secure and reliable experience for users and a great opportunity for all developers to be successful but, to be clear, when it comes to striking the balance, Apple errs on the side of the consumer.

Epic Store Within The App Store. As for the first request, Apple designed the App Store to be a secure and trusted place for consumers to discover and download software. Central to this is Apple's requirement that every iOS app undergo rigorous, human-assisted review. Apple invests significant resources to ensure that apps meet high standards for privacy, security, content, and quality; we have reviewers located on three continents, representing 81 languages, and reviewing on average 100,000 submissions per week.

That investment has paid off not just for Apple, but also for app developers large and small, including Epic. Because of Apple's rules and efforts, iOS and the App Store are widely recognized as providing the most secure consumer technology on the planet. And as a result, consumers can download and pay for an app and in-app content without worrying that it might break their device, steal their information, or rip them off. This level of security benefits developers by providing them with an active and engaged marketplace for their apps.

One way Apple helps maintain the confidence of its users is by not approving apps that create "an interface for displaying third-party apps, extensions, or plug-ins similar to the App Store or as a general-interest collection." App Store Review Guideline § 3.2.2. Absent this guideline, Apple would have no reliable way of delivering on its commitment to consumers that *every* app available via the App Store meets Apple's exacting standards for security, privacy, and content. Consumers rightly rely on that commitment in buying Apple devices and in purchasing from the App Store. They will quite properly hold Apple to account for any shortfall in performance. The health of Apple's ecosystem and the strength of its reputation as a maker of high-quality hardware accordingly depend upon rules like Guideline § 3.2.2.

Although Mr. Sweeney represented that, if Epic offered its own iOS app store, Epic would "protect device security, consumer privacy, and a high-quality user

experience," we cannot be confident that Epic or any developer would uphold the same rigorous standards of privacy, security, and content as Apple. Indeed, since Apple treats all developers according to the same terms, Epic is essentially asking Apple to outsource the safety and security of Apple's users to hundreds of thousands of iOS developers. Even if such a model were feasible (and it is not), we are simply unwilling to risk our users' trust in such a way. Incorporating third party app stores into iOS would undermine Apple's carefully constructed privacy and security safeguards, and seriously degrade the consumer experience and put Apple's reputation and business at risk.

Circumventing IAP. Epic also requests to offer payment processing options within Epic's apps other than via IAP. IAP is the App Store's centralized payment system. It lets users purchase digital goods and services within apps without the inconvenience and security risks of registering their payment information with each developer. As you note, Apple's App Review Guidelines require that apps use IAP to unlock additional features and functionalities. *See* App Store Review Guideline § 3.1.1.

Again, this rule is central to the App Store's business model and successes. IAP supports the seamless consumer experience and is the means by which Apple gets paid for the valuable services and consumer base that it provides. To take advantage of Apple's App Store, the bargain is simple: if you charge for software purchased through the App Store, Apple takes a percentage of the charge as commission. This business model has remained unchanged since the App Store launched.

Mr. Sweeney does not take issue with that model in his email—perhaps because Epic takes full advantage of it. Apple takes no cut from Epic's in-app advertising, nor from sales of items, like skins and currency, that iOS app users obtain outside of the App Store. And, as already discussed, Apple charges nothing for enabling millions of iOS users to play Fortnite for free. Without IAP, however, Apple would have no practical or reliable way of collecting its commission on in-app digital sales. Indeed, the IAP requirement applies equally for the very same reason to the Mac App Store, which you regard as "open and competitive."

* * *

Mr. Sweeney recently stated that "[i]t's up to the creator of a thing to decide whether and how to sell their creation." Tim Sweeney (@TimSweeneyEpic), Twitter (June 16, 2020, 11:53 PM), https://twitter.com/TimSweeneyEpic/status/1273101468875329537. We agree. It seems, however, that Epic wishes to make an exception for Apple and dictate the way that Apple designs *its* products, uses *its* property and serves *its* customers. Indeed, it appears that Mr. Sweeney wants to transform Apple's iOS devices and ecosystem into "an open platform… like the first Apple computers, where users had the freedom to write or install any software they wished." https://twitter.com/TimSweeneyEpic/status/1273090414476738567.

In the first place, this ignores the fundamental reality that the iPhone operates in an entirely different environment than a laptop or desktop computer and meets wholly different user expectations. As Steve Jobs explained in 2007, "[y]ou don't want your phone to be like a PC. The last thing you want is to have loaded three apps on your phone and then you go to make a call and it doesn't work anymore. These are more like iPods than they are like computers." Steve Jobs Walks the Tightrope Again, N.Y. Times (Jan. 12, 2007), https://www.nytimes.com/2007/01/12/technology/12apple.html.

The App Store is not a public utility. Epic appears to want a rent-free store within the trusted App Store that Apple has built. Epic wants "equal access" to Apple's operating system and "seamless" interaction between your store and iOS, without recognizing that the seamlessness of the Apple experience is built on Apple's ingenuity, innovation, and investment. Epic wants access to all of the Apple-provided tools like Metal, ARKit and other technologies and features. But you don't want to pay. In fact you want to take those technologies and then charge others for access. Apple has invested billions of dollars to develop technologies and features that developers like Epic can use to make great apps as well as a safe and secure place for users to download these apps. Apple designs its products and services to make developers successful through the use of custom chips, cameras, operating system features, APIs, libraries, compilers, development tools, testing, interface libraries, simulators, security features, developer services, cloud

services, and payment systems. These innovations are properly protected by intellectual property laws and Epic has no right to use them without a license from Apple. As a signatory to the Apple Developer Agreement and the Apple Developer Program License Agreement, Epic has acknowledged these IP rights (just as Epic's developers do the same with respect to Epic's intellectual property). *See* Apple Developer Program License Agreement § 2.5.

Surely Epic must understand that Apple is entitled to a return on its investment and the use of its property. After all, Epic takes great pains to protect *its own* investments and intellectual property. Epic rightly demands royalties from games built using its development software. *See* Unreal Engine End User Agreement § 5, https://www.unrealengine.com/en-US/eula/publishing. And it tightly controls how its games, designs, and content may be used, because, in its own words: "we spend a lot of time, thought, and money creating our intellectual property and need to protect it." Fan Content Policy, https://www.epicgames.com/site/en-US/fan-art-policy. Plus, Mr. Sweeney recently suggested that it's reasonable for other industry players, such as console manufacturers, to charge for distributing software. Tim Sweeney (@TimSweeneyEpic), Twitter (June 17, 2020, 11:29 AM), https://twitter.com/TimSweeneyEpic/status/1273276548569841667. And Epic's major investor, China's Tencent, also charges developers to take advantage of its platform. *See Tencent opens up WeChat Mini-Games Platform to External Devs*, Pocket Gamer (Apr. 11, 2018), https://www.pocketgamer.biz/asia/news/67901/tencent-opens-up-wechat-mini-games-platform-to-external-devs/.

Yet somehow, you believe Apple has no right to do the same, and want all the benefits Apple and the App Store provide without having to pay a penny. Apple cannot bow to that unreasonable demand. We must therefore respectfully decline to make the changes you request.

Sincerely,

Douglas G. Vetter
Vice President & Associate General Counsel

EXHIBIT F

From: Tim Sweeney <tim.sweeney@epicgames.com>
Date: July 17, 2020 at 1:49:23 PM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>, Douglas Vetter <vetter@apple.com>
Cc: Canon Pence <canon.pence@epicgames.com>
Subject: Re: Response to June 30 Email

Hi Tim, Phil, Craig, Matt, Douglas,

It's a sad state of affairs that Apple's senior executives would hand Epic's sincere request off to Apple's legal team to respond with such a self-righteous and self-serving screed -- only lawyers could pretend that Apple is protecting consumers by denying choice in payments and stores to owners of iOS devices. However, I do thank you for the prompt response and clear answer to my two specific requests.

If Apple someday chooses to return to its roots building open platforms in which consumers have freedom to install software from sources of their choosing, and developers can reach consumers and do business directly without intermediation, then Epic will once again be an ardent supporter of Apple. Until then, Epic is in a state of substantial disagreement with Apple's policy and practices, and we will continue to pursue this, as we have done in the past to address other injustices in our industry.

Tim Sweeney

On Fri, Jul 10, 2020 at 5:02 PM Douglas Vetter <vetter@apple.com> wrote:

> Mr. Pence, please find attached Apple's response to Mr. Sweeney's email to Apple of June 30, 2020.

EXHIBIT G

From: Tim Sweeney <tim.sweeney@epicgames.com>
Date: August 13, 2020 at 2:08:53 AM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>, Douglas <vetter@apple.com>
Subject: Fortnite payments

Dear Tim, Phil, Craig, Matt, Douglas,

I'm writing to tell you that Epic will no longer adhere to Apple's payment processing restrictions.

Today, Epic is launching Epic direct payments in Fortnite on iOS, offering customers the choice of paying in-app through Epic direct payments or through Apple payments, and passing on the savings of Epic direct payments to customers

in the form of lower prices.

We choose to follow this path in the firm belief that history and law are on our side. Smartphones are essential computing devices that people use to live their lives and conduct their business. Apple's position that its manufacture of a device gives it free rein to control, restrict, and tax commerce by consumers and creative expression by developers is repugnant to the principles of a free society.

Ending these restrictions will benefit consumers in the form of lower prices, increased product selection, and business model innovation.

Henceforth, all versions of Fortnite that Epic submits to the App Store will contain these two payment options, side by side, for customers to choose among.

We hope that Apple will reflect on its platform restrictions and begin to make historic changes that bring to the world's billion iOS consumers the rights and freedoms enjoyed on the world's leading open computing platforms including Windows and macOS. In support of this path, Epic's public explanation of our payment service will be neutral and factual to provide Apple with a chance to consider taking a supportive route and communicating it in a way of Apple's choosing.

If Apple chooses instead to take punitive action by blocking consumer access to Fortnite or forthcoming updates, then Epic will, regrettably, be in conflict with Apple on a multitude of fronts - creative, technical, business, and legal - for so long as it takes to bring about change, if necessary for many years.

Tim Sweeney
Epic Games

Epic Games, Inc. v. Apple, Inc.

___ F.4th ___ (9th Cir. 2023)

M. SMITH, Circuit Judge. Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1-2, and California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.* Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple's App Store, requiring in-app purchases on iOS devices to use Apple's in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users.

