No. 25A___

IN THE

Supreme Court of the United States

GOOGLE LLC, *et al.*,

Applicants,

v.

EPIC GAMES, INC.,

Respondent.

APPENDIX TO APPLICATION FOR PARTIAL STAY OF PERMANENT INJUNCTION PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Google Play Store Antitrust Litigation – EPIC GAMES, INC., a Maryland Corporation, *Plaintiff - Appellee*, v. GOOGLE LLC; GOOGLE IRELAND, LTD.; GOOGLE COMMERCE, LTD.; GOOGLE ASIA PACIFIC PTE, LTD.; GOOGLE PAYMENT CORP., *Defendants - Appellants*.	No. 24-6256 D.C. Nos. 3:21-md-02981-JD 3:20-cv-05671-JD OPINION
EPIC GAMES, INC., *Plaintiff - Appellee*, v.	Nos. 24-6274 25-303 D.C. No. 3:20-cv-05671-JD

GOOGLE LLC; GOOGLE IRELAND, LTD.; GOOGLE COMMERCE, LTD.; GOOGLE ASIA PACIFIC PTE, LTD.; GOOGLE PAYMENT CORP.,

Defendants - Appellants.

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Argued and Submitted February 3, 2025
San Francisco, California

Filed July 31, 2025

Before: M. Margaret McKeown, Danielle J. Forrest, and Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

[Antitrust

The panel affirmed a jury verdict and the district court's entry of a permanent injunction against Google in Epic

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Games, Inc.'s antitrust lawsuit filed in response to Google's removal of Epic's *Fortnite* video game from the Google Play Store for noncompliance with its terms of service.

Google removed *Fortnite* from the Play Store after Epic embedded secret code into the app's software so that players making in-app purchases would bypass the required payment-processing systems by which Google then charged 30% commission.

The jury found that Epic had proven the relevant product markets for Android app distribution and Android in-app billing services and a relevant geographic market of "worldwide excluding China." The jury also found that Google violated both federal and California antitrust law by willfully acquiring or maintaining monopoly power in those markets, unreasonably restraining trade, and unlawfully tying use of the Play Store to Google Play Billing. The district court entered a three-year injunction that prohibits Google from providing certain benefits to app distributors, developers, original equipment manufacturers, or carriers in exchange for advantaging the Play Store.

The panel rejected Google's claim that a decision in Apple's favor in a lawsuit Epic filed at the same time against Apple precludes Epic from defining the market differently in this case.

The panel held that the district court did not abuse its discretion in proceeding with a jury trial on Epic's equitable claims and Google's damages counterclaims.

The panel held that the district court did not abuse its discretion in declining to give a single-brand aftermarket jury instruction or in its framing of a Rule of Reason instruction.

The panel held that the injunction was supported by the jury's verdict as well as the district court's own findings.

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OPINION

McKEOWN, Circuit Judge:

In the world of adrenaline-fueled survival that epitomizes the video game *Fortnite*, winners are decided in blazes of destruction and glory. By contrast, the outcome of this case—centered on *Fortnite*'s developer, Epic Games, and the Google Android platform—turns on longstanding principles of trial procedure, antitrust, and injunctive remedies.

In 2018, videogame developer Epic Games released its immensely popular cross-platform game *Fortnite* as a smartphone app. For two years, Epic sought to distribute the game through direct mobile downloads from its website and through Samsung's Galaxy Store. In 2020, after Epic "realized that Google Play was the only hope that [Epic] had for actually reaching users," Epic reluctantly decided to offer the *Fortnite* app on both the Google Play Store (which operates on the Android operating system) and the Apple App Store (which operates on the iOS operating system). *Fortnite* is offered as a free download; the game generates revenue for Epic via players' purchase of special in-game features.

Shortly after *Fortnite*'s launch on the Apple App Store and Google Play Store, Epic embedded secret code into the app's software so that players making in-app purchases would bypass the required payment-processing systems by which Apple and Google then charged 30% commission. Epic dubbed these circumvention efforts "Project Liberty," part of its ongoing—and soon highly publicized—protest against mainstream app stores' restriction of developers' and users' choices for app distribution and in-app billing.

Almost immediately, Google and Apple removed *Fortnite* from the Play Store and App Store for noncompliance with their terms of service. Epic responded by filing antitrust suits against both Apple and Google. The two suits proceeded separately. The suit against Apple was resolved in Apple's favor.

Epic's suit against Google followed. After a 15-day trial involving 45 witnesses, the jury found that Google had violated federal and state antitrust laws in the markets for Android app distribution and Android in-app billing services. The district court held extensive post-trial proceedings and then entered a permanent injunction against Google to restore market competition. We affirm the jury's verdict and uphold the district court's injunction.[1]

Background

Smartphones have two key components: the physical hardware and the operating system. The operating system manages the interaction between the phone's hardware resources and separate software applications (or "apps") like TikTok and WhatsApp. Google and Apple own two popular operating systems: Android and iOS, respectively. Apple's iOS system is tied to the Apple hardware and is designed to prevent independent modification, creating a "walled garden." By contrast, Google's Android system is publicly available and free for anyone to access, modify, and distribute. Google itself engineered and produced a line of smartphones that run on the Android system. But in

[1] In connection with these proceedings, we received amicus curiae briefs from an array of interested parties, including federal agencies, nonprofit organizations, corporations, and professional associations. The briefs were helpful to our understanding of this case, and we thank amici for their participation.

addition, Google also licenses Android to hundreds of original equipment manufacturers ("OEMs") that make smartphones. Companies like Samsung and Motorola, for example, negotiate licenses to have Android pre-installed onto their products. As a result, Android runs on a variety of smartphones that are not Google-brand devices. All non-Apple smartphones sold worldwide, excluding China, use Android.

Apps are offered and installed separately from the operating system. But an app can only be installed on a device if it is compatible with that device's operating system. Thus, iOS apps work only on Apple iPhones that run on iOS; Android apps work only on Android smartphones. The applicable operating system creates an "ecosystem" of app development, distribution, maintenance, and security.

Google, in addition to owning and primarily developing the Android operating system, owns and operates the Google Play Store ("Play Store"), a platform for distributing apps to Android users. The Play Store has an enormous catalog of more than two million apps. In two-sided markets like this one—where Android users and Android app developers (the "two sides") rely on the platform as an intermediary for user-developer transactions—the platform benefits from significant network effects wherein "the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases." *Ohio v. Am. Express Co.*, 585 U.S. 529, 535 (2018). Users are attracted to large catalogs, and developers are attracted to large user bases.

