**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

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

**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.

**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.

67 F.4th 946 (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

We begin with Epic's appeal. Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless. Despite some threshold errors, the district court proceeded to analyze Epic's evidence pursuant to the proper legal framework and did not clearly err in rejecting Epic's proposed relevant markets. In particular, Epic failed to produce any evidence showing—as our precedent requires—that consumers are generally unaware of Apple's app-distribution and IAP restrictions when they purchase iOS devices. ***

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are "not generally known" when consumers make their foremarket purchase; (2) "significant" information costs prevent accurate life-cycle pricing; (3) "significant" monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single-brand market. *** Given the total lack of evidence on consumer-unawareness, Epic cannot establish its proposed aftermarkets. So, contrary to the partial dissent's assertion, we do not proceed to apply the Sherman Act's liability standards without first defining a relevant market. Epic's proposed aftermarkets fail, and Apple did not cross-appeal the district court's rejection of its proposed market. The district court's middle-ground market of mobile-games transaction thus stands on appeal, and it is that market in which we assess whether Apple's conduct is unlawful pursuant to the Sherman Act.

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 "outlaw only *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 anticompetitive 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. 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 finally argues that, even if Apple's security and privacy restrictions are procompetitive, they increase competition in a *different market* than the district court defined and in which Epic showed step-one anticompetitive effects, and thus are not legally cognizable at step two. In Epic's view, Apple's rationales relate to the market for smartphone operating systems (or the market for smartphones), while the anticompetitive effects of Apple's restrictions impact the market for mobile-game transactions.

The Supreme Court's precedent on this issue is not clear. *** Our court's precedent is similar. While we have never expressly confronted this issue, we have previously considered cross-market rationales when applying the Rule of Reason. We decline to decide this issue here. Like Epic's general cognizability argument, Epic did not raise this argument below. Nor did it raise this argument in its opening brief before our court, denying Apple an opportunity to respond.

More importantly, we need not decide this issue because Epic's argument rests on an incorrect reading of the record. Contrary to Epic's contention, Apple's procompetitive justifications *do* relate to the app-transactions market. Because use of the App Store requires an iOS device, there are two ways of increasing App Store output: (1) increasing the *total* number of iOS device users, and (2) increasing the *average* number of downloads and in-app purchases made by iOS device users. Below, the district court found that a large portion of consumers factored security and privacy into their decision to purchase an iOS device—increasing total iOS device users. It also found that Apple's security-and privacy-related restrictions "provide[ ] a safe and trusted user experience on iOS, which encourages both users and developers to transact freely"—increasing the peruser average number of app transactions.

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.

* * *

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.

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

**PERMANENT INJUNCTION**

This permanent injunction is entered in MDL member case *Epic Games, Inc. v. Google LLC et al.*, Case No. 20-cv-05671-JD, on the jury verdict against Google under Sherman Act Sections 1 and 2, 15 U.S.C. §§ 1, 2, and the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq., and the Court's finding that Google violated the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.

1. This injunction applies to Google LLC and each of its parent, affiliated, and subsidiary entities, officers, agents, employees, and any person in active concert or participation with them, who receive actual notice of this order by personal service or otherwise (together, Google).

2. Unless otherwise stated, the effective date of the injunction is November 1, 2024.

3. The geographic scope of the injunction is the United States of America.

4. For a period of three years ending on November 1, 2027, Google may not share revenue generated by the Google Play Store with any person or entity that distributes Android apps, or has stated that it will launch or is considering launching an Android app distribution platform or store.

5. For a period of three years ending on November 1, 2027, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement by an app developer to launch an app first or exclusively in the Google Play Store.

6. For a period of three years ending on November 1, 2027, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement by an app developer not to launch on a third-party Android app distribution platform or store a version of an app that includes features not available in, or is otherwise different from, the version of the app offered on the Google Play Store.

7. For a period of three years ending on November 1, 2027, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement with an original equipment manufacturer (OEM) or carrier to preinstall the Google Play Store on any specific location on an Android device.

8. For a period of three years ending on November 1, 2027, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement with an OEM or carrier not to preinstall an Android app distribution platform or store other than the Google Play Store.

9. For a period of three years ending on November 1, 2027, Google may not require the use of Google Play Billing in apps distributed on the Google Play Store, or prohibit the use of in-app payment methods other than Google Play Billing. Google may not prohibit a developer from communicating with users about the availability of a payment method other than Google Play Billing. Google may not require a developer to set a price based on whether Google Play Billing is used.

10. For a period of three years ending on November 1, 2027, Google may not prohibit a developer from communicating with users about the availability or pricing of an app outside the Google Play Store, and may not prohibit a developer from providing a link to download the app outside the Google Play Store.

11. For a period of three years, Google will permit third-party Android app stores to access the Google Play Store's catalog of apps so that they may offer the Play Store apps to users. For apps available only in the Google Play Store (*i.e.*, that are not independently available through the third-party Android app store), Google will permit users to complete the download of the app through the Google Play Store on the same terms as any other download that is made directly

through the Google Play Store. Google may keep all revenues associated with such downloads. Google will provide developers with a mechanism for opting out of inclusion in catalog access for any particular third-party Android app store. Google will have up to eight months from the date of this order to implement the technology necessary to comply with this provision, and the three-year time period will start once the technology is fully functional.

12. For a period of three years, Google may not prohibit the distribution of third-party Android app distribution platforms or stores through the Google Play Store. Google is entitled to take reasonable measures to ensure that the platforms or stores, and the apps they offer, are safe from a computer systems and security standpoint, and do not offer illegal goods or services under federal or state law within the United States, or violate Google's content standards. The review measures must be comparable to the measures Google is currently taking for apps proposed to be listed in the Google Play Store. If challenged, Google will bear the burden of proving that its technical and content requirements and determinations are strictly necessary and narrowly tailored. Google may require app developers and app store owners to pay a reasonable fee for these services, which must be based on Google's actual costs. Google will have up to eight months from the date of this order to implement the technology and procedures necessary to comply with this provision, and the three-year time period will start once the technology and procedures are fully functional. For the duration of this time period, the Technical Committee described in paragraph 13 below will in the first instance decide challenges to Google's review decisions, with the Court serving as the final word when necessary.

13. Within thirty days of the date of this order, the parties will recommend to the Court a three-person Technical Committee. Epic and Google will each select one member of the Technical Committee, and those two members will select the third member. After appointment by the Court, the Technical Committee will review disputes or issues relating to the technology and processes required by the preceding provisions. If the Technical Committee cannot resolve a dispute or issue, a party may ask the Court for a resolution. The Technical Committee may not extend any deadline set in this order, but may recommend that the Court accept or deny a request to extend. Each party will bear the cost of compensating their respective party-designated

committee member for their work on the committee. The third member's fees will be paid by the parties in equal share.

14. The Court will retain jurisdiction over the injunction for all purposes. Google or Epic may request a modification of the injunction for good cause.

**IT IS SO ORDERED.**

Dated: October 7, 2024

JAMES DONATO
United States District Judge

United States District Court
Northern District of California

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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

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

**JOINT MOTION TO MODIFY PERMANENT INJUNCTION**

Date: December 11, 2025
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Hon. James Donato

**NOTICE OF MOTION & MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE OF MOTION AND JOINT MOTION TO MODIFY THE INJUNCTION:

PLEASE TAKE NOTICE that on December 11, 2025, or a date to be set by the Court, in Courtroom 11, 19th Floor, 450 Golden Gate Avenue, before the Honorable James Donato, Plaintiff Epic Games, Inc. ("Epic") and Defendants Google LLC *et al.* ("Google"; collectively, "The Parties") will and hereby do move this Court to modify the Permanent Injunction in the above-captioned matters to conform it to the Proposed Modified Injunction proposed by the Parties.

The Parties seek a ruling under Federal Rule of Civil Procedure 60 adopting the Proposed Modified Injunction proposed by the Parties herein and attached as Exhibit B to the Declaration of Kuruvilla Olasa.

This joint motion is based on this notice of motion and motion, the memorandum of points and authorities that follows, the concurrently filed Declaration of Kuruvilla Olasa and exhibits thereto, the pleadings, papers, and other documents on file in this action, and such other evidence and argument presented to the Court at or prior to any hearing in this matter.

DATED: November 4, 2025

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## INTRODUCTION

Epic and Google have reached a comprehensive settlement. Among other things, that settlement would resolve this case (*Epic I*) and the separate action before this Court in *Epic Games, Inc. v. Samsung Electronics Co. Ltd.* (*Epic II*) (the "Settlement," Exhibit A to Declaration of Kuruvilla Olasa ("Olasa Decl."). The Settlement terms, which have been submitted to the Court under seal, would allow the parties to put their disputes aside while making Android a more vibrant and competitive platform for users and developers. The Settlement is contingent on the Court entering, and the parties respectfully request that the Court enter, the attached Proposed Modified Injunction covering Google's conduct in the United States. Olasa Decl. Ex. B.

In its October 7, 2024 injunction (the "Existing Injunction"), Dkt. No.[1] 1017, the Court prohibited certain conduct by Google and also took steps to enhance competition in the two markets identified by the jury—Android app distribution and Android in-app payment services for digital goods and services. As explained further below, the Proposed Modified Injunction is intended to achieve those same goals in those same markets.

***First***, with respect to past app distribution conduct, the Proposed Modified Injunction tracks the Existing Injunction almost *verbatim*, prohibiting Google from sharing Google Play store revenue with would-be competitors (Paragraph 4), entering into certain kinds of most-favored or exclusivity agreements with developers (Paragraphs 5-6), or entering into certain agreements with OEMs and carriers regarding the preinstallation or placement of third-party stores (Paragraphs 7-8).

***Second***, to enhance app distribution competition, the Proposed Modified Injunction would require Google to make changes to Android to enable users to seamlessly download and install certain third-party stores—referred to as "Registered App Stores"—as well as apps from such stores. This remedy addresses the install frictions that Epic contended at trial to be a major competitive challenge for rival app stores. The parties have identified reasonable, neutral criteria

[1] All references to Dkt. No. are to the MDL docket, *In re Google Play Store Antitrust Litig.*, No. 3:21-md-02981-JD, unless otherwise noted.

that third-party stores would need to meet to qualify as "Registered App Stores," and the parties have agreed on the streamlined installation flow that would apply to Registered App Stores and apps from such stores. These modifications will give new or existing app stores that meet safety and security standards a straightforward, low-friction way to get onto users' devices. And those stores would all compete globally with each other and with the Google Play store for users and for developers, enhancing competition in the Android App Distribution Market found by the jury.

Although this remedy differs from the Catalog Access and Third-Party Store Distribution remedies in Paragraphs 11-12 of the Existing Injunction, it is an appropriate alternative with meaningful benefits. Among other things, the Registered App Stores remedy would have a longer term; instead of lasting three years, it would extend to 2032. In addition, while the Catalog Access and Third-Party Store Distribution remedies of the Existing Injunction are limited in scope to the United States—which, in Epic's view, means competing app stores could continue to face challenges in gaining necessary scale against the Google Play store's global reach—the benefits of Registered App Stores involve changes to the Android operating system that would occur everywhere and promote competition across Android. The parties also expect that, as compared to Catalog Access and Third-Party Store Distribution, the modified remedy would provide more certainty to developers and engender fewer disputes for the Court to resolve.

***Third***, with respect to payment services, the Proposed Modified Injunction maintains the Existing Injunction's requirement that Google allow developers to flexibly steer users to payment alternatives to Google Play Billing. Here too, the parties have worked out low-friction flows that would allow developers and users to seamlessly use alternative payment mechanisms, while addressing Google's views on security and safety. These alternative payment mechanisms—both in-app and via external links—would compete with each other as well as Google Play Billing, promoting competition in the Android In-App Billing Services Market found by the jury.

In addition, the Proposed Modified Injunction specifies certain maximum fees that Google would be allowed to charge—for what Google contends are the valuable services provided by the Google Play store—on transactions in Play-distributed apps that use alternative payment options (either 9% or 20%, depending on the type of transaction). The parties believe this remedy offers

meaningful benefits to developers, including the certainty of lower prices that begin promptly and last through 2032. This provision would also resolve a significant area of disagreement between the Parties with respect to the Existing Injunction. *See* Dkt. No. 1118 at 2, 6-8.

***Finally***, the parties' Proposed Modified Injunction includes in full the three-member Technical Committee established by the Existing Injunction to review disputes or issues related to the required technology and processes.

* * *

The parties are aware of the time and effort that the Court put into crafting the Existing Injunction. But the parties are likewise aware and appreciative of the Court's efforts to encourage settlement. The parties believe the Proposed Modified Injunction is "suitably tailored" to the "changed circumstance" now before the Court, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992)—that is, to the parties' comprehensive Settlement, which would bring to a close over five years of disputes. The parties respectfully request the Court's assistance to enable them to consummate the Settlement and to provide its fruits to Android developers and consumers.

The Settlement is contingent on two events. *First*, it is contingent on the Court entering the Proposed Modified Injunction. *Second*, the Settlement is contingent on the Court not conditioning its preliminary approval of the proposed State Settlement in *Utah v. Google LLC*, No. 3:21-cv-05227-JD, on Google and the States agreeing to adopt certain remedies from the Existing Injunction that Epic has chosen to forego (and that are also not contained in the proposed State Settlement).[2] In this Settlement, Google is agreeing to implement certain remedies that the Parties believe will achieve the goals of the Existing Injunction and avoid disputes regarding the implementation of certain remedies in the Existing Injunction. To achieve this result, Epic is willing to forego certain remedies in the Existing Injunction, and Google is willing to make certain commitments not currently required under the Existing Injunction and that would benefit developers and consumers. But that balance and those benefits—including avoiding disputes—

[2] The remedies at issue are the portions of Paragraphs 7, 9 and 10 of the Existing Injunction that are not in the Proposed Modified Injunction, as well as Paragraphs 11-12.

cannot be achieved if Google were required to take on the new obligations appearing in the Proposed Modified Injunction and *also* implement certain remedies from the Existing Injunction that Epic is willing to forego to reach settlement. Accordingly, and because neither party wishes for the Existing Injunction to be modified without also having the Settlement go into effect, the parties condition their request for approval of the Proposed Modified Injunction on the satisfaction of this contingency.

The parties strongly believe that the Proposed Modified Injunction, and the Settlement it will enable, will benefit the Android ecosystem as a whole, and they will be prepared to answer any questions the Court may have at the forthcoming November 6, 2025 hearing.

## LEGAL STANDARDS

The Existing Injunction provides that "Google or Epic may request a modification of the injunction for good cause." (Existing Injunction ¶ 14.) In addition, Federal Rule of Civil Procedure 60 provides that "[o]n motion and just terms, the court may relieve a party" from an order if (among other reasons) "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The Supreme Court has explained that this Rule creates a "flexible standard" for modifying an injunction. *Rufo*, 502 U.S. at 393. Under that standard, a party seeking modification of an injunction bears the burden of establishing "a significant change in facts or law [that] warrants revision of the decree." *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999) (quoting *Rufo*, 502 U.S. at 376). "If the moving party" shows a "significant change in circumstances," then "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383. A settlement between the litigants can constitute a significant change in circumstances, warranting modification of an injunction. *See Janssen Prods., L.P. v. Lupin Ltd.*, 2016 WL 3392291, at *3 (D.N.J. June 15, 2016).

Further, the court's review of a proposed stipulated injunction—similar to a consent decree—"is informed by the public policy favoring settlement." *United States v. Google Inc.*, 2012 WL 5833994, at *2 (N.D. Cal. Nov. 16, 2012); *see also Fed. Trade Comm'n v. Enforma Nat. Prods., Inc*, 362 F.3d 1204, 1218 (9th Cir. 2004) (noting that "a consent decree is 'no more than a

settlement that contains an injunction'") (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1025 (2d Cir. 1992). This type of consensual agreement between two parties "is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The relevant question is not whether the modified injunction "is one which the court itself might have fashioned, or considers as ideal," *San Diego Coastkeeper v. Baker Iron Works, Inc.*, 2025 WL 1746304, at *3 (S.D. Cal. June 23, 2025) (quotation omitted), or whether it "impose[s] all the obligations authorized by law," *Oregon*, 913 F.2d at 581. Instead, "the 'court's approval is nothing more than an amalgam of delicate balancing, gross approximations and rough justice,'" and "[t]he court need only be satisfied that the decree represents a reasonable factual and legal determination." *Google, Inc.*, 2012 WL 5833994, at *3 (quoting *Oregon*, 913 F.2d at 581). Accordingly, such agreements should generally be approved unless they are "unfair, inadequate, or unreasonable." *S.E.C. v. Rothenberg*, 2018 WL 11436313, at *2 (N.D. Cal. Oct. 16, 2018) (quoting *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984)).

## ARGUMENT

### I. THE PARTIES' SETTLEMENT IS A SIGNIFICANT CHANGE IN CIRCUMSTANCES THAT WARRANTS MODIFYING THE INJUNCTION

At the Court's prompting, the parties have engaged in several rounds of negotiations, over several months, involving their most senior executives. These negotiations have ultimately borne fruit. The parties have agreed to resolve their disputes with a Settlement that both parties believe will advance the evolution of the Android platform. This significant change in circumstances warrants modifying the Existing Injunction.

Courts have granted requests to modify an injunction where, as here, parties reach a settlement after the injunction is issued. *E.g.*, *Janssen*, 2016 WL 3392291, at *3; *see also Aurelius Cap. Master, Ltd. v. Republic of Argentina*, 644 F. App'x 98, 107 (2d Cir. 2016) (approving vacatur of injunction against Argentina after new government entered into settlements, or attempted to settle, with various classes of bondholders); *Iofina, Inc. v. Khalev,* 2018 WL 11703893, at *1 (W.D. Okla. Apr. 24, 2018) (vacating injunction after settlement); *Trumark Mfg.*

*Co. v. Saunders Archery Co*., 1994 WL 623159, at *2 (D. Neb. July 25, 1994) (dissolving injunction after settlement of trademark case that assigned defendant's trademark).

For instance, in *Janssen Products*, the court held that the defendants' products infringed the plaintiff's patents and issued a permanent injunction prohibiting the defendants from using or selling infringing products for the remainder of the patents' term. *See* 2016 WL 3392291, at *1. Some of the parties subsequently reached a settlement that would permit the defendants to sell their products on a date prior to the patents' expiration, and jointly applied to the Court to modify the injunction to reflect that settlement. *See id.* at *2. The Court held that modification of its "injunctive order" was "appropriate under Rule 60(b)(5) and 60(b)(6) because applying the judgment prospectively 'is no longer equitable.'" *Id.* at *3 (quoting Fed. R. Civ. P. 60(b)(5)). The Court explained that the settlement was "a 'significant change . . . in factual conditions,'" and that, in light of the "strong policy 'in favor of voluntary settlement agreements,' it would be inequitable for the Court to refuse to modify a judgment preventing the parties from carrying out this settlement." *Id.* (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)).

The same is true here. The Ninth Circuit has recognized a "strong judicial policy that favors settlements of disputes." *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 939 (9th Cir. 2007) (quotation marks omitted). The parties' Settlement would put to rest their disagreements, benefit Android users and developers, as well as promote competition on the Android platform, in several respects.

*First*, as indicated in their October 30, 2025 submission, the parties have disagreements regarding the Existing Injunction that, absent settlement, would need to be resolved by the Technical Committee and the Court. *See* Dkt. No. 1118 at 2, 6-8. The parties' Settlement would moot those disagreements.

*Second*, the parties are engaged in ongoing litigation before the Court in *Epic II*, where Epic brings claims relating to the screens shown to users when downloading Epic's apps and app store on an Android device. Recently, the Court ordered the parties in *Epic II* to engage in settlement discussions. *See* Minute Entry, *Epic v. Samsung*, Case No. 3:24-cv-06843-JD (N.D. Cal. Sept. 11, 2025), Dkt. No. 109. The parties' Settlement would resolve that litigation entirely.

*Third*, the parties' Settlement would preempt any disputes regarding the Catalog Access and Third-Party Store Distribution remedies that, unless the Existing Injunction is modified, will go into effect on July 22, 2026. In establishing the Technical Committee, the Court recognized that "issues about security and the like" would "come up" and have to be resolved. *In re Google Play Store Antitrust Litig.*, 2024 WL 4438249, at *9 (N.D. Cal. Oct. 7, 2024). The Ninth Circuit similarly recognized the prospect of "inevitable disputes between the parties" and affirmed the Court's decision to create a Technical Committee "process to review" those disputes. *In re Google Play Store Antitrust Litig.*, 147 F.4th 917, 954 (9th Cir. 2025). By replacing the Catalog Access and Third-Party Store Distribution remedies with the Registered App Store process agreed to by the parties, the parties' Settlement would avoid disputes about the "potential security and technical risks involved" in the former. 2024 WL 4438249, at *7. As explained in more detail below, Google has agreed to modify future versions of the Android operating system to enable a user to install a Registered App Store that meets specified security and safety standards from a website by clicking on a single install screen using neutral language, thereby eliminating a barrier to entry found by the Court and promoting competition among Android app stores through streamlined distribution of qualified app stores from websites.

*Fourth*, the parties' Settlement would resolve Epic's motion for attorney's fees. Dkt. No. 1094-2. That motion practice involves extensive briefing, including attorney and expert witness declarations regarding the work of numerous attorneys on this case for the last five years. The parties' Settlement would obviate the need for the parties and the Court to adjudicate any disputes over fees.

In light of the parties' agreement to resolve their disputes while enhancing competition on the Android platform, it would be inefficient and unproductive to force the parties to continue operating under the Existing Injunction and litigate any disputes about that order.

## II. THE PROPOSED MODIFIED INJUNCTION WILL ENHANCE COMPETITION IN THE RELEVANT MARKETS

The parties' Proposed Modified Injunction "does not 'discard'" the Court's "previous decision," and "leaves intact" the jury's verdict and many of the core provisions of the Court's

Existing Injunction. *See Janssen*, 2016 WL 3392291, at *4. Rather than retreat from the Court's efforts to restore competition in the Android app distribution and Android in-app billing markets found by the jury, the Proposed Modified Injunction will enhance those efforts , and avoid potential delays and uncertainties created by disputes between the parties.

**A. Competition in the Android App Distribution Market**

**1. The Proposed Modified Injunction Addresses Past Conduct That Was Before the Jury**

The Proposed Modified Injunction preserves the key portions of the Existing Injunction that prohibit certain conduct by Google with respect to the Android App Distribution Market that was at issue in this case.

- **Revenue Sharing**: Existing Injunction ¶ 4 prohibits Google from sharing Google Play store revenue with any entity that "distributes Android apps, or has stated that it will launch or is considering launching an Android app distribution platform or store." The Proposed Modified Injunction retains this provision without modification.
- **No App Distribution Exclusivity**: Existing Injunction ¶ 5 prohibits Google from entering into agreements that would require an app to be launched "first or exclusively" on the Google Play Store. Paragraph 5 of the Proposed Modified Injunction includes a similar prohibition, but modifies it in two ways. *First*, the Proposed Modified Injunction makes clear an issue that the parties disputed, and it does so in a way that is favorable to developers and competing app stores. It makes explicit that the prohibition covers sim-ship agreements, *i.e.*, agreements to launch on Play "at the same time" as on any other Android store. *Second*, the Proposed Modified Injunction makes clear that Google can negotiate with developers for distribution exclusivity or parity of their apps on *Android* vis-à-vis *Apple*, as long as developers can meet any such exclusivity or sim-ship obligation in the United States by launching their Android app for distribution in the United States on *any* Android app store, *i.e.*, they need not launch on the Google Play store.
- **Feature Parity**: Existing Injunction ¶ 6 prohibits Google from requiring an app to offer the same features on the Google Play store as it does on another Android app store. The

Proposed Modified Injunction contains the same provision.

- **Placement**: Existing Injunction ¶ 7 prohibits Google from conditioning any payment or benefit on an agreement with an OEM or carrier "to preinstall the Google Play Store on any specific location on an Android device" (*e.g.* the home screen of a device). The Proposed Modified Injunction relaxes that prohibition somewhat, by prohibiting Google from conditioning any payment or benefit on an agreement with an OEM or carrier to prevent another store from being installed in any specific location. This provision ensures that Google cannot interfere with the placement of any third-party store, but leaves Google free to compete for its own placement agreements.
- **Exclusivity**: Existing Injunction ¶ 8 prohibits Google from conditioning any payment or benefit on an agreement with an OEM or carrier to make the Google Play store the exclusive preinstalled app store. The Proposed Modified Injunction retains this provision without modification.

In sum, like the Existing Injunction, the Proposed Modified Injunction ensures that Google cannot engage in the practices determined by the Court or jury to be anticompetitive with respect to the Android App Distribution Market.

**2. The Proposed Modified Injunction Would Enhance Competition in App Distribution.**

The Proposed Modified Injunction addresses the Court's conclusions regarding the continuing effects of Google's past conduct through a new Registered App Store remedy, which replaces the Catalog Access and Third-Party Store Distribution remedies in the Existing Injunction.

The Registered App Store remedy simplifies the process for an Android app store to be installed on user devices and for users to download apps from such stores, while allowing Google to take reasonable steps to protect user security and safety. Those steps are not left open-ended but are instead specified in the parties' Settlement. The Registered App Store Remedy is also timed to last for roughly six-and-a-half years—over twice as long as the corresponding remedies in the Existing Injunction—which will provide competing app stores even greater certainty and

predictability.

The Registered App Stores remedy requires Google to modify the Android operating system to simplify the installation and download flow for all Registered App Stores. When a user downloads a Registered App Store, the user will see a single screen explaining that (1) the store is a registered app store, (2) upon installation the store will be able to install and manage apps on the device, and (3) the entity responsible for the app store will manage downloads and updates for apps distributed by the store. The parties have agreed on neutral language to explain these details to the user. If the user clicks "install," the store will be installed and the operating system will give it the permissions necessary to install and update apps. Olasa Decl. Ex. C at 1.

With those permissions, the installation flow for apps downloaded and installed through Registered App Stores will be similar to the flow for downloading apps from the Play Store. That simplified flow, reflected in Exhibit C, is also established in the Settlement. Olasa Decl. Ex. C at 2 (final two screens pictured).

To address Google's view that app and app store downloads could be used by bad actors as a vector for fraud or malware, the parties have also agreed that Google may apply specified neutral safety and security criteria to review stores for certification as Registered App Stores. That process is conceptually similar to a remedy proposed by Epic's expert at trial. (*See* Trial Tr. vol. 11, 2156:25-2163:2, Nov. 21, 2023, Dkt. No. 844 ("Android is going to check to see if the app bears that notarization sort of stamp of approval. If so, Android does not show that friction screen . . . .").) Google will be permitted to charge reasonable fees to cover the operational costs of this review process. And the Technical Committee can provide guidance on any implementation questions relating to this remedy.

The Registered App Stores remedy will promote competition in the Android app distribution market by streamlining the process for downloading qualified Android app stores and downloading apps from those qualified stores, thereby making it easier for Google Play store competitors to offer their product directly to Android users, while also ensuring the safety and security of Android users.

The Existing Injunction took a different approach to this issue, requiring Google to offer,

for three years, its catalog of apps to competitor app stores (Catalog Access) and to distribute, for three years, competitor app stores through the Play Store (Third-Party Store Distribution). The Court recognized that "there are potential security and technical risks involved in making third-party apps available, including rival app stores," and the Court established the Technical Committee to help address them, recognizing that the Court would still need to be the decision maker of last resort. 2024 WL 4438249, at *7. The parties' remedies filings evidenced significant disagreements over such issues, including (among other things) the mechanism for disseminating and updating the Play Store catalog; the installation flow for apps in Google's catalog from third-party stores; the method of displaying third-party stores in the Play Store; the installation flow for third-party stores from the Play Store; and the adoption of eligibility criteria, policies, and fees for both Catalog Access and Third-Party Store Distribution. *See, e.g.*, Dkt. Nos. 982-2 (Google's Proffer), 986-2 (Epic's Response), 996 (Google's Supplemental Response).

The Proposed Modified Injunction significantly reduces the scope and magnitude of these implementation disputes by adopting an agreed-upon approach that would directly "lower the barriers for rival app stores to get onto users' phones," which was the purpose of "enjoining Google from prohibiting the presence of rival app stores in the Google Play Store." 2024 WL 4438249, at *7. This approach will reduce the need for "continuing supervision" by the Court. *NCAA v. Alston*, 594 U.S. 69, 102 (2021). To be sure, the parties may come to disagree on certain aspects of the implementation of the Registered App Stores remedy, and the Proposed Modified Injunction preserves the Technical Committee to resolve such disagreements in the first instance. But those disagreements will be narrower and less complex than those that were likely to arise in implementing Catalog Access and Third-Party Store Distribution.

The Proposed Modified Injunction, and the Settlement it enables, also address a limitation of the Catalog Access and Third-Party Store Distribution remedies arising from the territorial scope of the Existing Injunction. In Epic's view, because the Existing Injunction applied only to the United States, even when those remedies were in full bloom, third-party app stores would still face challenges in building the scale necessary to compete vigorously with the Google Play store, with its global footprint. If the Court adopts the Modified Injunction and the Settlement goes into

effect, however, the Registered App Store program will result in changes to the Android operating system worldwide, thereby strengthening competition across Android, including in the United States.