After a sixteen-day bench trial involving dozens of witnesses and nine hundred exhibits, the district court rejected Epic's Sherman Act claims challenging the first and second of the above restrictions—principally on the factual grounds that Epic failed to propose viable less restrictive alternatives to Apple's restrictions. The court then concluded that the third restriction is unfair pursuant to the UCL and enjoined Apple from enforcing it against any developer. Epic appeals the district court's Sherman Act rulings; Apple cross-appeals the district court's UCL rulings. We affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled "native" apps that Apple had developed itself. Shortly after the iPhone's debut, Apple decided to move on from its native-apps-only approach and open the iPhone's (and later, the iPad's) operating system (iOS) to third-party apps.

This approach created a "symbiotic" relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. These gaming apps generate an estimated $100 billion in annual revenue.

Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a "walled garden" in which Apple plays a significant curating role. Developers can distribute their apps to iOS devices only through Apple's App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases (downloading an app from the App Store) and subsequent in-app purchases (purchasing add-on content within an app).

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties' appeals. First, Epic is a video game devel-

oper—best known for the immensely popular *Fortnite,* which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. Epic monetizes *Fortnite* using a "freemium" model: The game is free to download, but a user can purchase certain content within the game, ranging from game modes to cosmetic upgrades for the user's character. . . .

Second, Epic is the parent company of a gaming-software developer. . . .

Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. The Epic Games Store has over 180 million registered accounts and over 50 million monthly active users. Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite.*

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat $99 fee and execute the Developer Program Licensing Agreement (DPLA). The DPLA is a contract of adhesion; out of the millions of registered iOS developers, only a handful have convinced Apple to modify its terms.

By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS aps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to license its IP to developers in exchange for a $99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit and were mentioned in the introduction. First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain mechanisms such as in-app links (the anti-steering provision). . . .

III. Apple and Epic's Business Relationship

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple's walled-garden approach. Epic's CEO Tim Sweeney argued, in an email seeking a meeting with Apple senior leadership, that it "doesn't seem tenable for Apple to be the sole arbiter of expression and commerce" for iOS users, and explained that Epic runs a competing game-transaction platform that it "would love to eventually" offer on iOS. Nothing came of this email, and Epic continued to offer games on iOS while complying with the DPLA's terms. In 2018, Epic released *Fortnite* on iOS— amassing about 115 million iOS users.

In 2020, Epic renewed the DPLA with Apple, but sought a "side letter" modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store)

and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: "We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users . . . ."

Once Apple rejected its offer, Epic kicked into full gear an initiative called "Project Liberty": a two-part plan it had been developing since 2019 to undermine Apple's control over software distribution and payment processing on iOS devices, as well as Google's influence over Android devices. Project Liberty coupled a media campaign against Apple and Google with a software update expressly designed to circumvent Apple's IAP restriction. On the media-campaign side, Epic lowered the price of *Fortnite*'s in-app purchases on all platforms but Apple's App Store and Google's Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with "generating continuous media. . . pressure" on Apple and Google; and it ran advertisements portraying Apple and Google as the "bad guys" standing in the way of Epic's attempt to pass cost-savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update (which Epic calls a "hotfix") to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple's IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter, Epic activated the undisclosed code and opened its IAP alternative to users. That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. Apple informed Epic that it had two weeks to cure its breaches of the DPLA, or otherwise Apple would terminate Epic Games' developer account.

IV. Procedural History

Only three days after Apple removed *Fortnite* from the App Store, Epic filed a 62-page complaint against Apple in the Northern District of California . . . . Epic brought claims for permanent injunctive relief pursuant to the Sherman Act and the UCL. Epic's requested relief, though somewhat vague, would essentially convert iOS into an entirely open platform: Developers would be free to distribute apps through any means they wish and use any in-app payment processor they choose. Taken together, this relief would create a pathway for developers to bypass Apple's 30% commission altogether, though Epic made open-ended assurances at trial that its relief would allow Apple to collect a commission—just not in the manner that the DPLA establishes. Apple brought counter-claims for breach of contract and indemnification for its attorney fees related to this litigation. . . . After a sixteen-day bench trial, the district court issued a 180-page order pursuant to Federal Rule 52 detailing its findings of facts and conclusions of law.

ANALYSIS

On appeal, Epic challenges the district court's Sherman Act and breach of contract rulings. We affirm the district court's denial of antitrust liability and its corresponding rejection of Epic's illegality defense to Apple's breach of contract counter-claim. Though the district court erred as a matter of law on several issues, those errors were harmless. Independent of the district court's errors, Epic failed to establish—as a factual matter—its proposed market definition and the existence of any substantially less restrictive alternative means for Apple to accomplish the procompetitive justifications supporting iOS's walled-garden ecosystem. * * *

I. Market Definition

[The court affirmed the district court's holding that the relevant market was the market for "mobile game transactions" and its rejection of Epic's proposed aftermarkets for iOS app distribution and iOS in-app payment systems. The court reasoned the Epic had failed to prove that consumers were unaware of Apple's app distribution restrictions when they purchased iOS devices and apps, which, among other things, must be proven to establish a single-brand aftermarket.]

II. Sherman Act Section 1: Unreasonable Restraint

With the relevant market for Epic's antitrust claims established (mobile-game transactions), we turn to the district court's rejection of Epic's Sherman Act Section 1 restraint-of-trade claim. Section 1 prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade." 15 U.S.C. § 1. Courts have long read Section 1 to "outlawonly *unreasonable* restraints." Ohio v. American Express Co., 138 S. Ct. 2274, 2283 (2018) (quoting *State Oil v. Khan,* 522 U.S. 3, 10 (1997)). . . . While a restraint can be unreasonable *per se* or pursuant to the Rule of Reason, the parties agree that the latter standard applies here. . . .

A. Existence of a Contract

The district court erred when it held that a non-negotiated contract of adhesion like the DPLA falls outside of the scope of Section 1. That holding plainly contradicts Section 1's text, which reaches "[*e*]*very contract,* combination . . ., or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1 (emphasis added). To hold that a contract is exempt from antitrust scrutiny simply because one party "reluctant[ly]" accepted its terms"would be to read the word[] 'contract'" out of the statute. *Systemcare, Inc. v. Wang Lab'ys Corp.,* 117 F.3d 1137, 1143 (10th Cir. 1997).

* * *

B. Rule of Reason Step One: Anticompetitive Effects

The district court did not err when it found that Epic made the Rule of Reason's required step-one showing. At step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Amex,* 138 S. Ct. at 2284. Antitrust plaintiffs can make their step-one showing either "directly or indirectly." *Id.*

* * *

Here, the district concluded that Epic produced both sufficient direct and indirect evidence to show that Apple's distribution and IAP restrictions impose substantial anticompetitive effects. . . .

1. Direct Evidence

Apple challenges both the district court's direct- and indirect-evidence conclusions on several grounds—some legal, some factual. We are not persuaded that the district court erred at step one of the Rule of Reason.

First, Apple argues that the district court's direct-evidence conclusion cannot stand because Epic did not show that Apple's restrictions reduced output. We squarely rejected this argument in *O'Bannon*. There, the NCAA similarly argued that liability was foreclosed because output in the relevant market "increased steadily over time." *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1070 (9th Cir 2015). "Although output reductions are one common kind of

anticompetitive effect in antitrust cases, a `reduction in output is not the *only* measure of anti-competitive effect.'" *Id.* (citation omitted). Nor does *Amex* displace our holding in *O'Bannon.* A showing of decreased output was essential in that case because the plaintiff "failed to offer any reliable measure of Amex's transaction price or profit margins" and "the evidence about whether Amex charges more than its competitors was ultimately inconclusive." *Amex,* 138 S. Ct. at 2288.

Second, Apple argues that Epic's evidence of supracompetitive pricing fails as a matter of law because Apple never raised its commission. A supracompetitive price is simply a "price[] above competitive levels." *Rebel Oil Co. v. Atlantic Richfield Co.,* 51 F.3d 1421, 1434 (9th Cir. 1995). Apple cites no binding precedent in support of its proposition that the charging of a supracompetitive price must always entail a price increase, though we recognize that it ordinarily does.

Third, Apple attacks the supracompetitive-pricing finding on factual grounds by asserting that Apple charges a substantially similar commission as its competitors. That assertion is true as far as *headline* rates go, but the district court reasonably based its supracompetitive-price finding on *effective* commission rates instead of headline rates. The district court found Apple's reliance on headline rates to be "suspect" because, unlike the App Store, other platforms "frequently negotiate[] down" the rates they charge developers. The court noted that Amazon has a headline rate of 30% but an effective commission rate of 18%. And it credited testimony that game-console transaction platforms often "negotiate special deals for large developers.". . .

Fourth, Apple argues that the district court's direct-evidence finding fails as a matter of law because *Amex* requires Epic to establish anticompetitive effects on both sides of the two-sided market for mobile-game transactions (developers and users). Apple's argument falls short both legally and factually. We have previously held: "*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the 'market as a whole.'" *PLS.com, LLC v. Nat'l Ass'n of Realtors,* 32 F.4th 824,839 (9th Cir. 2022) (quoting *Amex,* 138 S. Ct. at 2287). In any event, the district court found that, while Apple's restrictions "certainly impact developers," there was "some evidence" that the restrictions also "impact[] consumers when those costs are passed on."

2. Indirect Evidence

We are not persuaded by Apple's argument that the district court erred in concluding that Epic failed to establish indirect evidence of anticompetitive effects. Apple does not take issue with the district court's finding of a 52 to 55% market share (other than noting it was the court's "own. . . calculation"); nor does Apple challenge the court's barriers-to-entry finding. It instead argues that the finding that Apple wields its market power in an anticompetitive manner is speculative. But, supported by basic economic presumptions, the district court reasonably found that, without Apple's restrictions, would-be competitors could offer iOS users alternatives that would differentiate themselves from the App Store on price as well as consumer-appeal features like searchability, security, privacy, and payment processing. Indeed, it found competition in the PC-gaming market to be a "vivid illustration": Steam had long charged a 30% commission, but upon Epic's entry into the market, it lowered its commission to 20%. Epic's indirect-evidence showing was sufficient.

C. Step Two: Procompetitive Rationales

The district court correctly held that Apple offered non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. If a plaintiff establishes at step one that the defendant's restraints impose substantial anticompetitive effects, then the burden shifts back to the defendant to "show a procompetitive rationale for the restraint[s]." *NCAA v. Alston,* 141 S. Ct. 2141, 2160 (2021).