Google magnified these network effects and entrenched its dominant position in Android app distribution by its intentional efforts to frustrate users' access to and use of

alternatives to the Play Store, such as developer websites as well as other Android app stores.

Although an Android app developer can enable potential users to download its apps directly from a developer-specific website ("direct downloading" or, as Google refers to it, "sideloading"), Google's Android operating system creates "friction" that deters Android users from completing downloads this way. First, Android's default settings disable direct downloading. Even those users savvy enough to change the default settings must then click through a series of "scare screens"—sometimes as many as 14—to complete a direct download. Some of these screens notified the user that the app was being downloaded from an "unknown source," that the software could harm their device, and that the user was taking responsibility for any damage that might result from completing the download. Android's scare screens do not reflect any security assessment of the intended download sources; these screens appear whether the intended download source is a trusted developer's website or a hypothetical "illstealyourinfo.com." Thus the "scare screens" operate as a deterrent to downloading apps other than directly via the Play Store.

Efforts to download *Fortnite* illustrate the practical import of barriers erected by Google. Android users had to successfully navigate more than 15 steps to complete a direct download of *Fortnite*. Such "friction" "degrad[ed] the quality of the download experience" from websites like Epic's. Epic found that, of the Android users who initiated the process to download *Fortnite* directly, 35% abandoned the process after encountering Google's "warning messages."

In its dealings with OEMs, Google also sought to obstruct access to alternative app stores. Google's mobile contract, the Mobile Application Distribution Agreement ("MADA"), effectively required Android OEMs to preinstall the Play Store on the default home screen of their smartphones. Google's revenue-sharing agreements with a "premier tier" of these OEMs had the added effect of making the Play Store the *only* preinstalled app store on their phones. And Google's proposal to Samsung, denominated "Project Banyan," would have compensated an especially formidable OEM/app-distribution competitor to "drive down" its app-distribution market share and turn the Samsung Galaxy Store into a throughway for more Play Store traffic. Samsung's representatives expressly understood that the purpose of "Project Banyan" was to "[p]revent unnecessary competition [with the] store." As Epic's expert testified about these revenue-sharing arrangements, "these provisions, this conduct, disincentivizes" OEMs from competing with the Play Store.

When Epic suddenly posed a threat to the Play Store's dominance, Google went further still. In 2018, Epic initially told Google that it would not be introducing an Android version of *Fortnite* on the Play Store. Google feared that the game's off-Play launch could "legitimize" another Android app store and create "contagion" leading other software developers to leave the Play Store. To defend against that scenario, Google initiated Project Hug: a series of special agreements with 22 top game developers, including Activision (creator of the popular video game *Call of Duty*), under which the developers received cash payments and other benefits not to launch on any Android app store other than the Play Store.

Network effects, default settings and scare screens to deter direct downloads, plus strategic deals to limit the use of alternative stores proved a potent cocktail: As of 2020, the Play Store accounted for 95% of all Android app downloads in the United States, and more than 80% around the world (excluding China).

Google leveraged its significant market share in app distribution to maximize its profits from the Play Store. For instance, all developers offering apps on the Play Store are required by a Developer Distribution Agreement ("DDA") to process in-app purchases using Google Play Billing and pay a hefty commission on nearly all in-app transactions.[2] As of 2021, the Play Store was turning a 71% operating profit.

Convinced that Google was abusing its power in the Android app distribution and in-app billing markets, Epic sued Google shortly after *Fortnite* was removed from the Play Store in August 2020 for violations under the Sherman Act, California's Cartwright Act, and California's Unfair Competition Law ("UCL"). Google counterclaimed for breach of the DDA. Between 2020 and 2023, additional claimants—other developers, consumers, and state attorneys general—sued Google for antitrust violations. All these related claims were consolidated into a single multidistrict litigation.

In 2021, the district court decided that all jury-triable issues common to the parties' legal and equitable claims would be decided in a single jury trial. In April 2023, the

[2] Google originally set its 30% commission to match Apple's service fee. Seven months after Epic filed its lawsuit, Google introduced programs that lowered the fee to 15% in limited circumstances.

court set a November 2023 trial date. But, between April and November, every plaintiff other than Epic settled, leaving for trial only Epic's antitrust claims for equitable relief and Google's counterclaims for damages. Epic's UCL claims were held for later ruling by the court, per the parties' joint submission.

On December 11, 2023, the jury returned a unanimous verdict in favor of Epic. On the antitrust claims, the jury found that Epic had proven the relevant product markets for Android app distribution and Android in-app billing services and a relevant geographic market of "worldwide excluding China." And the jury found that Google violated both federal and California antitrust law by willfully acquiring or maintaining monopoly power in those markets, unreasonably restraining trade, and unlawfully tying use of the Play Store to Google Play Billing. Although Google's counterclaims for damages initially were part of the trial, during trial the parties withdrew these claims from the jury and later settled them.

Remedies proceedings followed the trial, with extensive briefing and two evidentiary hearings. On October 7, 2024, the district court entered a permanent injunction and an explanatory order that also resolved Epic's UCL claim ("Order re: UCL Claim and Injunctive Relief"). The three-year injunction prohibits Google from providing certain benefits to app distributors, developers, OEMs, or carriers in exchange for advantaging the Play Store. It also mandates that Google allow developers offering apps on the Play Store to provide users with information about and access to alternative app billing, pricing, and distribution channels.

Apropos of the claims, the injunction includes "catalog sharing" and "app-store distribution" provisions. The first

requires that Google "permit third-party Android app stores to access the Google Play Store's catalog of apps," and the second requires Google to allow "the distribution of third-party Android app distribution platforms or stores through the Google Play Store." Google was given eight months to comply with the catalog sharing and app-store distribution requirements. To review and resolve any issues that arose during that implementation process, the injunction also directed the creation of a three-person Technical Committee comprising members selected by both parties. Google appeals both the liability verdict[3] and the injunction.[4]

Analysis

We begin with Google's claim, which we reject, that the decision in the *Epic v. Apple* litigation precludes Epic from defining the market differently in this case. We then move to the jury issues, confirming that the district court did not abuse its discretion in proceeding with a single jury trial on Epic's equitable claims and Google's damages

[3] In addition to challenging antitrust liability, Google argues that the UCL liability relies on the antitrust verdicts and thus rises or falls with those claims. Not so. The UCL forbids not only "unlawful" but "unfair" conduct, thus allowing for liability even when there is a failure to prove an antitrust claim, as we held in *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 1001 (9th Cir. 2023) ("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."). Google's attempt to tether the UCL claim to the antitrust claims is "foreclosed by California law." *Id.* at 1001. The UCL claim survives independently of any antitrust liability.