In sum, the Proposed Modified Injunction effectuates the Settlement of the parties' remaining disputes while enhancing the provisions of the Existing Injunction that this Court adopted to restore competition to the Android app distribution market that the jury found. As such, the parties' Proposed Modified Injunction is "suitably tailored to the changed circumstances" created by the parties' Settlement. *Janssen*, 2016 WL 3392291, at *4 (quoting *Rufo*, 502 U.S. at 383).

**B. Competition in the Android In-App Billing Market**

Like the Existing Injunction, the Proposed Modified Injunction promotes competition in the Android In-App Billing Market by allowing developers to promote in-app and external alternatives to Google Play Billing in their apps. Epic argued at trial, and the jury found, that Google monopolized the Android In-App Billing Market by requiring developers to use Google Play Billing to process transactions for digital goods in apps downloaded from the Play Store. The Existing Injunction addresses this issue by, among other things, requiring Google to allow developers to offer alternative in-app payment methods and by requiring Google to allow developers to communicate with users about the availability and pricing associated with the use of an alternative billing option to Google Play Billing.

The Proposed Modified Injunction preserves these requirements and further clarifies developers' ability to communicate about alternative purchase options by using external *links* that take users outside the app to complete transactions. The Proposed Modified Injunction further enhances the protections of the Existing Injunction by (1) prohibiting Google from burdening the use of in-app or external payment methods by restricting how they look, what they say or where they appear in the app[3] (with Google able to implement reasonable user experience guidelines and

[3] The Proposed Modified Injunction reads: "Google may not burden the use of in-app alternative payment options or external links by limiting their design, placement (except Google may require side-by-side placement), formatting or messaging, or by requiring the user to change any settings or navigate other frictions in order to use them." Olasa Decl. Ex. B, at 2.

require developer compliance with certain trust and safety policies), and (2) prohibiting Google from discriminating against developers based on whether they choose to offer alternative payment methods. The Proposed Modified Injunction also extends the benefits of all of these protections to 2032.

- **Steering to Alternative In-App Payment Mechanisms**: The Proposed Modified Injunction enables developers to steer users to alternative in-app payment mechanisms. Under the Proposed Modified Injunction, the alternative options will be shown side-by-side, next to Google Play Billing. Although developers would not be able to omit Google Play Billing altogether, the Proposed Modified Injunction still allows rival payment solutions to compete on the basis of price and other features. Specifically, the developer will be free to set and to show users different prices for the alternative payment options and Google Play Billing. Thus, under the Proposed Modified Injunction, a developer may sell a subscription (or other digital good) in its app, offer users the choice to process the purchase of that subscription using either Google Play Billing or another payment method, charge a lower price for the other payment method, and show users the two prices for the different payment options side-by-side in the app.
- **Steering to In-App External Links**: The Proposed Modified Injunction also expressly allows developers to offer users the option to complete digital transactions through in-app links to external payments on websites. Thus, under the Proposed Modified Injunction, in addition to the scenario above, a developer may sell a subscription (or other digital good) in its app, offer users the option to process the purchase of that subscription using a link to an external website, charge a lower price for the external website than for Google Play Billing, and show users the two prices for the different payment options side-by-side in the app. Unlike the Existing Injunction, the Proposed Modified Injunction does not allow developers to offer links to app *downloads*. Instead, the Proposed Modified Injunction provides a streamlined process for downloading stores—and then apps within those stores—through the Registered App Store program, which includes a neutral security and safety review. *See supra,* Part II.A.2.

The Proposed Modified Injunction allows Google to adopt reasonable user experience guidelines for alternative payment options and to review external links to transactions for compliance with trust and safety policies. Subject to the limits described below, see discussion *infra* pp. 14-15, the Proposed Modified Injunction also allows Google to assess a service fee on transactions completed using alternative payment methods, including transactions on a linked website within 24 hours. The Proposed Modified Injunction also permits Google to separately assess a fee for transactions that are processed by Google Play Billing. In setting that fee, Google will have to account for the competition from all the forms of alternative billing permitted under the Proposed Modified Injunction.

**C. Service Fees**

Under the Proposed Modified Injunction, the Google Play store is free to assess service fees on transactions, including when developers elect to use alternative billing mechanisms. Those fees will be set by competitive conditions, including the competition promoted by the remedies described in the preceding sections. But to address Epic's concern that it will take time, even with the remedies described above, for competition to discipline Google Play's service fees, the Proposed Modified Injunction caps the service fees that Google may charge. Specifically, under the Proposed Modified Injunction, for digital transactions in apps downloaded from the Google Play store, Google may not charge a service fee of more than 9% or 20% (depending on the type of transaction and the date on which the app was installed).[4] While Google's fees ultimately will be determined in light of competitive conditions, Epic and Google agree that the service fee ceilings in the Proposed Modified Injunction will provide immediate, meaningful benefits to developers and consumers.

This aspect of the Proposed Modified Injunction resolves a significant dispute between the Parties as to the implementation of the Existing Injunction. Prior to the Settlement, the Parties were preparing to dispute the issue of whether (and, if so, to what degree) Google may charge service fees on transactions processed using alternate payment methods. *See* Dkt. No. 1118 at 2.

[4] As noted above, Google may separately charge for the use of Google Play Billing, and there are separate provisions ensuring that those fees are disciplined by competition.

In the context of this Settlement and with the consent of the parties, the Court has the authority to include such limits in the Proposed Modified Injunction. *See, e.g.*, *Am. Soc'y of Composers, Authors & Publishers v. Showtime*, 912 F.2d 563, 565 (2d Cir. 1990) (upholding order setting a specific fee—of 15 cents per subscriber—pursuant to a consent decree that provided that "in the event of a dispute concerning the amount of a fee . . . the District Court for the Southern District of New York is authorized to determine a reasonable fee"); *Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc.*, 681 F.3d 76, 78 (2d Cir. 2012) (upholding specific dollar fee set by the court, "acting as a rate court pursuant to a consent decree"); *United States v. Miller Indus., Inc.*, 2000 WL 33141220, at *3 (D.D.C. Dec. 12, 2000) (approving consent decree that set maximum prices for a list of patents to be licensed).

## CONCLUSION

The parties' Settlement will provide significant benefits to Android users and developers—with many key provisions lasting until 2032—and will promote competition on the Android platform while retaining many of the core provisions of the Existing Injunction. The Settlement and Proposed Modified Injunction will (i) provide a longer remedies period than the Existing Injunction; (ii) promote Android app store competition across Android by introducing a greatly simplified flow for the installation from the web of Registered App Stores (and of apps from those stores) that would apply around the world; (iii) allow developers to offer alternative payment options, including through links to payment websites; and (iv) provide developers with the immediate benefit of a reduction to Google's service fees. The Settlement accomplishes all this while also resolving the current disputes between the parties and minimizing the prospect of future disputes over remedies implementation and the associated burden on the Court. The parties respectfully submit that the changed circumstances presented by the benefits offered by the Settlement warrant entry of the Proposed Modified Injunction, without re-introducing the specified foregone remedies as a condition of preliminarily approving the proposed settlement between Google and the States.

DATED: November 4, 2025

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Jonathan I. Kravis
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DATED: November 4, 2025

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**CIVIL L.R. 5-1(i)(3) ATTESTATION**

Pursuant to Civil L.R. 5-1(i)(3), the filer of this document attests that concurrence in the filing of the document has been obtained from each of the other signatories.

By: */s/ Kuruvilla Olasa*

Kuruvilla Olasa

# EXHIBIT B

**Modified *Epic v. Google* Injunction**

This modified permanent injunction is entered in MDL member case *Epic Games, Inc. v. Google LLC et al.*, Case No. 20-cv-05671-JD, based on the joint motion filed by the parties. This injunction supersedes the permanent injunction entered by the Court on October 7, 2024, ECF No. 1017.

1. This injunction applies to Google LLC and each of its parent, affiliated, and subsidiary entities, officers, agents, employees, and any person in active concert or participation with them, who receive actual notice of this order by personal service or otherwise (together, Google). The term "Android" as used in this injunction refers to smartphones and tablets that run the Android operating system and the term "Android apps" refers to apps for Android smartphones and tablets. The term "app" or "apps" means all applications, including games, but excludes app stores.

2. Unless otherwise stated, the effective date of the injunction is seven (7) days after the Court enters this modified injunction (the "Effective Date").

3. The geographic scope of the injunction is the United States of America.

4. For a period of three years from the Effective Date, Google may not share revenue generated by the Google Play Store with any person or entity that distributes Android apps, or has stated that it will launch or is considering launching an Android app distribution platform or store.

5. For a period of three years from the Effective Date, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement by an app developer to launch an app first, exclusively, or at the same time in the Google Play Store, anywhere in the world, as compared to the launch date of that app on another app distribution platform or store for smartphones and/or tablets in the United States. Notwithstanding the prior sentence, Google may condition a payment, revenue share, or access to any Google product or service on an agreement by an app developer to launch an app first, exclusively or at the same time on the Android platform, provided that the developer is free to choose any Android app store for distribution in the United States.

6. For a period of three years from the Effective Date, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement by an app developer not to launch on a third-party Android app distribution platform or store in the United States a version of an app that includes features not available in, or is otherwise different from, the version of the app offered on the Google Play Store (anywhere in the world).

7. For a period of three years from the Effective Date, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement with an original equipment manufacturer (OEM) or carrier to refrain from placing a third party Android app store on any specific location on an Android device.

8. For a period of three years from the Effective Date, Google may not condition a payment, revenue share, or access to any Google product or service, on an agreement with an OEM or carrier not to preinstall an Android app distribution platform or store other than the Google Play Store.

9. For a period beginning on the later of (i) December 3, 2025, and (ii) 21 days after the Effective Date through June 30, 2032, Google will permit apps installed/updated by the Google Play store to show alternative payment options for digital transactions via external transaction web links and/or alternative in-app payment options. Alternative payment options shall be shown side-by-side along with Google Play Billing, and developers may show different prices and benefits for digital transactions processed using alternative payment options. Google may not (1) prohibit a developer from communicating with users about the availability of such alternative payment methods, (2) require a developer to set a price based on whether Google Play Billing is used, or (3) discriminate against any developer based on whether the developer offers alternative in-app payment options or external purchasing links.

a. Google may not burden the use of in-app alternative payment options or external links by limiting their design, placement (except Google may require side-by-side placement), formatting or messaging, or by requiring the user to change any settings or navigate other frictions in order to use them. Notwithstanding the preceding sentence, Google may adopt reasonable user experience guidelines in connection with alternative payment options. Google may review external transaction links for compliance with reasonable trust and safety policies to protect users and their payment data and to address illegal or harmful content on the destination page.

b. Google may assess a service fee on transactions completed using alternative payment methods, including transactions made on a linked website within up to 24 hours of using an external link on versions of Android where Google makes available a relevant API to track such transactions. The transaction tracking API may be used by Google for the primary purpose of facilitating payment to Google and accounting. Google may not share data from the API with third parties or use data from the API for the purpose of ads targeting or competing with the developer's app. Any API shall not interfere with developers' ability to offer or communicate about alternative payment methods, including external transaction links.

10. For a period beginning on the later of (i) December 3, 2025, and (ii) 21 days after the Effective Date through June 30, 2032, Google may not prohibit a developer from communicating with users inside or outside of an app about the availability or pricing of an app (including an app store) outside the Google Play Store. This paragraph does not require Google to permit a developer to include an in-app link leading to an app or app store download within apps installed or updated on the Google Play Store.

11. For a period beginning no later than March 31, 2026 through June 30, 2032, for digital goods purchases set forth in the second paragraph of this Section 11, Google Play and

Google Android shall not charge revenue proportionate or per purchase fees for apps first installed/updated from Google Play on or after October 30, 2025 ("New Installs") other than (1) the Google Play service fees set forth below; (2) fees for the use of Google Play Billing; and (3) applicable taxes. Google shall independently determine its fees, subject to the limitations provided for below.

Google may not charge a service fee greater than 20% for in-app and linked purchases in games (1) where such purchases provide more than a de minimis gameplay advantage, including but not limited to purchases that impact game outcomes, gameplay progress rate, or player power, or (2) purchases with random outcomes (such as "loot boxes"). Google may not charge a service fee greater than 9% for (1) in-app and linked purchases, in games, where such purchases do not provide more than a de minimis gameplay advantage, including purchases for content, levels, events, or cosmetic items; (2) in-app subscriptions for apps; and (3) in-app and linked purchases in non-game apps. Google may not charge a service fee greater than 9% (excluding any Google Play Billing fee) for apps sold upfront in the Google Play Store. For the avoidance of doubt, Google may charge the higher service fee for a bundle that includes items subject to two different service fees. For an in-app or linked purchase of virtual currency which can be used to obtain multiple kinds of items whose service fees differ, the higher service fee may apply until and unless a portion of the virtual currency use can be attributed and pro-rated to items bearing the lower service fee.

Google may establish eligibility requirements for these fees requiring the developer to build, with reasonably equivalent quality, a version of their application for Android smartphones and tablets that exists on other major mobile ecosystems.

12. For a period beginning on the Effective Date through June 30, 2032, for purchases in apps installed or updated by Google Play that do not qualify as New Installs, Google may not charge a service fee greater than 20% when payments are processed via external web links.

13. For a period beginning on the Effective Date through June 30, 2032, Google will continue to permit third-party app stores to operate on Android free of charge and will continue to permit the direct downloading of apps from developer websites and third-party stores without any fees being imposed for those downloads unless the downloads originate from linkouts from apps installed/updated by Google Play (excluding web browsers). Google will develop and release in a version of the next major Android release a process to certify an Android app store as a "Registered App Store" and will maintain this feature through June 30, 2032.

a. Starting with a version of the next major Android release through June 30, 2032, Google will modify future versions of the Android operating system so that a user can install a Registered App Store from a website by clicking on a single store install screen using neutral language. This will also grant the permission to the store to install apps.

b. Google may create reasonable requirements for certification as a Registered App Store, including but not limited to review of the app store by Google's Android

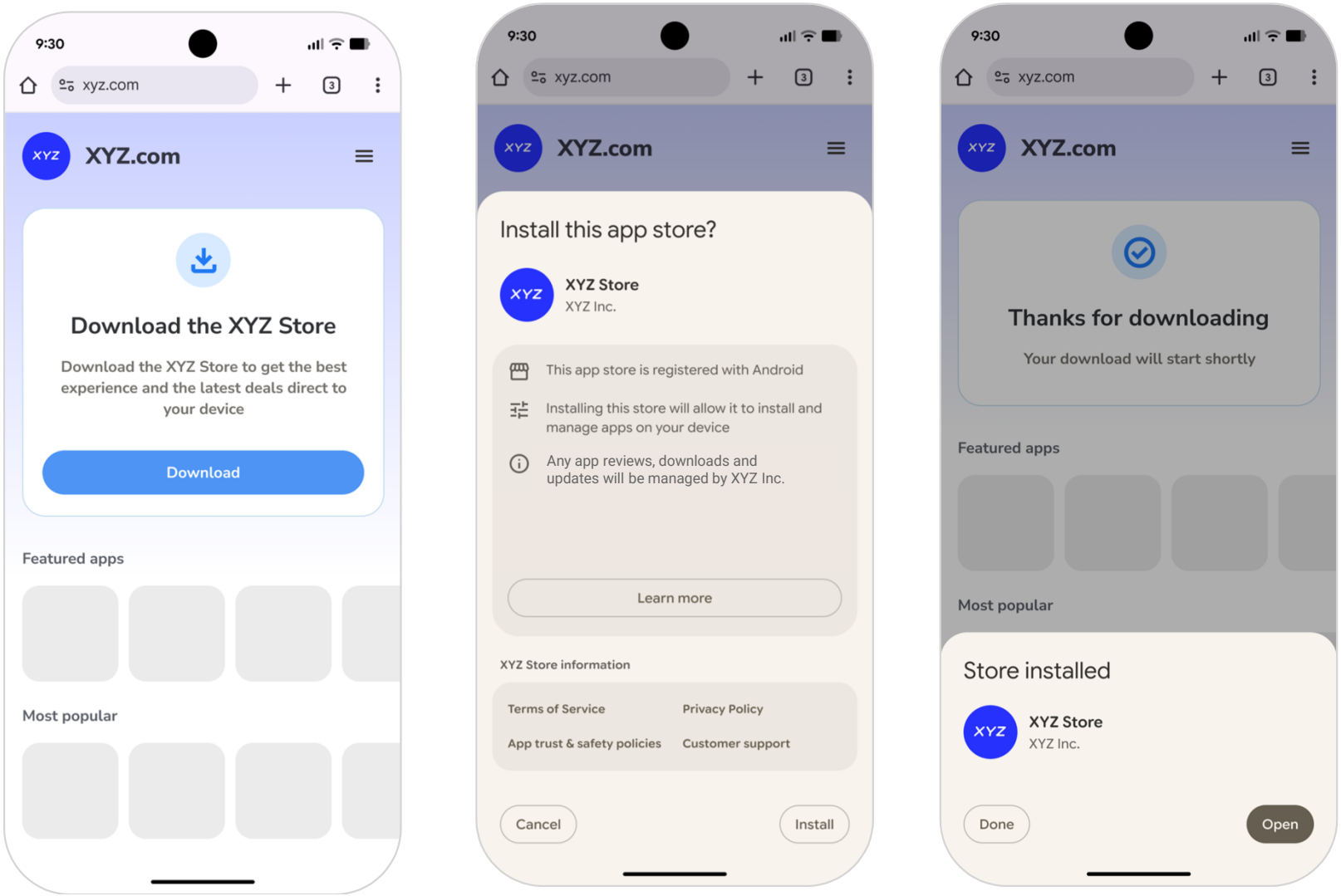
team and the payment of reasonable fees to cover the operational costs associated with the review and certification process. Such fees may not be revenue proportionate.

14. The parties will recommend to the Court a three-person Technical Committee. Epic and Google will each select one member of the Technical Committee, and those two members will select the third member. After appointment by the Court, the Technical Committee will review disputes or issues relating to the technology and processes required by the preceding Paragraphs. If the Technical Committee cannot resolve a dispute or issue, a party may ask the Court for a resolution. The Technical Committee may not extend any deadline set in this order. Each party will bear the cost of compensating their respective party-designated committee member for their work on the committee. The third member's fees will be paid by the parties in equal share.

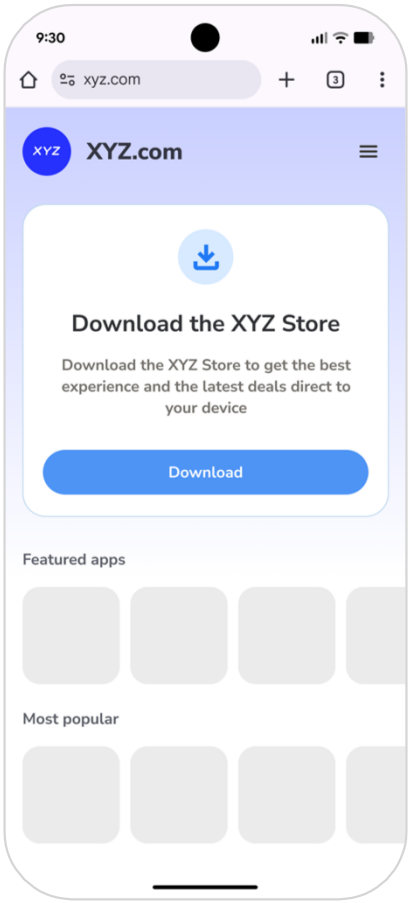
15. The Court will retain jurisdiction over the injunction for all purposes. Google or Epic may request a modification of the injunction for good cause.

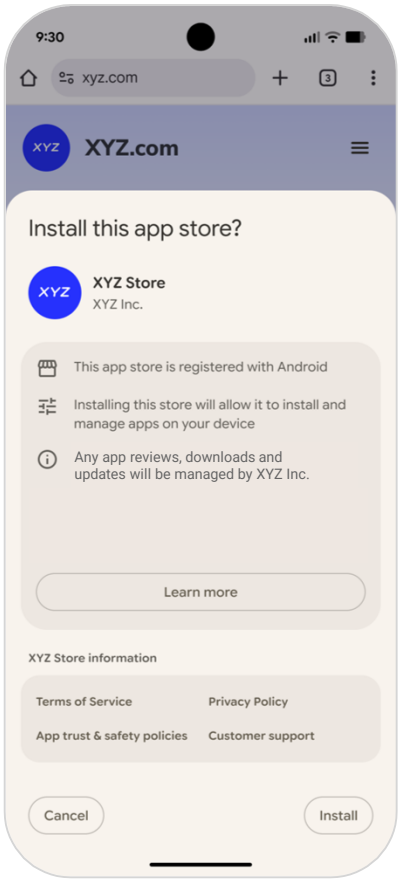
# EXHIBIT C

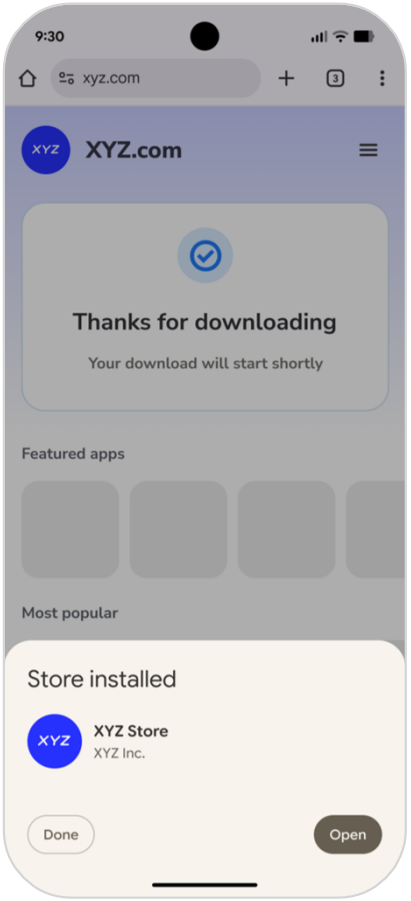
# Unified Install and Permission flow

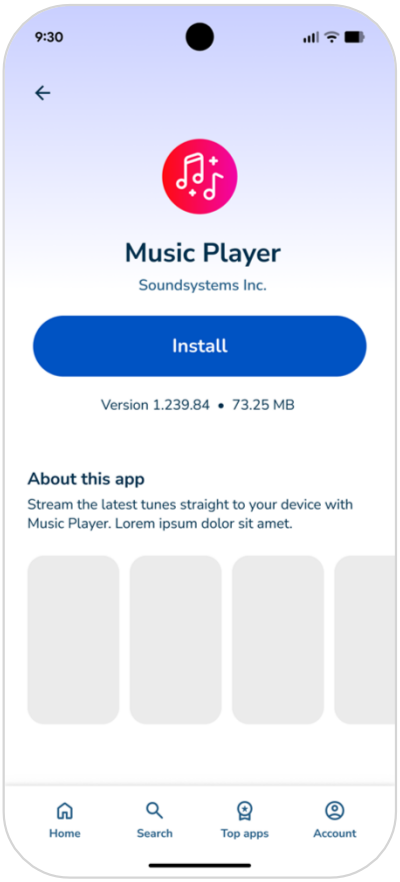


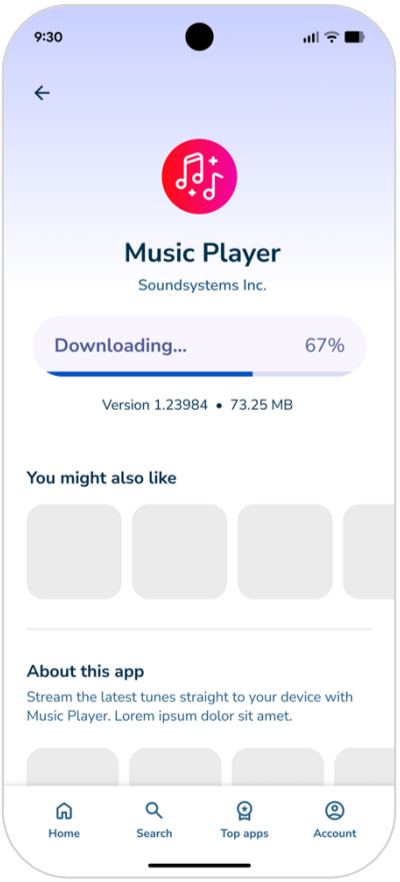
# Unified Install and Permission flow



European Commission - Press release

# Antitrust: Commission seeks feedback on commitments offered by Amazon concerning marketplace seller data and access to Buy Box and Prime

Brussels, 14 July 2022

The European Commission invites comments on commitments offered by Amazon to address competition concerns over its use of non-public marketplace seller data and over a possible bias in granting sellers access to its Buy Box and its Prime programme.

**The Commission's investigations**

Amazon is a data-driven company whose retail decisions are for most driven by automated systems, fuelled by the relevant data. Amazon has a dual role as a platform. It runs a marketplace where independent sellers can sell products directly to consumers and at the same time, it sells products on its platform as a retailer, in competition with independent sellers. As a result of this dual position, Amazon, has access to large sets of data about the independent sellers' activities on its platform, including non-public business data.

On 17 July 2019, the Commission opened a formal investigation to assess whether Amazon's **use of non-public data** from independent retailers selling in its marketplace breached EU competition rules. On 10 November 2020, the Commission issued a Statement of Objections outlining its preliminary view that Amazon should not rely on independent sellers' business data to calibrate its retail decisions, as this distorts fair competition on its platform and prevents effective competition.

In parallel, the Commission opened a second investigation into:

i. Amazon's **Buy Box**, which prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button, and;

ii. Amazon's **Prime programme**, which offers premium services to customers for a monthly or yearly fee and allows independent sellers to sell to Prime customers under certain conditions.

The Commission preliminarily found that the rules and criteria for the Buy Box and Prime unduly favour Amazon's own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services. This bias may harm other marketplace sellers, their independent carriers, other marketplaces, as well as consumers that may not get to view the best deals.

**The offered commitments**

To address the Commission's competition concerns in relation to both investigations, Amazon has offered the following commitments:

- **With respect to the marketplace seller data,** Amazon commits to refrain from using non-public data relating to, or derived from, the activities of independent sellers on its marketplace, for its retail business that competes with those sellers. This would apply to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for the purposes of retail decisions. The relevant data would cover both individual and aggregate data, such as sales terms, revenues, shipments, inventory related information, consumer visit data or seller performance on the platform. Amazon commits not to use such data for the purposes of selling branded goods as well as its private label products.
- **In relation to the Buy Box** Amazon commits:
  - to apply equal treatment to all sellers when ranking their offers for the purposes of the selection of the winner of the Buy Box;
  - and in addition, to display a second competing offer to the Buy Box winner if there is a second offer that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide for the same purchasing experience. This will enhance consumer choice.
- **Lastly, regarding Prime** Amazon commits:

- to set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;
- to allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice;
- not to use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services. This is to ensure that carriers' data is not flowing directly to Amazon's competing logistics services.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments related to Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority which already imposed remedies on Amazon with regard to the Italian market.

The commitments would remain in force for five years. Their implementation would be monitored by a monitoring trustee who would report regularly to the Commission.

The Commission invites all interested parties to submit their views on Amazon's proposed commitments before 9 September 2022.

A summary of the proposed commitments will be published in the EU's Official Journal. The full text of the commitments will be available on DG Competition's website.

**Background**

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant market position, including the imposition of unfair pricing in the form of excessive prices. The implementation of these provisions is defined in the EU's Antitrust Regulation, (Council Regulation (No) 1/2003), which is also applied by national competition authorities.

Article 9(1) of the Regulation (No) 1/2003 enables companies investigated by the Commission to offer commitments in order to meet the Commission's concerns and empowers the Commission to make such commitments binding on the companies. Article 27(4) of Regulation (No) 1/2003 requires that before adopting a decision pursuant to Article 9 of Regulation (No) 1/2003, the Commission shall provide interested third parties with an opportunity to comment on the offered commitments.

If the market test indicates that the commitments address the competition concerns, the Commission may adopt a decision making them legally binding Amazon. Such a decision would not conclude that there is an infringement of EU antitrust rules, but would legally bind Amazon to respect the commitments it has offered.

If Amazon breaks such commitments, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of the EU antitrust rules.

More information on the investigations is available on the Commission's competition website in the public case register under the case numbers AT.40462 and AT.40703.