Here, the district court accepted two sets of rationales as non-pretextual and legally cognizable. First, it found that Apple implemented the restrictions to improve device security and user privacy—thereby enhancing consumer appeal and differentiating iOS devices and the App Store from those products' respective competitors. Second, the court *partially* accepted Apple's argument that it implemented the restrictions to be compensated for its IP investment. While the court credited the IP-compensation rationale generally, it rejected the rationale "with respect to the 30% commission rate specifically." On appeal, Epic raises three arguments challenging Apple's rationales as legally non-cognizable.

1. Partial Acceptance of Apple's IP-Compensation Rationale

Epic argues that the district court may not credit Apple's IP-compensation rationale while finding that the rationale was pretextual "with respect to the 30% commission rate *specifically*" (emphasis added). We have held that IP-compensation is a cognizable procompetitive rationale, and we find no error in the district court's *partial* crediting of that rationale here.

The district court's acceptance of the rationale generally, while rejecting a specific application of it, resembles the district court's analysis in the NCAA litigation that culminated in *Alston,* 141 S. Ct. 2141. There, the district court credited the NCAA's amateurism-as-consumer-appeal rationale but found that the NCAA's "rules and restrictions on [amateurism] ha[d] shifted markedly over time," that the NCAA adopted some restrictions "without any reference to considerations of consumer demand," and that some were "not necessary to consumer demand." *Id.* at 2163. The court did not, as Epic requests here, resolve the case at step two and hold that the NCAA's shaky proof meant it lacked *any* procompetitive rationale. Instead, the "deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third [step]." *Id.* at 2162. Because the NCAA's amateurism-as-consumer-appeal rationale was nebulously defined and weakly substantiated, the plaintiffs had more flexibility at step three to fashion less restrictive alternatives.

The same is true here. Because the district court accepted only a general version of Apple's IP-compensation rationale (that Apple was entitled to "*some* compensation"), Epic at step three needed only to fashion a less-restrictive alternative calibrated to achieving that general goal, instead of one achieving the level of compensation that Apple currently achieves through its 30% commission. There is no legal requirement—as Epic suggests—that district courts make pretext findings on an all-or-nothing basis. When district courts at step two partially credit a rationale, step three will necessarily take that partial finding into account.

2. Cognizability of Apple's Privacy/Security Rationales

Epic and its *amici* next argue that Apple's security and privacy rationales are *social,* not procompetitive, rationales and therefore fall outside the purview of antitrust law. We reject this argument. . . .

Epic's argument characterizes Apple as asserting security and privacy as independent justifications in and of themselves. But, throughout the record, Apple makes clear that by improving

security and privacy features, it is tapping into consumer demand and differentiating its products from those of its competitors—goals that are plainly procompetitive rationales. Consumer surveys in the record show that security and privacy is an important aspect of a device purchase for 50% to 62% of iPhone users and 76% to 89% of iPad users worldwide. Even Epic's CEO testified that he purchased an iPhone over an Android smartphone in part because it offers "better security and privacy." And the district court found that, because Apple creates a "trusted app environment, users make greater use of their devices."

With Apple's restrictions in place, users are free to decide which kind of app-transaction platform to use. Users who value security and privacy can select (by purchasing an iPhone) Apple's closed platform and pay a marginally higher price for apps. Users who place a premium on low prices can (by purchasing an Android device) select one of the several open app-transaction platforms, which provide marginally less security and privacy. Apple's restrictions create a heterogenous market for app-transaction platforms which, as a result, increases interbrand competition—the primary goal of antitrust law. Antitrust law assumes that competition best allocates resources by allowing firms to compete on "all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost." *Nat'l Soc'y of Pro. Eng'rs v. United States,* 435 U.S. 679 (1978). If we were to accept Epic and its *amici*'s argument, then no defendant could cite competing on non-price features as a procompetitive rationale.

To avoid this conclusion, Epic and its *amici* rely on a line of cases stemming from *National Society of Professional Engineers.* But neither that case nor its progeny support their argument that improved quality is a social, rather than procompetitive, rationale. Instead, the *Professional Engineers* line of cases holds that a defendant cannot severely limit interbrand competition on the theory that *competition itself* is ill-suited to a certain market or industry. *See id.* at 694-96. Epic's selection of quotes from *Professional Engineers* and other cases—without acknowledging the distinct context in which they occurred— is unconvincing.

In *Professional Engineers,* a professional association with about 12,000 engineers adopted a rule prohibiting its members from engaging in competitive bidding on construction projects. *Id.* at 681. This "absolute ban" on competitive bidding imposed substantial anticompetitive effects, and the Society's sole justification was that competition in the construction-engineering market would lead engineers to perform "inferior work with consequent risk to safety and health." *Id.* at 692-94. In other words, competition in the construction engineering industry was not in the "public benefit." *Id.* The Supreme Court rejected this request for a judge-made exemption from the Rule of Reason, which "does not support a defense based on the assumption that competition itself is unreasonable," and stated that the Society's argument should be "addressed to Congress." *Id.* at 696. . . .

The Supreme Court followed suit last term in *Alston* when it rejected the NCAA's sweeping plea for leniency. The NCAA argued that something more deferential than the Rule of Reason should apply to its restrictions on student-athlete compensation because the NCAA's amateurism restrictions advance the "societally important non-commercial objective of higher education." *Alston,* 141 S. Ct. at 2158. The Supreme Court held that this argument— that the NCAA "should be exempt from the usual operation of the antitrust laws"—should be directed to Congress, not a court. *Id.* at 2160.

Apple's rationales categorically differ from those asserted in the above cases. Apple did not agree with other app-transaction platforms (*e.g.,* the Google Play Store) to eliminate *interbrand* competition and then invoke security and privacy to avoid the "normal operation" of the Rule of Reason. *Id.* at 2147. Rather, Apple imposed *intrabrand* limitations (that iOS devices use Apple

distribution and payment-processing channels) and contends that these restrictions tap into consumer demand for a private and secure user experience and distinguish the App Store from its open-platform competitors.

3. Cognizability of Cross-Market Rationales

[Epic argued that the security and privacy restrictions provide benefits in a market different from the relevant market defined by the court. The court noted that neither the Supreme Court nor the Ninth Circuit had resolved the question whether benefits in one market may justify harm to competition in a different market, but it declined to decide the issue on the ground that Epic did not raise the argument in the trial court or in its opening brief on appeal.]

D. Step Three: Substantially Less Restrictive Means

The district court did not clearly err when it held that Epic failed to prove the existence of substantially less restrictive alternatives (LRAs) to achieve Apple's procompetitive rationales. At step three of the Rule of Reason, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Alston,* 141 S Ct. at 2160 (quoting *Amex,* 138 S. Ct. at 2284). When evaluating proposed alternative means, courts "must give wide berth to [defendants'] business judgments" and "must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives." *Id.* at 2163, 2166; *see also id.* at 2161 ("[A]ntitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes."). As such, this circuit's test—which the Supreme Court approved in *Alston*—requires a "*substantially* less restrictive" alternative. *O'Bannon,* 802 F.3d at 1070 (emphasis added). To qualify as "substantially less restrictive," an alternative means "must be `virtually as effective' in serving the [defendant's] procompetitive purposes . . . without significantly increased cost." *Id.* at 1074 (quoting *County of Tuolumne v. Sonora Cmty. Hosp.,* 236 F.3d 1148, 1159 (9th Cir. 2001)). . . .

Epic argues that Apple already has an LRA at its disposal for the distribution restriction: the "notarization model" that Apple uses for app distribution on its desktop and laptop operating system (macOS). The notarization model sits somewhere between iOS's "walled garden" and the open-platform model that characterizes some app-transaction platforms. Unlike on iOS, the Mac Store (the Apple-run equivalent of the iOS App Store for Mac computers) is *not* the exclusive means for macOS users to download apps; instead, users can download apps from the Mac Store or anywhere else on the internet. Also unlike on iOS, a developer can distribute a macOS app to users without first submitting it to Apple. But, regardless of how the developer distributes that app, it will carry a warning that Apple has not scanned it for malware. . . .

The malware scanning that Apple performs in the notarization model is not the same as the full app review that it conducts on iOS apps. Importantly, the notarization model does not include *human* review—a contextual review that, as found by the district court, cannot currently be automated. As part of iOS human review, a reviewer confirms that an app corresponds to its marketing description to weed out "Trojan Horse" apps or "social engineering" attacks that trick users into downloading by posing as something they are not. The reviewer also checks that the app's entitlements are reasonable for its purpose—rejecting, for example, a Tic-Tac-Toe game that asks for camera access and health data, while approving camera access for a social media app. On occasion, human review also detects novel, well-disguised malware attacks. Despite Epic carrying the burden at step three of the Rule of Reason, it was not clear before the

district court—and still is not entirely clear—how Epic proposes that the notarization model translates from macOS to iOS. In particular, it is unclear whether the proposed model would incorporate human review and what type (if any) of licensing scheme Apple could implement to complement the notarization model. Whatever the precise form of Epic's proposed notarization model, the district court did not err in rejecting it.

First, to the extent Epic argues that Apple could jot-for-jot adopt macOS's notarization model without adding human review, Epic failed to establish that this model would be "virtually as effective" in accomplishing Apple's procompetitive rationales of enhancing consumer appeal and distinguishing the App Store from competitor app-transaction platforms by improving user security and privacy. *See O'Bannon,* 802 F.3d at1073. . . . Moreover, the district court found "compelling" Apple's explanation of why human review is necessary "against certain types of attacks." And it found that "Epic Games did not explain how, if at all" a purely automated process could screen for such threats. . . .

Second, to the extent Epic proposes a notarization model that incorporates human app review, Epic failed to develop how Apple could be compensated in such a model for third-party developers' use of its IP. . . .The district court accordingly found that Epic's proposed distribution LRAs "leave unclear whether Apple can collect licensing royalties and, if so, how it would do so" and thus declined to consider them as "not sufficiently developed."

It is, however, Epic's burden at step three to prove that a tiered licensing scheme (or some other payment mechanism) *could* achieve Apple's IP-compensation rationale. Without any evidence in the record of what this tiered licensing scheme would look like, we cannot say that it would be "virtually as effective" without "significantly increased cost." *O'Bannon,* 802 F.3d at 1074. Nor can we even "explain" it, let alone direct the district court to craft an injunction that it could "adequately and reasonably supervise." *Alston,* 141 S. Ct. at 2163.