[4] Google filed a motion to stay the permanent injunction pending appeal. The district court granted a partial stay pending our resolution of that motion. The stay motion on appeal is denied as moot in light of our decision.

counterclaims. Nor did the district court abuse its discretion in declining to give a single-brand aftermarket jury instruction or in its framing of the Rule of Reason instruction. Finally, we affirm the district court's injunction, which was supported by the jury's verdict as well as the district court's own findings.

I. The *Epic v. Apple* Litigation Findings Are Not Preclusive

Market definition is a central and hotly contested aspect of nearly every antitrust case. Little wonder, then, that the parties have diametrically opposed views on this issue. Google claims that the relevant market determination in Epic's prior suit against Apple binds Epic here, whereas Epic maintains that there is no preclusive effect.

Reviewing de novo, we agree with the district court that the market definition in Epic's suit against Apple is not preclusive in this litigation. *Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173, 1176 (9th Cir. 2002) (reviewing de novo district court's determination of preclusion). Google homes in on the finding in *Epic v. Apple* that Apple and Google are competitors in the market for "digital mobile gaming transactions." *See Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 921 (N.D. Cal. Sept. 10, 2021), *aff'd* 67 F.4th 946, 981 (9th Cir. 2023) (affirming on the issue of market definition).[5] That single determination, however, does not

[5] Google's issue-preclusion argument bookended its advocacy before the district court. Before trial, the district court determined that Google's preclusion argument was untimely and without "good cause excusing the delay." The court emphasized that the matter should have been raised on summary judgment but concluded that issue preclusion was not appropriate in any event. Google does not challenge these rulings on

preclude an independent analysis of the very different relationship between Epic and Google, the relevant submarket in the Android platform, or the distinct market-definition issues in the two suits.

A. The *Apple* Litigation: Trial and Appeal

Filed on the same day as Epic's case against Google, Epic's case against Apple proceeded first in time before Judge Gonzalez Rogers in the Northern District of California. The two parties offered competing definitions of the relevant market, with Epic arguing for Apple's total monopoly power in "an antitrust market of one," and Apple proposing a broader market including "all digital video games." *Apple*, 559 F. Supp. 3d at 921.

The district court ultimately ascertained a market of "digital mobile gaming transactions." *Id.* at 921, 954–55, 1021–26. From there, the court found that Apple exercised a "considerable" but not necessarily monopolistic level of market power, in part because the company had to compete with Google. *Id.* at 1030–32. These determinations supported the conclusion that Apple was not liable on any of the federal antitrust causes of action, though the court found that Apple violated California's UCL and entered an injunction against Apple's use of anti-steering provisions to keep consumers from transacting outside the App Store's payment processing systems. *Id.* at 1052–59.

Epic and Apple cross-appealed, and we affirmed on all substantive issues. *Apple*, 67 F.4th at 966. Though we agreed with Epic that the district court erred in categorically rejecting its proposed iOS foremarket, we deemed that error

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appeal. Google's timely post-trial motion under Rule 52 preserved the preclusion issue.

harmless in light of Epic's failure to demonstrate consumers' lack of awareness about the alleged aftermarket restrictions. *Id.* at 978, 979, 980–81. Importantly, "Apple offered non-pretextual, legally cognizable procompetitive rationales for its app-distribution and [billing] restrictions." *Id.* at 985. And, as we held, "[e]ven assuming Apple has monopoly power, Epic failed to prove Apple's conduct was anticompetitive." *Id*. at 999. Apple's challenges to the UCL ruling and remedy fell short. We further held that federal antitrust doctrine did not preclude liability for anti-steering provisions under state law; that the district court did not clearly err in finding that Epic had suffered irreparable harm; and that a nationwide injunction did not constitute an abuse of discretion "because the scope [wa]s tied to Epic's injuries." *Id.* at 1002–03. We reversed only with regard to Epic's contractual obligations to pay attorneys' fees. *Id.* at 1003–04.[6]

B. Issue Preclusion Requirements Are Not Met

Google now seeks to preclude Epic's suit in light of the *Apple* judgment and decision. Issue preclusion requires that "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Love v. Villacana*, 73 F.4th 751, 754 (9th Cir. 2023) (citation and internal quotation marks omitted). Google's preclusion argument fails at both the first and

[6] On April 30, 2025, the district court issued an order finding that Apple had failed to comply with the injunction and that "Apple's continued attempts to interfere with competition will not be tolerated." Order Granting Epic Games, Inc.'s Motion to Enforce Injunction, 4:20-CV-05640-YGR, 2025 WL 1260190, at *1 (N.D. Cal. Apr. 30, 2025).

second steps because the market definition question was neither identical to the issue in this case nor litigated and decided in *Apple*. The difference in the market-definition issues is the death knell for Google's argument.

It is well established that the relevant market "can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)). This case-by-case inquiry underlies the principle that relevant markets are not independent, freestanding entities defined in a vacuum. Our sister circuits recognize that "the nature of the claim can affect the proper market definition" and counsel that courts "remember[] to ask, in defining the market, *why* we are doing so: that is, what is the antitrust question in this case that market definition aims to answer?" *United States Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993). Recently, we endorsed this principle in concluding that the "market definition must be relevant to the theory of harm at issue." *Teradata Corp. v. SAP SE*, 124 F.4th 555, 570 (9th Cir. 2024) (internal quotation marks omitted).

It follows from the logic of *Kodak* and *Teradata* that the market-definition issue in Epic's two lawsuits was not "identical" for the purposes of issue preclusion, because Epic's claims against Apple involved meaningfully different commercial realities and theories of harm from its claims against Google. In short, we conclude that "the issue at stake" was not identical in the two cases.