IP/22/4522

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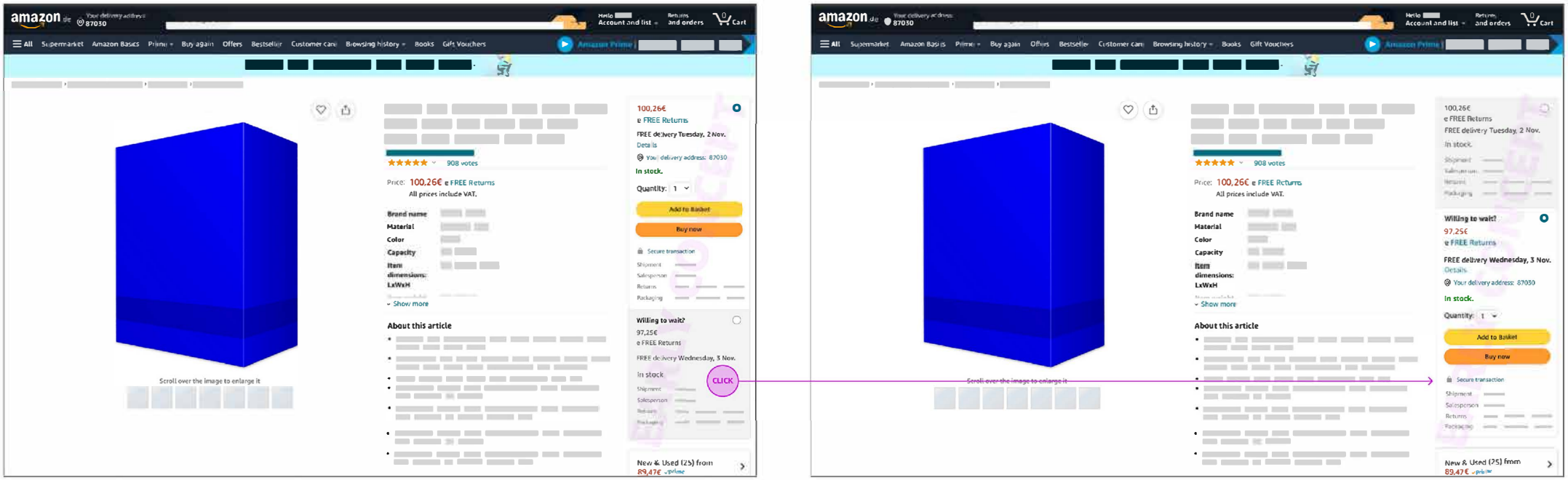
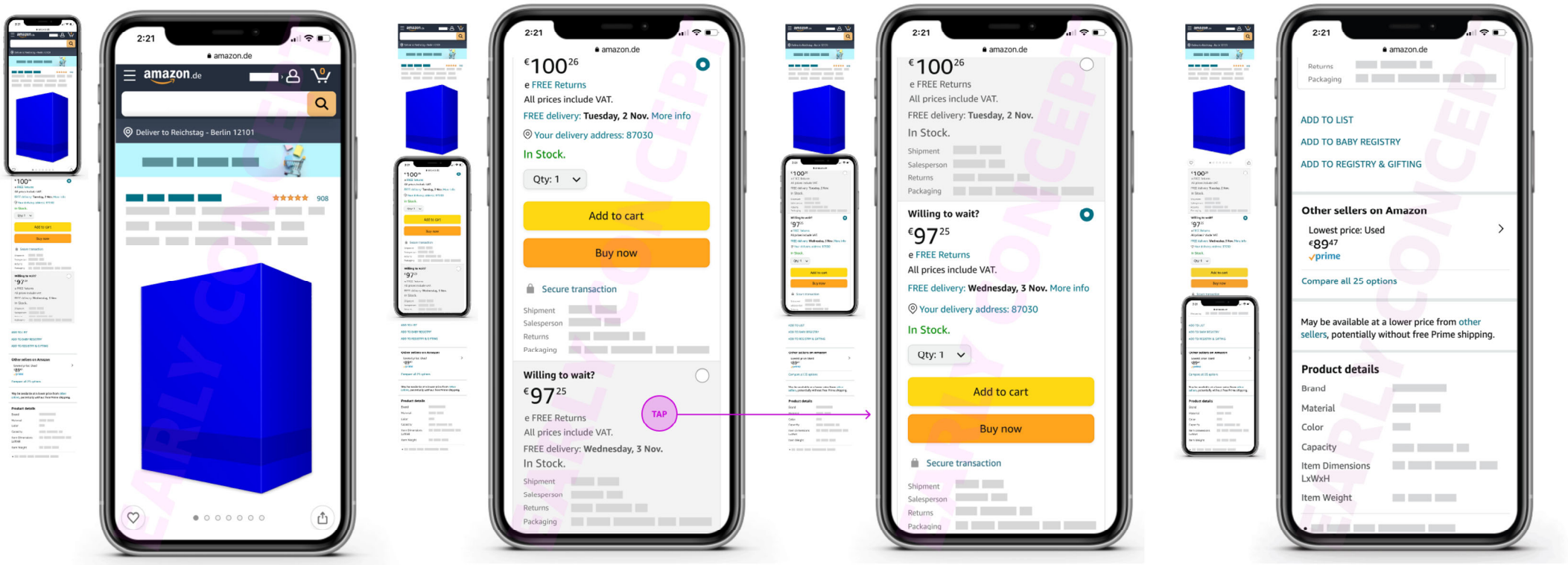
Maria TSONI (+32 2 299 05 26)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

The display of a second Offer in the Offer Display

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May be available at a lower price from other sellers, potentially without free Prime shipping.
Product details
Brand
Material
Color
Capacity
Item Dimensions LxWxH
Item Weight

European Commission - Press release

# Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime

Brussels, 20 December 2022

The European Commission has made commitments offered by Amazon legally binding under EU antitrust rules. Amazon's commitments address the Commission's competition concerns over Amazon's **use of non-public marketplace seller data** and over a possible bias in granting to sellers access to its **Buy Box** and its **Prime programme**.

**The Commission's concerns**

In July 2019, the Commission opened a formal investigation into Amazon's **use of non-public data** of its marketplace sellers. On 10 November 2020, the Commission adopted a Statement of Objections in which it preliminarily found Amazon dominant on the French and German markets, for the provision of online marketplace services to third-party sellers. It also found that that Amazon's reliance on marketplace sellers' non-public business data to calibrate its retail decisions, distorted fair competition on its platform and prevented effective competition.

In parallel, on 10 November 2020, the Commission opened a second investigation to assess whether the criteria that Amazon sets to select the winner of the **Buy Box** and to enable sellers to offer products under its **Prime Programme**, lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services.

In the second investigation, the Commission preliminarily concluded that Amazon abused its dominance on the French, German and Spanish markets for the provision of online marketplace services to third-party sellers.

It also preliminarily concluded that Amazon's rules and criteria for the Buy Box and Prime unduly favour its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.

**The commitments**

To address the Commission's competition concerns in relation to both investigations, Amazon initially offered the following commitments:

**- To address the data use concern,** Amazon proposed to commit:

- not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace, for its retail business. This applies to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for retail decisions;
- not to use such data for the purposes of selling branded goods as well as its private label products.

**- To address the Buy Box concern,** Amazon proposed to commit to:

- treat all sellers equally when ranking the offers for the purposes of the selection of the Buy Box winner;
- display a second competing offer to the Buy Box winner if there is a second offer from a different seller that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide the same purchasing experience.

**- To address the Prime concerns** Amazon proposed to commit to:

- set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;
- allow Prime sellers to freely choose any carrier for their logistics and delivery services and

negotiate terms directly with the carrier of their choice;

- not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services.

Between 14 July 2022 and 9 September 2022, the Commission market tested Amazon's commitments and consulted all interested third parties to verify whether they would remove its competition concerns. In light of the outcome of this market test, Amazon amended the initial proposal and committed to:

- **Improve** the **presentation** of the **second competing Buy Box offer** by making it more prominent and to include a **review mechanism** in case the presentation is not attracting adequate consumer attention;
- **Increase** the **transparency** and **early information flows** to sellers and carriers about the commitments and their newly acquired rights, enabling, amongst others, early switching of sellers to independent carriers;
- Lay out the means for **independent carriers to directly contact their Amazon customers**, in line with data-protection rules, enabling them to provide equivalent delivery services to those offered by Amazon;
- **Improve carrier data protection** from use by Amazon's competing logistics services, in particular concerning cargo profile information;
- **Increase** the **powers** of the **monitoring trustee** by introducing further notification obligations;
- Introduce a **centralised complaint mechanism**, open to all sellers and carriers in case of suspected non-compliance with the commitments.
- **Increase** to **seven years**, instead of the initially proposed five years, the **duration** of the **commitments relating to Prime and the second competing Buy Box offer**.

The Commission found that Amazon's final commitments will ensure that Amazon does not use marketplace seller data for its own retail operations and that it grants non-discriminatory access to Buy Box and Prime. The Commission decided to make them legally binding on Amazon.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments relating to the Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority imposing remedies on Amazon with regard to the Italian market.

The final commitments will remain in force for seven years in relation to Prime and the display of the second competing Buy Box offer, and five years for the remaining parts of the commitments. Under supervision of the Commission, an independent trustee will be in charge of monitoring the implementation and compliance with the commitments.

If Amazon were to breach the commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to find an infringement of EU antitrust rules or a periodic penalty payment of 5% per day of Amazon's daily turnover for every day of non-compliance.


**Background**

Amazon has a dual role as a platform. It runs a marketplace where independent sellers can sell products directly to consumers and at the same time, it sells products on its platform as a retailer, in competition with those independent sellers. As a result of this dual position, Amazon, has access to large data sets about the independent sellers' activities on its platform, including non-public business data.

Amazon's **Buy Box**, prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button. Amazon's **Prime programme**, offers premium services to customers for a fee and allows independent sellers to sell to Prime customers under certain conditions.

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position that may affect trade within the EU and prevent or restrict competition. The implementation of this provision is defined in the EU Antitrust Regulation (Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 9 (1) of the EU Antitrust Regulation (Regulation 1/2003) allows the Commission to conclude antitrust proceedings by accepting commitments offered by a company. Such a decision does not reach a conclusion as to whether there is an infringement of EU antitrust rules but legally binds the company to respect the commitments. A policy brief on commitment decisions under Article 9 is available here.

More information, including the full text of today's Article 9 Commission decision and the full version of the commitments will be available on the Commission's competition website in the public case register under the case numbers AT.40462 and AT.40703.

IP/22/7777

Quotes:

Today's decision sets new rules for how Amazon operates its business in Europe. Amazon can no longer abuse its dual role and will have to change several business practices. They cover the use of data, the selection of sellers in the Buy Box and the conditions of access to the Amazon Prime Programme. Competing independent retailers and carriers as well as consumers will benefit from these changes opening up new opportunities and choice.
Margrethe Vestager, Executive Vice-President in charge of competition policy - 20/12/2022

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| FEDERAL TRADE COMMISSION, ET AL.,<br><br>Plaintiffs,<br><br>v.<br><br>AMAZON.COM, INC., a corporation,<br><br>Defendant. | CASE NO. 2:23-cv-01495-JHC<br><br>SEALED ORDER ON DEFENDANT'S MOTION TO DISMISS & PLAINTIFFS' MOTION TO BIFURCATE |

## I INTRODUCTION

This matter comes before the Court on Amazon's Motion to Dismiss (MTD), Dkt. # 127, and Plaintiffs' Motion to Bifurcate, Dkt. # 167.

The Federal Trade Commission (FTC) and the states and territories of New York, Connecticut, Pennsylvania, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Puerto Rico, Rhode Island, Vermont, and Wisconsin, by and through their Attorneys General, (collectively, Plaintiffs) sue Amazon.com, Inc. for allegedly violating Section 2 of the Sherman Act, 15 U.S.C.

§ 2; Section 5(a) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a); and state antitrust and consumer protection laws.

Amazon moves to dismiss the Amended Complaint.[1] Dkt. # 127. The rules require the Court, in ruling on the MTD, to construe the Amended Complaint in the light most favorable to Plaintiffs, to accept all well-pleaded facts as true, and to draw all reasonable inferences in their favor. Applying these standards, for the reasons discussed below, the Court DENIES Amazon's MTD as to Plaintiffs' claims under Section 2 of the Sherman Act and Section 5(a) of the FTC Act. The Court GRANTS in part and DENIES in part Amazon's MTD as to the state-law claims. And the Court GRANTS the Motion to Bifurcate.

## II BACKGROUND

Plaintiffs request equitable relief against Amazon to undo and prevent its alleged unfair methods of competition that they say violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), Section 2 of the Sherman Act, 15 U.S.C. § 2, and state antitrust and consumer protection laws. Dkt. # 171 at 5.[2]

In the Amended Complaint, Plaintiffs allege that Amazon possesses "monopoly power in two markets: (1) the online superstore market and (2) the market for online marketplace services." Dkt. # 171 at 44. While these markets are distinct, Plaintiffs also allege that "the relationship and feedback loops between the two relevant markets can create powerful barriers to entry in both markets." *Id.* at 45. They say that "Amazon illegally maintains its monopolies through an interrelated course of conduct that blocks competition." *Id.* at 85. They say,

[1] The parties' briefing is excellent, and the Court finds oral argument unnecessary.

[2] Under the scheduling order on Amazon's Motion to Dismiss the Amended Complaint (Dkt. # 175), Amazon's MTD (Dkt. # 127), Plaintiffs' opposition (Dkt. # 149), and Amazon's reply (Dkt. # 178) are all deemed to apply to the Amended Complaint (Dkt. ## 170 (SEALED), 171).

"Amazon deploys a series of anticompetitive practices that suppress price competition and push prices higher across much of the internet by creating an artificial price floor and penalizing sellers that offer lower prices off Amazon"—known as Amazon's "anti-discounting strategy." *Id.* at 85, 87. And they say, "Amazon coerces sellers into using its fulfillment service to obtain Prime eligibility and successfully sell on Amazon." *Id.* at 85–86.

Plaintiffs allege that, through its anti-discounting strategy, Amazon seeks to ensure that third-party retailers do not offer their products for lower prices elsewhere on the internet. *Id.* at 11. They contend that Amazon "execute[s] its anti-discounting strategy" through "a variety of tactics." *Id.* at 87. First, according to Plaintiffs, Amazon employs a "price-surveillance group" that monitors the internet for third-party Amazon Marketplace sellers who sell items on the Marketplace but offer the same items for lower prices at other online stores. *Id.* They say that this price-surveillance group allows Amazon to identify such third-party Marketplace sellers who offer lower prices elsewhere and "systematically punish[ ] sellers when Amazon detects a lower price on other online stores." *Id.* at 89. And they say that Amazon "punishes" the sellers by depriving them of access to the Amazon "Buy Box," [3] imposing detrimental contractual obligations, or even banishing the third-party seller from the Marketplace. *Id.* at 89.

Plaintiffs also allege that, using the same "extensive surveillance network," Amazon "detect[s] and deter[s] discounting, artificially inflat[es] prices on and off Amazon, and depriv[es] rivals of the ability to gain scale by offering lower prices." *Id.* at 102. They highlight that a former member of Amazon's leadership team made comments that apparently show that

[3] The "Buy Box" is "the display from which a shopper can 'Add to Cart' or 'Buy Now' an Amazon-selected offer for a product. Nearly 98% of Amazon sales are made through the Buy Box and, as Amazon internally recognizes, eliminating a seller from the Buy Box causes that seller's sales to 'tank.'" Dkt. # 171 at 9.

the goal of this strategy is to "deter[] rivals from discounting." Dkt. # 149 at 12 (citing Dkt. # 171 at 103) (former CEO of Amazon's Worldwide Consumer business, Jeff Wilke, explained, the "anti-discounting algorithm enables Amazon to avoid a 'perfectly competitive market' in which rivals continually lower their prices, benefitting shoppers but competing away profits." He added that "Amazon uses a 'game theory approach' where Amazon will 'never move first' when it comes to lowering prices. If Amazon detects a price change in either direction by a monitored online store or marketplace seller, Amazon will copy that change in price to the penny. The net effect, Mr. Wilke predicated, is that 'prices will go up.'").

Second, Plaintiffs allege that Amazon has "hiked average fulfillment fees to sellers" and "effectively forces sellers to purchase its fulfillment services to access the full reach of Amazon's marketplace services that Prime eligibility unlocks." Dkt. # 171 at 83. They say that this "one-two punch of high fees and seller threats forces sellers to use their inflated Amazon prices as a price floor everywhere else they sell online." *Id.* at 98. Also, Plaintiffs state that Amazon conditions Prime eligibility on sellers using its Fulfillment by Amazon (FBA) service.[4] *Id.* at 109. This requirement, Plaintiffs assert, "(1) rais[es] the costs for sellers of using multiple sales channels and (2) artificially stunt[s] the growth of independent fulfillment providers[,]"

[4] Fulfillment by Amazon is Amazon's fulfillment and delivery services that it sells to third-party sellers. Dkt. # 171 at 43. "'Fulfillment refers to the process of preparing items for shipping to 'fulfill online orders.' Fulfillment involves storing, picking (retrieving from storage), packaging, and preparing items purchased from online retail stores for delivery." *Id.* "'Delivery' refers to the specific process of transporting a package from a fulfillment center to a customer's chosen address." *Id.* "When a seller uses FBA, Amazon charges the seller for storing their items and charges the seller a fee based on the dimensions and weight of the product when it is purchased." *Id.* at 44.

Amazon Prime is a subscription program where customers pay for various benefits, including "free two-day shipping" on Prime eligible purchases. *Id.* at 37–38. Prime members spend more on Amazon than non-members, and Amazon recognized that "there is a causal and substantial increase to a customer's annual spend with Amazon—buying more frequently and across a broader set of categories." *Id.* at 39. In 2021, a significant percentage of U.S. households were enrolled in Prime and Amazon projected that number to grow in 2024. *Id.* at 42. "Prime eligibility is critical for sellers in part because of the enormous reach of Amazon's Prime subscription program." *Id.* at 12. Plaintiffs say that "Amazon requires sellers" to use FBA to be Prime eligible. *Id.*

thus "denying rivals the ability to gain the scale needed to compete meaningfully against Amazon." *Id.* at 121.

Third, Plaintiffs point to Amazon's "Project Nessie" algorithm, allegedly "designed to raise prices on and off Amazon" by "predict[ing] the likelihood that the online store or stores offering the lowest price for a given product would follow an Amazon price increase." *Id.* at 128. Plaintiffs allege that, with this information, Amazon "increased [its] products' prices when those price hikes were most likely to be followed" and after "successfully induc[ing] the other online store to raise its price, Amazon continued to sell the product at the now-inflated price." *Id.* Amazon began using this program in 2014 and has allegedly turned Project Nessie "'on' and 'off' at least eight times between 2015 and 2019" during periods "of increased media focus and customer traffic." *Id.* at 129–30. Further, Plaintiffs assert that "Amazon paused Project Nessie in 2019 only when regulatory scrutiny, including the Federal Trade Commission's initiation of the investigation that led to this Complaint, caused Amazon to superficially change or conceal many of its practices." *Id.* at 130. Plaintiffs say that, although Project Nessie is currently paused, "[t]here are no technical barriers to Amazon resurrecting—or even expanding—its use of Project Nessie" and, in fact, in "January 2022, the CEO of Worldwide Amazon Stores, Doug Herrington, asked about turning on '[o]ur old friend [Project] Nessie, perhaps with some new targeting logic' to juice profits for Amazon's Retail arm." *Id.*

Plaintiffs filed their Complaint on September 26, 2023, Dkt. ## 1, 3 (SEALED); and filed their Amended Complaint, which joins the Commonwealth of Puerto Rico and the State of Vermont as Plaintiffs, on March 14, 2024, Dkt. ## 170 (SEALED), 171. Plaintiffs bring 20 counts:

- Count I: Monopoly Maintenance of the Online Superstore Market under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Count II: Monopoly Maintenance of the Online Marketplace Services Market under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Count III: Unfair Method of Competition under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a);
- Count IV: Unfair Method of Competition under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a);
- Count V: Monopoly Maintenance of the Online Superstore Market under Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Count VI: Monopoly Maintenance of the Online Marketplace Services Market under Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Count VII: Violations of Connecticut State Law: Connecticut Antitrust Act, Conn. Gen. Stat. § 35-27 and Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110b *et seq.*;
- Count VIII: Violations of Maine State Law: Maine Monopolies and Profiteering Law, Me. Rev. Stat. Ann. tit. 10, § 1102;
- Count IX: Violations of Maryland State Law: Maryland Antitrust Act, Md. Code Ann., Com. Law § 11-201 *et seq.*;
- Count X: Violations of Michigan State Law: Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.771, *et seq.*;

- Count XI: Violations of the Nevada State Law: Nevada Unfair Trade Practices Act, Nev. Rev. Stat. § 598A.060;
- Count XII: Violation of New Jersey State Law: New Jersey Antitrust Act, N.J. Stat. Ann. §§ 56:9-1 to -19;
- Count XIII: Violation of New Jersey State Law: New Jersey Consumer Fraud Act (NJCFA),N.J. Stat. Ann. § 56:8-4(b);
- Count XIV: Violation of New Jersey State Law: the NJCFA, N.J. Stat. Ann. § 56:8-2;
- Count XV: Violations of New York State Law: N.Y. Exec. Law § 63(12);
- Count XVI: Violations of Oklahoma State Law: Oklahoma Antitrust Reform Act, Okla. Stat. tit. 79, §§ 201, *et seq.*, and Oklahoma Consumer Protection Act, Okla. Stat. til. 15, §§ 751, *et seq.*;
- Count XVII: Violations of Oregon State Law; Oregon Antitrust Law, Or. Rev. Stat. §§ 646.705 to 646.836;
- Count XVIII: Violations of Pennsylvania State Law: Pennsylvania's Unfair Trade Practices and Consumer Protection Law (PUTPCPL), 73 Pa. Cons. Stat. § 201-2, § 201-3, § 201-4 and Pennsylvania antitrust common law;
- Count XIX: Violations of Rhode Island Law: Rhode Island Antitrust Act, 6 R.I. Gen. Laws § 6-36-1, *et seq.* and Rhode Island Deceptive Trade Practices Act (RIDTPA), 6 R.I. Gen. Laws § 6-13.3-1, *et seq.*; and
- Count XX: Violations of Wisconsin State Law: Wisconsin's Antitrust Act, Wis. Stat. §§ 133.03 *et seq.*

Dkt. # 171 at 130–58.

Amazon moves to dismiss the Amended Complaint. Dkt. ## 127, 175. For the Sherman Act claims, Amazon contends that Plaintiffs fail to allege anticompetitive conduct and anticompetitive effects. Dkt. # 127 at 8–9, 15–22. For the "standalone" FTC Act claims, Amazon asserts that the Court may not, in the first instance, "determine whether conduct that would not otherwise violate the antitrust laws is 'unfair' under Section 5 of the FTC Act." *Id.* at 10. Amazon also contends that Count IV, which challenges Project Nessie under Section 5 of the FTC Act, should be dismissed for two additional and independent reasons: (1) it is untimely and (2) it is "irreconcilable with settled Section 5 precedent." *Id.* at 11. Finally, Amazon contends that the state-law claims "fail for several, often overlapping, reasons," *id.* at 11, the details of which this Order addresses below, *infra* Section III.C.

## III DISCUSSION

A defendant may move to dismiss when the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), courts construe the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). Courts must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). But courts are not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 677–78. "In dismissing for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (internal citation omitted).

A. MTD: Section 2 Sherman Act Claims

Counts I, II, V, and VI challenge Amazon's alleged "monopoly maintenance and unfair methods of competition under Section 2 of the Sherman Act, 15 U.S.C. § 2." Dkt. # 149 at 13. Plaintiffs assert that,

> Amazon has willfully maintained its monopoly power through its course of anticompetitive and exclusionary conduct, including Amazon's anti-discounting practices, which stifle price competition and tend to create an artificial price floor, and Amazon's practice of coercing sellers who want their products to be Prime eligible into using Fulfillment by Amazon, which makes it more difficult and more expensive for rivals to offer increased product selection.

Dkt. # 171 at 133 (Count I), 134 (Count II), 136–37 (Count V), 137–38 (Count VI). Plaintiffs also contend that while each category of conduct is "anticompetitive in its own right," the "interrelated and independent actions have had a cumulative and synergistic effect that has harmed competition and the competitive process." Dkt. # 171 at 133 (Count I), 134 (Count II), 137 (Count V), 138 (Count VI).[5]

[5] Amazon challenges this "'synergistic'" and "'holistic[]' . . . approach to antitrust liability" on Reply. Dkt. # 178 at 5. The Court need not consider arguments made for the first time on reply. *Cf. Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ("[W]e decline to consider new issues raised for the first time in a reply brief."). But also, because the Court concludes that the Amended Complaint plausibly alleges anticompetitive conduct with respect to the individual forms of conduct outlined by Plaintiffs, it need not reach, at this point, the issue whether Defendants' conduct should be considered cumulatively. *See infra* III.A.2.

Amazon says that Plaintiffs (1) fail "to allege anticompetitive conduct" because the conduct challenged in the Amended Complaint are "well-established forms of competition," and (2) fail to allege "plausible anticompetitive effects." Dkt. # 127 at 8–9, 16–22.

For claims under Section 2 of the Sherman Act,

> It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system..... To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

*Verizon Commc'ns Inc. v. L. Offs. Of Curtis v. Tinko*, *LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). Thus, "[a] Section 2 monopolization claim 'has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th Cir. 2023) (quoting *Grinnell Corp.*, 384 U.S. at 570–71).[6] To satisfy the second element, a plaintiff "must show that the defendant acquired or maintained its monopoly through anticompetitive conduct." *Id.* "Anticompetitive conduct consists of acts that 'tend[ ] to impair the opportunities of rivals' and 'do[ ] not further competition on the merits or do[ ] so in an unnecessarily restrictive way.'" *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1137 (9th Cir. 2022) (quoting *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)).

[6] Amazon asserts that while "Plaintiffs..... must prove that Amazon has monopoly power in a properly defined antitrust market, and the [Amended] Complaint's highly gerrymandered market is unlikely to survive that test[,] . . . [t]hat factual dispute need not be resolved in this motion." Dkt. # 127 at 8. Thus, this Order does not address the first element.

1. Amazon's Procompetitive Justifications are Inapt on a Motion to Dismiss.

Amazon says that "[e]ach policy challenged by the [Amended] Complaint is facially procompetitive, and Plaintiffs' efforts to obstruct such procompetitive conduct would chill retail competition and harm consumers." Dkt. # 127 at 16. But "whether the alleged procompetitive benefits of the [challenged conduct] outweigh its alleged anticompetitive effects [(i.e., procompetitive justifications)] is a factual question that the district court cannot resolve on the pleadings." *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022); *see also United Food & Com. Workers Loc. 1776 & Participating Emps. Health & Welfare Fund v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1067 & n.16 (N.D. Cal. 2014). A procompetitive justification "may be used to rebut Plaintiffs' claims once a *prima facie* case has been established, but the Court need not consider such rebuttals on a motion to dismiss." *Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 992 (W.D. Wash. 2022); *see also De Coster v. Amazon.com, Inc.*, No. C21-693RSM, 2023 WL 372377, at *3 (W.D. Wash. Jan. 24, 2023); *Floyd v. Amazon.com, Inc.*, No. C22-1599-JCC, 2023 WL 3891973, at *5 (W.D. Wash. June 8, 2023); *Brown v. Amazon.com, Inc.*, No. 2:22-cv-00965-JHC, 2023 WL 5793303, at *4 (W.D. Wash. Sept. 7, 2023). Thus, to the extent Amazon challenges Plaintiffs' Section 2 Sherman Act claims with procompetitive justifications, those arguments are inapt at this stage.

2. Plaintiffs Plausibly Allege that Amazon's Conduct is Individually Anticompetitive.

As for Plaintiffs' specific allegations of anticompetitive conduct, Amazon asserts that each category of conduct is lawfully competitive. The three categories of conduct, as described by Amazon, include (1) competing on price (i.e., discount-matching practice), (2) competing by offering a better in-store experience, and (3) competing through better delivery experiences. Dkt. # 127 at 8–9.

Amazon asserts that the first category of conduct—above-cost discounting—is per se lawful. Dkt. # 178 at 5. It contends that the second and third categories, while not per se lawful, are "commonplace in retail and have facially procompetitive attributes." Dkt. # 178 at 5.

a. Amazon's Anti-Discounting Practices

Amazon asserts that its anti-discounting practice is per se legal under *Brooke Group Limited v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Dkt. # 127 at 17–18. There, the Supreme Court explained that Section 2 of the Sherman Act condemns "predatory pricing when it poses a dangerous probability of actual monopolization." *Id.* at 222 (internal citation and quotation marks omitted). There are "two prerequisites" to state a predatory pricing claim under Section 2 of the Sherman Act. *Id.* "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* And second, the plaintiff must show "that the competitor had . . . under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224.

As to the first prerequisite, the Supreme Court explained that the reasoning in two prior decisions, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S 104 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), while not resolving the question of "whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost," "suggests that only below-cost prices should suffice." *Brooke Grp.*, 509 U.S. at 223 (internal quotation marks omitted). And the Supreme Court has "rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." *Id.* (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)); *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007) ("We were particularly wary

of allowing recovery for above-cost price cutting because allowing such claims could, perversely, chill legitimate price cutting, which directly benefits consumers." (internal citation and quotation omitted)).

Plaintiffs disagree with Amazon's description of its pricing practices and assert that "Amazon designed its anti-discounting tactics to deprive rivals of scale and exert control over pricing at rival stores, with the intention of deterring sellers and rivals from lowering prices." Dkt. # 149 at 18 (citing Compl. ¶¶ 262–65, 316, 328, 365). Plaintiffs state that the price-cost test outlined in *Brooke Group* "only matters when a plaintiff seek[s] to establish competitive injury resulting from a rival's low prices." Dkt. # 149 at 22 (citing *Church & Dwight Co. v. Mayer Lab'ys, Inc.*, No. C-10-4429 EMC, 2011 WL 1225912, at *8–10 (N.D. Cal. Apr. 1, 2011) ("[*Brooke Grp.*] line of cases is inapposite" when the claim at issue "is not a predatory pricing claim"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 279 (3d Cir. 2012) ("[*Brooke Grp.*] line of cases is inapposite" when the claim is not a "predatory pricing claim"); *Pulse Network, L.L.C. v. Visa, Inc.*, 30 F.4th 480, 493 (5th Cir. 2022) (*Brooke Grp.* inapplicable because plaintiff "isn't challenging . . . low or below-cost pricing," but rather claims defendant is "manipulating prices in a way that excludes competitors from the market")). The Court agrees with Plaintiffs that they do not assert a predatory pricing claim and thus *Brooke Group* does not foreclose the type of Section 2 Sherman Act claim that they bring here.