Epic proposes access to competing payment processors as an LRA to Apple's IAP requirement. Like the distribution requirement LRA, this LRA suffers from a failure of proof on how it would achieve Apple's IP-compensation rationale. As the district court noted, in a world where Apple maintains its distribution restriction but payment processing is opened up, Apple would still be contractually entitled to its 30% commission on in-app purchasers. Apart from any argument by Epic, the district court "presume[d]" that Apple could "utilize[e] a contractual right to audit developers . . . to ensure compliance with its commissions." But the court then rejected such audits as an LRA because they "would seemingly impose both increased monetary and time costs."

E. Step Four: Balancing

Epic—along with several *amici,* including the United States and thirty-four state attorneys general—argue that the district court erred by not proceeding to a fourth, totality-of-the-circumstances step in the Rule of Reason and balancing the anticompetitive effects of Apple's conduct against its procompetitive benefits. . . .

* * *

We are skeptical of the wisdom of superimposing a totality-of-the-circumstances balancing step onto a three-part test that is already intended to assess a restraint's overall effect. Neither Epic nor any *amicus* has articulated what this balancing really entails in a given case. Epic argues only that the district court must "weigh[]" anticompetitive harms against procompetitive benefits, and the United States describes step four as a "qualitative assessment of whether the harms or benefits predominate.". . .

Nonetheless, we are bound by *County of Tuolumne* and mindful of *Alston*'s warning that the first three steps of the Rule of Reason are not a "rote checklist." Therefore, where a plaintiff's case comes up short at step three, the district court must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits. In most instances, this will require nothing more than—as in *County of Tuolumne*—briefly confirming the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive.

Turning to the record here, the district court's failure to explicitly reach the fourth step was harmless. Even though it did not expressly reference step four, it stated that it "carefully considered the evidence in the record and. . . determined, based on the rule of reason," that the distribution and IAP restrictions "have procompetitive effects that *offset* their anticompetitive effects" (emphasis added). This analysis satisfied the court's obligation pursuant to *County of Tuolumne,* and the court's failure to expressly give this analysis a step-four label was harmless.

III. Sherman Act Section 1: Tying

In addition to its general restraint-of-trade claim, Epic brought a Section 1 claim asserting that Apple unlawfully tied together app distribution (the App Store) and in-app payment processing (IAP). On appeal, Epic argues that (1) the district court clearly erred when it found that Epic did not identify separate products, and (2) we can enter judgment in its favor because the tie is unlawful, either *per se* or pursuant to the Rule of Reason. We agree with Epic that the district court clearly erred in its separate-products finding, but we find that error to be harmless. The Rule of Reason applies to the tie involved here, and, for the reasons already explained, Epic failed to establish that Apple's design of the iOS ecosystem—which ties the App Store and IAP together—is anticompetitive.

* * *

. . . [W]e join the D.C. Circuit in holding that *per se* condemnation is inappropriate for ties "involv[ing] software that serves as a platform for third-party applications." *United States v. Microsoft,* 253 F.3d 34,89 (D.C. Cir. 2001) (en banc). "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 9 (1979). That is because *per se* condemnation embodies a judicial assessment that a category of restraints is "plainly anticompetitive" and "lack[ing] . . . [in] any redeeming virtue" such that it can be "conclusively presumed illegal." *Id.* at 7-8 (citations omitted). Given the costs of improperly condemning a practice across the board, extending a *per se* rule requires caution and judicial humility. Based on the record, we do not have the level of confidence needed to universally condemn ties related to app-transaction platforms that combine multiple functionalities. *See Microsoft,* 253 F.3d at 93 ("[B]ecause of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the per se rule as originally conceived.").

The tie in this case differs markedly from those the Supreme Court considered in *Jefferson Parish* and prior tying cases. Particularly, "[i]n none of these cases was the tied good . . . technologically integrated with the tying good." *Microsoft,* 253 F.3d at 90. Moreover, none of the ties presented any purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good, as Apple does here.

Moreover, while *Jefferson Parish*'s separate-products test filters out procompetitive bundles from *per se* scrutiny in traditional markets, we are skeptical that it does so in the market involved

here. Software markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. In such a market, any first-mover product risks being labeled a tie pursuant to the separate-products test. *See Microsoft,* 253 F.3d at 92. If *per se* condemnation were to follow, we could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect. The Rule of Reason guards against that risk by "afford[ing] the first mover an opportunity to demonstrate that an efficiency gain from its `tie' adequately offsets any distortion of consumer choice." *Id.*

Applying the Rule of Reason to the tie involved here, it is clearly lawful. Epic's tying claim (that app distribution and payment processing are tied together) is simply a repackaging of its generic Section 1 claim (that the conditions under which Apple offers its app-transactions product are unreasonable). For the reasons we explained above, Epic failed to carry its burden of proving that Apple's structure of the iOS ecosystem is unreasonable. *See supra* section II.

* * *

VI. California's Unfair Competition Law

We now turn to Apple's cross-appeal, beginning with its arguments concerning the UCL. The district court . . . concluded that Apple's anti-steering provision violates the UCL's unfair prong, and entered an injunction prohibiting Apple from enforcing the anti-steering provision against any developer. Apple challenges each aspect on appeal. We affirm.

* * *

B. Merits

As relevant here, the UCL prohibits "any [1] unlawful, [2] unfair or [3] fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. As the UCL's three-prong structure makes clear, a business practice may be "unfair," and therefore illegal under the UCL, "even if not specifically proscribed by some other law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.,* 20 Cal. 4th 163, 180 (1999). The unfair prong is "intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable `new schemes which the fertility of man's invention would contrive.'" *Id.*

The California Supreme Court has refined this "wide standard," *Cel-Tech,* 20 Cal. 4th at 181, into two tests relevant to this litigation. First, to support "any finding of unfairness to *competitors,*" a court uses the "tethering" test, which asks whether the defendant's conduct "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* at 186-87 (emphasis added). Second, to support a finding of unfairness to *consumers,* a court uses the balancing test, which "weigh[s] the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Progressive W. Ins. Co. v. Super. Ct.,* 135 Cal. App. 4th 263, 285 (2005) (citation omitted).

Here, the district court applied both tests. Through the Epic Games Store, Epic is a games-distribution competitor of Apple—triggering the competitor test. Through its subsidiaries that have apps on the App Store, Epic consumes the app transactions that Apple offers in a two-sided market—triggering the consumer test. *Cf. Amex,* 138 S. Ct. at 2286 (each side of two-sided market "jointly consume[s] a single product" (citation omitted)). Applying the tethering test, the court found that the anti-steering provisions "decrease [consumer] information," enabling supracompetitive profits and resulting in decreased innovation. It relied on Apple's own internal

communications for the proposition that the anti-steering provision prevents developers from using two of the three "most effective marketing activities," push notifications and email outreach. It then reiterated these factual findings to conclude that the provision also violates the balancing test.

Apple does not directly challenge the district court's application of the UCL's tethering and balancing tests to the facts of this case. Instead, Apple makes two arguments attacking UCL liability as a matter of law. Neither is supported by California law.

1. Safe-Harbor Doctrine

Apple argues that Epic's failure to establish Sherman Act liability forecloses UCL liability pursuant to the UCL's "safe harbor" doctrine, which bars a UCL action where California or federal statutory law "absolutely preclude[s] private causes of action or clearly permit[s] the defendant's conduct." *Zhang v. Sup. Ct.,* 57 Cal. 4th 364, 379-80 (2013). The safe-harbor doctrine emphasizes that there is a "difference between (1) not making an activity unlawful, and (2) making that activity lawful." *Cel-Tech,* 20 Cal. 4th at 183. Accordingly, in every instance where a court found the Sherman Act to preclude a UCL action, a *categorical* antitrust rule formed the basis of the decision. We held that the judge-made baseball exemption—that "the business of providing public baseball games for profit . . . [is] not within the scope of the federal antitrust laws"—precluded a UCL action. A California Court of Appeal similarly held that the *Colgate* doctrine—that it is lawful for a company to unilaterally announce the terms on which it will deal—precluded a UCL action.

Neither Apple nor any of its *amici* cite a single case in which a court has held that, when a federal antitrust claim suffers from a *proof deficiency,* rather than a *categorical legal bar,* the conduct underlying the antitrust claim cannot be deemed unfair pursuant to the UCL. . . .

2. Importation of Sherman Act Principles

Apple next argues that two principles from Sherman Act case law preclude UCL liability here. We find neither argument persuasive. First, Apple contends that the Supreme Court's decision in *Amex*—finding in favor of American Express in a suit challenging its anti-steering provision—bars UCL liability stemming from Apple's anti-steering provision. Apple does not explain how *Amex*'s fact- and market-specific application of the first prong of the Rule of Reason establishes a categorical rule approving anti-steering provisions, much less one that sweeps beyond the Sherman Act to reach the UCL. *Amex* was based on the plaintiff's failure to establish direct evidence of anticompetitive effects through a reduction in output, supracompetitive pricing, or excessively high profit margins; it was not a blanket approval of anti-steering provisions.

Second, Apple argues that the UCL mandates trial courts to define a relevant market and then conduct the balancing test within that market (similar to the Rule of Reason). Again, Apple does not cite any California authority for this proposition. Moreover, such a rule runs contrary to California courts' repeated instruction that "[n]o inflexible rule can be laid down as to what conduct will constitute unfair competition." *E.g., Pohl v. Anderson,* 13 Cal. App. 2d 241, 242 (1936) (citation omitted). . . .

C. Injunctive Relief

Apple also argues that the district court . . . abused its discretion when applying the injunction against all developers, not just Epic's subsidiaries that have apps on the App Store. We disagree. . . .

The district court found that the anti-steering provision harmed Epic by (1) increasing the costs of Epics' subsidiaries' apps that are still on the App Store, and (2) preventing other apps' users from becoming would-be Epic Games Store consumers. Because Epic benefits in this second way from consumers of other developers' apps making purchases through the Epic Games Store, an injunction limited to Epic's subsidiaries would fail to address the full harm caused by the anti-steering provision.