To begin, the commercial realities are different. Apple's "walled garden" is, as the district court in *Apple* noted, markedly different from Google's "open distribution"

approach. 559 F. Supp. 3d at 1036–40. Google admits as much, noting that "Android's open philosophy offers users and developers wider choices" than iOS does, even as that openness "limit[s] Google's ability to directly protect users from encountering malware and security threats when they download apps." As a consequence of its business model, Apple does not license iOS to other OEMs in the way that Google licenses Android to Samsung, Motorola, and other smartphone manufacturers. Indeed, because Apple manufactures its own phones, Apple effectively has no relationship with other OEMs. Apple's "walled garden" also creates different dynamics in app distribution channels. Apple's iPhones do not support any third-party app stores, and iOS disables direct downloads of apps from the web. *See id.* at 1005 ("Apple currently prevents direct distribution from the web using technical measures.").

The theories of harm in the two cases are also different. Epic articulated theories of harm against Apple that it did not bring against Google. Because Apple vertically integrates its hardware, iOS operating system, and app store, a consumer locked in through any one part of the stack is, in effect, locked into the entire system. Therefore, numerous Apple-unique product features were relevant to Epic's theory of harm—from the "stickiness" of iMessage to the overall "speed and reliability provided by iPhones"—because those features increased consumers' switching costs. *Id.* at 957–60 ("Apple's evidence strongly suggests that low switching between operating systems stems from overall satisfaction with existing devices, rather [than] any 'lock-in.'"); *see also, e.g.*, 4:20-cv-05640-YGR, Dkt. #616 (Epic's opening statement), p. 11–13. Epic also complained that Apple's agreements with developers precluded Epic from distributing or creating third-party app stores—conduct

not at issue in the Google litigation. At the time of trial, there were no competing app stores on iOS.

The difference in the markets also led Epic to articulate theories of harm against Google that were not brought against Apple. For example, Epic alleged that Google's conduct—requiring OEMs to install Google Play on the home screen of every device the OEM makes—had harmed Epic. Because Apple does not license its operating system to other OEMs, this type of alleged anticompetitive behavior was simply not at issue in the *Apple* litigation. Epic also alleged that Google made deals to keep other app stores off OEMs' home screens. Because Apple's iPhones preclude third-party app stores altogether, these strategic dealings were not at issue. As Google's attorney articulated in a 2023 hearing before the district court: "For . . . iPhones, there's only one App Store. There always has been only one App Store. That's not true in Android. So there's a difference that already exists, a fundamental difference, an important difference for this case." Nor—for much the same reason—was there evidence in the *Apple* litigation of alleged monopolistic agreements with app developers to refrain from offering their apps on any other app store, or evidence of Apple manipulating its operating system to deter direct downloads.

These are not fringe issues. These are the issues that formed the core of the market definition in each suit. As the district court noted, "[Epic] took a wholly different approach for the antitrust claims against Google, and offered wholly different evidence about relevant markets than that offered in the case against Apple." Even Google's own digital markets expert did not initially seek to define a market analogous, let alone identical, to the one that Apple sought

in *Apple* or the market defined by the district court in that case.

It is of little consequence that Apple and Google were previously found to compete in the market for "digital mobile gaming transactions" in the *Apple* litigation. 559 F. Supp. 3d at 921. The Google trial focused on gaming *within* the Android ecosystem. That the markets in this case—for Android app distribution and Android in-app billing—overlap with or may constitute submarkets of the "digital mobile gaming transactions" market does not make them identical markets. Recognizing distinctions between overlapping markets is not "inherently contradictory." *Olin Corp. v. FTC*, 986 F.2d 1295, 1301 (9th Cir. 1993) (establishing a relevant submarket for chemical compounds was not inconsistent with a broader market for pool sanitizers).

This framing also conforms to the real-world experience of overlapping markets and submarkets. For example, McDonald's might compete against Chick-fil-A in the fast-food market yet not compete against Chick-fil-A in the *hamburger* fast-food market (and instead compete with Wendy's, Burger King, Sonic, and In-N-Out Burger). Although Google and Apple compete for mobile-gaming downloads and mobile-gaming in-app transactions, they do not compete in the Android-only app distribution and in-app billing markets, where Google competes against Samsung, Amazon, and others.

Google's argument is further at odds with Section 2 of the Sherman Act, which prohibits monopolization of submarkets—"any *part* of the classes of things" forming U.S. trade or commerce—as much as it prohibits monopolization of broader markets. *Ind. Farmer's Guide*

Publ'g Co. v. Prairie Farmer Publ'g Co., 293 U.S. 268, 279 (1934) (emphasis added). As the Department of Justice ("DOJ") Antitrust Division and the Federal Trade Commission ("FTC") emphasize in their amicus brief, "[j]ust because parties compete in one market does not mean, as a matter of law, that there cannot be a narrower or overlapping market in which the parties do not compete." This lesson follows Supreme Court guidance that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). To conclude otherwise would effectively render a court's definition of a given market a universal ban on antitrust action in any market within or overlapping that market. Consistent with the Supreme Court's interpretation of the Sherman Act, we decline to hamstring antitrust jurisprudence in this way.

At bottom, Google's preclusion argument fails due to the absence of an identical issue.[7] The *Apple* litigation involved market realities and theories of anticompetitive harms that were separate and distinct from those involved in this case. Epic's allegations against Google required an independent analysis to determine the relevant market. And the harm-

[7] Even if issue preclusion were available, we would review for abuse of discretion the district court's decision not to apply the doctrine. *SEC v. Stein*, 906 F.3d 823, 828 (9th Cir. 2018). Despite the parties' heated debates over market definition, and the fact that the appeal in *Apple* was decided on April 24, 2023, Google waited until less than six weeks before trial to raise issue preclusion. Given that expert testimony and other fact evidence on the critical issue of market definition had been fully developed by that time, this delay amply supports the district court's exercise of its discretion to decline application of issue preclusion.

specific market definition applicable here was not "actually litigated" or "decided" in *Apple*. *Love*, 73 F.4th at 754.

II. Denying Google's Motion to Bifurcate and Holding a Jury Trial Was Not an Abuse of Discretion

Throughout the litigation, both sides repeatedly changed their positions on the availability and propriety of a jury trial and whether the trial should be bifurcated into separate jury and bench trials. What remained constant was the district court's message that there would be one jury trial for all common issues and that there was considerable overlapping evidence on equitable and legal issues: "I have said from Day One, there will not be multiple jury trials. It's going to be one and done for everything." Just before trial was set to begin, Google asked for a bench trial on Epic's antitrust claims but maintained its demand for a jury trial on its counterclaims. Google now claims the court erred in holding a single jury trial. We conclude that the district court did not abuse its discretion in declining to bifurcate the trial and holding a combined jury trial on both the legal and equitable issues.