Plaintiffs adequately allege that Amazon's anti-discounting practices "stifle price competition." Dkt # 149 at 18. Specifically, they aver that Amazon's actions that prevent third-party sellers "from offering discounts on other sites are anticompetitive because they foreclose price competition from those sellers elsewhere." *Id.* (citing Compl. ¶¶ 17, 285). Plaintiffs assert that "Amazon tells sellers that they will be punished if Amazon detects a lower price on any other online store." Dkt. # 171 at 92. These penalties include, for example, taking away a

seller's access to Amazon's Buy Box "when Amazon finds a lower price on another online store for an item being sold by a seller on Amazon," *id.* at 89, or "demoting them in search results," *id.* at 93. Plaintiffs say,

> Amazon's penalties effectively deter sellers from offering prices elsewhere that are lower than their prices on Amazon, even where their costs are lower through other online sales channels. That in turn limits the ability of other online superstores to offer prices lower than those on Amazon, hindering the growth of would-be rivals and denying them the scale necessary to compete.

*Id.* at 93. The effect of these practices, Plaintiffs allege, is that the price on Amazon's marketplace, "which often includes Amazon's bloated fees[,] effectively becomes the price floor market-wide." Dkt. # 149 at 19 (citing Compl. ¶¶ 17, 309–12).

Plaintiffs also allege that, when Amazon acts as the seller (i.e., a first-party seller), it "uses its extensive surveillance network to block price competition by detecting and deterring discounting, artificially inflating prices on and off Amazon, and depriving rivals of the ability to gain scale by offering lower prices." Dkt. # 171 at 102. Plaintiffs allege that,

> Amazon disciplines rivals by immediately copying—but never undercutting—prices. If and when the lowest price by a monitored online store or marketplace seller increases (or the product goes out of stock), Amazon automatically increases its Retail price to copy the new lowest price, whether that is a higher price offered by the same online store or marketplace seller it had been copying or a price offered on a different website. If Amazon detects a "lowest price" drop, Amazon automatically copies that move. And if the "lowest price" increases, Amazon automatically copies again without even considering whether it could earn more business by continuing to offer shoppers the lower price.

*Id.* at 103–04. As mentioned above, Plaintiffs also point to this statement by a former Amazon executive: "Amazon designed this system to deliberately avoid a 'perfectly competitive market' in which stores undercut each other to win customers." Dkt. # 149 at 21 (citing Compl. ¶ 327); *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (reasoning that in a Section 2 Sherman Act monopolization claim, "evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or

'anticompetitive'"). Plaintiffs allege that "Amazon uses all of its various anti-discounting programs—and the combined power of its Marketplace and Retail arms—to limit price competition and comparison shopping for the hundreds of billions of dollars in goods sold annually in the relevant markets." Dkt. # 171 at 106.

Taking Plaintiffs' well-pleaded facts as true, and drawing all reasonable inferences in their favor, the Court concludes that the Amended Complaint adequately alleges that the challenged discounting practices are anticompetitive for purposes of their Section 2 Sherman Act claim. *See Dreamstime.com, LLC*, 54 F.4th at 1137 ("Anticompetitive conduct consists of acts that tend[ ] to impair the opportunities of rivals and do[ ] not further competition on the merits or do[ ] so in an unnecessarily restrictive way." (internal quotation marks and citation omitted) (alterations in original)).

b. Amazon's "Featuring" Practices

As to the second category—"offering a better in-store experience"—Amazon asserts,

> By featuring offers it thinks a customer will like, Amazon reduces the inconvenience and time associated with sorting through many offers, without taking away consumers' ability to do so if they would prefer. And by not featuring offers when it knows a competitor is offering a better price in another store, Amazon both builds trust with consumers and facilitates the comparison-shopping that the Complaint itself acknowledges is necessary for retailers to compete.

Dkt. # 127 at 18. Amazon says, "Amazon's Featured Offer and [Amazon's Standards for Brands (ASB)] policies are procompetitive practices aimed at encouraging third-party sellers, who are responsible for setting their own prices in Amazon's store, to offer low prices."[7] *Id.* at 20.

[7] A "Featured Offer" is the offer that Amazon chooses to display when an item is offered for sale on the marketplace by more than one seller. Dkt. # 171 at 29–30. "When there are multiple offers for a single item, Amazon uses the 'Featured Merchant Algorithm' to choose one offer to display in the Buy Box. Amazon calls this displayed offer the 'Featured Offer.' Being chosen as the Featured Offer is commonly known as 'winning' the Buy Box." *Id.*

Amazon relies on *Dreamstime.com, LLC*, 54 F.4th at 1141, in which the Ninth Circuit held that favoring contractual partners is "not anticompetitive conduct under Section 2 [of the Sherman Act]." Dkt. # 127 at 11–12.

Plaintiffs dispute Amazon's contention that Amazon's "anti-discounting policies are 'facially procompetitive' because they improve the in-store experience." Dkt. # 149 at 19. Plaintiffs argue that, through its anti-discounting strategy, Amazon hides the best deals from customers when a seller offers the "best deal" for a product on Amazon but offers the same product for a lower price on another website. *Id.* at 18–19. They contend that Amazon's threats to "bury discounting sellers in its search results or conceal those sellers' prices, even if a seller's price is the best deal available on Amazon," are anticompetitive. *Id.* at 19 (citing Compl. ¶¶ 16, 283). Plaintiffs say that the cases Amazon cites, including *Dreamstime.com, LLC*, 54 F.4th 1130, are inapposite to Amazon's contention, because by actively deterring sellers from offering a lower price on another site, Amazon does not actually steer customers to good deals. Dkt. # 149 at 19.

The Court agrees with Plaintiffs. First, as discussed above in Section III.A.1, Amazon's procompetitive justifications—including with respect to its "featuring" practices—are improper to consider at this stage. *See PLS.Com, LLC*, 32 F.4th at 839. Second, *Dreamstime.com, LLC*, 54 F.4th 1130 is distinguishable. In the pertinent portion of *Dreamstime.com, LLC*, 54 F.4th at 1141, cited by Amazon, the Ninth Circuit quoted a passage from the Supreme Court's decision in

Amazon designates certain third-party sellers as ASB sellers. *Id.* at 93. ASB sellers are subject to additional contractual requirements "to ensure that their products' prices on other online stores are as high or higher than their prices on Amazon at least 95% of the time." *Id.* at 94. ASB contracts also ~~require ASB sellers "to sell most~~ of their selection on Amazon," "to have nearly all of their inventory in-stock and ready for sale to Amazon customers," and "to use Amazon's fulfillment service for the vast majority of their products." *Id.* at 94–95. Amazon unilaterally designates sellers as ASB sellers and "[i]n 2021, 55% of Amazon Marketplace sales were by ASB sellers." *Id.* at 94.

*United States v. Colgate & Co.*, which states, "*In the absence of any purpose to create or maintain a monopoly*, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom [it] will deal." 250 U.S. 300, 307 (1919) (emphasis added). This section of *Dreamstime.com, LLC*, 54 F.4th at 1141, stands for the unremarkable principle that an allegation that a defendant favors certain contractual partners is not enough by itself to adequately plead anticompetitive conduct. Here, Plaintiffs have not merely alleged that Amazon favors certain sellers over others. They have alleged that Amazon actively deters third-party sellers from offering lower prices for their products on sites other than Amazon's. Dkt. #171 at 89–90. This suffices to state a claim under Section 2 of the Sherman Act, which requires a plaintiff to show that a defendant possessing monopoly power engaged in anticompetitive conduct with an "intent to control prices or exclude competition in the relevant market." *Dreamstime.com, LLC*, 54 F.4th at 1137 (quoting *Cal. Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 736 (9th Cir. 1979)); *see also* Dkt. # 149 at 19 (citing Compl. ¶¶ 16, 277, 283).

Taking Plaintiffs' well-pleaded facts as true, and drawing all reasonable inferences in their favor, the Court concludes that the Amended Complaint adequately alleges that Amazon's "featuring" practices "tend[ ] to impair the opportunities of rivals and do[ ] not further competition on the merits or do[ ] so in an unnecessarily restrictive way." *Dreamstime.com, LLC*, 54 F.4th at 1137 (internal quotation marks and citation omitted).

c. Amazon's "Fulfillment by Amazon" and Prime Badge Policies

Regarding the third category—delivery experience—Amazon asserts that "[t]he [Amended] Complaint . . . attacks procompetitive conduct when it alleges that Amazon displays

the Prime badge to third-party sellers only if they enlist Amazon to handle fulfillment under the FBA program."[8] Dkt. # 127 at 19. But again, "whether the alleged procompetitive benefits of the [conduct] outweigh its alleged anticompetitive effects is a factual question that the district court cannot resolve on the pleadings." *PLS.Com, LLC*, 32 F.4th at 839; Dkt. # 149 at 17.

Amazon also asserts that it does not "condition the Prime Badge on use of FBA," and that third-party sellers can gain a Prime Badge though Amazon's Seller Fulfilled Prime (SFP) program. Dkt. # 127 at 13 n.3. Amazon explains,

> In 2015, Amazon created a program called [SFP], Compl. ¶ 398, which it maintains today, *id.*, ¶ 409. SFP permits third-party sellers to obtain the Prime badge on offers even if they do not use FBA. The Complaint misleadingly states that Amazon "shuttered SFP" in 2019, *id.*, but elsewhere acknowledges that Amazon merely paused "*new enrollment* in SFP," *id.* ¶ 404, a temporary step taken to address speed and performance issues. Amazon has reopened new enrollment in SFP. *See* Seller Fulfilled Prime, https://sell.amazon.com/programs/seller-fulfilled-prime.

*Id.*

But the Amended Complaint alleges that "Amazon maintains its monopolies . . . by coercing sellers to use FBA," by "generally conditioning [access to Prime eligibility] on use of Amazon's" FBA. Dkt. # 171 at 109. According to Plaintiffs, "many sellers would prefer to use an independent fulfillment provider that would allow them to more easily fulfill orders placed on both Amazon and non-Amazon marketplaces." *Id.* at 110. And as "the former head of FBA put it, '[s]ellers may not have wanted to buy fulfillment [from Amazon]' but they did so in order to 'buy increased sales' that come with Prime eligibility." *Id.* at 112. This conduct, Plaintiffs allege, forces "sellers who do not want to sell solely through Amazon [to] split their physical inventory by putting inventory for Amazon orders into FBA and inventory for non-Amazon

[8] "Amazon displays a 'Prime Badge' to show Prime subscribers which items are eligible for the prepaid unlimited shipping included in the Prime subscription." Dkt. # 171 at 39.

orders in a different fulfillment network." *Id.* at 115. As a result, "[s]plitting inventory among multiple fulfillment networks raises the costs for sellers to offer products for sale through multiple sales channels." *Id.*

Plaintiffs also allege,

> In contrast to independent fulfillment providers, Amazon's FBA service only fulfills orders placed on Amazon's Marketplace. Sellers cannot use FBA to fulfill orders off Amazon. To fulfill orders off Amazon, sellers can pay an additional fee for a separate Amazon fulfillment service. But unlike independent fulfillment providers, this Amazon fulfillment service does not provide custom packaging, standard integration with non-Amazon platforms, or visibility into the separate but complementary delivery process.

*Id.* at 119.

As for SFP, Plaintiffs allege that while "SFP was an immediate hit among sellers," "internally certain Amazon executives feared SFP was '[s]trategically risky' because it could 'seriously imper[i]l FBA[,]'" and they "were concerned that SFP was an independent fulfillment provider 'enabler' that could help independent fulfillment providers 'get to scale,' which could then benefit 'other retailers." *Id.* at 122–23. In 2019, Amazon stopped "new enrollment in SFP" but, wanting to "minimize any potential backlash from SFP sellers . . . let sellers already in SFP remain while blocking all new enrollment." *Id.* at 123–24. But "Amazon communicated to those sellers . . . that it expected them to fulfill orders themselves, rather than using independent fulfillment providers. Most remaining SFP sellers have since left or been disqualified from the program." *Id.* at 124. Plaintiffs also allege while

> Amazon recently announced plans to reopen SFP enrollment . . . to enroll in the program, sellers would need to meet rigorous pre-qualification criteria to enroll in a 30-day SFP trial, after which Amazon will determine whether they may participate in SFP. Amazon's communications about upcoming changes to the SFP program continue to indicate that sellers would need to fulfill Prime orders themselves, without using independent fulfillment providers.

*Id.* at 125. Plaintiffs allege that, when they filed their Amended Complaint, SFP enrollment had remained closed. *Id.* Amazon says that it has reopened new enrollment in SFP, Dkt. # 127 at 13 n.3, but, even if this is true, on an MTD the court limits its consideration to the facts alleged in the complaint. *Livid Holdings Ltd.*, 416 F.3d at 946.

Viewing the facts alleged in the Amended Complaint in the light most favorable to Plaintiffs, the Court concludes that the Amended Complaint's description of SFP adequately supports Plaintiffs' allegations that Amazon effectively requires third party sellers to use FBA to qualify for a Prime Badge. Plaintiffs plausibly allege that the challenged conduct is anticompetitive. And again, any procompetitive justifications for Amazon's FBA and Prime Badge Policies are improper to consider at this stage. *See PLS.Com, LLC*, 32 F.4th at 839. Taking Plaintiffs well-pleaded facts as true, they have plausibly alleged that Amazon's FBA and Prime Badge practices "tend[ ] to impair the opportunities of rivals and do[ ] not further competition on the merits or do[ ] so in an unnecessarily restrictive way." *Dreamstime.com, LLC*, 54 F.4th at 1137 (internal quotation marks and citation omitted).

Given the analysis above, the Court concludes that the Amended Complaint states a claim of anticompetitive monopoly maintenance under Section 2 of the Sherman Act.

B. MTD: Section 5 FTC Act Claims

Plaintiffs bring Counts III and IV under Section 5 of the FTC Act, 15 U.S.C. § 45(a). Dkt. # 149 at 13–14. Count III alleges that "Amazon's anti-discounting practices, which stifle price competition and tend to create an artificial price floor, and Amazon's practice of coercing sellers who want their products to be Prime eligible into using Fulfillment by Amazon, which makes it more difficult and more expensive for rivals to offer increased product selection," violate Section 5 of the FTC Act as they are "anticompetitive and exclusionary." Dkt. # 171 at

135. Count IV alleges that Amazon's "Project Nessie" constitutes an unfair method of competition. *Id.* at 135–36.

Amazon says that Counts III and IV should be dismissed for two reasons: first, because "[t]he FTC may not use Section 5 of the FTC Act to condemn practices that are lawful under 'well forged' Sherman Act doctrine,"; and second, because the FTC "improperly attempt[s] to side-step the procedures the FTC must use to develop new policy and instead ask this Court to do what no federal district court has done: become an administrative-policy-maker for the FTC by defining new meanings of 'unfair' competition." Dkt. # 127 at 23. Amazon further challenges Count IV as untimely and contradicting settled precedent. *Id.* at 25.

1. Count III: Conduct Challenged Under Section 2 of the Sherman Act may also be Challenged Under Section 5 of the FTC Act.

Amazon asserts that because Plaintiffs bring a Section 5 FTC Act claim in addition to its Sherman Act claims for the same conduct, the Court must grant its MTD on the Section 5 claims if it denies the MTD on the Sherman Act claims. Amazon argues that "[t]he FTC included Count III in the alternative out of concern that its Sherman Act claims premised on that same conduct would fail; if those claims were in fact valid, Count III would be surplusage." Dkt. # 178 at 9. But Amazon cites no authority to support its contention that, if the Sherman Act claims were valid, the FTC Act claims based on the same conduct should be dismissed.

Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). These methods may include practices that violate the Sherman Act. *F.T.C. v. Cement Inst.*, 333 U.S. 683, 694–95 (1948). In *F.T.C. v. Qualcomm Inc.*, the court determined that the FTC adequately stated a claim under Section 5 of the FTC Act because it adequately alleged that Qualcomm's conduct violated Sections 1 and 2 of the Sherman Act. No. 17-CV-002200-LHK, 2017 WL 2774406, at *9 (N.D. Cal. June 26, 2017). Plaintiffs say

that "Amazon's arguments for dismissal of the monopolization claims fail for the" same reasons Plaintiffs provide regarding their Section 2 Sherman Act claims. Dkt. # 149 at 26. Their reasoning, Plaintiffs assert, "is justification enough to reject Amazon's passing argument regarding Count III." *Id.* The Court agrees. Because Plaintiffs have adequately alleged that Amazon's conduct violates Section 2 of the Sherman Act, the FTC has also adequately stated a claim under Section 5 of the FTC Act. *See Qualcomm Inc.*, 2017 WL 2774406, at *9.

2. Count IV: Project Nessie Claim under Section 5 of the FTC Act Survives the Motion to Dismiss.

Amazon challenges Count IV on three independent grounds: first, that Plaintiffs may not bring a "standalone" claim when the Court must define "new meanings of 'unfair' competition" under Section 5 of the FTC Act; second, that "the FTC's legal basis for attacking [Project] Nessie contradicts settled precedent under both the Sherman Act and the FTC Act"; and third, that the claim is untimely. Dkt. # 127 at 23, 25. For the reasons below, the Court determines that Plaintiffs have plausibly alleged facts to support a Section 5 challenge to Project Nessie.

a. Standalone FTC Act Section 5 claim

Amazon says that the Section 5 claim fails because the Court cannot determine whether Amazon's actions regarding Project Nessie are "unfair" methods of competition. Dkt. # 127 at 23–24. Amazon contends that the FTC cannot bring a "standalone" Section 5 claim—a claim not "premised on a violation of some other well-developed source of law"—before a district court because "label[ing] a practice unfair is a determination of policy or judgment which the agency alone is authorized to make in its administrative forum." *Id.* at 24 (quoting *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972)) (internal quotations omitted).

Relying on *Sperry & Hutchinson*, Amazon argues that the FTC Act requires the FTC to declare a practice unlawful through "statutorily prescribed procedures for determining whether

the challenged conduct is 'unfair'" before it can bring a case in federal court. Dkt. # 127 at 24. In that case, the Supreme Court explained that "[a] court cannot label a practice 'unfair' under [Section 5 of the FTC Act]. It can only affirm or vacate an agency's judgment to that effect." 405 U.S. at 249. The Supreme Court reasoned that Congress did not define "unfair practices" and instead chose to "leave it to the [FTC] to determine what practices were unfair." *Id.* at 240.

But *Sperry & Hutchinson* does not hold that district courts cannot determine whether a defendant's action is "unfair" in a "standalone" case. There, the Supreme Court "said nothing about the need for the FTC to 'declare' a law 'unfair' or 'abusive' before proceeding to litigation." *Consumer Fin. Prot. Bureau v. D & D Mktg., Inc.*, No. CV 15-9692 PSG (EX), 2017 WL 5974248, at *5 (C.D. Cal. Mar. 21, 2017) (citing *Sperry & Hutchinson*, 405 U.S. at 239.). The pertinent discussion in *Sperry & Hutchinson* arose in the context of the Supreme Court's decision to remand the case to the FTC instead of the Fifth Circuit; the Supreme Court remanded the case to the FTC so that the agency could determine whether the practice was unfair through its adjudicatory process. 405 U.S. at 245. Further, Section 13(b) of the FTC Act, which was added after the Supreme Court decided *Sperry & Hutchinson*, authorizes the FTC to bring a lawsuit in a district court to enjoin "any provision of law enforced by the [FTC]" and allows the FTC to seek a permanent injunction "in proper cases . . . after proper proof." 15 U.S.C. § 53(b). Amazon says that this case is not a "proper case" for the FTC to pursue in federal district court under Section 13(b). Dkt. # 127 at 24 (citing 15 U.S.C. § 53(b)). But the Ninth Circuit has interpreted Section 13(b) to mean that a district court has "authority to grant a permanent injunction against violations of *any provisions of law enforced by the Commission*." *F.T.C. v. Evans Prod. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985) (quoting *F.T.C. v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (emphasis added)). In *F.T.C. v. Surescripts, LLC*, a case

Amazon cites, the district court for the District of Columbia determined that the case was "proper" because the FTC grounded its argument in caselaw and did "not seek to rely on its agency expertise to develop the law." 424 F. Supp. 3d 92, 98 (D.D.C. 2020).

Here, as discussed below in Section III.B.2.c., the FTC's argument is supported by the caselaw: courts have laid out standards by which this Court can determine whether Amazon's conduct is unfair in this situation. Further, the FTC does not rely on its own interpretation of the FTC Act in this case.[9]

b. Timeliness of claim

The FTC may seek an injunction when the defendant's conduct "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). Amazon asserts that the Amended Complaint is untimely because Amazon is not currently using Project Nessie and there is no sign that Amazon is "about to" revive it. Dkt. # 127 at 27. Plaintiffs say that the challenged conduct is "likely to recur." Dkt. # 149 at 29.

"[I]n the Ninth Circuit, if a violation of the FTC Act has ceased, an injunction will issue under § 53(b) if the FTC has reason to believe that the past conduct is 'likely to recur.'" *F.T.C. v. Elec. Payment Sols. of Am. Inc.*, No. CV-17-02535-PHX-SMM, 2019 WL 4287298, at *9 (D. Ariz. Aug. 28, 2019) (citing *Evans Prods. Co.*, 775 F.2d at 1087). "[A]n inference arises from illegal past conduct that future violations may occur. The fact that illegal conduct has ceased does not foreclose injunctive relief." *Elec. Payment Sols. of Am. Inc.*, 2019 WL 4287298, at *9 (internal citation omitted).

[9] Amazon stresses that the FTC announced a change in its internal policy for Section 5 enforcement. Dkt. # 127 at 23. But the FTC's internal policy is inapt here; neither side argues that the Court should look to these policy statements in interpreting the Section 5 of the FTC Act.

Plaintiffs allege that Amazon strategically "turned Project Nessie on and off" to avoid scrutiny during two busy shopping periods: Prime Day and the winter holiday shopping season. Dlkt. # 171 at 129–30. "Amazon turned Project Nessie 'on' and 'off' at least eight times between 2015 and 2019." *Id.* at 130. Further, Plaintiffs allege that "Amazon paused Project Nessie in 2019 only when regulatory scrutiny, including the Federal Trade Commission's initiation of the investigation that led to this Complaint, caused Amazon to superficially change or conceal many of its practices." *Id.* Lastly, Plaintiffs allege:

> Amazon considered running experiments in 2020 and 2021 to improve Project Nessie's effectiveness with an eye towards turning it back on. These discussions picked up steam in late 2021 and early 2022 as inflation threatened to dent Amazon's profitability. In January 2022, the CEO of Worldwide Amazon Stores, Doug Herrington, asked about turning on "[o]ur old friend [Project] Nessie, perhaps with some new targeting logic" to juice profits for Amazon's Retail arm.

*Id.*

As alleged, Amazon's past actions show capability and willingness to turn Project Nessie back on. This suffices to show that Plaintiffs' claim is timely under 15 U.S.C. § 53(b).

c. Unfair competition under the FTC Act

Amazon asserts that settled precedent does not support "a theory of liability based upon other firms' uncoordinated conduct in response to Amazon's unilateral setting of its own price[s]" through Project Nessie, and thus the Complaint did not state a claim for "unfair methods of competition" under Section 5. Dkt. # 127 at 25. Plaintiffs disagree, saying that the "prohibition of 'unfair method[s] of competition' in Section 5 of the FTC Act reaches beyond the prohibitions in the Sherman Act." Dkt. # 149 at 26.

"The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but

also practices that the Commission determines are against public policy for other reasons." *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (internal citations omitted). Section 5 encompasses "incipient violations of [the Sherman Act], and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." *E.I. du Pont de Nemours & Co. v. F.T.C.* (*Ethyl*), 729 F.2d 128, 136–37 (2d Cir. 1984) (internal citations omitted).

Amazon says that "parallel pricing, ubiquitous throughout the economy, is lawful in the absence of an anticompetitive agreement, which the Complaint nowhere alleges." Dkt. # 127 at 26.[10] Both sides rely on *Ethyl*. In *Ethyl*, the Second Circuit laid out the standard for determining whether parallel pricing without conclusion is unfair under Section 5. 729 F.2d at 139. It explained that "[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws." *Id.* (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)). But the court also explained that,

> [i]n our view, before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, *at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose* on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. ..... business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.

[10] Amazon cites *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015), for the proposition that allegations of parallel conduct do not suffice to state a claim. But this case concerns a Section 1 Sherman Act conspiracy claim, not a Section 2 monopoly claim. *Id.* And the section of the case opinion cited by Amazon addresses whether certain alleged conduct sufficed to claim a *conspiracy*. *Id.*

*Id.* at 139–40 (emphasis added). Thus, to state a claim for an "unfair method of competition" under Section 5, Plaintiffs must allege "evidence of anticompetitive intent or purpose" in Amazon's execution of Project Nessie.

Plaintiffs allege that when Amazon began testing Project Nessie, "[t]hese early experiments showed that 'in many cases competitors match us at the higher price.'" Dkt. # 171 at 127. Plaintiffs also allege "Amazon *realized* that it could increase its prices while reducing the risk of shoppers finding a lower price off Amazon if Amazon focused its price increases on products sold by competitors that were matching Amazon's prices." *Id.* at 127–28 (emphasis added). "*Armed with the knowledge* that others would likely follow its price hikes, Amazon could charge shoppers higher prices while minimizing the chance that shoppers would catch on." *Id.* at 128 (emphasis added).

Taking Plaintiffs' factual allegations as true and construing them in the light most favorable to Plaintiffs, the Court determines that these allegations suffice to allege anticompetitive intent and purpose.

[State law claim discussion omitted]

## CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part the MTD[17] as follows:

A. Regarding the Sherman Act claims, Counts I, II, V, and VI, DENIES the motion;

[17] Plaintiffs filed two notices of supplemental authority. Dkt. ## 267, 272. Amazon objects to both on the ground that Plaintiffs used the notices to advance arguments. Dkt. ## 271, 274. Neither the supplemental authorities nor the descriptions of them affect the legal analysis herein. Thus, the Court need not address this issue.

B. Regarding the FTC Act claims, Counts III and IV, DENIES the motion;

***

L. GRANTS Plaintiffs until October 31, 2024, leave to file a Second Amended Complaint as to any claims dismissed without prejudice.

Further, regarding Plaintiffs' Motion to Bifurcate, the Court ORDERS:

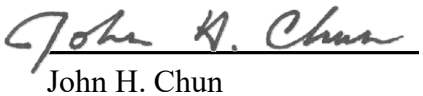
A. The bench trial identified in the Case Scheduling Order (Dkt. #159) will address only Amazon's liability under the FTC Act, Sherman Act, and the state laws implicated by Plaintiffs' Amended Complaint.

B. If the Court renders a decision finding Amazon liable, the Court will schedule a conference to address how to proceed on remedies.

C. Nothing in this Order shall (a) alter the Parties' respective abilities to offer evidence relevant to Amazon's liability at trial nor alter the burden of proof, persuasion, or production to establish each and every element of liability, justifications, or defenses, or (b) limit the scope of fact discovery in this case.

The Court provisionally files this order under seal. The Court DIRECTS the parties to file a joint statement, on or before October 14, 2024, indicating what redactions, if any, should be included in the public version of the order.

Dated this 30th day of September, 2024.



John H. Chun
United States District Judge

## United States v. Google LLC

747 F.Supp.3d 1 (D.D.C. 2024)

AMIT P. MEHTA, District Judge.

### INTRODUCTION

The general search engine has revolutionized how we live. Information that once took hours or days to acquire can now be found in an instant on the internet with the help of a general search engine. General search engines use powerful algorithms to create what seems like magic. Enter a search query, and the general search engine will retrieve, rank, and display the websites that provide the exact information the user seeks at that very moment. And it all happens in the blink of an eye.

General search engines make money by selling digital advertisements. Type the words "running shoes" into a general search engine, and sellers of running shoes will compete with one another in a split-second auction to place an advertisement on the results page, which if clicked takes the user directly to the seller's website. This is a highly effective way of reaching consumers. It is also an incredibly lucrative business. In 2021, advertisers spent more than $150 billion to reach users of general search engines.

For more than 15 years, one general search engine has stood above the rest: Google. The brand is synonymous with search. Once a scrappy start-up founded by two Stanford University students in a rented garage, Google is now one of the world's most valuable companies. Its parent company, Alphabet Inc., today has a market capitalization (the value of its outstanding shares of stock) of more than $2 trillion. Much of that value is due to Google's extremely profitable advertising business.

Google's dominance has gone unchallenged for well over a decade. In 2009, 80% of all search queries in the United States already went through Google. That number has only grown. By 2020, it was nearly 90%, and even higher on mobile devices at almost 95%. The second-place search engine, Microsoft's Bing, sees roughly 6% of all search queries—84% fewer than Google.