* * *

CONCLUSION

To echo our observation from the NCAA student-athlete litigation: There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

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

Match Group, LLC et al. v. Google LLC et al.,
Case No. 3:22-cv-02746-JD

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

TRIAL BRIEF OF EPIC GAMES, INC. AND THE MATCH PLAINTIFFS

Judge: Hon. James Donato

Google is a monopolist. It has maintained durable monopolies in the markets for Android App Distribution and Android In-App Payment Solutions for Digital Goods and Services for over a decade, not by competing on the merits, but by paying off its rivals and using its monopoly power and vast resources to snuff out all competition. Google unlawfully restrains trade through a web of secretive, anticompetitive agreements with original equipment manufacturers ("OEMs"), wireless network operators, and app developers. And it further prevents competition by imposing artificial technical restraints on the distribution of Android apps and competing app stores and flatly prohibiting competition from other in-app payment solutions for "digital content". Indeed, in the few years since these lawsuits were filed, Google flexed its monopoly power by raising prices for many developers, including Match and Epic's Bandcamp, through a change to its payments policy. Through this conduct, which is described more fully below, Google extracts billions in monopoly profits and suppresses innovation and choice in multiple markets. Plaintiffs brought these lawsuits to end Google's ongoing anticompetitive practices.

Plaintiffs will prove at trial that Google's unlawful conduct causes widespread harm to Android developers and consumers, including supracompetitive prices and a reduction in the output and quality of app distribution and in-app payment services. Google's unlawful conduct includes the following:

- Agreements with OEMs that prohibit nearly all major OEMs from preinstalling competing app stores on their devices, ensure that the Google Play Store is preinstalled on the home screen of virtually all Android devices, and impede developers' ability to distribute Android apps (including other app stores) directly to users.
- Agreements with competitors and "agitators" through "Project Hug", whereby Google paid over $1 billion to dozens of major developers, including to secure agreement from Activision Blizzard, Riot Games and Supercell not to launch competing Android app stores.
- Agreements with app developers, whereby Google uses its market power over Android app distribution to tie Google Play Billing ("GPB")—its in-app payment solution for "digital goods and services"—to the Google Play Store, thereby forcing developers selling "digital goods and services" to pay Google a supracompetitive fee of up to 30% on all in-app sales of digital content, and preventing developers from communicating to their consumers other ways of making purchases and obtaining lower prices outside the app.
- Arbitrary technical restraints making it commercially unviable for developers to distribute Android apps directly to users, including pretextual security warnings and requirements that users modify device settings to download apps outside the Google Play Store.

As a result of its anticompetitive acts, Google faces no meaningful competition or threat of competition. Its share of the relevant markets has exceeded 85% for years and years. Due to Google's contractual and technological restraints, the only effective way for developers to distribute their apps to the more than three billion Android users on their smartphones is through the Google Play Store.

To make matters worse, Google engaged in a multi-year campaign to conceal its conduct and deprive Plaintiffs and this Court of relevant evidence. Indeed, the full record of Google's unlawful conduct will never be seen. As this Court has already found, "Google intended to subvert the discovery process" by funneling sensitive communications into "history off" Chats that it then destroyed. That intentional conduct "certainly" prejudiced Plaintiffs. (Dkt. 469 at 18.) Plaintiffs will show that Google's Chat destruction was not an oversight or mistake, but the intended result of a corporate culture of attempting to sanitize, conceal, and destroy evidence, which is itself evidence of Google's knowing violation of the antitrust laws.

Pursuant to Sections 1 and 2 of the Sherman Act, as well as California law, all Plaintiffs seek injunctive relief, and all except Epic seek damages. The evidence at trial will show that Plaintiffs are entitled to relief on each of their claims and that Google's counterclaims are meritless.

PLAINTIFFS' CASE

I. Plaintiffs' Claims Against Google

A. Section 2 of the Sherman Act: Unlawful Monopolization[1]

Section 2 prohibits persons from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations". 15 U.S.C. § 2. A claim for unlawful monopolization requires that a plaintiff show: "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury". *FTC v. Qualcomm Inc.*, 969 F.3d 974, 989-90 (9th Cir. 2020) (quotation marks omitted). Monopoly power is "the power to control prices or exclude competition". *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quotation marks omitted). "The relevant market is the field in which meaningful competition is said to exist." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202

[1] Epic Compl. Counts 1, 6; Match Compl. Counts 2, 8.

(9th Cir. 1997). The market "must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008). "The consumers do not define the boundaries of the market; the products or producers do." *Id.*

Monopolization claims are assessed under the rule of reason, which "requires courts to conduct a fact-specific assessment of market power and market structure . . . to assess the [restraint]'s actual effect on competition". *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018) (citations omitted). This assessment is done under "a multi-step burden-shifting framework". *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 974 (9th Cir. 2023). "At step one, 'the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.'" *Id.* at 983 (quoting *Amex*, 138 S. Ct. at 2284). At step two, "the burden then 'shifts to the defendant to show a procompetitive rationale for the restraint.'" *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) (quoting *Amex*, 138 S. Ct. at 2284). At step three, "[i]f the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* "[W]here a plaintiff's case comes up short at step three, the district court must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits." *Epic*, 67 F.4th at 994.

The evidence will show that, through numerous anticompetitive acts, including those described above, Google has unlawfully maintained monopolies in the Android App Distribution and Android In-App Payment Solutions Markets. Google's conduct cannot withstand scrutiny under the rule of reason, and judgment must be entered for Plaintiffs.

B. Section 2 of the Sherman Act: Attempted Monopolization[2]

Attempted monopolization requires "(1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power,' and (4) causal antitrust injury." *Kodak*, 125 F.3d at 1202 (citations omitted). Specific intent may be shown through "direct evidence of 'unlawful design' or circumstantial evidence 'principally of illegal conduct.' This inference [of specific intent] may be drawn from conduct with an unreasonable restraint of trade in violation of section 1."

[2] Match Compl. Count 9.

Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Inc., 20 F.4th 466, 483 (9th Cir. 2021).

The evidence will show that, through its numerous anticompetitive acts, including those described above, Google specifically intends to control prices and eliminate competition in the Android In-App Payment Solutions Market. Google's attempted monopolization is unlawful, and judgment must be entered for Match.

C. Section 1 of the Sherman Act: Unreasonable Restraints of Trade[3]

Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". 15 U.S.C. § 1. "To establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016). "[*E*]*very contract*", including "a non-negotiated contract of adhesion", falls within the scope of Section 1. *Epic*, 67 F.4th at 982 (emphasis in original). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason'." *Qualcomm*, 969 F.3d at 989 (citation omitted). (*See* Section I.A.) For restraints that are not unreasonable *per se*, the anticompetitive-conduct analysis is "essentially the same" under Sections 1 and 2. *Id.* at 991.

The evidence will show that through its OEM agreements, Google unreasonably restrained trade by, among other things, conditioning OEMs' access to essential Android services on their agreement to preinstall the Google Play Store on the default home screen of their smartphones; paying OEMs not to preinstall competing app stores; and restricting OEMs from offering frictionless downloading of apps outside the Google Play Store. Through its Developer Distribution Agreement ("DDA"), Google unreasonably restrained trade by, among other things, forcing developers to agree to terms that prevent them from offering competing app stores, and requiring that they use GPB for in-app "digital content" transactions. Through its Project Hug and Apps Velocity Program agreements, Google unreasonably restrained trade by, among other things, preventing competing app stores from offering differentiated content (through simultaneous shipment and parity clauses) that is critical for their success. And Google leveraged revenue share agreements with wireless carriers to discourage them from creating competing app stores and, once it succeeded in boxing carriers out, reduced their

[3] Epic Compl. Counts 2, 3, 5, 7; Match Compl. Counts 3, 4, 7.

revenue shares to keep the monopoly rents to itself. Google's conduct cannot withstand scrutiny under the rule of reason, and judgment must be entered for Plaintiffs.

D. Section 1 of the Sherman Act: *Per Se* Restraints of Trade[4]

"[U]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48 (1990) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)). Agreements not to compete between actual or would-be competitors are "[o]ne of the classic examples of a *per se* violation." *Id.* at 49. "[T]he agreement can be tacit as well as express." *Moore v. James H. Matthews & Co.*, 473 F.2d 328, 330 (9th Cir. 1972). "When a *per se* prohibition applies, we deem a restraint unlawful without any 'elaborate study of the industry' in which it occurs." *Epic*, 67 F.4th at 974 (citation omitted).

The evidence will show that through its Project Hug and Apps Velocity Program agreements, Google committed *per se* restraints of trade by, among other things, paying potential competitors to agree not to launch app stores on Android that would compete with the Google Play Store. Google's conduct is *per se* unlawful under Section 1, and judgment must be entered for Plaintiffs.

E. Section 1 of the Sherman Act: Unlawful Tying[5]

Tying involves the use of market power over one product to coerce customers into purchasing a separate product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). "[T]he existence of separate products is inferred from more readily observed facts. These include consumer requests to offer the products separately, disentangling of the products by competitors, analogous practices in related markets, and the defendant's historical practice." *Epic*, 67 F.4th at 995.

Tying may be condemned as *per se* unlawful or under the rule of reason. *Jefferson Parish*, 466 U.S. at 29. "For a tying claim to suffer *per se* condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied

[4] Epic Compl. Count 4; Match Compl. Count 6.
[5] Epic Compl. Count 8; Match Compl. Count 1.

product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Cascade Health Sols. v. PeaceHealth*, 15 F.3d 883, 913 (9th Cir. 2008) (citation omitted); *see also Jefferson Parish*, 466 U.S. at 12-18; *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992). When assessing tying claims under the rule of reason, courts apply the same four-step framework outlined above. (*See* Section I.A.)

The evidence will show that through its DDA and incorporated Developer Program Policies ("DPP"), Google unlawfully ties GPB to the Google Play Store, extracting supracompetitive fees on billions of dollars of transactions, eliminating user and developer choice of payment solutions, and increasing consumer prices. The evidence will further show that Google has sufficient economic power in the Android App Distribution Market to force this tie on developers, and that the tying product (the Google Play Store) is distinct from the tied product (GPB). Google's conduct is *per se* unlawful under Section 1, and in the alternative cannot withstand scrutiny under the rule of reason, and judgment must be entered for Plaintiffs.

F. Cal. Cartwright Act: Unreasonable Restraints of Trade; Unlawful Tying[6]

Under the Cartwright Act "every trust" is "unlawful, against public policy and void". Cal. Bus. & Prof. Code § 16726. A "trust" is defined as "a combination of capital, skill, or acts by two or more persons . . . [t]o create or carry out restrictions in trade or commerce". *Id.* § 16720. The evidence will show that the same conduct by Google that violates the Sherman Act violates the Cartwright Act.