A. The Winding Road to the Jury Trial

Epic's complaint against Google sought only injunctive relief. In response, Google filed contract counterclaims seeking damages and demanded a jury trial on all jury-triable claims. Epic's Answer to Google's Counterclaims denied Google's entitlement to a jury trial.

During the discovery period, the parties had ongoing discussions regarding the configuration of trial. For example, as early as December 16, 2021, Epic suggested it should have a partially separate trial from the other plaintiffs. The district court rejected that approach.

The parties, which then included numerous plaintiffs, eventually coalesced around the idea of a jury trial on virtually all claims, including Epic's antitrust claims. In May 2023, the parties filed a Joint Submission Regarding Trial Proposal agreeing "that all claims by all Plaintiffs are triable to a jury" (except for certain state law claims) and that Google's counterclaims against Epic should be tried to the same jury. At this stage, the litigation included plaintiffs like Match that, unlike Epic, sought damages.

In July 2023, Epic and Match filed a motion to bifurcate Google's counterclaims and hold a separate trial on those claims. Google opposed bifurcation, arguing substantial overlap in evidence between its counterclaims and its defenses against Epic's antitrust claims. Siding with Google, the district court denied the motion to bifurcate.

Prior to October 2023, as the litigation rolled on, some plaintiffs settled with Google. On October 12, the States and the putative consumer class settled, leaving only Match and Epic asserting claims against Google. During a hearing that same day, Google raised the prospect of a bench trial on Epic's claims if a settlement with Match was reached, though Google reiterated its demand for a jury trial on its counterclaims against Epic. The district court held a pretrial conference on October 19 and, in its order on October 20, confirmed the case would proceed by jury trial, directing the parties to submit updated jury instructions by October 25.

On Halloween, less than two weeks later, Google alerted the district court that it had settled with Match. The district court immediately ordered briefing on the impact of the settlement on the jury trial. Google's Statement on a Non-Jury Trial argued for a bench trial on Epic's claims and defenses. Google also stated it had offered to consent to a

bench trial on its counterclaims, but Epic declined to consent. Given Epic's refusal, Google thus sought bifurcation, arguing its counterclaims should be tried to a jury first, followed by a bench trial on Epic's claims. Epic argued for a jury trial on its antitrust claims based on Google's implied consent, Epic's reliance on Google's earlier representations regarding a jury trial, how "factually intertwined" the antitrust claims were with the jury-triable counterclaims, and the prejudice Epic would face in altering its "ongoing preparation of its case and witnesses" at the last minute. On November 2, 2023, the district court denied Google's request for bifurcation.

The jury trial began on November 6, 2023. The jury heard evidence regarding both Epic's antitrust claims and Google's counterclaims. However, during the final stretch of trial, the parties stipulated that Epic had violated the DDA agreement with the Play Store by incorporating its own payment solution into *Fortnite* during "Project Liberty" and therefore Epic owed "$398,931.23 in fees that Google" would otherwise have received. Thus, when instructed by the district court on December 11, the jury was told not to consider the counterclaims. On August 19, 2024, long after the trial had concluded, Epic agreed to pay Google to resolve the counterclaims.

B. The District Court Had Discretion to Deny the Motion to Bifurcate

Because Google's counterclaims were headed to the jury, but Google wanted Epic's claims and defenses tried to the bench, Google's Statement on a Non-Jury Trial is best construed as a motion to bifurcate. In pressing for a bifurcated trial, Google urged that a jury trial on Epic's antitrust claims was improper because Google had

withdrawn consent to a jury on those claims. That argument runs into several roadblocks due to the intersection of three federal rules of civil procedure: Rule 38(b)—Right to a Jury Trial; Rule 39—Trial by Jury or by the Court; and Rule 42(b)—Consolidation; Separate Trials. Ultimately, under the circumstances here, Google's demand for a bench trial fails because its claims are so factually intertwined with Epic's equitable claims.

Under Rule 38(b), a jury trial demand may be made "[o]n any issue triable of right by a jury." Fed. R. Civ. P. 38(b). At the outset of the case, Google made a proper jury demand on its counterclaims under Rule 38. The counterclaims sought damages for alleged breach of contract, making them quintessential legal claims triggering the right to a jury. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477–78 (1962). About six months before trial, the parties jointly proposed that all the plaintiffs' federal claims and Google's counterclaims be tried to the same jury. Both Epic and Google reiterated that position in the pretrial conference, as reflected in the court's October 20 pretrial order. That order confirmed a jury trial and deadlines for submission of jury instructions.

Having made a proper jury demand under Rule 38(b), Google was bound by the strictures of the rule. Rule 38(d) provides that such a demand "may be withdrawn *only if the parties consent*." Fed. R. Civ. P. 38(d) (emphasis added). But here there was no consent. Although Google sought at the last minute to withdraw its demand for a jury and try its counterclaims to the bench, Epic was within its rights under Rule 38(d) to decline to consent to this change.

Though Google emphasizes that it withdrew its consent to a jury trial on Epic's antitrust claims, its counterclaims

against Epic for damages remained subject to the earlier jury demand. Importantly, the operative question under the federal rules is whether a jury trial has been demanded for a particular *issue*. Fed. R. Civ. P. 38(b) ("issue triable of right by a jury"), (c) ("may specify the issues"), 39(a) ("all issues so demanded"), (b) ("jury trial on any issue"), (c) ("try any issue by a jury"). Although Rule 39(a) suggests that, once a jury demand is made, the entire action is to be docketed as a "jury action," it also clarifies that a jury trial will be held on the "issues so demanded," and that the court can decline a jury demand as to any issues on which it finds there is no right to a jury on "some or all of th[e] issues." Fed. R. Civ. P. 39(a); *see also* Fed. R. Civ. P. 39(b) (providing that even where a jury demand is not made, the court may "order a jury trial on any issue for which a jury might have been demanded"). Holistically, the civil rules implement the constitutional right to jury trial on a claim-by-claim basis. *See* Fed. R. Civ. P. 38 advisory committee's note to 1937 amendment (stating Rules 38 and 39 preserve the Seventh Amendment right to a jury).[8]