Google has not achieved market dominance by happenstance. It has hired thousands of highly skilled engineers, innovated consistently, and made shrewd business decisions. The result is the industry's highest quality search engine, which has earned Google the trust of hundreds of millions of daily users.

But Google also has a major, largely unseen advantage over its rivals: default distribution. Most users access a general search engine through a browser (like Apple's Safari) or a search widget that comes preloaded on a mobile device. Those search access points are preset with a "default" search engine. The default is extremely valuable real estate. Because many users simply stick to searching with the default, Google receives billions of queries every day through those access points. Google derives extraordinary volumes of user data from such searches. It then uses that information to improve search quality. Google so values such data that, absent a user-initiated change, it stores 18 months-worth of a user's search history and activity.

The distribution agreements benefit Google in another important way. More users mean more advertisers, and more advertisers mean more revenues. As queries on Google have grown, so too has the amount it earns in advertising dollars. In 2014, Google booked nearly $47 billion in advertising revenue. By 2021, that number had increased more than three-fold to over $146 billion. Bing, by comparison, generated only a fraction of that amount—less than $12 billion in 2022.

For years, Google has secured default placements through distribution contracts. It has entered into such agreements with browser developers, mobile device manufacturers, and wireless carriers. These partners agree to install Google as the search engine that is delivered to the user right out of the box at key search access points.

Google pays huge sums to secure these preloaded defaults. Usually, the amount is calculated as a percentage of the advertising revenue that Google generates from queries run through the default search access points. This is known as "revenue share." In 2021, those payments totaled more than $26 billion. That is nearly four times more than all of Google's other search-specific costs combined. In exchange for revenue share, Google not only receives default placement at the key search access points, but its partners also agree not to preload any other general search engine on the device. Thus, most devices in the United States come preloaded exclusively with Google. These distribution deals have forced Google's rivals to find other ways to reach users.

Google's dominance eventually attracted the attention of antitrust enforcers—the U.S. Department of Justice and nearly every state's Attorney General. They homed in on Google's distribution agreements and in late 2020 filed two separate lawsuits alleging that the agreements and certain other conduct violate Section 2 of the Sherman Act. According to their complaints, Google has unlawfully used the distribution agreements to thwart competition and maintain its monopoly in the market for general search services and in various online advertising markets.

The proceedings that followed have been remarkable. Discovery began in December 2020 and concluded in March 2023. Millions of pages exchanged hands, Google produced petabytes of data, and the parties deposed dozens of witnesses, including high-ranking executives at some of the world's largest technology companies. The court held a nine-week bench trial starting in September 2023. It heard from dozens of live witnesses, including multiple experts, and admitted over 3,500 exhibits. After receiving extensive post-trial submissions, the court held closing arguments over two days in early May 2024. The lawyering has been first rate throughout.

After having carefully considered and weighed the witness testimony and evidence, the court reaches the following conclusion: Google is a monopolist, and it has acted as one to maintain its monopoly. It has violated Section 2 of the Sherman Act.

Specifically, the court holds that (1) there are relevant product markets for general search services and general search text ads; (2) Google has monopoly power in those markets; (3) Google's distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits.

Other determinations favor Google. The court holds that (1) there is a product market for search advertising but that Google lacks monopoly power in that market; (2) there is no product market for general search advertising; and (3) Google is not liable for its actions involving its advertising platform, SA360. The court also declines to sanction Google under Federal Rule of Civil Procedure 37(e) for its failure to preserve its employees' chat messages. ***

# FINDINGS OF FACT

## I. PARTIES AND RELEVANT NONPARTIES

### A. Parties ***

3. Alphabet Inc. is the California-based parent company of a collection of businesses, the largest of which is Defendant Google LLC (Google). Google was founded in 1998 by two students from Stanford University, Larry Page and Sergey Brin, who left school to create Google, which is a general search engine (GSE). Trial Tr. at 7292:21-7293:1 (Raghavan) [hereinafter Tr.]. A GSE is software that produces links to websites and other relevant information in response to a user query. What started in a rented garage is today one of the world's largest companies. The Chief Executive Officer (CEO) of Alphabet and Google is Sundar Pichai.

4. Although Google began as a GSE, today its core services include a suite of applications widely used on mobile and desktop devices, including Gmail, Google Drive, Google Maps, Google Photos, Google Play, and YouTube.

5. In 2008, Google developed **Android**, an open-source operating system for mobile devices. An open-source system allows third-party developers to create new smart devices and technologies by customizing the Android system to the device or technology. Today, hundreds of millions of mobile devices in the United States run on the Android operating system.

6. Also in 2008, Google launched **Chrome**, a web browser. A web browser is software that allows users to access websites on the internet, among other things. Chrome was designed to increase the speed and seamlessness of web navigation by users. *** Google is the default search engine on Chrome.

7. Google also acquired an online advertising platform, DoubleClick, in 2008, which it developed into what today is known as **SA360**. SA360 is a search engine marketing tool, which allows advertisers to purchase digital advertisements across multiple platforms.

8. In 2022, Google reported Search+ revenues over $162 billion. Between 2014 and 2021, Google's Search+ revenues more than tripled, with gross margins ranging from 76-82% annually. *See* UPX7002.A. The vast majority of Alphabet's revenues (nearly 80%) come from digital advertisements, and historically the largest component has been ads displayed on Google's search engine results page. *See* UPX8085 at 878-89; UPX342 at 824 (attributing approximately 66% of the "company's revenue and $ growth for 10+ years" to search advertising).

### B. Key Third Parties

9. **Apple Inc.** is a California-based company that "designs, manufactures[,] and markets smartphones, personal computers, tablets, wearables[,] and accessories, and sells a variety of related services." Those products include the iPhone, iPad, and Mac personal computers (PCs). Each of these devices runs on an Apple-developed, proprietary operating system: iOS for iPhones, iPadOS for iPads, and macOS for Mac computers. Unlike Android, Apple's operating systems are not open source. Apple's products all come preloaded with its proprietary web browser, Safari. In 2022, Apple's market capitalization was at least $2.8 trillion.

10. **Microsoft Corporation** is a Washington-based company whose products include an operating system called Windows, a web browser called Edge, and various devices, including PCs and tablets. In 1998, Microsoft licensed a third-party GSE, MSN Search, for use on its devices. In 2005, Microsoft created its own GSE, which was then known as Live Search. In 2009, Microsoft launched Bing, a GSE. Microsoft has invested nearly $100 billion into search over the

past two decades. Bing's search and news advertising revenue totaled $11.6 billion in 2022. The CEO of Microsoft is Satya Nadella. Microsoft's revenues in 2022 were over $198 billion, with a market capitalization of $2.5 trillion.

11. **Mozilla Corporation** is a California-based company that developed an open-source web browser called Firefox for both desktop and mobile devices. Today, Mozilla's share in the desktop browser market is about 10% and negligible in the mobile market. In 2018, Mozilla generated $435 million in revenues.

12. **DuckDuckGo (DDG)** is Pennsylvania-based web services company founded in 2008. It offers a product that is an integrated browser and GSE. Gabriel Weinberg is the founder and CEO of DDG. DDG does not produce its own search results or search advertisements. It syndicates both from Microsoft. DDG attempts to differentiate itself from other GSEs through a focus on user privacy.

13. **Yahoo** is a California-based provider of general search services and was an early market leader in general search. In 1998, the year that Google was founded, Yahoo already had hundreds of millions of users. By 2009, however, Yahoo had stopped crawling the web and producing its own search results. Instead, it reached a data-sharing and syndication agreement with Microsoft, which provided that the two companies would combine their search engine user data (primarily to compete with Google) and, going forward, Yahoo's search results would be delivered by Bing. Yahoo also has popular subject-specific, or "vertical," products, such as Yahoo Sports and Yahoo Finance.

14. **Neeva** was a California-based company incorporated in 2017 that introduced a new GSE in 2019. Neeva was founded by Dr. Sridhar Ramaswamy, a veteran Google Search executive. One of Neeva's distinguishing features was that it was a subscription-based service that did not serve advertisements. Although Neeva initially licensed Bing's search infrastructure to respond to all queries, by 2022 Neeva responded to about 60% of queries using its own systems, relying on Bing for the remainder. In May 2023, Neeva shut down and was acquired by Snowflake Inc., an enterprise data company. It no longer exists as a GSE. ***

16. **Samsung Electronics Co. Ltd.** is a Korea-based original equipment manufacturer (OEM) of smartphones and other mobile devices that run on the Android platform. Samsung devices "represent the primary competitor to the iPhone in key monetizing regions, such as the US[.]" UPX639 at 266. Samsung develops mobile applications that it preloads onto its devices, including a browser known as S Browser and an app store called the Galaxy Store. Samsung also invests in novel products through its innovation arm, Samsung Next.

17. **Motorola Mobility LLC** is an Illinois-based OEM of smartphones that run on the Android platform. Motorola and Samsung together manufacture the majority of Android devices in the United States. Google acquired Motorola but later sold it to Lenovo Group Ltd.

18. **AT&T Mobility LLC** is a Georgia-based mobile carrier that provides wireless services that connect mobile devices to cellular networks. AT&T also sells devices directly to consumers. Roughly 30% of the smartphones that it distributes are Android devices. The other 70% are Apple devices.

19. **T-Mobile US, Inc.** is a Washington-based mobile carrier that provides cellular services and sells mobile devices directly to consumers. Approximately half of the phones sold by T-Mobile run on Android, and the other half are Apple devices.

20. **Cellco Partnership**, doing business as Verizon Wireless, is a New Jersey-based mobile carrier that provides cellular services and sells mobile devices directly to consumers. It distributes roughly twice as many Apple devices (70%) as Android devices (30%).

II. GENERAL SEARCH ENGINES ***

21. Google, Bing, Yahoo, DDG, Ecosia, and Brave are GSEs. ***

22. Bing is Google's largest general search competitor today. It is the only rival that crawls the web and generates its own search results. The next two largest search engines, Yahoo and DDG, syndicate their search results from Bing.

23. By 2009, 80% of all general search queries, whether entered on a desktop computer or mobile device, flowed through Google. That percentage had increased from 80% to 89.2% by 2020.

24. Google's share of search queries on mobile devices was even higher at 94.9% in 2020. The percentage on desktop devices was 84%.

25. Google's second-place rival, Bing, receives roughly 6% of all search queries. Bing (5.5%), Yahoo (2.2%), DDG (2.1%), and other rivals (0.9%) together see less than 11% of all queries. *Id.* Their numbers are even lower on mobile devices. *Id.* at 4762:19-4763:2 (Whinston) (discussing UPXD102 at 49) (Bing (1.3%), Yahoo (2.1%), DDG (1.5%), and others (0.2%)). Bing's market share has never risen above 12%.

26. Bing sees more desktop queries than mobile queries because it has greater distribution on Windows desktop devices, where it is the default GSE on the preloaded Edge browser. ***

35. Many users begin their online information gathering journeys on GSEs. An analysis by U.S. Plaintiffs' expert Dr. Michael Whinston found that 77% of search sessions on Windows desktop devices began on GSEs. That 77% figure is arguably lower on mobile devices, on which users are more likely to start searches directly within an application instead of a GSE. ***

50. Constructing a GSE is an extremely capital- and human-resource intensive endeavor. Developing just the technical infrastructure alone requires billions of dollars.

51. A competitive analysis performed by Google illustrates the point. In late 2020, Google estimated how much it would cost Apple to create and maintain a GSE that could compete with Google. Google "estimate[d] that the total capital expenditures required [for Apple] to reproduce [Google's technical] infrastructure dedicated to search would be in the rough order of $20[ billion]." UPX2 at 392-93; Tr. at 1644:8-20 (Roszak). Google further estimated that, if Apple needed only half of Google's infrastructure to produce a competitive GSE, it would have to spend $10 billion to get it off the ground, plus $4 billion annually in technical infrastructure. UPX2 at 393. On top of that, if Apple could sustain a business with only one third of Google's engineering and product management costs, it still would cost Apple $7 billion annually. Seven billion dollars was equal to more than 40% of Apple's total research and development expenditure in 2019. *Id.*

52. The cost of maintaining a fully-integrated GSE once built runs into the billions of dollars. In 2020, Google spent $8.4 billion to operate its search engine (excluding revenue share payments). *** Certain highly effective ranking mechanisms, such as artificial intelligence-driven models, are computationally more expensive than others because they are costly to train and require significant engineering capabilities. ***

54. Apple itself has estimated that it would cost $6 billion annually (on top of what it already spends developing search capabilities) to run a GSE.

55. But building and maintaining a GSE is only half of the cost equation. Monetizing a GSE is also an expensive proposition. In 2020, Google spent $11.1 billion to operate its search ads business. By comparison, it spent $8.4 billion on search (excluding revenue share payments). Tr. at 4764:12-20 (Whinston) (discussing UPXD102 at 52). In 2020, Bing earned only $7.7 billion *total* in search ads revenue.

56. As result of the extraordinary resources required to build, operate, and monetize a GSE, venture capitalists and other investors have stayed away from funding new search ventures. ***

F. GSE Distribution

58. Search providers have multiple channels to make accessible, or distribute, their GSE to users on mobile and desktop devices. They include but are not limited to: (1) the search bar integrated into browsers; (2) search widgets on Android device home screens; (3) search applications; (4) preset bookmarks within the default browser; (5) downloading an alternate browser; and (6) direct web search (i.e., navigating to www.google.com or www.bing.com). These channels of distribution are known as search access points.

59. The most efficient channel of GSE distribution is, by far, placement as the preloaded, out-of-the-box default GSE. That access point varies by device. On Apple products, it is the integrated search bar in the Safari browser (and to some extent, Apple's voice assistant, Siri, and on-device search, Spotlight). On Android devices, it is the search widget (prominently displayed at the center of the device's home screen) and the search toolbar in the Chrome browser. The Chrome browser typically appears on the home screen of Android devices either in the "hotseat"—that is, the row of applications at the bottom of the home screen—or in a folder on the home screen along with other Google applications. And, on Windows desktop computers, the default access point is the integrated search bar in the Edge browser. Google is the default GSE on all of these access points except on Edge, where the default GSE is Bing.

60. Other browsers, which are not preloaded on devices but can be downloaded, also use an integrated search bar. Google is the current default search engine on Firefox. From 2014 through 2017 it was Yahoo. On Firefox, a drop-down menu allows users to select a non-default search provider for the next search without changing the default search engine. ***

61. Default settings can be changed by the user. On all major browsers, users can navigate to the browser's settings and change the default to their preferred GSE. No browser allows a user to change the default GSE to a specialized vertical provider, such as Amazon, or to a social media platform.

62. Notwithstanding the option to switch, the default remains the primary search access point. Roughly 50% of all general search queries in the United States flow through a search access point covered by one of the challenged contracts. Of that 50%, 28% of those queries are entered into search access points covered by the Google-Apple Internet Services Agreement, 19.4% through Google's agreements with Android OEMs and carriers, and 2.3% through search access points on third-party browsers, such as Mozilla's Firefox.

63. Another 20% of all general search queries in the United States flow through user-downloaded Chrome, which defaults to Google.

64. Thus, only 30% of queries in the United States run through a search access point that does not default to Google. (To be clear, those 30% of searches are not all run on GSEs other than Google. A large percentage of those searches still are entered into Google, but through channels other than the default search access points, such as user-downloaded Google Search app or a search on www.google.com.)

65. That users overwhelming use Google through preloaded search access points is explained in part by default bias, or the "power of defaults." The field of behavioral economics teaches that a consumer's choice can be heavily influenced by how it is presented. ***

66. According to U.S. Plaintiffs' expert, Dr. Antonio Rangel, whose testimony the court credits, "the vast majority of individual searches, or queries, are carried out [by] habit," because search is a high frequency activity done on a familiar device that provides an instant response. *Id.* at 543:2-9 (Rangel). ***

67. Individuals often are not aware that they are acting out of habit. Consequently, when users are habituated to a particular option, they are unlikely to deviate from it. As Google's behavioral economics team wrote in 2021: "Inertia is the path of the least resistance. People tend to stick with the status quo, as it takes more effort to make changes." UPX103 at 214; *see also* UPX171 at 190 (2015 Google study based on 26 user interviews; almost half of the users (12) did not notice a surreptitious change from Google to Bing on their iPhone; "People expressed interest (but not huge urgency) to switch back to Google"); Tr. at 7677:5-7682:19 (Pichai) (discussing UPX172, a 2005 letter from Google to Microsoft stating that "most end users do not change defaults").

68. Many users do not know that there is a default search engine, what it is, or that it can be changed. ***

69. Even users who "are not in this habitual mode and [] try to change the default will get frustrated and stop the process" if there is "choice friction." "Choice friction" refers to the concept that subtle challenges or barriers make it increasingly more difficult to implement a change. "[T]he more choice friction it takes to change the defaults, the sticker the defaults are." *Id.* at 554:20-21 (Rangel).

70. The amount of choice friction varies and depends on many factors. For instance, default effects are weaker when the product is of poor quality or is unknown to users. Consumers "start thinking about switching more if the experience is unsatisfactory" or if they have, "over years, developed a very strong preference for a [rival] brand[.]" *Id.* at 548:15-20 (Rangel). By contrast, default effects are stronger when the user is satisfied with the product. *Id.* at 650:22-651:9 (Rangel).

71. The type of device matters as well. Default effects are stronger on mobile devices, as opposed to desktop computers, in part because of the smaller interface. Also, switching certain default settings on an Android device is arguably harder than on an iPhone.

72. Google understands that switching on mobile is more challenging than on desktop. To illustrate, in 2016 and 2020, Google estimated that if it lost the Safari default placement, it would claw back more search volume on desktop than on mobile. *See* UPX142 at 886 (2016) (Google would recover only 30% on iOS but 70% on MacOS); UPX148 at 826 (2020) (same, projecting 60-80% query loss on iOS); *see also* UPX84 at 728 (2016) ("User behavior is more heavily influenced by default settings on mobile and tablet[.]"); UPX139 at 119 (2020) ("People are much less likely to change [the] default search engine on mobile.").

73. Google appreciates that increased choice friction discourages users from changing the default.

74. A GSE's placement as the default thus drives search volume through that access point. In 2017, over 60% of all queries entered on Google flowed through defaults. UPX83 at 967; *see id.* (60% of iOS queries were through the Safari default, and 80% of Android queries were through defaults secured by the distribution deals). Far fewer users search directly on Google's website.

75. Google recognizes that securing the default placement is extremely valuable for monetizing search queries. In 2017, Google estimated that its default placements drove over half (then 54%) of its overall search revenue, a percentage that had grown since 2014. UPX83 at 968. For devices manufactured by Samsung—the largest Android OEM—80% of search revenue earned on those devices in 2016 flowed through default placements secured by the MADAs (Chrome and the Google Search Widget). *See* UPX639 at 266; UPX660 at 369. In 2019, about 50% of all search revenue on Android devices flowed through the Google Search Widget. UPX0316 at 906. In 2020, Google's internal modeling projected that it would lose between 60-80% of its iOS query volume should it be replaced as the default GSE on Apple devices, UPX148 at 826, which would translate into net revenue losses between $28.2 and $32.7 billion (and over double that in gross revenue losses), UPX1050 at 887. And in a 2015 presentation, Google expressed confidence in its standing among Apple users, but warned that its position "is still very vulnerable if defaults were to change." UPX171 at 186. ***

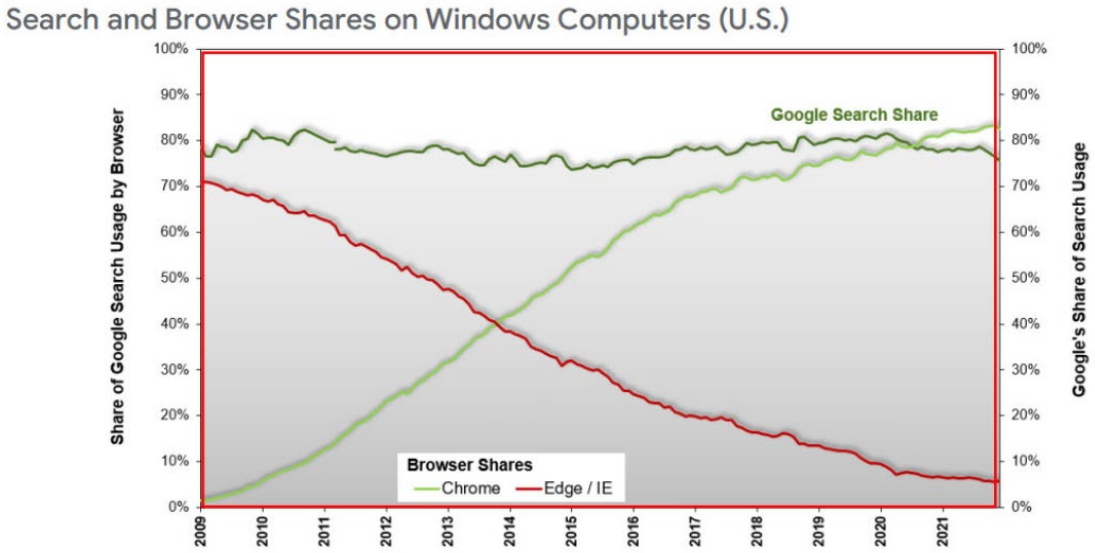
77. There are access points other than the default that can be used to distribute a GSE, but those channels are far less effective at reaching users. That is due in part to users' lack of awareness of these options and the "choice friction" required to reach these alternatives.

78. Users can download search applications on Apple devices from the App Store or on Android devices from the Google Play Store. But to reach such applications, a user would have to (1) know the application exists and (2) download it. Those points of choice friction reduce the effectiveness of a search app as a channel of distribution. To illustrate the point: Google receives only about 10% of its searches on Apple devices through the Google Search App (GSA).

79. Google recognizes that the user-downloaded GSA is an ineffective way to reach users. A 2018 internal study revealed that over 35% of iOS users did not know they could download GSA, and most of those who were aware of GSA did not want to install it. Over half of Safari users had not installed GSA, and of those that *had* installed it, over 80% still preferred using Safari. ***

81. Users also can reach GSEs by downloading an alternative browser from an applications store or the web. For example, a user can download Chrome, Edge, or DDG onto an Apple device. This, too, is not an easily accessible search point, as it involves similar choice friction as acquiring a search application. Google receives only 7.6% of all queries on Apple devices through user-downloaded Chrome.

82. To be sure, downloads of an alternative browser occur with greater frequency on Windows desktop computers. On such devices, Edge is the default browser and Bing is the default search engine. Yet, Google's search share on Windows devices is 80%, with most of the queries flowing through the Chrome default, which means Chrome was downloaded onto the device. Google's dominance on Windows cannot, however, be attributed simply to the popularity of Chrome. Google had an 80% search share on Windows when Chrome first launched, and that share has remained steady ever since (see below).




DXD37 at 38.

83. Google's dominance on Windows does not, however, undermine the power of defaults. Google's strong product quality and brand recognition likely weakened the effectiveness of defaults on Windows devices before the introduction of Chrome. The popularity of Chrome over time only fortified that dominance.

84. The power of defaults *is* evident, however, from the share of Bing users on Edge. Bing's search share on Edge is approximately 80%; Google's share is only 20%. *Id.* at 5744:24-5745:20 (Whinston) (discussing UPXD104 at 29). Even if one assumes that some portion of those Bing searches are performed by Microsoft-brand loyalists, Bing's uniquely high search share on Edge cannot be explained by that alone. The default on Edge drives queries to Bing.

85. Finally, users can navigate directly to the GSE on the web to conduct searches—for example, by entering google.com or bing.com in a browser search bar. This is known as an "organic" search. But few users search in this way. On Apple devices, Google receives less than 5% of its query volume through organic searches. On Android devices, that number is only 10%.

G. The Importance of Scale ***

87. Greater query volume means more user data, or "scale." As the most widely used GSE in the United States, Google receives nine times more queries each day than all of its rivals *combined* across all devices. The disparity is even more pronounced on mobile. There, Google receives *nineteen* times more queries than all of its other rivals put together. ***

H. Artificial Intelligence

107. "Artificial intelligence is the science and engineering of getting machines, typically computer programs, to exhibit intelligent behavior." *Id.* at 6339:18-20 (Nayak). One application of AI enables computers to understand and solve problems without human intervention. ***

109. Beginning in 2015, Google increasingly began to incorporate AI technologies into its search processes. ***

112. The integration of generative AI is perhaps the clearest example of competition advancing search quality. Google accelerated and launched its public piloting of Bard one day before

Microsoft announced BingChat, the integration of ChatGPT's generative AI technology into Bing to deliver answers to queries. ***

115. Importantly, generative AI has not (or at least, not yet) eliminated or materially reduced the need for user data to deliver quality search results. ***

## III. GOOGLE SEARCH

### A. Product Development

126. Google is widely recognized as the best GSE available in the United States. *See, e.g., id.* at 2586:1-2 (Cue) (Apple) ("Google still has the best search engine by far[.]"); DX547 at .002 (Mozilla) ("Google is the clear winner when it comes to product experience and what users want.") (internal quotation marks omitted).

127. Although Google significantly outperforms all rivals on mobile devices, Bing's search quality on desktop measures up to Google's. *See* Tr. at 6048:12-15 (Whinston) (Bing's quality "is very close on desktop" to Google); UPX238 at 667 ("Bing is comparable on desktop . . . and leads in several desktop verticals[.]"); UPX260 at 681 (Bing is comparable to Google for desktop result relevance and outperforms Google on desktop for overall preference).

128. Google's superior product quality rests in part on its numerous innovations over the years ***.

## IV. OTHER PLATFORMS

### A. Special Vertical Providers

141. Specialized vertical providers, or SVPs, are platforms that respond to queries centered on a particular subject matter. Tr. at 8626:5-12 (Israel). Examples of SVPs include Amazon, Expedia, and Yelp. *See id.* at 1031:14-18 (Higgins); *id.* at 2169:3-8 (Giannandrea).

142. Most SVPs do not respond to noncommercial queries, although there are exceptions, e.g., Wikipedia. *Id.* at 8396:23-8397:3 (Israel).

143. SVPs are not GSEs. ***

### B. Social Media Platforms

159. Users go to social media platforms primarily to interact with others and view photos and videos. People tend to engage with social media properties for longer sessions than with GSEs.

160. Examples of social media platforms are Facebook, Instagram, Twitter, Snapchat, LinkedIn, Pinterest, and TikTok.

161. Industry participants do not consider social media sites to be GSEs. ***

## V. THE DIGITAL ADVERTISING INDUSTRY ***

### A. Search Advertisements

167. Search advertisements are a form of digital advertising. Search advertisements are paid, or "sponsored," postings published in response to a user's query on a search platform. ***

168. A "signal" within the context of search advertising is an indicator of a consumer's intent to purchase a good or service.

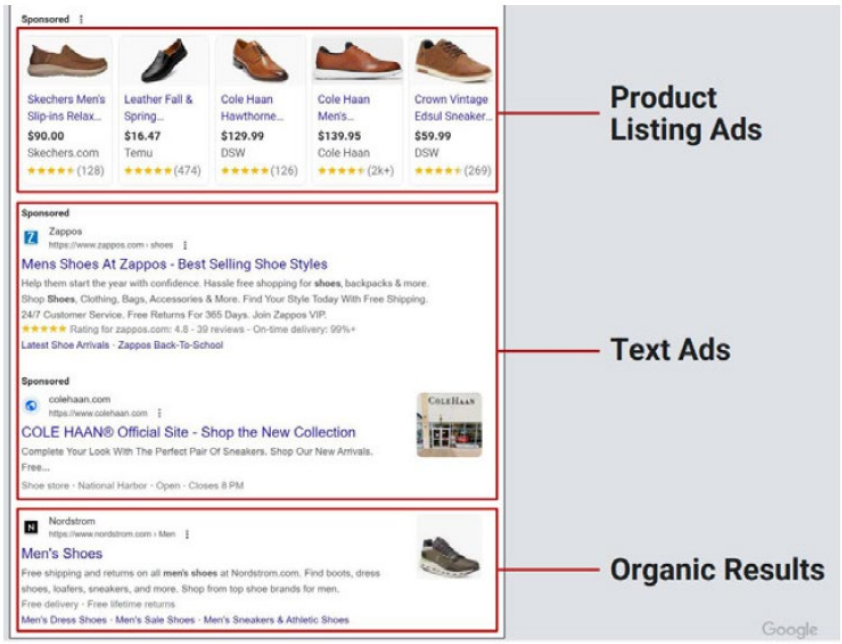
169. Search ads are the product of a uniquely strong signal because they are delivered in response to a user's query.

170. This signal is all the more powerful because it represents the user's declared intent in real time, that is, at the moment the intent is manifest.

171. As a result, advertisers view paid search as particularly efficient at driving conversions. A conversion typically is a sale or, for some goods or services, a new account or enrollment.

1. Search Ads on GSEs ***

175. There are two primary types of search ads sold on GSEs: (1) general search text ads and (2) shopping ads, or product listing ads (PLAs). The figure below illustrates how those ad types can appear on a SERP. Other types of ads that appear on SERPs include local ads, hotel ads, and other travel ads.