G. Cal. Unfair Competition Law ("UCL")[7]

The UCL "prohibits 'any [1] unlawful, [2] unfair or [3] fraudulent business act or practice.'" *Epic*, 67 F.4th at 1000 (brackets in original) (quoting Cal. Bus. & Prof. Code § 17200). Under the "unlawful" prong, "[v]irtually any law—federal, state or local—can serve as a predicate" unlawful act. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1361 (2010) (citation omitted). Under the "unfair" prong, "a business practice may be 'unfair,' and therefore illegal under the UCL, 'even if not specifically proscribed by some other law.'" *Epic*, 67 F.4th at 1000 (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999)). "[T]o support 'any finding of unfairness to

[6] Epic Compl. Counts 9, 10, 11, 12; Match Compl. Counts 10, 11, 12.
[7] Epic Compl. Count 13; Match Compl. Count 13.

competitors,' a court uses the 'tethering' test, which asks whether the defendant's conduct 'threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Id.* (quoting *Cel-Tech*, 973 P.2d at 544). "[T]o support a finding of unfairness to *consumers*, a court uses the balancing test, which weigh[s] the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* (quotation marks omitted). "These tests are not mutually exclusive." *Id.* The Ninth Circuit recently affirmed a decision permanently enjoining under the UCL the anti-steering clause in Apple's App Store developer agreements. *Id.* at 999.[8]

The evidence will show that Google's conduct, including foreclosing competition, paying off competitors, charging supracompetitive prices, and reducing output and innovation, is both unlawful and unfair under the UCL. Judgment must be entered for Plaintiffs.

H. Interference with Contractual and Prospective Economic Relations[9]

The elements of "intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1191 (9th Cir. 2022). In contrast, "interference with prospective advantage does not require proof of a legally binding contract." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990). An independently wrongful act is required for interference with prospective economic relations. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003). "[A]n act is independently wrongful . . . if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* at 1159.

The evidence will show that Google's anticompetitive and wrongful acts—including leveraging its dominance, preventing app updates for Match's apps, and taking steps to remove them from the

[8] Apple's clause states that developers "may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase." *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1013 (N.D. Cal. 2021). A parallel clause in Google's DPP states that "apps may not lead users to a payment method other than Google Play's billing system." *Payments*, Play Console, https://support.google.com/googleplay/android-developer/answer/9858738.

[9] Match Compl. Counts 14, 15.

Google Play Store—tortiously interfere (and if successful, will interfere) with Match's contracts and relationships with their users. Judgment must be entered for Match.

II. Google's Defenses

In its answers to Plaintiffs' complaints, Google asserted 19 affirmative defenses. The sole defense where Google is seeking a jury instruction, however, is a business justification defense.[10] That defense is a component of the rule of reason framework discussed above. (*See* Section I.A.)[11]

GOOGLE'S CASE

III. Google's Claims Against Epic and Match

Breach of Contract.[12] Under California law, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff". *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011); *see* CACI No. 303 (2020). "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899).

Breach of Implied Covenant of Good Faith and Fair Dealing.[13] "In California, the factual elements necessary to establish a breach of the covenant of good faith and fair dealing are: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (citing CACI No. 325 (2020)). Such a claim may not lie where the terms of the challenged agreement are unlawful. *Toce v. Rentch*, 2018 WL 5994598, at *12 (S.D. Cal. Nov. 15, 2018).

Quasi-Contract / Unjust Enrichment.[14] "[T]here is no cause of action in California for unjust

[10] Google also seeks a statute of limitations instruction, but it pertains to the apportionment of damages, not liability.

[11] To the extent Google intends to pursue its remaining defenses at trial, Plaintiffs oppose each of them, and the evidence will show they are meritless.

[12] Google Counterclaim (Epic) Count 1; Google Counterclaim (Match) Count 1.

[13] Google Counterclaim (Epic) Count 2; Google Counterclaim (Match) Count 2.

[14] Google Counterclaim (Epic) Count 3; Google Counterclaim (Match) Count 4.

enrichment." *Levine v. Blue Shield of California*, 189 Cal. App. 4th 1117, 1138 (2010) (citation and quotation omitted). Parties may seek restitution under a quasi-contract theory, but may not "pursue or recover on a quasi-contract claim if the parties have an enforceable agreement regarding a particular subject matter." *Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1388 (2012). "The elements of unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014). "[E]quity does not create a duty to pay for a benefit one neither sought nor had the opportunity to decline, and over which one had no control." *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 353 P.3d 319, 327 (Cal. 2015). "When a person acts simply as she would have done in any event, out of duty or self-interest, she cannot equitably claim compensation from anyone who merely happens to benefit as a result." *Id.* The law "precludes recovery on principles of quasi-contract for benefits conferred under an illegal bargain, as well as an action on the bargain itself." *Owens v. Haslett*, 98 Cal. App. 2d 829, 833 (1950).

Declaratory Judgment.[15] Google asserts a "Count" for a declaratory judgment, but a declaratory judgment is not a claim but a form of relief. "[T]he Declaratory Judgment Act does not provide an affirmative cause of action where none otherwise exists." *City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022). Google's declaratory judgment "claims" are coextensive with its claims for breach of contract: Google seeks a declaration that the DDA is valid, that it was breached by Epic and Match, and that Google has the right to remove Epic's and Match's apps from the Google Play Store and terminate their developer accounts. The declaratory judgment claims must fail because Google's contracts are illegal and unenforceable. (*See* Section IV.)

False Promise.[16] "Under California law, a cause of action for fraud based on a false promise must allege: (1) a material promise, (2) knowledge of its falsity, (3) intent to defraud or induce reliance, (4) justifiable reliance, and (5) resulting damage." *First Advantage Background Servs. Corp. v. Priv. Eyes, Inc.*, 2007 WL 2572191, at *4 (N.D. Cal. Sept. 5, 2007). A false promise must be "clear and unequivocal." *Phillips v. JP Morgan Chase Bank, N.A.*, 2011 WL 1301726, at *9 (S.D. Cal. Nov. 14, 2011). "[A] promise that is 'vague, general or of indeterminate application' is not

[15] Google Counterclaim (Epic) Count 4; Google Counterclaim (Match) Count 5.
[16] Google Counterclaim (Match) Count 3.

enforceable." *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1017 (9th Cir. 2003). Google seeks to show that Match promised to comply with Google's Payments Policy by March 31, 2022. This claim fails because the Payments Policy is illegal. The evidence will also show that Match made no promise to comply, that it repeatedly and explicitly told Google why it could not comply, that it had no intent to deceive, that Google did not actually and justifiably rely on any alleged false promise, and that Google suffered no resulting damages.

IV. Epic's and Match's Defenses

Epic and Match discuss here the defenses they intend to focus on at trial, while reserving all rights with respect to their remaining defenses, including those for which they seek jury instructions.

Google's Contracts Are Illegal and Unenforceable.[17] "[N]o court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen*, 174 U.S. at 654. Courts will not enforce a contract that violates the Sherman Act if "the judgment of the Court would itself be enforcing the precise conduct made unlawful by [the antitrust laws]". *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959); *see also Tri-Q, Inc. v. Sta-Hi Corp.*, 63 Cal. 2d 199, 218 (1965). Plaintiffs will establish that Google's Payments Policy and other terms that form the basis of its counterclaims are unlawful, because they are part of Google's unlawful anticompetitive conduct in the relevant markets.

Google Modified or Otherwise Waived the Payments Policy.[18] "A contract in writing may be modified by a contract in writing." Cal. Civ. Code § 1698(a). No new consideration is required where "[t]he modification is in accordance with the terms of the contract." *Major v. Western Home Ins. Co.*, 169 Cal. App. 4th 1197, 1211 (2009). "[P]arties may, by their words or conduct, waive contractual rights" expressly or impliedly. *Wind Dancer Prod. Grp. v. Walt Disney Pictures*, 10 Cal. App. 5th 56, 78 (2017). Match will establish that Google modified or otherwise waived its Payments Policy such that Match had no obligation to exclusively use GPB before March 31, 2022.

CONCLUSION

The evidence at trial will show that judgment should be entered for Plaintiffs on all their claims, and for Epic and Match on all Google's counterclaims.

[17] Epic's Answer Defenses 1-2, 5; Match's Answer Defenses 2-3, 6.
[18] Match's Answer Defense 18.

Dated: October 5, 2023

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION This Document Relates To: *Epic Games Inc. v. Google LLC et al.,* Case No. 3:20-cv-05671-JD *In re Google Play Consumer Antitrust Litigation,* Case No. 3:20-cv-05761-JD *State of Utah et al. v. Google LLC et al.,* Case No. 3:21-cv-05227-JD *Match Group, LLC et al. v. Google LLC et al.,* Case No. 3:22-cv-02746-JD	Case No. 3:21-md-02981-JD **DEFENDANTS' TRIAL BRIEF** Judge: Hon. James Donato

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I. INTRODUCTION

Google created Android to provide more choice in the mobile ecosystem. Instead of building another walled garden, Android offered a new open approach, putting choice in the hands of users and developers and harnessing the innovation of phone manufacturers. Unlike Apple, which controls all manufacturing of iPhones and distributing apps for iPhones, Google enables phone manufacturers to build a variety of Android phones at different prices. That business model has unlocked tremendous value for users and developers: more and cheaper devices, millions of free and safe apps, and access to billions of potential customers. The conduct challenged by Epic and Match—agreements with phone manufacturers and developers, security policies, and a service fee model—is how Android competes with Apple's iOS and other platforms.

App stores are a critical part of the competition between Android and iOS because applications (or apps) are central to the experience that a smartphone platform provides to users. If apps are hard to find, or difficult to acquire safely and securely, or simply do not exist on Android, users are more likely to buy an iPhone. Thus, to compete with iOS, Google operates an app store that competes with Apple's App Store. For developers, the Play store provides a way to showcase their apps to millions of users around the world, as well as software development tools to help them build, refine, and market their apps. For users, the Play store provides a safe, secure, reliable way to find and acquire the apps that define the smartphone experience today.

Those users pay nothing to use the Play store. When millions of users download free apps like Epic's *Fortnite* or Match's dating apps, Google charges them nothing. Developers pay service fees only when they make money from selling subscriptions or digital add-ons inside apps downloaded from the Play store. Epic and Match disagree with how Google has chosen to charge for its services and simply do not want to pay for them. They seek to misuse the antitrust laws to upend an ecosystem that has enhanced competition, and benefited consumers and developers, based on the fiction that Google does not compete against Apple. Epic asserted the same theory against Apple. It lost. Plaintiffs' claims against Google will fail for many of the same reasons (and others). The Ninth Circuit held that Apple has not unlawfully monopolized the market by requiring all iPhone users to use the Apple App Store. The evidence will show that Google, which

enables users to choose between app stores, has not violated the antitrust laws either.