[8] Google's citation to cases stating a party can unilaterally withdraw its consent to a jury trial under Rule 39(c)(2)—which assumes an action *not* triable of right by a jury—is inapposite, given Google's jury demand on the issues underlying both its counterclaims and Epic's antitrust claims. Additionally, in each of the cases cited by Google, by the time of trial, all that remained were equitable issues. *See FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1089 (11th Cir. 2016) ("When no right to a jury trial exists and where no prejudice will result, a party may unilaterally withdraw its consent to a jury trial."); *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 968 (7th Cir. 2004) (allowing a defendant to withdraw consent when there was no right to jury trial); *CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 450 F.3d 505, 517 n.25 (11th Cir. 2006) (concluding it was not reversible error to strike a jury trial demand days

Confronted with a jury demand on the counterclaims, which presented issues closely intertwined with Epic's antitrust claims, the district court faced a choice about how to proceed. And its decision is reviewed in part for its conformity to the "usual practice" under the federal rules, a principle recently reiterated by the Supreme Court: "when a factual dispute is intertwined with the merits of a claim that falls under the Seventh Amendment, that dispute should go to a jury." *Perttu v. Richards*, 605 U.S. ----, No. 23-1324, 2025 WL 1698783, at *6 (U.S. June 18, 2025). Addressing an affirmative defense "intertwined" with the merits, the Court harkened back to *Dairy Queen, Inc.*, in which "the district judge erred in refusing . . . [a] demand for a trial by jury" where the plaintiff brought legal and equitable claims based on "common" "factual issues." 369 U.S. 469, 479 (1962). As the Court held in *Beacon Theaters*, the right to have a jury decide legal issues cannot be compromised by a court first deciding equitable issues, absent extraordinary circumstances. 359 U.S. 500, 510 (1959). This principle is salient to our reading of the federal rules and of the district court's decision here to follow "the usual practice of the federal courts in cases of intertwinement" and "send common issues to the jury." *Perttu*, 2025 WL 1698783, at *10.

This was a classic case of intertwinement. The factual issues underlying Google's legal counterclaims overlapped and intertwined extensively with the factual issues underlying Epic's equitable antitrust claims. Google itself

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before trial where the plaintiffs sought purely equitable relief and no legal claims remained in the case). That was not the posture here, where there were equitable claims, legal claims, and a jury trial demand on factual issues underlying both sets of claims.

had previously taken the position that it would "present much of the same evidence" on its counterclaims as it would in "defending against Plaintiffs' antitrust case." This evidence included Google's justifications for requiring the use of Google Play Billing for all developers offering apps on the Play Store, as well as the "trust and safety concerns" motivating "the notifications and consent screens that are displayed when users attempt to" directly download apps "rather than download them from an app store." Google argued that its counterclaims turned on the same facts regarding in-app billing and app-distribution that were the underpinning of Epic's antitrust claims. In Google's words, "the factual overlap between the counterclaim evidence and the antitrust claims" was "extensive."

Most prominently, Epic's illegality defense to Google's counterclaims centered on the issues of whether Google's contracts had violated the antitrust laws and whether Google had sufficient procompetitive justifications for its conduct. These same issues were at the core of Epic's antitrust claims. The district court's decision thus fully conformed with the "usual practice" outlined in *Perttu* and *Dairy Queen*.

Again, the district court was thus presented with a decision on the eve of trial: to bifurcate and hold two trials—deciding in a bench trial those issues that were not jury-demanded—or send Epic's antitrust claims together with Google's counterclaims to the jury. (Despite Google's opposition to a jury hearing Epic's antitrust claims, Google never asked for the jury to be advisory only—under Rule 39(c)(1)—to address its concern: it was bifurcation or bust.)

Rule 42(b) permits, but does not require, separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). It has long been the case

that while "[t]he jury and nonjury issues may be tried separately . . . . that is not required . . . . The matter is within the trial court's discretion as long as the order of trial is arranged so that it preserves the jury right on the jury triable issues." Wright & Miller, *Fed. Prac. & Proc.* § 2337; *see also Beacon Theatres*, 359 U.S. at 508–10 (noting the trial court's discretion to arrange cases so long as the jury right is preserved); *Ammesmaki v. Interlake S. S. Co.*, 342 F.2d 627, 631 (7th Cir. 1965) ("A single trial tends to lessen delay, expense, and inconvenience. The granting of separate trials rests in the discretion of the trial judge. Rule 42(b) obviously is not mandatory. For this reason [defendant] cannot now be heard to complain about the district court's denial of the motion for separate trials."). By sending all the issues to a jury, the district court ensured that no jury right was jeopardized—and simultaneously managed the trial in the spirit of economy.

Trial bifurcation is a question soundly within the district court's judgment: "We review for abuse of discretion the district court's rulings on whether to bifurcate a trial," and "we usually affirm a trial judge's decision." *Huizar v. City of Anaheim (Estate of Diaz)*, 840 F.3d 592, 601 (9th Cir. 2016) (citation omitted). The district court was well within its discretion to deny bifurcation because of the overlap in factual disputes raised by the counterclaims and antitrust claims explained above. The court's decision is supported by Google's own representations. In its earlier opposition to bifurcation, Google argued that Match and Epic failed to "carry their burden to show that bifurcation would promote efficiency." The district court agreed with Google that bifurcation was unwarranted and thus found it "particularly significant" that on the eve of trial Google made a complete about-face to argue *for* bifurcation, after having "expressly

represented to the Court that the facts underlying plaintiffs' antitrust claims and Google's counterclaims overlap in substantial measure" only a few months before. Google never explains what facts changed to suddenly invert the equation and render bifurcation most efficient. Fed. R. Civ. P. 42(b) (allowing bifurcation "to expedite and economize"). And Google would be hard pressed to offer a credible justification: the focus of the antitrust claims and Epic's illegality defense to the counterclaims centered on many of the same facts and arguments.

By the time of trial, the litigation had long proceeded on the understanding that a single trial would take place, to which both Epic and Google had explicitly agreed. And the district court declined to conduct separate proceedings on the parties' claims because it concluded that Google did not effectively withdraw its prior consent to a jury trial on Epic's equitable claims. We do not need to address this additional withdrawal-of-consent issue. The district court's ultimate decision was consistent with "the usual practice of the federal courts in cases of intertwinement." *Perttu*, 2025 WL 1698783, at *10. For that reason, we conclude that the district court did not abuse its broad discretion in denying Google's request to bifurcate.