176. As shown, text ads resemble the organic links on a search engine results page (SERP). When a user types in a query, text ads generally appear at the top of the SERP with a designation indicating that they are paid advertisements. On Google, that designation is the word "Sponsored." Occasionally, a text ad will include an image. *** [T]he number of text ads served can vary based on the query. Google's policy, however, is to serve no more than four text ads on a SERP.

177. PLAs, also known as "[s]hopping ads[,] are designed for retail advertisers," that is, sellers of tangible goods. Tr. at 1353:3 (Dischler); *id.* at 3998:7-9 (Juda). "The reason why is because when users are shopping, they often want to see pictures and prices and other relevant information about products." *Id.* at 1353:4-6 (Dischler).

178. Google developed PLAs both to meet this consumer need and to compete with Amazon's retail offerings. ***

179. Text ads differ from PLAs in several ways. Text ads can be used to advertise almost any product or service. So, virtually any seller can advertise using a text ad. PLAs, however, are used to market only tangible goods.

180. A significant portion of Google's search advertisers can purchase a text ad, but not a PLA. For example, a financial institution like JPMorgan Chase purchases text ads but not PLAs.

Moreover, many of Google's top advertisers by ad spend are online travel companies that do not purchase PLAs.

181. Text ads are thus the predominant form of advertising on Google, whether measured by revenue or number of advertisers. In 2020, text ads made up about 80% of Google's search ads by revenue. In terms of ad types, 52.8% of ad dollars spent on Google come from advertisers who purchase only text ads; 46.9% is generated from advertisers who purchase both text ads and PLAs; and a mere 0.1% is originated by PLA-exclusive advertisers. When measured by number of advertisers, 92.5% of Google's advertisers purchase only text ads, 5.5 % purchase PLAs and text ads, and 2% purchase only PLAs. ***

185. Both text ads and PLAs are sold using an auction, although those auctions are different. In 2017, Google considered and rejected a combined auction for text ads and PLAs. At present, changes to pricing of text ads auctions does not impact the pricing of PLA auctions.

186. Both text ads and PLAs are sold on a cost-per-click (CPC) basis. "[T]he advertisers only pay[] if the user clicks on a link within their ad." *Id.* at 1195:14-16, 1177:5-20 (Dischler). ***

## VI. THE RELEVANT CONTRACTS

289. Google has entered into search distribution contracts with two major browser developers (Apple and Mozilla); all major OEMs of Android devices (Samsung, Motorola, and Sony); and the major wireless carriers (AT&T, Verizon, and T-Mobile) in the United States. In 2021, Google paid out a total of $26.3 billion in revenue share under these contracts, an expense listed in its financial statements as "traffic acquisition costs," or TAC. UPX7002.A; Tr. at 7577:2,7577:20-24 (Raghavan) (discussing DXD21 at 2). TAC was Google's greatest expense in 2021, almost four times more than all other search-related costs combined.

### A. Browser Agreements

#### *1. The Google-Apple Internet Services Agreement*

290. The Internet Services Agreement (ISA) is an agreement between Google and Apple, wherein Google pays Apple a share of its search ads revenue in exchange for Apple preloading Google as the exclusive, out-of-the-box default GSE on its mobile and desktop browser, Safari. Apple is a crucial partner to Google, in part due to "Apple's sizeable and valuable user base, for which Apple controls distribution." UPX6024 at 437; Tr. at 9742:1-9743:13 (Murphy) (discussing DXD37 at 40) (over half of all search volume in the United States flows through Apple devices).

##### a. Current ISA Terms

291. The parties entered into the current ISA in 2016, JX33, and in 2021 extended it for a period of five years until 2026. Apple can unilaterally extend the agreement by two years until 2028. After that point, the agreement can be further extended until 2031 if the parties mutually agree to do so. Neither party has the right to unilaterally terminate the ISA prior to its current termination date.

292. The ISA also requires both parties to cooperate to defend the agreement, including in response to regulatory actions.

293. Two provisions of the ISA are at the heart of the parties' dispute: (1) the default and revenue share provisions and (2) restrictions on Apple's product development.

i. Default and Revenue Share

294. The ISA requires Apple to set Google as the default search engine on Safari for all its devices. Under the ISA, a "Default" search engine is one that "will automatically be used for responding to Search Queries initiated from the Web Browser software, unless the End User selects a different third-party search service."

295. "Search Query" under the ISA is defined as any user input seeking information that is entered on Apple's voice assistant, Siri; its on-device search, Spotlight; or Safari. Between Siri, Spotlight, and Safari, Apple gets about 10 billion user queries per week. Roughly 80% of those queries are entered into Safari; Siri and Spotlight thus make up a minority of queries.

296. Across all Apple devices, 65% of searches are entered into Safari's default access point, which is the integrated search bar. This means that across all Apple devices, only 35% of all queries flows through non-default search access points. The numbers are similar for mobile searches: 61.8% of query volume flows through search access points governed by the ISA, and 38.2% of queries are run through non-default search access points. Only 5.1% of all searches on iPhones are conducted on a GSE other than Google. So, Google receives almost 95% of all general search queries on iPhones.

297. Queries entered through the Safari default (both mobile and desktop) account for 28% of all queries in the United States.

298. In return for these default placements, Google pays Apple [REDACTED]% of its ad revenue on Safari and Chrome, including queries initiated through Safari's default bookmarks. Google pays revenue share on Chrome queries, notwithstanding the fact that Apple does not preload Chrome onto its devices.

299. In 2022, Google's revenue share payment to Apple was an estimated $20 billion (world-wide queries). Tr. at 2492:22-2493:6 (Cue). This is nearly double the payment made in 2020, which was then equivalent to 17.5% of Apple's operating profit. *Id.* at 2492:2-8 (Cue); *id.* at 5727:20-5728:4 (Whinston) (discussing UPXD104 at 19). Google's 2022 payment under the ISA is more than all of its other revenue share payments combined and is approximately double that combined value.

ii. Apple's Product Development

300. Google has long recognized that, if Apple were to develop and deploy its own search engine as the default GSE in Safari, it would come at great cost to Google. For example, Google projected that without the ISA, it would lose around 65% of its revenue, even assuming that it could retain some users without the Safari default. *See* UPX1050 at 886.

301. Apple has taken steps to grow its capacity in search. In 2018, it hired the former head of Google Search, John Giannandrea, as its Chief of Machine Learning and AI Strategy. Under his leadership, Apple has made a significant commitment to developing certain foundational elements of a GSE, including crawling and indexing the web and creating a knowledge graph. It also has integrated machine learning into its development efforts. Apple has invested [REDACTED] of dollars and committed [REDACTED] employees to search development.

302. Notwithstanding these investments, Apple has decided not to enter general search at this time. Apple would forego significant revenues under the ISA if it were to do so. UPX273 at 974 (2016 email from Cue to Apple CEO Tim Cook stating that Apple would have to "jeopardize revenue" if it stopped partnering with Google); UPX460 at 176-77 (internal Apple assessment from 2018, which concluded that, even assuming that Apple would retain 80% of queries should

it launch a GSE, it would lose over $12 billion in revenue during the first five years following a potential separation from Google). It would also have to undertake the risk of consumer backlash, *see* DX374 at .001 (Giannandrea email stating, "there is considerable risk that [Apple] could end up with an unprofitable search engine that [is] also not better for users"), and forgo investment in other areas of product development, Tr. at 2541:13-17 (Cue) ("And so if we took all of our resources and started spending them on search, sure, we could have competed with Google . . . [b]ut that meant we wouldn't have done other things."). ***

b. History of the ISA

312. The ISA did not start out with Google as the exclusive default GSE. The first-ever ISA was signed in 2002. *See* JX1 (2002 ISA). It granted Apple the right to license Google Search, allowing its users to access the Google SERP directly from the "search box" in Apple's web browser. *Id.* at 678. The contract was not exclusive as to either party: Apple could preload rival search engines, and Google could license its search product to other third parties. *Id.* at 679. The five-year agreement allowed for either party to terminate the agreement on certain grounds, and it permitted Apple to unilaterally terminate the agreement for any reason after its first year. *Id.* at 680. The 2002 ISA did not include any payment of revenue share.

313. Around 2005, Google initiated the idea of an exchange of revenue share for default exclusivity after it grew concerned that Yahoo might replace Google. Apple did not ask for revenue share.

314. The parties subsequently amended the 2002 ISA, providing that Google would pay Apple a one-time sum of $10 million, plus 50% of its annual advertising revenue. JX2 at 818. As consideration, Apple agreed to preinstall Google as the default GSE on Safari, such that it would "automatically be used for web search unless the user selects another search provider." *Id.* at 819. The 2005 amendment was set to terminate after three years, with Apple retaining the right to unilaterally terminate the agreement any time during the last year.

315. In 2007, Apple launched the iPhone. The parties amended the ISA to include the Safari default placement on mobile devices and other platforms. JX4 at 647 (expanding the definition of "software" to include web browser software for iPhones, iPods, Safari for Windows, etc.).

316. The 2007 amendment included two notable amendments. First, it required that "Apple shall not pre-populate the search box with search terms that are not initiated by the end user," but that "queries utilizing auto complete features . . . shall be considered input by the End User." *Id.*; *see* Tr. at 5001:16-5004:15 (Braddi) (describing Apple top hits, Apple Suggestions, and Google suggestions).

317. Second, the 2007 amendment secured Google's default status in the Safari search bar not only on the iPhone but also on various other Apple products, including iPods and Safari for Windows. The 2007 amendment also made clear that Google would not pay revenue share to Apple if it decided to create a homepage on Safari that included a search service other than Google. This term apparently grew out of a worry that Apple might install Yahoo as a default GSE on a Safari for Windows homepage. UPX672 at 475-76. Apple apparently never implemented such a homepage on any version of Safari, so Google remained the only default GSE on Apple devices.

318. The ISA amendments in 2008 and 2009 were largely without substantive change.

319. In 2009, Apple sought greater flexibility to grant its users access to other GSEs. Apple sought "[t]he option but not the obligation to set Google as the default search provider" and still receive revenue share. UPX605 at 269. Specifically, Apple proposed that it would receive

slightly less revenue share for non-default queries (40%) and the full amount (50%) for queries on search access points preset with Google as the default. *See* UPX675 at 249-50 (Apple redline of ISA). Google rejected those terms in large part because Apple "could decide to work with an alternate provider for the desktop/Safari search solution," i.e., use Google as the default for some, but not all, locations or product lines/versions. UPX605 at 270; UPX675 at 250. Apple's requests did not make it into the updated amendments. The agreement remained exclusive.

320. In 2012, Apple again sought the flexibility to distribute other GSEs to its users. It sent Google a term sheet requesting that Apple would have "[n]o obligation to use Google search services or to make Google the default" while maintaining its then-revenue share of 50% for all Google searches on Apple devices. UPX570 at 724. Google stood firm that "[i]f they wanted to receive revenue share," Apple had to maintain Google as the exclusive Safari default. Tr. at 5001:8-11 (Braddi). The resulting amendment, entitled the 2014 Joint Cooperation Agreement, maintained Google as the exclusive default search engine. *See* JX24 at 822 ("Google shall remain the default search engine" in the United States.). The 2014 amendment also provided for the creation of "default bookmarks," which required Apple to include a bookmark for Google Search "prominently displayed on the Safari default bookmarks page" and obligated Google to pay revenue share "for all traffic initiated via the Google search bookmark." *Id.* Apple, however, was not precluded from offering default bookmarks that linked to rival GSEs, and it reached agreements with Bing and Yahoo for bookmark placement. *See, e.g.,* DX962 at .003-.004 (Apple-Microsoft promotional agreement providing that Apple will make Bing readily discoverable, including by preloading it as a default bookmark on Safari). Two years later, Apple and Google entered into the ISA currently in effect.

c. Microsoft-Apple Negotiations

321. Apple and Microsoft occasionally have had discussions regarding installing Bing as the default GSE on Safari. Microsoft has not been successful.

322. In 2015, prior to the signing of the 2016 ISA, Microsoft hoped that Bing might replace Google as the default GSE on Safari. As part of its pitch, Microsoft claimed that "increased competition between Microsoft and Google enabled by a search partnership [with Apple] is in Apple's long-term economic interests[.]" UPX614 at 112. Microsoft made clear that it was "willing to provide Apple with the majority of profits in a search partnership along with greater levels of flexibility and control over the product experience including user experience and branding," with one example being improved private searching "consistent with the broader Apple value proposition around respecting user privacy[.]" *Id.*

323. Microsoft understood that it "would have to pay and even subsidize the transfer" for the period of transition and was willing to do so for the long term. Tr. at 3502:21-3503:8 (Nadella). Microsoft offered Apple a revenue share rate of 90%, or a little under $20 billion over five years. UPX614 at 113-14. It did so recognizing that "there was going to be a period of turbulence of shift," both as a result of the change and assuming that Google would respond by encouraging users to abandon Safari for its browser, Chrome. When that offer was not accepted, Microsoft proposed sharing 100% of its Bing revenue with Apple to secure the default or even selling Bing to Apple. *Id.* at 2511:14-14, 2530:14-21 (Cue).

324. Microsoft "thought they had great [search] quality and they said that with [Apple's] search volume, they could be even better," but Apple disagreed. *Id.* at 2510:8-11 (Cue). Moreover, Apple was concerned that despite the high revenue share percentage, Bing would not be able to bring in sufficient revenues because it was "horrible at monetizing advertising." *Id.* at

2510:25-2511:11, 2511:24-2512:16 (Cue) ("If you have an inferior search engine, customers wouldn't use it, and so, therefore, I don't know how you could monetize it well.").

325. Apple evaluated the potential financial impact of replacing Google with Bing. *See generally* UPX273. The analysis assumed that Microsoft would initially pay Apple 100% of Bing's revenue share, while Google would continue paying Apple [REDACTED]% revenue share if retained as the default. *Id.* at 975-76. The analysis showed that if Apple extended the ISA, it would gain about $40 billion from Google in the next five years, and then $70 billion in the following five years. *Id.* at 974. This was double the $20 billion Microsoft offered Apple for the first five years. *Id.* ("Clearly, Microsoft can't commit to these numbers or even anything close to them.").

326. In response to this analysis, Apple's Senior Vice President of Services, Eddy Cue, internally proposed that the only way Apple could make the switch was if Microsoft were to guarantee minimum annual revenues of $4 billion the first year and a stepped increases of $1 billion per year over the next four years, for a total of $30 billion in guarantees. Still, even that approach would produce revenues well short (by $10 billion) of Apple's expected earnings if it retained Google as the default. *Id.* ("[T]his doesn't match Google ($30B v. $40B) and provides no protection for the following 5 years[.]"). Cue concluded that a Microsoft-Apple deal would only make sense if Apple "view[ed] Google as somebody [they] don't want to be in business with and therefore are willing to jeopardize revenue to get out. Otherwise it [was a] no brainer to stay with Google as it is as close to a sure thing as can be." *Id.*; Tr. at 2528:13-16 (Cue) ("And so Google's a sure thing. They have the best search engine, they know how to advertise, and they're monetizing really well.").

327. Apple proposed to Microsoft that it guarantee revenues (the record is not clear whether the proposal mirrored what Cue suggested above), but Microsoft balked, which Cue expected. Tr. at 2522:3-19, 2518:18-24 (Cue). Regardless, Apple would not have accepted the deal, even if Microsoft had agreed to a guarantee. According to Cue, there was "no price that Microsoft could ever offer [Apple]" to make the switch, because of Bing's inferior quality and the associated business risk of making a change. *Id.* at 2519:10-11 (Cue); *id.* at 2530:17-19 (Cue) ("I don't believe there's a price in the world that Microsoft could offer us. They offered to give us Bing for free. They could give us the whole company.").

328. Google has also analyzed what Microsoft would need to offer Apple in order to win the Safari default. It called this study "Alice in Wonderland," with Alice referring to Microsoft. *See id.* at 1678:16-20 (Roszak). The analysis concluded that in order for Microsoft to match Google's financial contribution, it would have to pay Apple 122% of Bing's revenue share just to equal Google's then-33.75% revenue share. *Id.* at 1683:10-13 (Roszak); UPX674 at 914. Google thus determined that "it will not be possible for Alice to match our payments profitably[.]" UPX674 at 914. Accordingly, during ISA negotiations, Google understood that Bing was not a viable option, which minimized Apple's leverage.

329. Although Apple has never seriously considered Bing as an option, Microsoft perceives that Apple has used Bing "to bid up the price" in its negotiations with Google and extract a higher revenue share from Google. *Id.* at 3505:6 (Nadella). Microsoft CEO Satya Nadella testified that if, hypothetically, Bing exited the market, there would be a real concern as to whether Google would even pay Apple for default status, given the lack of any other option at all. *Id.* at 3505:12-17 (Nadella). ***

e. Apple's Recent Evaluation of GSEs

333. In 2021, Apple's "Aethon" study demonstrated that, as measured by relevance of results, Google is superior to Bing on all search access points (except desktop queries on Safari). UPX260 at 681. "Google has a much larger lead on Mobile than Desktop[.]" *Id.* Google's relevance advantage was particularly strong for long-tail queries. As to users' overall preferences, Bing outperformed Google on its desktop user interface (for both Safari and Spotlight), but Google tied with Bing as to overall Safari queries and beat out Bing as to Spotlight on mobile. *Id.*

2. Mozilla-Google RSA

334. Google also has a revenue sharing agreement with the browser developer Mozilla, whereby it pays Mozilla [REDACTED]% revenue share in exchange for the default search placement on the Firefox browser. JX65 at 100, 107. The search access points on Firefox include "the search box" in the browser, "the navigation or location bar," any "search box displayed on a Firefox Startpage," among others. *Id.* at 102-03. If Mozilla implements the "this time, search with" feature on its mobile application, the revenue share paid under the Google-Mozilla agreement drops from [REDACTED]% to [REDACTED]%. *See id.* at 100, 107.

335. Google's 2021 revenue share payment to Mozilla was over $400 million, or about 80% of Mozilla's operating budget. Mozilla has repeatedly made clear that without these payments, it would not be able to function as it does today.

336. Under the terms of the current Mozilla RSA, either party may terminate the agreement only upon a breach.

a. Mozilla-Yahoo Partnership

337. From 2014 through 2017, the default GSE on Firefox was Yahoo, not Google. The Mozilla-Yahoo agreement required Yahoo to pay a minimum annual payment of $375 million, or 70% revenue share, whichever was higher.

338. When Mozilla switched the Firefox default GSE from Google to Yahoo, the query volume for each search provider changed. Google's share of queries on Firefox abruptly dropped from between 80-90% to between 60-70%, a 20-point decline. Yahoo's share, in turn, increased from around 10% to 30% of the Firefox queries. Between 2014 and 2017, Google gained back some amount of query share, but never more than 70%. When Mozilla reverted the default back to Google in 2017, Google regained its former query share at Yahoo's expense.

339. To meet the minimum payment guarantee, Yahoo increased the number of ads it placed on the SERP, degrading the user experience and ultimately resulting in Mozilla changing the default back to Google.

b. Mozilla's Experiments

340. Mozilla has run experiments to assess a potential switch of the default GSE from Google to a rival. It tends to run these experiments when its agreements come up for renewal.

341. In a 2016 experiment, Mozilla switched the default GSE on both new and existing users from Google to Bing. By the twelfth day, Bing had kept only 42% of the search volume. After some additional time, those numbers dropped to 20-35%, depending on certain variables. Mozilla's takeaway was that switching the Firefox default to Bing would result in missing revenue targets. ***

## B. Android Agreements

### *1. Mobile Application Distribution Agreements*

348. Google has entered into Mobile Application Distribution Agreements, or MADAs, with all Android OEMs, including Motorola and Samsung, among others. The MADA is a device-by-device license that allows OEMs to use Google's proprietary mobile applications developed for the Android ecosystem. This suite of applications is referred to as Google Mobile Services (GMS). OEMs pay no fee for the GMS license, but Google requires OEMs to preload certain applications in prominent placements.

349. The MADAs may be terminated only by a breach by either party.

350. As of 2019, about 2.3 billion Android devices were subject to the MADA. Google employees were not aware of any non-MADA Android device sold in the United States. Moreover, there are no Android OEMs that have revenue share agreements but are *not* MADA signatories.

351. Google views the MADA as securing "baseline distribution of [its] apps on Android[.]" UPX129 at 904. Under the MADA, partner OEMs must preload all 11 GMS applications onto a new device, including the Google Search Widget, Chrome, YouTube, Gmail, Google Maps, and Google Drive, among others. Six of these applications, including the Google Search application and Chrome (which both default to Google), cannot be deleted by the user. Without a MADA, an OEM cannot distribute any one of these GMS applications.

352. One of the GMS applications is the Google Play Store, the leading Android app store. Without a MADA, an OEM cannot distribute the Play Store. The Play Store contains a set of application programming interfaces (APIs), which support the functionality of all Android applications—both those developed by Google and by third parties. A user cannot effectively utilize GMS applications without having the Google Play Store installed, because the GMS apps' APIs rely on the Play Store's infrastructure. UPX125 at 067; *see* Tr. at 3517:18-19 (Nadella) ("And without [the] Google Play [Store], an Android phone is a brick.").

353. The Play Store is not just technically required, but it also contributes significantly to the user experience. Carriers view the Play Store as essential.

354. Samsung, which preloads its own proprietary app store onto its devices, does not see its "Galaxy Store" as replacing the Play Store. ***

358. Nothing in the MADA expressly requires an OEM to preload only the GMS applications. OEMs are, for instance, free to preload a second (or third) browser or search widget.

359. In practice, however, OEMs recognize that preloading more than one of the same search access points, especially in similar prominent positions, is a suboptimal design that would degrade the user experience. This overloading of apps is known as "bloatware." Even Microsoft avoided adding a Bing search widget on its Duo devices to avoid degrading the user experience.

360. As another example, Samsung already preloads a second browser—its proprietary S browser—on all Samsung devices. Rival browser and GSE providers, like Microsoft, understand that Samsung is extremely unlikely to preload a third browser on Samsung devices.

361. Google recognizes this reality, too. Google employees were unable to identify any Android device that is preloaded with two search widgets.

### 2. Revenue Share Agreements

362. A revenue share agreement, or RSA, is a separate agreement from the MADA. Each RSA generally follows a tiered structure, in which a carrier's or OEM's payment is tied to the degree

of device exclusivity. The RSAs are device-by-device, meaning that partners can opt into different tiers based on the device model sold. The RSAs do not prohibit the preinstallation of social networks like Facebook and Instagram.

363. Although no OEM or carrier is required to enter into an RSA, all do so. It would be irrational for a profit-maximizing firm to sign a MADA but then forgo at least some revenue share under the RSA.

a. Carrier RSAs

364. Google has signed RSAs with each major wireless carrier: Verizon, AT&T, and T-Mobile. Google's agreement with Verizon has three tiers, whereas its contracts with AT&T and T-Mobile only have two and one, respectively. All three carrier RSAs may only be terminated should either party breach the contract.

365. Google has long viewed RSAs with carriers as essential to securing query traffic on Android devices to the exclusion of rivals. In fact, Google viewed exclusivity on Android devices as "very strategic to Google." UPX134 at 865. In a 2011 email, Google executive Chris Barton wrote about then-existing exclusive distribution deals with T-Mobile, Verizon, and Sprint, "I think this approach is really important otherwise Bing or Yahoo can come and steal away our Android search distribution at any time, thus removing the value of entering into contracts with them. Our philosophy is that we are paying revenue share *in return for* exclusivity." *Id.* at 869. ***

i. Verizon

366. Verizon's RSA has three tiers: Core, Qualifying, and Preferred. Google pays Verizon [REDACTED]% revenue share on devices where the "core" search access points have been preinstalled and defaulted to Google. Those include Chrome, the Samsung Browser (on Samsung devices only), and the Google Assistant application. *** In exchange for more placements, Google pays more revenue share. The RSA requires Google to pay Verizon [REDACTED]% revenue share on Preferred Tier devices (a three-fold increase from Verizon's Core Tier), provided that those devices have several other default Google placements. Those include, but are not limited to, the Google Search Widget, Chrome, and the default homepage on the browser. ***

369. On June 13, 2017, Verizon purchased Yahoo. One of Verizon's goals was to preload certain Yahoo features, including search, onto its devices. Verizon raised this with Google in its negotiations for the 2021 Google-Verizon RSA. *See* UPX1026 at 080-81.

370. In November 2018, during RSA negotiations, Verizon shared a redline of the draft RSA with Google, striking out the exclusivity provision, which previously read: "Company will not include on the device any alternative search service that is similar to Google Search." *Id.* at 080. In that same redline, Verizon sought to limit the search access points governed by the RSA to expand its "flexibility for additional search capabilities on devices." Tr. at 1056:5-10 (Higgins); *see* UPX1026 at 081.

371. During those negotiations, Verizon hoped to increase the revenue share it was paid under the RSA.

372. Despite these asks, Google insisted on the tiered revenue share system in effect at the time. It "advised [that] all go-forward agreements with carriers include exclusivity provisions and exceptions cannot be made." UPX642 at 198. Despite Verizon "arguing vigorously . . . to keep [the] contract non-exclusive," *id.,* Google was insistent that Verizon could not preload any

other GSE, such as Yahoo Search, and still receive the then-20% revenue share, Tr. at 1075:16-21 (Higgins). In order for Verizon to preload Yahoo onto its devices, it had to accept the much-lower [REDACTED]% revenue share on those models in the Core Tier, which does not require exclusivity.

373. Verizon viewed the [REDACTED]% revenue share as "punitive." UPX495 at 003. It conducted a "full revenue impact" assessment if it were to either not renew the RSA or renew but accept the Core Tier to allow it to "commingl[e] search" with Yahoo. That analysis demonstrated that Verizon's acceptance of the Core Tier revenue share payment would result in a $1.4 billion loss in revenue to the company. This was both due to the decreased revenue share from Google, as well as Yahoo's revenue projections, which indicated "smaller [revenue] relative to the agreement that [Verizon] had with Google." Tr. at 1090:2-5 (Higgins).

374. As a result, Verizon determined that "the lower revenue from Yahoo [was] not worth it." UPX306 at 976. Instead, it determined that it would preload Yahoo properties that "do not have general search capabilities outside of the app," which would not run afoul of the Preferred Tier requirements. *** Those vertical properties, however, could not serve as a search access point or otherwise direct users to a non-Google GSE.

375. Ultimately, these negotiations regarding Yahoo verticals became moot because Verizon sold Yahoo shortly before the 2021 RSA was executed.

ii. AT&T

376. AT&T's RSA is very similar to Verizon's ***.

377. The RSA requires Google to pay AT&T [REDACTED]% revenue share on Preferred Tier devices provided that all search access points default to Google and those devices preload the Google Search Widget on the default home screen.

iii. T-Mobile

378. T-Mobile's RSA is structured differently than the others. T-Mobile is compensated for the default placements on Qualifying Devices and Preferred Devices through a $[REDACTED] bounty per device. ***

379. It is not economically rational for any profit-maximizing carrier to opt for the lower-revenue share option. Consequently, all three major carriers under their current RSAs have enrolled all Android devices sold at the highest revenue tier.

b. RSAs with OEMs

380. Google also has RSAs with the two primary Android OEMs, Samsung and Motorola. These RSAs cover the relatively small number of Android devices sold directly by OEMs. ***

c. Definitions of Alternative Search Services

385. All current Android RSAs contain a definition of "alternative search services" that limits the partner's ability to preinstall or promote a different GSE. ***

CONCLUSIONS OF LAW

I. LEGAL FRAMEWORK

"Section 2 of the Sherman Act makes it unlawful for a firm to 'monopolize.'" *United States v. Microsoft*, 253 F.3d 34, 50 (D.C. Cir. 2001) (citing 15 U.S.C. § 2). The offense of monopolization

requires proof of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

The D.C. Circuit's decision in *Microsoft* explains how to evaluate claims of monopolization. The first element—"monopoly power in the relevant market"—consists of two inquiries: (1) market definition, both product and geographic, and (2) power within the relevant market. *Microsoft*, 253 F.3d at 51. The plaintiff bears the burden of proof on both. *Id.* The second element—"willful acquisition or maintenance" of monopoly power—involves a burden-shifting inquiry. The plaintiff bears the initial burden of establishing a prima facie case of anticompetitive effects resulting from the challenged conduct. *Id.* at 58. If the plaintiff makes out its prima facie case, the burden shifts to the defendant to "proffer a 'procompetitive justification' for its conduct," that is, "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.* at 59. Finally, "[i]f the monopolist asserts a procompetitive justification . . . then the burden shifts back to the plaintiff to rebut that claim." *Id.* "[I]f the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* ***

## II. MONOPOLY POWER: GENERAL SEARCH SERVICES

*** Plaintiffs maintain that Google has monopoly power in the product market for general search services in the United States. According to Plaintiffs, Google has a dominant and durable share in that market, and that share is protected by high barriers to entry.