II. PLAINTIFFS' CLAIMS WILL FAIL AT TRIAL

A. Plaintiffs' Section 2 Monopolization Claim Will Fail

Plaintiffs assert that Google engaged in unlawful monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. "To establish liability under § 2, a plaintiff must show: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *FTC v. Qualcomm, Inc.*, 969 F.3d 974, 990 (9th Cir. 2020). Plaintiffs cannot prove these elements.

1. Google Does Not Have Monopoly Power Because It Competes with Apple and Other Platforms

Plaintiffs cannot prove that Google has monopoly power because the Google Play store competes with the Apple App Store and other platforms. "Market power is the ability to raise price profitably *by restricting output*." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Monopoly power differs in degree from market power, requiring "something greater." *Epic Games, Inc. v. Apple, Inc.* ("*Apple II*"), 67 F.4th 946, 998 (9th Cir. 2023). To prove monopoly power, Plaintiffs must first define a proper relevant antitrust market. Indeed, "[a] threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Qualcomm*, 969 F.3d at 992. "Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition." *Amex*, 138 S. Ct. at 2285 (cleaned up).

"A relevant market contains both a geographic component and a product or service component." *Apple II*, 67 F.4th at 975. "The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *see also Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 (W.D. Ark. 1995) ("market constraints" also "limit one's ability to reduce quality or service below competitive levels"). The market is "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Indus., Inc. v.*

Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989). Thus, a relevant market must reflect "commercial realities." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992); *see also Nat'l Coll. Athletic Assoc. v. Alston*, 141 S. Ct. 2141, 2158 (2021) (requiring "careful analysis of market realities.").

Plaintiffs' alleged product markets ignore commercial realities. Plaintiffs allege relevant markets for (1) distribution of apps for Android devices, and (2) billing services for transactions inside those apps. Plaintiffs thus claim that the Google Play store does not compete with the Apple App Store. The district court and the Ninth Circuit rejected this theory. *Epic Games, Inc. v. Apple Inc.* ("*Apple I*"), 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff'd in part, rev'd in part*, *Apple II*, 67 F.4th 946. Epic "structured its lawsuit to argue that Apple does not compete with anyone; it is a monopoly of one." *Apple I*, 559 F. Supp. 3d at 921. But the Court found that "Epic Games' sole focus on iOS devices simply ignores the market reality that is available to consumers." *Id.* at 1025. The Court found that "Apple and Google compete with one another," *id.* at 992 n.454, and that Google "operates in the same market" as Apple, describing Google as "Apple's main competitor," *id.* at 1031, 1036. The Ninth Circuit affirmed in a decision describing the Google Play store as the App Store's "main competitor." *Apple II*, 67 F.4th at 985.

As explained in Google's motion *in limine* (No. 1), collateral estoppel precludes Epic from seeking a different decision here. It cannot be that the Apple App Store competes against the Google Play store for purposes of Epic's claims against Apple, but not Epic's claims against Google. Regardless, the evidence will show that the Play store and the Apple App Store compete intensely on price, quality, and security. Google cannot have monopoly power when it competes with Apple. *E.g.*, *Rebel Oil*, 51 F.3d at 1443 (only "one firm alone" can monopolize).

Because apps are central to the smartphone experience, the Play store must compete with the Apple App Store for Android to compete against Apple's iOS and other platforms. The law presumes that when consumers buy devices, they knowingly choose between products and services for those devices, so competition between the iPhone and Android devices "will significantly restrain power" over app stores. *Kodak*, 504 U.S. at 470; *see Apple II*, 67 F.4th at 978 (identifying an "economic presumption that . . . consumers make a knowing choice to restrict

their aftermarket options when they" make a purchase "in the initial (competitive) market"). To overcome that presumption, Plaintiffs must prove that (1) technical limits on what products work on mobile devices are not generally known when consumers buy the devices; (2) significant information costs prevent consumers from calculating the total cost of a mobile device and associated products and services; and (3) significant costs to switching mobile devices. *Id.* This test was not satisfied in *Epic v. Apple* and Plaintiffs will not satisfy it here, either.

Google also must compete against other major companies in addition to Apple. Unlike on the iPhone, Android users have choices for how to install apps on their phones. Consumers can download Android apps directly from websites (known as "sideloading") and choose between app stores, including stores operated by major companies such as Samsung and Amazon. Indeed, Samsung smartphones come with Samsung's own app store on the home screen, right next to the Play store. Consumers also can go to websites to buy subscriptions and other in-app add-ons for products like Spotify and Netflix as well as Epic's *Fortnite* and Match's dating apps. Google earns nothing when consumers make that choice.

Plaintiffs cannot prove that Google has monopoly power merely by showing that Google has a high share of transactions in Android app stores. *See Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1208 (9th Cir. 1997) (Section 2 plaintiff "must establish more than just market share"). Plaintiffs must show that "new competitors face high market barriers to entry and that current competitors lack the ability to expand their output . . . ." *Id.* Plaintiffs cannot prove barriers that would prevent Samsung or Amazon from building competitive app stores if they chose to make the investments like Google has. Nor can Plaintiffs prove that Google has monopoly power merely because Plaintiffs would prefer to pay less or Google earns significant profits: "[A] reasonable finder of fact cannot infer monopoly power just from higher prices," and "it is always treacherous to try to infer monopoly power from a high rate of return." *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995).

Finally, Plaintiffs' alleged geographic market for the entire world except for China is artificial. It assumes that U.S. consumers would switch to app stores designed for foreign countries in languages they do not speak with prices in currencies they do not use. Even if that

were true, there is no basis to exclude China from a global market merely because Google has chosen not to do business there. App stores used in China can and do expand to compete with Google in the rest of the world, constraining the exercise of market power. *See Rebel Oil*, 51 F.3d at 1436 ("A reasonable market definition must also be based on 'supply elasticity.'").

2. Plaintiffs Cannot Prove that Google Engaged in Anticompetitive Conduct that Harmed Users or Developers

Even the "possession of monopoly power, and the concomitant charging of monopoly prices, is not [itself] unlawful; [instead,] it is an important element of the free-market system." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful [under § 2] unless it is accompanied by an element of anticompetitive *conduct.*" *Id.* "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect'"—that is, it "must harm the competitive *process* and thereby harm consumers." *Id.*

Plaintiffs thus have "the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Qualcomm*, 969 F.3d at 991. Anticompetitive effects include "reduced output, increased prices, or decreased quality in the relevant market" compared to competitive levels. *Amex*, 138 S. Ct. at 2284. App stores are two-sided platforms that sell a single product to two sets of consumers—users and developers—that enables them to transact with each other. Thus, Plaintiffs "must establish an anticompetitive impact on the 'market as a whole,'" *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022), accounting for impacts on users and developers, *see Amex*, 138 S. Ct. at 2287 (rejecting evidence that "wrongly focuses on only one side of the two-sided" market).

Plaintiffs cannot meet that burden. The evidence will show "expanding output and improved quality" of devices, apps and app transactions. *Amex*, 138 S. Ct. at 2289. And Google's prices were not "higher than the price one would expect to find in a competitive market." *Amex*, 138 S. Ct. at 2288. Users do not pay to use the Play store. Some 97 percent of developers pay no service fees. And Google's service fees for the fraction of developers that do pay have *declined* over time, on average, and are the same or lower than the rates that Apple, Microsoft, Sony, and

others charge. *See id.* at 2289 (no anticompetitive effect where "plaintiffs did not show that Amex charged more than its competitors"). *Cf. Somers v. Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013) (that Apple's prices remained the same "renders implausible" claim of supracompetitive prices).

3. Google's Conduct Enhanced Competition with Apple and Benefited Consumers

Even if Plaintiffs could prove that Google's conduct harmed competition and consumers (and they cannot), that would merely shift the burden to Google "proffer a procompetitive justification for its conduct." *Id.* This involves "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." *Id.* Google's challenged conduct is procompetitive. It enhances the appeal of Android devices as compared to iPhones, expands consumers' choice of devices, reduces device prices, expands the set of potential users for developers, and increases output of apps and transactions. *See Apple II*, 67 F.4th at 990 ("increasing the total number of iOS device users" was procompetitive); *O'Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015) (identifying "increasing consumer demand" as a procompetitive justification and stating "that a restraint that broadens choices can be procompetitive"). Google's challenged conduct also made Android devices more secure, which benefited consumers and enhanced competition with Apple. *See Apple II*, 67 F.4th at 987 ("improving security and privacy" are "goals that are plainly procompetitive rationales").

4. Plaintiffs Cannot Prove that Google Could Have Generated These Massive Benefits With a Different Business Model

Plaintiffs will have the burden to "demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Qualcomm*, 969 F.3d at 991. This requires proof that Google had "a substantially less restrictive alternative," *i.e.*, one that would have been "virtually as effective' in serving [Google's] procompetitive purposes . . . without significantly increased cost." *Apple II*, 67 F.4th at 990. In applying this standard, "antitrust courts must give wide berth to business judgments before finding liability," *Alston*, 141 S. Ct. at 2163, and "should not second-guess degrees of reasonable necessity," *id.* at 2161. Plaintiffs may wish that Google's business model cost them less, but they cannot prove that a different business model would have generated the same enormous benefits for users and developers as a whole.

5. Balancing Is Not Required, but Google's Conduct on Balance Benefitted Users and Developers

In *Epic v. Apple*, the Ninth Circuit held that even if an antitrust plaintiff fails to prove a less restrictive alternative, the factfinder "must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits." *Apple II*, 67 F.4th at 994. Google preserves for appellate review its argument that this step is contrary to the law.[1] But even if balancing is permissible, "[i]n most instances," balancing "will require nothing more than . . . briefly confirming the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive." *Id.*

B. Plaintiffs' Section 1 and Cartwright Act Claims Will Fail

Plaintiffs allege that Google unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act. Section 1 and Section 2 allegations involve "essentially the same" "three-part burden-shifting test." *Qualcomm*, 969 F.3d at 991; *Apple I*, 559 F. Supp. 3d at 1049 (same under Cartwright Act). For all the reasons outlined, *supra*, at 2-7, Plaintiffs will fail at every step of that test.