III. The District Court Did Not Err in Instructing the Jury

A. A Jury Instruction on Single-Brand Aftermarkets Was Not Warranted

This case was never framed by either party as involving single-brand aftermarkets. So, it is no surprise that the district court declined to instruct the jury on this principle when Google raised it well into trial. Although we review de novo whether a jury instruction accurately states the law,

"whether an instruction should be given in the first place depends on the theories and evidence presented at trial" which "is mostly a factual inquiry" that "we typically review . . . for abuse of discretion." *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007). Under either standard, the district court did not err in declining to give the proposed instruction.

A single-brand aftermarket is a market in which a consumer is "locked in" with a single brand and "demand for a good is entirely dependent on the prior purchase of a durable good in a foremarket." *Apple*, 67 F.4th at 976 (emphasis removed). The seminal example comes from *Kodak*, where once customers purchased Kodak photocopiers or other equipment in the foremarket, they were "locked in" to an aftermarket of Kodak parts and servicing. 504 U.S. at 476.

Google requested a jury instruction explaining the burdens a plaintiff must carry[9] to prove a single-brand aftermarket. But a single-brand aftermarket theory was not presented at trial. Not only did Epic never argue for single-brand aftermarkets, but Google also never framed the market this way. Instead, Google's expert testified, "what this market is about is that app developers and app users want their . . . digital interactions[] to go well." As the district court pointed out, "[n]obody in this case . . . has said a word about it, including [Google's] own experts . . . none of your

[9] "[T]o 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." *Apple*, 67 F.4th at 977.

experts . . . said a peep about a proposed relevant market being based on a for[e]-market and after-market theory." Because that theory lacks a "foundation in the evidence," Google was not entitled to the instruction. *Heredia*, 483 F.3d at 922. It was also "within the district court's discretion to refuse to give the requested instruction because the instruction could have confused the jury." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 917 (9th Cir. 2008).

The same evidentiary void sinks the proposed instruction under de novo review. Regardless of the parties' framing or terminology, the facts presented at trial do not meet the legal definition of a single-brand aftermarket so as to warrant Google's proposed instruction. The foremarket of durable goods in this case would be the market for smartphones that run the Android operating system. The "undisputed evidence showed at trial" that these durable goods "are manufactured by many companies, including Google, Samsung, Motorola, OnePlus, Xiaomi, and other OEMs."

Multiple brands are also at play in the aftermarkets for app distribution and in-app payments on Android-compatible smartphones. The district court summarized that "[s]ubstantial evidence was presented at trial that multiple Android app stores can be, and on occasion have been, available to consumers." Indeed, "Google's efforts to suppress rival app stores" like Samsung's Galaxy Store, and maintain Play Store dominance, were a focal point during trial. Because Google licenses the Android operating system directly to OEMs rather than consumers, and because Play Store alternatives exist for Android app distribution and in-app payments, the reality is that consumers might not transact with Google in either the foremarket or aftermarket, making it difficult to argue that they are "locked in" to that brand.

By contrast, Apple's vertical integration made it a strong candidate for a single-brand aftermarket theory, as Epic explicitly argued in the *Apple* litigation. 67 F.4th at 978. Consumers using iOS have necessarily purchased an Apple product (*i.e.*, iPhone) from Apple and are then locked into a "walled garden" with Apple's App Store. In that litigation, however, Epic failed to meet the burden imposed on plaintiffs asserting a single-brand aftermarket, including proving that consumers were unaware of aftermarket restrictions. *Id.* at 980–81. Google now argues for imposing those same burdens here in hopes of receiving the same result, but we are comparing *Apple* to oranges: Epic never argued for a single-brand Google aftermarket, nor does Android operate the same way as Apple.

Advocating for single-brand aftermarkets is another attempt by Google to flatten the entire Android ecosystem into one brand that competes against one other brand—Apple. But the crux of this case is Google's anticompetitive conduct vis-à-vis many different brands *within* the Android ecosystem. Given that the markets for Android app distribution and in-app payment systems are not single-brand aftermarkets, and no such theory was proposed by either party during trial, the district court did not err in denying Google's request for a single-brand aftermarket instruction.

B. The Rule of Reason Does Not Require Consideration of Procompetitive Benefits Across Markets

In its effort to cast this case as a Google-versus-Apple struggle for market share, Google tries to sidestep the focus of the case presented to the jury, namely that Google improperly monopolized and restrained trade within the

Android app markets. This theme resurfaces in another jury instruction dispute. It has long been understood that "the Rule of Reason is the presumptive mode of analysis" for both Section 1 and Section 2 of the Sherman Act. Irving Scher & Scott Martin, *Antitrust Adviser* § 2:12 (5th ed. 2023). The rule requires the plaintiff to first show the challenged conduct had an adverse effect on competition and then considers whether any procompetitive benefits are outweighed by anticompetitive effects. *Id.* Google argues that the jury instruction for Rule of Reason Step 2 improperly limited the jury's consideration of procompetitive benefits of the challenged conduct to the "relevant market," instead of allowing the jury to also consider *related* markets.[10] Yet again, Google's concern is that its competition with Apple should have been a focus for the jury, despite Epic defining Android-only markets.

Specifically at issue is an instruction directed only to the Section 2 Sherman Act (monopolization) claim. If the jury determined at Step 1 of the Rule of Reason that Epic proved Google's conduct caused substantial harm to competition in a relevant market, then the jury should decide "whether Google has justified its conduct by proving that its conduct was reasonably necessary to achieve competitive benefits for *consumers in that relevant market*." We review de novo whether that jury instruction accurately states the law. *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017)

[10] Google also argues the instructions improperly allowed the jury to balance pro- and anticompetitive effects at Step 3 of the Rule of Reason, rather than proceeding to a fourth Step. But "Google acknowledges that [our precedent in *Apple*] forecloses this argument before [this] panel." *See also* 67 F.4th at 993–94 ("Supreme Court precedent neither requires a fourth step nor disavows it" and the Rule of Reason steps are not a "rote checklist."). The district court did not err in its balancing instruction.

(quoting *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014)).