Google counters that there is no such thing as a product market for general search services. What exists instead, Google insists, is a broader market for query responses, in which there is vigorous competition. That market includes a host of other firms that fall outside of Plaintiffs' proposed market, including (1) SVPs like Amazon, Booking.com, and Yelp, (2) social media companies like Meta (which owns Facebook and Instagram) and TikTok, and (3) prominent stand-alone websites, like Wikipedia. *Id.* These firms answer queries and therefore compete with Google. Secondarily, even if there is a product market for general search services, Google argues that it lacks monopoly power in it. The emergence of other search competitors, Google says, proves that barriers to entry are not as high as Plaintiffs claim. ***

The evidence at trial established that general search services is a relevant product market and alternative sources for query information, like SVPs and social media sites, are not adequate substitutes. The *Brown Shoe* practical indicia highlight the unique features of a GSE that make it distinct from other platforms. ***

The court turns now to address whether Google possesses monopoly power within the market for general search services. *** Plaintiffs attempt to prove that Google has monopoly power in the market for general search services through both direct and indirect evidence. Although they offer little direct evidence, the indirect evidence supporting the structural approach—a dominant market share fortified by barriers to entry—easily establishes Google's monopoly power in search.

*** Plaintiffs easily have demonstrated that Google possesses a dominant market share. Measured by query volume, Google enjoys an 89.2% share of the market for general search services, which increases to 94.9% on mobile devices. FOF ¶¶ 23-24. This overwhelms Bing's share of 5.5% on all queries and 1.3% on mobile, as well as Yahoo's and DDG's shares, which are under

3% regardless of device type. FOF ¶ 25. Google does not contest these figures. Nor is this market dominance of recent vintage. Google has enjoyed an over-80% share since at least 2009. FOF ¶¶ 23-24. That is a durable dominant share by any measure.

3. Indirect Evidence — Barriers to Entry

Barriers to entry are essential to establishing monopoly power because the current market share may not reflect the "possibility of competition from new entrants[.]" *Microsoft*, 253 F.3d at 54. "[I]f barriers to entry are high, then market power can be sustainable over a long period of time." Tr. at 4763:21-22 (Whinston). Plaintiffs identify several such barriers to the general search services market: (1) high capital costs, (2) Google's control of key distribution channels, (3) brand recognition, and (4) scale. The court finds that these barriers exist and that, both individually and collectively, they are significant barriers that protect Google's market dominance in general search.

a. High Capital Costs

*** Building and maintaining a competitive GSE require an extraordinary upfront capital investment, to the tune of billions of dollars. FOF ¶¶ 50-55. Apple's Chief of Machine Learning and AI Strategy, John Giannandrea, testified that "a startup could not raise enough money . . . to build a very good, large-scale search engine" because "to build a competitive project is very expensive," amounting to a "multi-billion dollar investment." Tr. at 2261:11-19, 2268:6-7 (Giannandrea); DX374 at 301. *** High capital costs thus constitute a substantial barrier to entry.

b. Google's Control of Key Distribution Channels

*** Plaintiffs point to two sources of Google's control: the challenged contracts and its ownership of Chrome. *** Without descending into the contested issues of exclusivity and anticompetitive effects at this juncture, *see infra* Section IV.C & Part V, it suffices to say that Google controls the most efficient and effective channels of distribution for GSEs. ***

c. Brand Recognition

*** Record evidence firmly establishes that Google's brand is widely recognized and valued. FOF ¶¶ 130-131. After all, "Google" is used as a verb. Even on Bing, "google.com" is the number one search. FOF ¶ 132. The "entrenched buyer preferences" enjoyed by Google are a major deterrent to market entry. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1126 (10th Cir. 2014).

Google's brand recognition also provides its distribution partners with a powerful incentive to retain Google as the default GSE. FOF ¶ 133. *** To be sure, Google's brand recognition is due in no small part to its product quality. FOF ¶ 130. But as previously stated, "[t]he defendant's innocence or blameworthiness . . . has absolutely nothing to do with whether a condition constitutes a barrier to entry" evincing monopoly power. *AT&T*, 740 F.2d at 1001.

d. Scale

Finally, Plaintiffs identify scale as a barrier to entry. A lengthy discussion on the relationship between scale and search engine quality is unnecessary at this stage. *See infra* Section V.A.2. It is enough to say for now that scale is an important factor in search quality. ***

4. Google's Counterarguments

Google counters that the barriers to entry are not as high as Plaintiffs suggest. It points to (1) evidence of new entrants; (2) the emergence of nascent technology like artificial intelligence; and (3) its own emergence in a market that, prior to its entry, was dominated by other firms, most notably Yahoo. Google also cites the growth of search output (measured by number of queries) as inconsistent with its monopoly power. None of these contentions demonstrate low barriers to entry. ***

*First,* Google identifies Neeva and DDG as two market entrants during the alleged monopoly maintenance period. *** Both entered the market notwithstanding Google's dominance, but neither has "taken significant business" from Google and they therefore have not posed any meaningful threat to its "market power." DDG, though in operation since 2008, has barely reached a 2% market share. FOF ¶ 25. As for Neeva, it entered and exited within four years. FOF ¶ 14. Google argues that Neeva's failure was caused by its subscription-based model, *see* GRFOF ¶ 25, but that is not the full story. The lack of access to efficient channels of distribution diminished Neeva's ability to grow its user base and significantly contributed to its demise. FOF ¶ 76.

*Second,* the advent of artificial intelligence (AI) has not sufficiently eroded barriers to entry—at least not yet. *** Despite building a search engine enhanced by AI technology, FOF ¶¶ 110-111, Neeva could not ride it to market success. AI may someday fundamentally alter search, but not anytime soon. FOF ¶¶ 114-115.

*Third,* Google's early success in dethroning Yahoo as the dominant market player says nothing about the barriers to entry *as they exist today*. For that same reason, Microsoft's impression in *2009* that barriers to entry were low in search carries little weight here. *See* GTB at 33 (citing DX430 at 2). The internet of today is a far different animal. ***

*Finally,* Google argues that regardless of its market share and any barriers to entry, its lack of monopoly power is confirmed by the dramatic growth in search output and its numerous innovations that have increased search quality. *** But restricted output is simply a form of direct proof. Its absence is not fatal, as indirect evidence suffices to establish monopoly power. ***

For these reasons, the court concludes that Google has monopoly power in the general search services market.

## III. MONOPOLY POWER: ADVERTISING MARKETS

The court now moves from search to advertising. Plaintiffs collectively assert that Google has monopoly power in three overlapping advertising markets. *** U.S. Plaintiffs allege the broadest proposed market, search advertising, which includes all advertisements served in response to a query, regardless of the digital platform. Within the search ads market, Plaintiff States define a general search advertising market that includes only ads served on GSEs. Finally, both sets of Plaintiffs propose a general search text advertising market, limited to text ads appearing on a GSE's SERP. Google counters that Plaintiffs' proposed markets do not comport with business realities. There is, according to Google, one omnibus market for digital advertising, and the markets as alleged exclude various digital ad types that are effective substitutes for Google's text and shopping ads.

The court consider each of Plaintiffs' proposed markets under the *Brown Shoe* factors, and, to the extent that it recognizes a market, determines whether Google has monopoly power within it. The court addresses the broadest market first (search advertising), followed by the narrowest (general search text advertising), and then concludes with the one in between (general search

advertising). It finds as follows. First, although there is a relevant product market for search advertising. Google does not monopolize it. Second, general search text advertising is a relevant product market in which Google has monopoly power. Finally, a relevant product market for general search advertising does not exist. ***

## IV. EXCLUSIVE DEALING

Before moving forward, it is worthwhile to pause and summarize where we are. The court has found that Plaintiffs have proven that Google has monopoly power in two relevant product markets: general search services and general search text advertising. On the other hand, although the court recognized a separate market for search ads, it found that Google did not have monopoly power in that market. It also rejected a separate general search ads market. As to the latter two markets, the court's Section 2 inquiry proceeds no further.

Because "having a monopoly does not by itself violate § 2," *Microsoft*, 253 F.3d at 58, the next step in the analysis is to determine whether Google has engaged in exclusionary conduct with respect to general search services and general search text advertising. Plaintiffs must prove a second element, which is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 50 (internal quotation marks omitted). The bulk of Plaintiffs' case focuses on the search distribution contracts—the browser agreements (primarily with Apple and Mozilla) and the Android agreements (the MADAs and RSAs)—which Google allegedly uses to maintain its monopoly in the relevant markets.

According to Plaintiffs, the challenged contracts are unlawful exclusive agreements. They effectively block Google's rivals from the most effective channels of search distribution, namely, the out-of-the-box default search settings. Google is the exclusive default search engine on the Safari and Firefox browsers. Likewise, on all Android devices, the Google Search Widget appears on the home screen and, on all except Samsung devices, Chrome is preloaded as the exclusive browser. Plaintiffs say that these distribution contracts effectively "lock up" half of the market for search and, by extension, nearly half of the market for general search text ads. These exclusive deals protect Google's dominant position and shield it from meaningful competition. Plaintiffs also specify certain contractual provisions that they claim thwart competition. The ISA, for example, contains provisions arguably restricting Apple's ability to divert queries away from Google and serve search ads, and the RSAs prohibit partners from preloading "alternative search services" on Android devices.

Before turning to the merits of Plaintiffs' arguments, the court considers two threshold matters. First, Google contends that it is not subject to Section 2 liability because its positions as the default GSE are the product of "competition for the contract" and thus are not exclusionary. Second, Plaintiffs maintain that the court should eschew *Microsoft*'s exclusive dealing framework in favor of a broader "general Section 2 standard." UPCL at 14. The court rejects both arguments.

### A. "Competition for the Contract" Is No Defense.

Google disputes that the distribution agreements are exclusionary. Recall, the Supreme Court has drawn a line between exclusionary conduct versus "growth or development as a consequence of a superior product, business acumen, or historical accident." *Grinnell*, 384 U.S. at 571. The former violates the Sherman Act; the latter does not. Google says that it has secured default distribution, not through exclusionary conduct, but by developing a "superior product" through

constant innovation. Google claims that it "has repeatedly outcompeted its rivals . . . on the basis of its superior quality and monetization," and that any "scale benefits achieved from winning customers' business based on competition on the merits [do not] turn[] an otherwise lawful agreement into an unlawful one." GTB at 50, 56. Google points out that its partners chose to design their products to have a default GSE, and Google simply has bested its rivals to secure those default positions. Google also emphasizes its superior "business acumen." *See id.* at 50-60. For instance, unlike Microsoft, Google anticipated that there would be increasing demand for search on mobile, and it invested accordingly. *Id.* at 68. Thus, Google says, it has won (and continues to win) the defaults through competition as opposed to exclusionary conduct.)

In a sense, Google is not wrong. It has long been the best search engine, particularly on mobile devices. FOF ¶¶ 126-127. Nor has Google sat still; it has continued to innovate in search. FOF ¶ 128. Google's partners value its quality, and they continue to select Google as the default because its search engine provides the best bet for monetizing queries. FOF ¶¶ 126, 133. Apple and Mozilla occasionally assess Google's search quality relative to its rivals and find Google's to be superior. FOF ¶¶ 324, 332-333, 340-344. And Google's rivals have tried to oust it as the default GSE. Microsoft, most notably, has pitched Apple on making Bing the default multiple times, and DDG made a bid to be the default for private browsing mode searches on Safari. FOF ¶¶ 321, 330. These firms have not succeeded in part due to their inferior quality. FOF ¶¶ 324, 327, 332. It is also true that Google foresaw that the future of search was on mobile. Microsoft acknowledges that it was slow to recognize the importance of developing a search product for mobile, and it has been trying to catch up—unsuccessfully—ever since.

But these largely undisputed facts are not inconsistent with possessing and exercising monopoly power. Nor do they tell the full story. There is no genuine "competition for the contract." Google has no true competitor. Consider that Google's monopoly in general search has been remarkably durable. Its market share in 2009 was nearly 80%, and it has *increased* since then to nearly 90% by 2020. FOF ¶ 23. Bing, during that same period, has never held a market share above 11%, and today it stands at less than 6%—meaning that Google's biggest rival trails in market share by a whopping 84%. FOF ¶ 25. Yahoo, long ago considered Google's closest competitor, today holds less than 2.5% of the market. *Id.* Thus, over the last decade, Google's grip on the market has only grown *stronger*.

That is not the only evidence of market stasis. Only once in the last 22 years has a rival dislodged Google as the default GSE, and in that case, Mozilla switched back from Yahoo to Google three years later. FOF ¶¶ 337-339. Moreover, there have been only two new market entrants of note in the last 15 years—DDG and Neeva. One of them is no longer in business (Neeva), and the other has achieved a market share of 2.1% (as of 2020) after more than a decade in business. If there is genuine competition in the market for general search, it has not manifested in familiar ways, such as fluid market shares, lost business, or new entrants.

The market reality is that Google is the only real choice as the default GSE. Apple's Senior Vice President of Services, Eddy Cue, put it succinctly when, in a moment of (perhaps inadvertent) candor, he said: "[T]here's *no price* that Microsoft could ever offer [Apple] to" preload Bing. Tr. at 2519:10-11 (Cue) (emphasis added). "No price." Mozilla stated something similar in a letter to the Department of Justice prior to the filing of this lawsuit. It wrote that switching the Firefox default to a rival search engine "would be a losing proposition" because no competitor could monetize search as effectively as Google. DX547.002. A "losing proposition." If "no price" could entice a partner to switch, or if doing so is viewed as a "losing proposition," Google does not face true market competition in search.

Google understands there is no genuine competition for the defaults because it knows that its partners cannot afford to go elsewhere. Time and again, Google's partners have concluded that it is financially infeasible to switch default GSEs or seek greater flexibility in search offerings because it would mean sacrificing the hundreds of millions, if not billions, of dollars that Google pays them as revenue share. FOF ¶¶ 319, 320, 370-375, 378 (identifying instances in which Apple, Verizon, AT&T, and T-Mobile have all sought and failed to obtain greater flexibility under the relevant contracts). These are Fortune 500 companies, and they have nowhere else to turn other than Google. ***

Like Microsoft before it, Google has thwarted true competition by foreclosing its rivals from the most effective channels of search distribution. *See infra* Section V.A.2. The result is that consumer use of rival GSEs has been kept below the critical levels necessary to pose a threat to Google's monopoly. The exclusive distribution agreements thus have significantly contributed to Google's ability to maintain its highly durable monopoly. Google asserts that this case is unlike *Microsoft* because there, Microsoft radically changed its conduct in response to Netscape's threat and, in so doing, flipped the companies' market shares. Here, by contrast, Google says its conduct has been relatively constant, both before and after its acquisition of dominant market status. But "many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even honestly industrial." *Berkey Photo*, 603 F.2d at 274-75 (internal quotation marks and citations omitted). It is Google's status as a monopolist that makes its distribution contracts exclusionary, even if the same conduct did not have that effect when Google first began employing it. ***

C. The Challenged Agreements Are Exclusive.

"Generally, a prerequisite to any exclusive dealing claim is an agreement to deal exclusively." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (internal quotation marks and citations omitted). Exclusivity need be neither express nor complete to render an agreement "exclusive" for Section 2 purposes: *De facto* and partial exclusivity may suffice depending on the circumstances. *Id.* at 270, 283.

To illustrate, in *Microsoft,* the D.C. Circuit upheld the trial court's determination that "although not literally exclusive, the deals were exclusive *in practice* because they required developers to make Microsoft's [Java Virtual Machine] the default in the software they developed." 253 F.3d at 75-76 (emphasis added); *see also LePage's Inc. v. 3M,* 324 F.3d 141, 157 (3d Cir. 2003) (Section 2 liability encompasses "arrangements which, albeit not expressly exclusive, effectively foreclosed the business of competitors.") (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365. U.S. 320, 327 (1961)). The court also found that Microsoft's distribution agreements with Internet Access Providers (IAPs) were exclusive, even though browser distribution could be achieved by other "more costly and less effective" means. 253 F.3d at 70. *Microsoft* thus provides the template for evaluating Google's distribution agreements.

1. Browser Agreements

Google's browser agreements are exclusive insofar as they establish Google as the out-of-the-box default search engine. The Apple ISA requires that Google be preloaded as the exclusive

default search engine on all Safari search access points in exchange for [REDACTED] % revenue share. FOF ¶ 298. The resulting query volume is substantial. About 65% of queries on all Apple devices (mobile and desktop), and 61.8% on iOS devices (mobile), flow through the Safari default, demonstrating that default placement is a "primary channel[] for distribution of" search. FOF ¶¶ 296-297 (queries entered on Safari (both mobile and desktop) account for 28% of all queries in the United States); *Microsoft*, 253 F.3d at 61.

The Mozilla RSA has a similar effect. Google is the default GSE on all Firefox search access points, including the navigation bar and the homepage, among others. FOF ¶ 334. Google's default placements on Firefox generate 80% of Mozilla's overall operating revenue, demonstrating that the vast majority of query volume on Firefox goes through defaults. FOF ¶ 335. Google also has comparable agreements with smaller browsers, like Samsung's S Browser. FOF ¶ 346; *see also* UPFOF ¶¶ 310-318.

Google mounts several arguments as to why these agreements are not exclusive as a matter of law.

*First,* it asserts that the browser agreements permit the browser to "promote search rivals on the same browser, and Apple and Mozilla have for many years entered into such promotional deals." GTB at 37. For instance, Apple's agreement with Microsoft provides that Apple will provide a readily discoverable means of switching the default and will install Bing as a default bookmark. FOF ¶ 320. Relatedly, Google's agreement with Mozilla permits the "this time, search with" feature on Firefox, which allows users to select a different search product from its "Awesome Bar" for a given query. FOF ¶ 60.

The fact that Google's browser partners can contract with its rivals for distribution through less efficient channels does not, however, immunize the challenged agreements from being deemed exclusive. That is the clear lesson of *Microsoft*. There, for example, Microsoft's contracts with the leading IAP, America Online ("AOL"), provided that AOL would not "provide software using any non-Microsoft browser except at the customer's request, and even then AOL [would] not supply more than 15% of its subscribers with a browser other than I[nternet] E[xplorer]." 253 F.3d at 68. The trial court had described this agreement "for all practical purposes" as guaranteeing that Internet Explorer would be AOL's "browser of choice," even though "Microsoft [] permitted AOL to offer Navigator through a few subsidiary channels." *United States v. Microsoft Corp.*, 87 F.Supp.2d 30, 53 (D.D.C. 2000). The trial court held that the agreement was exclusive, and the D.C. Circuit agreed. The Circuit explained that IAPs were one of the two major channels of distribution, and by reaching agreements with 14 of the top 15 IAPs, Microsoft had "kept usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *Microsoft*, 253 F.3d at 67. Similarly here, the mere fact that the browser agreements do not prevent Apple and Mozilla from entering into limited distribution deals with rivals does not render the agreements non-exclusive. ***

*Third,* Google argues that "users' search behavior [is] not consistent with Plaintiffs' assertion that the agreements were exclusive or *de facto* exclusive," and that ultimately, user choice is determined by quality, not defaults. GTB at 38. It points out that nearly 40% of queries on Apple's mobile devices flow through non-default search access points, such as default bookmarks or organic search. *Id.*; FOF ¶ 296. "This fact, alone," Google says, "confirms that the Safari agreement is not exclusive." GTB at 38. It also highlights the example of Firefox's default change from Google to Yahoo. In 2014, when that change happened, users switched back to Google despite the Yahoo default because users preferred Google. *Id.* And Google cites its own success

on Windows PCs, where Google is not the preloaded search default. *Id.* at 38-39. This actual user behavior, Google says, "flatly contradicts Plaintiffs' assertion that browser default agreements are the equivalent of an exclusive distribution agreement." *Id.* at 39.

But the fact that some consumers access search on non-default access points is not dispositive on exclusivity. On Apple devices, 65% of queries still go through the default. FOF ¶ 296. That is a "substantial amount of distribution[.]" *Microsoft*, 87 F.Supp.2d at 42. *** And Google's success on Windows again illustrates that defaults are less effective when the alternative has strong brand recognition and product quality. FOF ¶ 70. Even then, the default effect on users who stick with the Edge browser on Windows devices is real, as Bing receives 80% of such queries. FOF ¶¶ 82-84 (Google's share on Windows devices overall is 80%, but its share on Edge where it is not the default is only 20%).

To be deemed exclusive, a contract need not foreclose all other avenues of distribution to which consumers might have access. It is enough that the contract "clos[es] to rivals a substantial percentage of the available opportunities for [] distribution." *Microsoft*, 253 F.3d at 70. As will be seen when the court discusses market foreclosure, *infra* Section V.A.1.b, the distribution agreements do just that. ***

2. Android Agreements

Plaintiffs likewise contend that the RSAs and MADAs are exclusive. Google disputes that characterization.

a. MADAs

At summary judgment, the court concluded 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." Google, 687 F.Supp.3d at 76. With the benefit of a full trial, the court can now conclude that the MADA is exclusive in practice.

Its exclusivity arises from two contractual requirements and two market realities. The two contractual requirements are that all MADA signatories must: (1) feature the Google Search Widget in the center of the home screen and (2) place Chrome on the home screen with Google as the default GSE. FOF ¶¶ 351, 356. The two market realities are that: (1) the Google Play Store is a must-have on all Android devices, FOF ¶¶ 352-354, and (2) the industry-wide practice is to avoid excessive preloading of applications, or "bloatware," FOF ¶¶ 359-361. This combination of factors has resulted in all Android OEMs and carriers entering into MADAs, with all Android devices featuring the Google Search Widget and Chrome on the home screen to the exclusion of rivals as a practical matter. No Android device carries a second search widget and, other than Samsung, no device comes with a second preinstalled browser (and even the S Browser defaults to Google because of the RSA). *Id.* These prized placements are extremely effective at driving searches to Google. To illustrate, Samsung, the largest Android OEM, derives 80% of its on-device search revenue through searches performed via the Google Search Widget and Chrome default. FOF ¶ 74. ***

b. RSAs

The RSAs between Google and Android device distributors formalize the practical exclusivity of the MADAs. *** It is, of course, true that no distributor of Android devices is *required* to enter into an RSA with Google. They can opt to distribute MADA-compliant devices without

earning revenue share. Also, Google's agreements with Verizon and Samsung permit those partners to retain the option to preinstall another GSE, albeit at a lower revenue share percentage. FOF ¶¶ 366, 381. As Google argues, RSA "[p]artners are not prevented from preloading rivals on any devices (and any amount of devices) of their choosing—the only result of doing so is that the partner will not receive the highest revenue share on those devices." GTB at 77.

This optionality does not make the RSAs any less exclusive. *** No rational market actor would sell a MADA-compliant device without ensuring that it earned search revenue through the RSA. FOF ¶ 363. The forgone revenue is simply too great. For instance, Verizon considered switching away from the Google default but would have had to risk a $1.4 billion loss to do so. FOF ¶¶ 372-374. The decision to stick with Google was the only rational choice. FOF ¶ 379. Not surprisingly then, Google has identified no Android device presently sold in the United States that is subject to a MADA but not an RSA. *Id.* *** The RSAs therefore are properly treated as exclusive agreements.

## V. EFFECTS IN THE MARKET FOR GENERAL SEARCH SERVICES

### A. The Exclusive Agreements Cause Anticompetitive Effects in the General Search Services Market.

Merely categorizing Google's distribution agreements as "exclusive" does not answer the question of whether those deals violate Section 2. That is because exclusive agreements are not condemned per se by the antitrust laws, even if they involve a dominant firm. *Microsoft*, 253 F.3d at 69 ("[E]xclusivity provisions in contracts may serve many useful purposes.") ***

The key question then is this: Do Google's exclusive distribution contracts reasonably appear capable of significantly contributing to maintaining Google's monopoly power in the general search services market? The answer is "yes." Google's distribution agreements are exclusionary contracts that violate Section 2 because they ensure that half of all GSE users in the United States will receive Google as the preloaded default on all Apple and Android devices, as well as cause additional anticompetitive harm. The agreements "clearly have a significant effect in preserving [Google's] monopoly." *Microsoft*, 253 F.3d at 71.

The agreements have three primary anticompetitive effects: (1) market foreclosure, (2) preventing rivals from achieving scale, and (3) diminishing the incentives of rivals to invest and innovate in general search. Plaintiffs also contend that Google's incentives to invest are diminished, but the evidence of that effect is weaker than the others.

#### 1. The Exclusive Agreements Foreclose a Substantial Share of the Market.

An exclusive agreement violates the Sherman Act only when its "probable effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Id.* at 69 (quoting *Tampa Elec.*, 365 U.S. at 328). "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.'" *Id.* (quoting *Tampa Elec.*, 365 U.S. at 328). ***

##### a. Foreclosure Calculation

U.S. Plaintiffs' expert, Dr. Whinston found that 50% of all queries in the United States are run through the default search access points covered by the challenged distribution agreements. FOF ¶ 62 (28% through the ISA, 19.4% through the MADAs and RSAs, and the remaining

2.3% through third-party browser agreements). This figure does not include the 20% of all queries in the United States that flow through Google on user-downloaded Chrome. FOF ¶ 63.

Google does not dispute Dr. Whinston's 50% computation. Instead, it challenges his very understanding of market foreclosure. First, Google contends that the proper measure of foreclosure is not market coverage but the percentage of queries available to rivals in a "but-for world" in which the challenged contracts do not exist. In such a world, the foreclosure number would be far lower because users in large numbers still would use Google. ***

Consequently, the court does not rely on Dr. Whinston's but-for world "Super Duck" analysis or determine foreclosure against a hypothetical world in which users are offered a GSE "choice screen" out of the box. *See* GTB at 44 (arguing that "Plaintiffs did not attempt to calculate the degree of alleged foreclosure if all browser developers offered a choice screen instead of setting Google as the default"). Proving substantial foreclosure does not require such thought experiments. *** The court thus finds that as to the general search services market Plaintiffs have proven that Google's exclusive distribution agreements foreclose 50% of the general search services market by query volume.

b. Significant Foreclosure

To be considered anticompetitive, the market foreclosure must be "significant." *Microsoft*, 253 F.3d at 70-71. The 50% figure meets that threshold. *See id.* (stating 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* roughly 40% or 50% share usually required to establish a § 1 violation") (emphasis added). *** These factors all demonstrate that Google's distribution agreements foreclose a substantial portion of the general search services market and impair rivals' opportunities to compete. ***

2. The Exclusive Agreements Have Deprived Rivals of Scale.

Google's exclusive agreements have a second important anticompetitive effect: They deny rivals access to user queries, or scale, needed to effectively compete. Scale is the essential raw material for building, improving, and sustaining a GSE. FOF ¶¶ 86-106. For more than a decade, the challenged distribution agreements have given Google access to scale that its rivals cannot match. FOF ¶¶ 87-89. Google has used that scale to improve its search product and ad monetization. FOF ¶¶ 90-94, 103-105. Meanwhile, without access to scale, other GSEs have remained at a persistent competitive disadvantage, and new entrants cannot hope to achieve a scale that would allow them to compete with Google. FOF ¶¶ 76, 87-89, 106. Naturally then, GSE distributors prefer Google because of its search quality and because it would be economically irrational to sacrifice the high revenue share. They thus routinely renew the distribution deals with their exclusive terms. In this feedback loop, the revenue share payments "effectively make the ecosystem exceptionally resistan[t] to change" and "basically freeze the ecosystem in place[.]" Tr. at 3797:24-3798:21 (Ramaswamy); *see id.* at 3513:1-3 (Nadella) ("[T]his vicious cycle that [Microsoft is] trapped in can [] become even more vicious because the defaults get reinforced."). That is the antithesis of a competitive market. ***

a. The Power of Defaults

Numbers help explain the power of the search default settings. Half of all GSE queries in the United States are initiated through the default search access points covered by the distribution agreements. An additional 20% of all searches nationwide are derived from user-downloaded

Chrome, a market reality that compounds the effect of the default search agreements. FOF ¶ 63. That means only 30% of all GSE queries in the United States come through a search access point that is not preloaded with Google. Additionally, default placements drive significant traffic to Google. Over 65% of searches on all Apple devices go through the Safari default. FOF ¶ 296. On Android, 80% of all queries flow through a search access point that defaults to Google. FOF ¶ 74.

All of this makes the defaults extremely valuable. In 2021, Google spent $26.3 billion in traffic acquisition costs—the revenue share paid to its partners—which is four times more than the company's other search-related costs combined, including research and development. FOF ¶ 289. The true value of the defaults is undoubtedly far greater. Tr. at 9786:6-8 (Murphy) (stating "there's a lot of headroom" between Google's revenues and the price of the distribution agreements).

Google, of course, recognizes that losing defaults would dramatically impact its bottom line. For instance, Google has projected that losing the Safari default would result in a significant drop in queries and billions of dollars in lost revenues. FOF ¶¶ 72, 75. The same would occur if Google were to lose the Android defaults. Over 50% of all search revenue on Android devices flows through the Google Search Widget alone. FOF ¶ 74; *see also* FOF ¶ 75 (the Widget and Chrome make up 80% of search revenue on Samsung devices). The defaults are more than just "incremental promotion." GRFOF ¶ 96. They supply Google with unequalled query volume that is effectively unavailable to rivals. ***

Google's discounting of the default also cannot be squared with Bing's success on the Edge browser on Windows desktops, where Bing is the default GSE. Of the users that remain on Edge, 80% of their searches are conducted using Bing. FOF ¶¶ 83-84. Even if some of that rate is attributable to users who prefer Microsoft products, and therefore consciously do not switch, the default effect no doubt materially contributes to the uniquely high percentage of Bing users on Edge. That added search volume has allowed Microsoft to improve its search quality on desktop devices, to the extent that it is now nearly on par with Google. FOF ¶ 127.