C. Plaintiffs' Tying Claims Will Fail

Plaintiffs allege that Google illegally ties its billing system to the Play store. Google charges developers service fees only when they sell apps in the Play store or sell digital content in apps downloaded from the Play store. Google requires developers to use Google Play Billing ("GPB") only to make those sales. The Ninth Circuit held that it is "clearly lawful" for Apple to require developers to use its billing system. *Apple II*, 67 F.4th at 998. Plaintiffs, however, allege that it is illegal tying for Google to do the same. They allege that they should be able to use other billing systems to bypass paying *anything* for the services they get from the Play store. Plaintiffs' tying claims will fail for the same reason Epic lost its tying claim against Apple.

The rule of reason applies to Plaintiffs' claim that Google has tied "software that serves as a platform for third-party applications." *Apple II*, 67 F.4th at 997 (rejecting parallel *per se* tying

[1] The panel in *Epic v. Apple* was "skeptical of the wisdom of superimposing a totality-of-the-circumstances balancing step," noted that Epic had not "articulated what this balancing really entails in a given case," and stated that it was not "evident what value a balancing step adds." *Id.*

claim against Apple). Just like Apple, Google is justified in requiring developers to use its billing system in order "to be compensated for its IP investment." *Id.* at 996. In *Epic v. Apple*, "Epic propose[d] access to competing payment processors as an [alternative] to Apple's" requirement to use its own billing system. *Id.* at 992. However, the Court found that "in a world where Apple maintains its distribution restriction but payment processing is opened up, Apple would still be contractually entitled to its 30% commission on in-app purchases." *Id.* at 993. Epic failed to show how Apple could use an audit mechanism to collect those fees without "increased monetary and time costs." *Id.* Here, too, Plaintiffs cannot show how Google could collect compensation for the value of its IP and services if developers could bypass Google's billing system.

Even if *per se* scrutiny applied to Plaintiffs' tying claim (and it does not), that claim will fail. The elements of a *per se* tying claim are (1) the defendant "tied together the sale of two distinct products or services," (2) "the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product," and (3) "the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008). As explained, Google does not have power in the alleged "tying product market" for Android app distribution because Google competes with Apple and other platforms. And Plaintiffs cannot show that Google "coerced or forced its customer[s] to buy the tied product"—GPB—"in order to obtain the tying product," the Play store. *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003). Developers are free to distribute their apps through the Play store and then sell subscriptions and IAPs through their websites, and pay Google nothing. Indeed, 97 percent of developers use the Play store without using GPB.

D. Plaintiffs' *Per Se* Claims Regarding the Games Velocity Program Will Fail

Google's Games Velocity Program involved nearly two dozen written agreements in which Google offered gaming developers incentives to launch their apps in the Play store at the same time as in the Apple App Store and other app stores. Google offered those incentives to twenty developers who Plaintiffs do not allege had ever explored opening an app store. Plaintiffs nevertheless allege that three developers who signed these incentive contracts—Activision

Blizzard, Riot Games, and Supercell—also agreed not to open their own app stores. Plaintiffs cannot prove any such agreement existed, and cannot show "evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The facts that (a) Google offered developers a better deal to use the Play store and (b) some developers chose not to open their own app stores, are "as consistent with permissible competition as with illegal conspiracy." *Id.*

Even if Plaintiffs could prove an agreement, it would be subject to the rule of reason for the reasons Google explained in its motion for partial summary judgment. *See* MDL Dkt. 483 at 9-13. Regardless, a *per se* claim also would fail because Plaintiffs cannot prove any injury "caused by the anticompetitive aspects of the illegal act." *Rebel Oil*, 51 F.3d at 1444. Neither Epic nor Match was injured because Activision, Riot, or Supercell did not open an app store.[2]

E. Match's Unique Claims Will Fail

1. Match's Attempted Monopolization Claim Will Fail

Match (and only Match) brings an attempted monopolization claim under Section 2, which requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Coal. For ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 506 (9th Cir. 2010). As explained, Match cannot show anticompetitive conduct or any danger of monopoly power.

2. Match's Exclusive Dealing Will Fail

Match (and only Match) alleges that Google's requirement to use GPB is a form of exclusive dealing. This claim is duplicative of Match's tying claim and fails for the same reasons.

3. Match's Tortious Interference Claims Will Fail

Match (and only Match) asserts claims for tortious interference with its contracts with users and tortious interference with prospective economic advantage. Both claims require proof of

[2] All parties agree that Epic's and Match's claims under the California Unfair Competition Law ("UCL") will be tried to the Court, not the jury. Google therefore does not address the substance of Plaintiffs' UCL claims in this trial brief, and reserves discussion for a separate submission, including proposed findings of fact and conclusions of law if the Court requests them. If Epic and Match's claims are not tried together, then the Court and the parties may need to revisit the question of which claims and defenses will be tried to a jury.

an "independently wrongful" act because Match's agreements with users are at-will. *See Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1158 (2003) (required element of interference with prospective advantage claim); *Ixchel Pharma, LLC v. Biogen, Inc*., 9 Cal. 5th 1130, 1148 (2020) (same requirement when contract is at-will). Match cannot prove any "independently wrongful" act because it cannot prove that Google violated any other law.

III. GOOGLE WILL PREVAIL ON ITS COUNTERCLAIMS

Google respectfully refers the Court to the parties' joint pretrial statement for a more detailed description of Google's counterclaims against Epic and Match. Google summarizes the broad outlines of these counterclaims below.

A. Epic Intentionally Deceived Google Using a Secret Scheme

In an effort that Epic codenamed "Project Liberty," Epic launched a secret and "highly choreographed attack on Apple and Google." *Apple I*, 559 F. Supp. 3d at 935. One of Epic's "primary reasons" for this attack was to obtain "tremendous monetary gain and wealth." *Id.* While Google provided Epic with resources to build an Android version of *Fortnite* and distribute it through the Google Play store, Epic was plotting against it. Just months later, "in willful violation of [its] contractual obligations," Epic "engineered a 'hotfix' to covertly introduce code that would enable additional payment methods for the iOS and Android versions of *Fortnite*." *Id.* at 936–37. Epic's scheme to bypass agreed-upon fees for the use of the Google Play store was a breach of contract. And Epic's deceitful conduct unjustly enriched Epic at Google's expense.

B. Match Made False Promises and Breached its Contract with Google

For years, Match tried to avoid paying Google service fees by misconstruing its contract with Google and bypassing Google's billing system. When Google clarified publicly that this was not permitted, Match falsely promised Google that it would comply, stringing Google along for months while Google wasted valuable resources trying to help Match. Match still refuses to pay the service fees required by the contract that Match signed. Match's conduct was a breach of contract and a fraud that unjustly enriched Match by more than $20 million.

DATED: October 5, 2023

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E-FILING ATTESTATION

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

/s/ Dane P. Shikman
Dane P. Shikman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION	MDL Case No. 21-md-02981-JD Member Case No. 20-cv-05671-JD **VERDICT FORM**

When answering the following questions and filling out this Verdict Form, please follow the directions provided throughout the form. Your verdict must be unanimous.

We, the jury, return these answers as our verdict in this case:

Monopolization (Sherman Act Section 2)

Question No. 1:

Did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, the existence of a relevant antitrust market?

_X_ YES _____ NO

If you answered "Yes" to Question 1 then continue to Question 2.

If you answered "No" to Question 1 then continue to Question 6.

United States District Court
Northern District of California

Question No. 2:

If you answered "yes" to Question 1, please specify each relevant product market and associated geographic market that Epic proved:

Relevant Product Market	Relevant Geographic Market
1) Android app distribution market	Worldwide excluding China
2) Android in-app billing services for digital goods and services transactions	Worldwide excluding China

Continue to Question 3.

Question No. 3:

Did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that Google willfully acquired or maintained monopoly power by engaging in anticompetitive conduct in any market that you specified in response to Question 2?

X YES _____NO

If you answered "Yes" to Question 3 then continue to Question 4.

If you answered "No" to Question 3 then continue to Question 6.

United States District Court
Northern District of California

Question No. 4:

If you answered "yes" to Question 3, please specify each relevant product market and associated geographic market for your answer:

Relevant Product Market	Relevant Geographic Market
1) Android app distribution market	Worldwide excluding China
2) Android in-app billing services for digital goods and services transactions	Worldwide excluding China

Continue to Question 5.

Question No. 5:

If you answered "yes" to Question 3, did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that it was injured as a result of Google's violation of the antitrust laws?

_X_ YES ____ NO

Continue to Question 6.

United States District Court
Northern District of California

Unlawful Restraint of Trade (Sherman Act Section 1 and California State Law)

Question No. 6:

Did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that Google entered into one or more agreements that unreasonably restrained trade in a relevant antitrust market?

X YES ____ NO

If you answered "Yes" to Question 6 then continue to Question 7.

If you answered "No" to Question 6 then continue to Question 10.

Question No. 7:

If you answered "yes" to Question 6, which of these agreements did you find to be unreasonable restraint(s) of trade in accordance with the instructions given to you?

X DDA agreements

X Agreements with Google's alleged competitors or potential competitors under Project Hug or Games Velocity Program

X Agreements with OEMs that sell mobile devices (including MADA and RSA agreements)

Continue to Question 8.

United States District Court
Northern District of California

Question No. 8:

If you answered "yes" to Question 6, please specify each relevant product market and associated geographic market for your answer:

Relevant Product Market	Relevant Geographic Market
1) Android app distribution market	Worldwide excluding China
2) Android in-app billing services for digital goods and services transactions	Worldwide excluding China

Continue to Question 9.

Question No. 9:

If you answered "yes" to Question 6, did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that it was injured as a result of Google's violation of the antitrust laws?

X YES _____NO

Continue to Question 10.

United States District Court
Northern District of California

Tying (Sherman Act Section 1 and California State Law)

Question No. 10:

Did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that Google unlawfully tied the use of the Google Play Store to the use of Google Play Billing?

X YES ____NO

If you answered "Yes" to Question 10 then continue to Question 11.

If you answered "No" to Question 10 then go to the bottom of the form.

Question No. 11:

If you answered "yes" to Question 10, did Epic prove, by a preponderance of the evidence and in accordance with the instructions given to you, that it was injured as a result of Google's violation of the antitrust laws?

X YES ____NO

You have now reached the end of the verdict form and should review it to ensure it accurately reflects your unanimous determinations. The Presiding Juror should then sign and date the verdict form in the spaces below and notify the courtroom deputy that you have reached a verdict. The Presiding Juror should retain possession of the verdict form and bring it when the jury is brought back into the courtroom.

DATED: 11 Dec 2023 Signed:

Presiding Juror

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