Finally, Google's position on defaults is at odds with many internal records that recognize, from a behavioral standpoint, the power of the default. FOF ¶¶ 66-68, 72-73, 75. It also is contrary to Google's well-documented early recognition of defaults as critical to driving query volume. FOF ¶¶ 67, 73.

b. The Impact of Scale

Having established that Google gets substantially more queries than its rivals as a result of the defaults, the question becomes how, if at all, that advantage impacts competition. The answer to that question turns on the relationship between scale and a GSE's quality.

The sheer magnitude of Google's query volume, or scale, compared to rivals is startling: Users enter nine times more queries on Google than on all rivals combined. On mobile devices, that multiplier balloons to 19 times. FOF ¶ 87. *** The market for GSEs is thus characterized by a type of network effect. *Cf. Microsoft,* 253 F.3d at 49 (discussing network effects in phone services). (1) More user data allows a GSE to improve search quality, (2) better search quality attracts more users and improves monetization, (3) more users and better monetization attract more advertisers, (4) more advertisers mean higher ad revenue, and (5) more ad revenue enables a GSE to expend more resources on traffic acquisition costs (i.e., revenue-share payments) and investments, which enable the continued acquisition of scale. *See* Tr. at 3492:8-25 (Nadella) (describing "network effects" in the market for search). ***

Google also maintains that the quantity of user data is less important than how it is used, and if its rivals had Google's business foresight and drive to innovate, they too could win default distribution. GTB at 50. But that position blinks reality. Apple's flirtation with Microsoft best illustrates this point. Microsoft has invested $100 billion in search in the last two decades and its quality now matches Google's on desktop search. FOF ¶¶ 10, 127. Yet, Microsoft's failure to anticipate the emergence of mobile search caused it to fall behind, and with Google guaranteed default placement on all mobile devices, Microsoft has never achieved the mobile distribution that it needs to improve on that platform. FOF ¶¶ 24-25. This perpetual scale and quality deficit means that Microsoft has no genuine hope of displacing Google as the default GSE on Safari. FOF ¶¶ 321-329. As Apple's Eddy Cue testified, there was "no price that Microsoft could ever offer [Apple]" to prompt a switch to Bing, because it lacks Google's quality. FOF ¶¶ 323, 326. Google's massive scale advantage thus is a key reason why Google is effectively the only genuine choice as a default GSE.

That barrier is reinforced by the size of Google's revenue share payments. Consider the following thought experiment. What would it take for a new market entrant to convince Mozilla—a small distribution channel—to walk away from Google as the default? The following would have to happen. First, the new entrant would have to surmount the entry barriers to create a GSE of comparable quality to Google. Second, it would have to build an ads platform that could monetize search on par with Google. Third, it would have to promise to offset any revenue shortfall that might arise either from reduced query volume (because some users would elect to stay with Google) or from inferior ad monetization (because fewer users could mean fewer advertisers and less profitable ad auctions, notwithstanding the quality of its delivery of ads). A new entrant would need billions of dollars to meet these three conditions. And notably, it would have to accomplish this trifecta either by acquiring enough user data through non-default distribution channels (which is improbable) or by developing a technology that would make the need for user data far less important (which is unlikely to happen anytime soon, FOF ¶¶ 102-104, 114-115). The truth is, no new entrant could hope to compete with Google for the default on Firefox or any other browser. Google's query and quality advantage and high revenue share payments are strong incentives simply to stay put. ***

3. The Exclusive Agreements Have Reduced Incentives to Invest and Innovate.

The distribution agreements have caused a third key anticompetitive effect: They have reduced the incentive to invest and innovate in search. For more than a decade, the market for general search services has presented the opportunity to earn outsized profits. Google certainly has reaped the rewards. FOF ¶ 8 (Google Search's 2022 booked revenue was over $162 billion). Yet the general search services market has remained static for at least the last 15 years, with investments largely coming from established players. Only Google and Microsoft have made the sizeable capital investments needed to build a self-sustaining GSE. FOF ¶¶ 10, 55. Smaller competitors do even not compete as fully integrated search engines. Yahoo, once the market leader, no longer crawls the web and instead relies on Microsoft for web results. FOF ¶ 13. DDG operates in the same way. FOF ¶ 12.

Nor has venture capital money rushed in. As Apple's John Giannandrea wrote in 2018: "[T]he reason a better search engine has not appeared is that it's not a VC fundable proposition even though it's a lucrative business." UPX240 at 507; *see also* Tr. at 3510:24-3512:7 (Nadella) (describing Silicon Valley venture funding in search as a "no fly zone"). As a result, DDG and

Neeva are the only two notable market entrants in the last 15 years. Each attempted to innovate—DDG on privacy and Neeva through a subscription-based model—but found only limited success (DDG) or left the market altogether (Neeva). FOF ¶¶ 14, 25, 76. ***

Plaintiffs offer other examples of how the distribution agreements disincentivize investment and innovation in general search: (1) Google's main rival, Microsoft, has limited its investment due to its limited distribution on mobile; (2) Apple, a fierce potential competitor, remains on the sidelines due to the large revenue share payments it receives from Google; *** and (4) knowing that stagnation will engender no consequences, Google lacks incentives to innovate. The court addresses each in turn.

a. Microsoft

Everyone agrees that Google's distribution agreements did not cause Microsoft's *past* underinvestment in search. Microsoft "missed" the mobile revolution and was unable to improve its browser, Internet Explorer, until it used Google's rendering engine, Chromium. Some of Microsoft's quality issues also were attributable to its poor index. *See* DX429 at .021 (Bing is 25 times worse than Google regarding not-in-index issues). By 2007, Microsoft understood that it was three to five years behind in search and increased investment was needed. Ultimately, Microsoft committed significant capital to search. FOF ¶ 10. That investment (combined with secured distribution on Windows devices) has allowed Bing to achieve quality parity with Google on Windows desktop devices. FOF ¶ 127.

Today, Microsoft could invest more money in search but chooses not to without assurances of additional distribution on mobile. *** Google responds that Microsoft's current investment strategy is not evidence of an anticompetitive effect because market actors must take financial risks to compete and Microsoft's unwillingness to take such risks is not an antitrust problem. What Google says has intuitive appeal, but it does not reflect market realities. Microsoft stood no realistic chance of beating Google for the Apple default, and there is no evidence of any serious negotiations for Android placements. No profit-driven firm in Microsoft's position would invest the substantial sums required to enhance its search product when there is little to no genuine opportunity for a default distribution deal. Google's distribution agreements thus appear reasonably capable of having significantly contributed to disincentivizing Microsoft from enlarging its investment in search. ***

b. Apple

Plaintiffs contend that the billions of dollars that Apple receives in revenue share are, in effect, a payoff to keep Apple on the sidelines of search. *** The evidence relating to Apple cannot be cast in such absolute terms and calls for more nuance. *** Apple has the financial, technological, and human resources to develop or acquire a competing GSE. *** Both Apple and Google understand that Apple could develop its own GSE to replace Google as the default in Safari. FOF ¶¶ 300-301. Apple has decided not to do so thus far. FOF ¶ 302. The ISA revenue share is an important factor in Apple's calculus. In return for exclusive and non-exclusive default placements (i.e., user-downloaded Chrome and Safari default bookmarks), Google pays Apple [REDACTED] % of its net ad revenue, which amounted to $20 billion in 2022. FOF ¶¶ 298-299. This is almost double the payment Google made in 2020, which was at that time 17.5% of Apple's operating profit. *Id.* Google pays Apple more in revenue share than it pays all other partners combined. FOF ¶ 299. If Apple were at all inclined to enter the market for general

search, it would have to be prepared to lose these large revenue share payments. FOF ¶¶ 302-326.

But the loss of revenue share is not the only reason Apple has not entered the market. There are other costs and risks. Although Apple has built an infrastructure to deliver some search results to its users, it would have to commit billions more to build and maintain a fully functioning GSE. FOF ¶ 302. It also would need to develop an ad platform to monetize searches. Critically, Apple would have to be willing to put its brand reputation—and possibly device sales—at stake if it were to produce an inferior or unpopular product. *See id.* The required investment also would divert capital from other possibly profitable ventures. *Id.* Even if all went well, Apple's own projections estimate that it would lose over $12 billion in revenue during the first five years following a potential separation from Google. *Id.*

Still, the ultimate question is whether the ISA reasonably appears capable of significantly contributing to keeping Apple on the sidelines of search, thus allowing Google to maintain its monopoly. *See Microsoft,* 253 F.3d at 79. The revenue share payments unquestionably have that effect. The prospect of losing tens of billions in guaranteed revenue from Google—which presently come at little to no cost to Apple—disincentivizes Apple from launching its own search engine when it otherwise has built the capacity to do so. The payments need not be Apple's sole reason for staying out of search to constitute an anticompetitive effect. Plaintiffs are not required to prove that Google's "continued monopoly power is precisely attributable to" the ISA. *Id.* ***

d. Google

Finally, Plaintiffs argue that the absence of genuine competition for general search queries has reduced Google's incentives to innovate its search product, thereby harming consumers. They note that Google spends seven times more on securing defaults than on R&D, FOF ¶ 289, and point to some evidence that its search expenses have declined over the years. Plaintiffs also identify instances where Google has reacted to rare competitive pressure by rapidly investing in product improvements or launches. For example, Plaintiffs point to Google's "Go Big in Europe" campaign, launched in response to the advent of a search engine choice screen on Android devices required by European Union regulators. Plaintiffs also cite to some isolated examples of degraded search engine quality, such as a period of stagnation and decline in Google's index size, declining latency, and anecdotal evidence from complaining employees.

The court is not persuaded. Google has not sat still despite its dominant market share. Search has changed dramatically over the last 15 years, largely because of Google. FOF ¶ 128. Its SERP, for example, is different today than it was even five years ago. *Id.* Moreover, the evidence that Google has left innovative technologies on the shelf, or that its investments in R&D and human capital have fallen behind others in the industry, is sparse. "Go Big in Europe" is a one-time, discrete episode that is far from robust evidence that Google remains inert absent competition. In truth, Google's penchant for innovation is consistent with the behavior of a monopolist. *Microsoft*, 253 F.3d at 57 ("[M]onopolists have reason to invest in R&D," as "innovation can increase an already dominant market share and further delay the emergence of competition[.]").

There is one notable exception, however. That is Google's launch of its generative AI chatbot Bard (now Gemini) in direct response to Microsoft's announcement of BingChat (now Copilot), which integrates Bing and ChatGPT's AI technology. FOF ¶¶ 111-112. This is a clear example of Google responding to competition.

In any event, based on the record as a whole, the court cannot find that the distribution agreements have had an anticompetitive effect by deterring Google from innovating in search.

* * *

Plaintiffs have made the required showing of anticompetitive effects in the general search services market, satisfying their prima facie case. The burden now shifts to Google to proffer a "procompetitive justification" for the exclusive distribution agreements. *Microsoft*, 253 F.3d at 59.

B. The Exclusive Agreements Do Not Result in Procompetitive Benefits.

"[I]f 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.* The defendant must "present the District Court with evidence demonstrating that the exclusivity provisions have some such procompetitive justification." *Id.* at 72. "If the monopolist asserts a procompetitive justification—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—then the burden shifts back to the plaintiff to rebut that claim." *Id.* at 59.

Google advances three categories of procompetitive benefits. It submits that the challenged agreements (1) enhance the user experience, quality, and output in the market for general search services, (2) incentivize competition in related markets that redounds to the benefit of the search market, and (3) produce consumer benefits within the related markets. The court concludes that the record does not sufficiently support any of these procompetitive justifications.

1. Benefits in the Market for General Search Services

*First,* Google argues that its browser agreements "allow[] the browser's search functionality to work effectively out of the box," which "ensure[s] convenience for Safari and Firefox users[.]" GTB at 51, 53. As support for this proposition, Google notes the longstanding industry practice of preloading a browser with a default GSE. *Id.* at 51. Indeed, all browsers in the United States are so designed. FOF ¶ 59. This practice, Google contends, is evidence that the browser agreements benefit consumers.

But the procompetitive benefit must justify "the specific means here in question, namely exclusive dealing contracts[.]" *Microsoft*, 253 F.3d at 71; *see id.* at 76 (defendant did not carry its burden when its purported benefit failed to justify the particular contractual clause that made the agreement exclusive). Assuming Google has established the value of a default placement to competition and consumers, it has not shown that *exclusive* defaults across nearly all key search access points have such utility.

What's more, a non-exclusive default would still provide all the convenience and efficiency benefits that Google touts. *See* UPRFOF ¶ 2143 ("Plaintiffs are not challenging the concept of a search default or that distributors may recommend a search engine, set a search default, or preinstall search access points. Plaintiffs are challenging Google's exclusionary contracts that require counterparties to set Google as the exclusive search default."). For example, Google asserts that "Apple's commitment to providing the best out-of-the-box experience to consumers includes designing the products to be simple to use and work right out of the box" and that "product designs with additional decisional steps for consumers to take can cause users to abandon use of the product." GFOF ¶¶ 1223, 776. But Google does not explain why Apple would lack those same incentives absent exclusivity. Indeed, the original Google-Apple ISA preloaded Google as the default but did not require exclusivity. FOF ¶ 312. The absence of exclusivity did

not stunt Apple's product development during that time. Additionally, Apple in the past has sought greater flexibility with defaults, which Google rejected. FOF ¶¶ 319-320. Presumably, Apple would not have made that request if it felt that it would harm the consumer experience.

*Second,* Google contends that "the contest to be the default presents search engines the opportunity to" win incremental promotion, thereby incentivizing firms "to make quality improvements to compete for the default position[.]" GTB at 53. That may be true in a competitive market. But as the court already has concluded, there is no genuine competition among GSEs for defaults, and there is no record evidence that competition for the default has motivated GSEs to make quality improvements. If anything, Google's near dominance over the defaults for more than a decade has *reduced* the incentive to invest.

Google notes that "Microsoft highlighted its improvements in search quality over the past years" during its negotiations with Apple. GFOF ¶ 1440. But that only illustrates the importance of real competition for defaults. Microsoft committed resources to search, and Bing's quality followed, because it has access to an efficient channel of distribution: the Edge browser on Windows. FOF ¶ 59. Without such access, it would be where Yahoo or DDG is today, with no real prospect of competing for any default placement. Microsoft's ability to leverage its advantage on Windows is what spurred Microsoft's investment in search, not the unrealistic prospect of replacing Google as a search default on Apple or any other device.

Relatedly, Google argues that the revenue sharing provisions of the agreements introduce price competition for the default that would not exist otherwise, because GSEs are free products. The evidence does not support that assertion. True, Microsoft perceives that Apple has used it as a stalking horse in its negotiations with Google, FOF ¶ 329, but there is no evidence that Google made its revenue share offer to Apple based on a concern that Apple might accept a better price from Microsoft. To the contrary, Google knew there was no prospect that Microsoft could outbid it. Google's "Alice in Wonderland" analysis projected that Microsoft would have to offer Apple over 100% revenue share to compete, FOF ¶ 328, and this study turned out to be wholly accurate. Microsoft *did* offer Apple 100% revenue share plus guarantees, but Apple's executives testified that Bing was never a realistic option to replace Google. FOF ¶¶ 323-327. Even Google CEO Sundar Pichai testified that Google took "into account" that Apple had no other viable option "which was why [it] didn't pay the share Apple wanted." Tr. at 7772:12-7773:10 (Pichai).

Google further claims that "[t]his price competition can also reduce barriers to entry or expansion and facilitate entry from new rivals by allowing them to 'buy' their way into the market." GTB at 54. That assertion does not square with market realities. There is no evidence that entrants have been able to "buy their way into" the market, let alone ante up for default placement. ***

2. Benefits in Other Markets that Redound to the Benefit of the Search Market

Google also asserts that its revenue share payments facilitate better browsers, improved and lowered cost for smartphones, and increased competition between Apple and Android, all of which redound to the benefit of the general search market by increasing search output.

*First,* Google contends that its browser agreements promote browser competition, because a better GSE improves the browser experience, and browser developers use the revenue share payments they receive to improve their products. Put simply, better browsers equal better search products. *** The court accepts that the user experience of a browser is enhanced when the default GSE is excellent, but the evidence shows no more.

The ISA does not require Apple to use revenue share payments to improve Safari, and Google has presented no evidence that Apple does so. Mozilla likely does use its payments from Google to upgrade Firefox (given that those payments make up 80% of its operating budget), but Firefox's contribution to the overall search market is so small that the additional output it produces, at most, marginal procompetitive benefits. FOF ¶ 11. Importantly, even if there is a link between more competitive browsers and search output, Google not shown how the *exclusivity* of its agreements has produced that benefit. ***

*Second,* Google claims that the Android agreements promote smartphone competition between Android and Apple devices (inter-brand competition) and among Android devices (intra-brand competition). "This smartphone competition leads to higher-quality, lower-priced devices, thereby increasing usage of mobile devices and expanding search output." GTB at 89. Again, Dr. Murphy asserted that Google's revenue share payments fund the Android ecosystem, enabling competition with Apple, which results in more consumers searching on all devices. But this contention once again falls short. For one, the evidence is thin that Android device makers and carriers use Google's revenue share in any of the ways Google suggest. Also, once more, Google has not shown how the agreements' *exclusivity* is the reason for greater smartphone competition and thus increased search output.

If anything, greater output resulting from increased competition between Android devices and iPhones benefits mainly Google. Search on those devices occurs primarily through the defaults, so more searching on those devices means more ad revenue for Google, which only entrenches Google as the default GSE of choice. An out-of-market benefit that "preserve[s] [Google's] power in the [search] market" is not a procompetitive justification for the exclusive distribution agreements. *Microsoft*, 253 F.3d at 71.

3. Cross-Market Benefits

Google also claims that its distribution agreements create procompetitive benefits within the related markets themselves, which independently justifies their exclusionary effect in the market for search. *See* GCL ¶ 116 ("Procompetitive benefits that accrue in highly complementary markets should be considered in addition to the aforementioned benefits in Plaintiffs' alleged markets."). Put differently, Google says that exclusionary conduct in one market can be excused if it sufficiently promotes competition in another. This is a concept known as cross-market balancing. The parties dispute whether the court can engage in such balancing in a Section 2 case.

The Ninth Circuit recently observed that "[t]he Supreme Court's precedent on cross-market balancing is not clear." *Epic Games*, 67 F.4th at 989; *see NCAA v. Alston,* 594 U.S. 69, 87 (2021) (declining to consider argument by *amici* that "review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury," when the parties had agreed in the trial court that cross-market balancing was appropriate). The Court has refused to engage in cross-market balancing in cases of *per se* violations. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."). But in two Sherman Act cases the Court did consider with little discussion whether procompetitive benefits in one market justified anticompetitive conduct in a related one. *See Image Tech. Servs.,* 504 U.S. at 482-84 (addressing argument in a Section 2 case that exclusionary conduct in the parts and repairs market was justified by "interbrand competition" in the market for photocopiers); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104-08, 115-17 (1984) (considering in a Section 1 case a procompetitive

rationale regarding the college football tickets market when assessing anticompetitive conduct in the market for college football television).

The court need not, however, resolve this legal question because the record evidence does not support Google's contention that the exclusive agreements have resulted in procompetitive benefits in related markets.

*Browser Market.* The link between the exclusive agreements and competition in the browser market is weak. It rests on the presumption that browser developers invest Google's revenue share payments in improving their browsers. But, as discussed, no evidence shows how Apple uses its revenue share payments, and to the extent Mozilla uses them to improve Firefox, its share of the browser market is so low that it does not move the competitive needle.

*Device Market.* As to the Android agreements, Google argues that its payments fund the Android ecosystem, which promotes consistency across devices, lowers device prices, and ultimately stimulates competition among Android devices and with iPhones. But here, too, the evidence is unconvincing. Google has produced little industry evidence from any OEM or carrier that views the Android agreements and their revenue share payments as enhancing competition among devices. ***

*Security Upgrades.* Before moving on to the general search text ads market, the court needs to address one more contention. That is Google's argument that the RSAs enhance security in the Android device market because the agreements condition payment on making security upgrades. Google notes that Apple can do this directly, as it is vertically integrated. By contrast, OEMs historically have failed to prioritize performing security upgrades. *** Even if the court were to accept that the RSAs provide some additional incentive to partners to perform security upgrades, Google has not established a connection between that benefit and the agreement's exclusivity. In fact, its CEO Sundar Pichai admitted that incentivizing partners to perform timely security upgrades could be done through a structure other than the RSA. Tr. at 7718:24-7719:1 (Pichai); FOF ¶¶ 397-398 (describing Mobile Service Incentive Agreements).

* * *

Google has not met its burden to establish that valid procompetitive benefits explain the need for exclusive default distribution. Accordingly, Plaintiffs have established that Google is liable under Section 2 of the Sherman Act for unlawfully maintaining its monopoly in the market for general search services through its exclusive distribution agreements with browser developers and Android OEMs and carriers.

## VI. EFFECTS IN THE MARKET FOR GENERAL SEARCH TEXT ADVERTISING

To prove a Section 2 violation in the general search text ads market, Plaintiffs again must show that the exclusive agreements "indeed [have] the requisite anticompetitive effect." *Microsoft*, 253 F.3d at 58-59. Plaintiffs contend that Google's conduct has caused three anticompetitive effects particular to the text ads market: (1) market foreclosure, (2) supracompetitive text ads pricing, and (3) product degradation through diminished transparency regarding text ads auctions. As before, Plaintiffs argue that the exclusive deals deprive rivals of scale, which freezes competition in the text ads market in the same manner as in general search.

### A. The Exclusive Agreements Foreclose a Substantial Share of the Market.

As previously discussed, evaluating an alleged exclusive dealing agreement first requires an estimation of market foreclosure. Recall, the D.C. Circuit has said that "a monopolist's use of exclusive contracts . . . 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." *Microsoft*, 253 F.3d at 70. Here, Dr. Whinston has calculated that Google's distribution agreements foreclose 45% of the text ads market, measured by ad spend. FOF ¶ 192. As before, Google does not dispute the underlying methodology used to calculate this figure, but rather mounts various objections as to its sufficiency, each of which the court has already considered and rejected. Google does not make additional arguments specific to the text ads foreclosure percentage. The court thus accepts Dr. Whinston's determination that the challenged agreements foreclose 45% of the general search text ads market. The court also concludes that the market foreclosure is significant in light of same factors that court considered in the general search market.

B. The Exclusive Agreements Allow Google to Profitably Charge Supracompetitive Prices for Text Advertisements.

The trial evidence firmly established that Google's monopoly power, maintained by the exclusive distribution agreements, has enabled Google to increase text ads prices without any meaningful competitive constraint. There is no dispute that the cost-per-click for a text ad has grown over time. FOF ¶ 186. Google has used various "pricing knobs" to drive these increases, often between 5% and 15% at a time, without a significant shift in advertiser spending to GSE competitors. FOF ¶¶ 243-267. Ad experiments consistently showed Google achieving a "stickage" rate of 50% for its pricing knob adjustments, meaning half of post-launch revenue increases translated into long-term gains. FOF ¶¶ 252, 254-255. Google also tweaked the pricing knobs when needed to achieve periodic revenue targets. FOF ¶¶ 257-260. Google did so successfully, as its ad revenues have grown consistently at a rate of 20% or more year over year. FOF ¶ 259.

What's more, there is no evidence that any rival constrains Google's pricing decisions. In fact, Google admits it makes auction adjustments without considering Bing's prices or those of any other rival. The only apparent constraint on Google's pricing decisions are potential advertiser outcry and bad publicity. Google, however, has managed to avoid those pitfalls by ramping up its pricing incrementally, which has allowed advertisers "to internalize prices and adjust bids appropriately[.]" UPX519 at .003. Many advertisers do not even realize that Google is responsible for the changes in price. Thus, through barely perceptible and rarely announced tweaks to its ad auctions, Google has increased text ads prices without fear of losing advertisers.

Unconstrained price increases have fueled Google's dramatic revenue growth and allowed it to maintain high and remarkably stable operating profits. FOF ¶ 289 (citing UPX7002.A). Google in turn has used these monopoly profits to secure the next iteration of exclusive deals through higher revenue share payments. Google's counter to this pricing evidence is to focus not on the nominal price increases of text ads, but on their quality-adjusted prices. Even a monopolist can increase prices to reflect improvements in quality without running afoul of the antitrust laws. Google insists that as text ads prices have grown, so too has their effectiveness.

Google says that its quality-adjusted price in fact has *decreased* over time. GFOF ¶¶ 1131-1143. As proof, it points to the increase in click-through rate (i.e., how often an ad is clicked) as a proxy for ad quality, assuming that "higher-quality ads are more likely to be clicked on by users[.]" *Id.* ¶ 1133. Plaintiffs dismiss this evidence *** [but it] is not an unreasonable inference that more ad clicks might correspond to better results for advertisers.

That said, the evidence that Google's quality-adjusted ads prices have remained steady, let alone decreased, is weak. Google has long recognized the inherent difficulty in determining the value of an ad to its buyer. FOF ¶ 228 (advertisers struggle to quantify ROI). Its ad launch and

experiments reflect as much. FOF ¶¶ 251, 253. Instead, what they show is the company, largely through trial and error, attempting to capture the "headroom" between an ad's purchase price and its value to the buyer. FOF ¶¶ 254-255. This evidence does not reflect a principled practice of quality-adjusted pricing, but rather shows Google creating higher-priced auctions with the primary purpose of driving long-term revenues. FOF ¶¶ 257-265.

But even if Google's ads have increased in quality, that by itself would not establish the absence of anticompetitive pricing effects. *** Consider the following hypothetical (in whole numbers). Say, an advertiser values an ad at $10. That advertiser would be willing to pay up to $9 for the ad. A second-price auction, however, could result in a final price that is lower, say $5, because the runner-up has capped its price at that amount. Google has endeavored through the years to capture the "headroom" between the ad's value ($10) and its price. It has done that by using its tuning knobs to adjust the auction formula so that, in this hypothetical case, it would push the final ad price to upwards of $9. Google simply could not take this approach in a competitive market. If it did so, a rival could adjust its auction to charge the advertiser less for the same ad, say, $7. In the competitive market then, Google still could earn a profit from the sale of an ad, but it could not achieve the *monopoly* profits that it does presently in the absence of rivals. This is an anti-competitive price effect, irrespective of Google's ad quality.

C. The Exclusive Agreements Have Allowed Google to Degrade the Quality of its Text Advertisements.

Google's text ads product has degraded in two ways: (1) advertisers receive less information in search query reports (SQRs) and (2) they no longer can opt out of keyword matching. Specifically, Google removed information from SQRs that provided advertisers with insight into low-volume queries, which diminished advertisers' ability to tailor their ad strategy in light of such queries. Similarly, disallowing advertisers from opting out of keyword matching created thicker auctions at the expense of advertiser control. These are arguably small changes, but they reveal Google as a monopolist unconcerned about product changes that have decreased advertisers' autonomy over the auctions they enter and the ads they purchase. Google has suffered no consequences because it does not operate in a competitive text ads market.

D. The Exclusive Agreements Have Capped Rivals' Advertising Revenue.

The exclusive distribution agreements allow Google to maintain its text ads monopoly in much the same way as in the general search services market. That is, Google's rivals must distribute their GSEs through less efficient, non-default access points, which results in fewer users and fewer ad dollars spent to target those users. With less ad revenue, Google's rivals are limited in their ability to reinvest in quality improvements (both as to search and general search text ads) to attract more users and more ad dollars. That cycle puts rivals in no position to compete with Google for the increased ad revenue that accompanies greater query volume.

Advertising witnesses consistently testified to this reality. They uniformly cap their text ads spending on Bing at no more than 10% to approximate its relative market share. FOF ¶ 233. So, even if Bing's ads were to offer better value than Google's, Bing could not effectively constrain Google's ad pricing. As one witness put it, once the spending maxes out on Bing, there is simply "[nowhere] else to go." Tr. at 4875:19-4876:4 (Lim). By locking in a huge comparative query volume advantage through its exclusive agreements, Google ensures that advertisers will continue to spend 90% of their text ad dollars with Google, regardless of increases in price or decreases in quality. That is an anticompetitive effect in the marketplace.

* * *

Google has not argued that the contracts generate procompetitive benefits beyond those already addressed and rejected. The court thus concludes that Plaintiffs have proven that Google's exclusive distribution agreements substantially contribute to maintaining its monopoly in the general search text advertising market, violating Section 2 of the Sherman Act. ***

CONCLUSION

For the foregoing reasons, the court concludes that Google has violated Section 2 of the Sherman Act by maintaining its monopoly in two product markets in the United States—general search services and general text advertising—through its exclusive distribution agreements. The court thus holds that Google is liable as to Counts I and III of the U.S. Plaintiffs' Amended Complaint, Am. Compl. ¶¶ 173-179, 187-193. To the extent that Counts I and III of the Plaintiff States' Complaint are co-extensive with the U.S. Plaintiffs Counts I and III, the court finds Google liable. *Colorado* Compl. ¶¶ 212-218, 226-232.

The court enters judgment for Google as to Count II of both the U.S. Plaintiffs' Amended Complaint and the Plaintiff States' Complaint, Am. Compl. ¶¶ 180-186; *Colorado* Compl. ¶¶ 219-225, as well as the remainder of Counts I and III of the Plaintiff States' Complaint.