To begin, it is not settled case law that a jury is required to consider cross-market procompetitive benefits when conducting Rule of Reason analysis. In *Apple* we concluded that "[t]he Supreme Court's precedent on this issue is not clear," citing cases going both ways, and noting that "[o]ur court's precedent is similar" and "we have never expressly confronted this issue." 67 F.4th at 989. Google itself acknowledges that "the Supreme Court has recently indicated that the question [of cross-market procompetitive justifications] remains open," citing *National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 87 (2021), where the Court "express[ed] no views" on the issue. *Id.* Because consideration of cross-market competitive benefits is an open question and not an established legal requirement, it was not error for the district court to exclude it from the jury instruction.

In any event, should the Supreme Court ultimately impose such a rule, any error in the instruction was harmless. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 805–06 (9th Cir. 2001) (holding that reversal is not warranted where "the error is more probably than not harmless.") (citation omitted). Throughout trial, Google presented the position that its restrictive practices were justified by its competitive battle with Apple. The Section 1 Sherman Act (restraint of trade) instruction imposed no limit on procompetitive considerations in other markets. It would be illogical to divine that the jury would have viewed the monopolization claim differently than it viewed the restraint-of-trade claim, on which the jury found against Google. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020) (Rule of Reason analysis "essentially the same" for the two claims).

Jury instructions must be reviewed "as a whole." *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir. 2020) (en banc). Under that standard, given the jury's verdict and the strength of the evidence, any claimed error was harmless.

IV. The Permanent Injunction Is Valid

Following the jury's verdict on December 8, 2023, the district court commenced post-trial proceedings that allowed each side "a virtually unlimited opportunity to present its views about the scope and content of an injunction." Epic submitted a proposed injunction; Google responded with its objections; and the court extensively queried both parties and their many fact and expert witnesses. After two evidentiary hearings, twenty written submissions from the parties, and vigorous argument by counsel, the court entered a permanent injunction and issued findings of fact and conclusions of law in a separate order, which was supplemented by the court's earlier denial of Google's JMOL motion.

A. The Injunction's Provisions

The injunction balances Epic's proposals to remedy the antitrust violations against Google's concerns about overbreadth, security, and implementation. Adopting a nationwide scope and halving Epic's proposed six-year timeline to a period of three years, the injunction commenced on November 1, 2024, and extends for three years to November 1, 2027.[11]

[11] Only one of the injunction's provisions—prohibiting Google from paying smartphone manufacturers not to preinstall Play Store competitors on their devices—has taken effect. All other provisions were stayed pending appeal.

The court's order began by prohibiting anticompetitive arrangements that insulated the Play Store and Google Play Billing from competition. The injunction prohibits Google from sharing Play Store revenue with actual or prospective entrants in the Android app-distribution market, just as Google earlier sought to compensate Samsung with "Project Banyan" to "[p]revent unnecessary competition" between the Samsung Galaxy Store and Play Store. The injunction next prohibits Google from engaging counterparties in restrictive deals that condition payment or access to the Play Store on (1) an agreement to launch apps first or exclusively on the Play Store, or (2) an agreement to preinstall the Play Store and not any other app store in any specific location on an Android smartphone. Finally, the injunction prohibits Google from continuing to require Google Play Billing for all apps distributed on the Play Store. The district court explained that these remedies "closely track the evidence of anticompetitive conduct at trial." On appeal, Google does not directly challenge these prohibitions on anticompetitive arrangements, though it folds them into its broader attacks on the factual findings and Epic's standing to seek a nationwide injunction.

In addition to these restrictions on Google's prior anticompetitive conduct, the injunction also seeks to restore competition in the Android app-distribution market with the catalog-access and app-store-distribution remedies. The catalog-access remedy requires Google to "permit third-party Android app stores to access the Google Play Store's catalog of apps," so that competing app stores can offer users a comparable library of software products. On the other side of the market, the app-store-distribution remedy forbids Google from banning "third-party Android app distribution platforms or stores through the Google Play Store," so that

the same platforms can access Android smartphone users who are currently accustomed to downloading all their apps through the Play Store. Together these provisions allow other app stores to compete in this two-sided market by letting them offer the apps and reach the users on the Play Store platform. The district court gave Google an eight-month timeline to develop the systems needed to comply with both the catalog-access and app-store-distribution remedies. Responding to Google's concerns about the safety of products offered on the Play Store, the injunction permits Google to adopt "reasonable measures" and charge "a reasonable fee . . . based on Google's actual costs" to ensure user security and privacy.

Finally, anticipating disputes over implementation, the court ordered the formation of a three-person Technical Committee composed of one member selected by Epic, another member selected by Google, and a third member selected by those two representatives. In the event of a disagreement, Google bears the burden of showing that its technical requirements are "strictly necessary to achieve safety and security for users and developers." The district court maintains control, since any unresolved issues are to be referred to the court. We uphold the injunction in full.

B. The District Court Had Broad Discretion to Craft the Antitrust Injunction

Google raises a number of objections to the injunction. "Because '[a] district court's decision to grant a permanent injunction involves factual, legal, and discretionary components,' we evaluate such a decision under three different standards of review." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002) (citation omitted). "[W]e review factual findings for clear error, legal

conclusions de novo, and the scope of the injunction for abuse of discretion." *United States v. Wash.*, 853 F.3d 946, 962 (9th Cir. 2017) (citing *id.*).

Equitable relief in private antitrust actions is governed by Section 16 of the Clayton Act, which grants that "[a]ny person, firm, corporation, or association shall be entitled to . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. Though "caution is key," *Alston*, 594 U.S. at 106, the Supreme Court has repeatedly endorsed the principle that district courts are "clothed with 'large discretion' to fit the decree to the special needs of the individual case"—not just to "unfetter a market from anticompetitive conduct," but also to "pry open to competition a market that has been closed by defendants' illegal restraints." *Ford Motor Co. v. United States*, 405 U.S. 562, 573, 577–78 (1972) (cleaned up). These equitable powers animate Section 16, because "the purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130–31 (1969). As a result, Epic "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur," and the district court may "restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *Id.* at 130, 132 (citation omitted).

Echoing the Supreme Court's guidance, we recently concluded that where a defendant has been found to violate federal antitrust laws, "the available injunctive relief is

broad, including to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 486 (9th Cir. 2021) (citation omitted). Enacting extensive Section 16 relief requires a "clear indication of a significant causal connection between the conduct enjoined or mandated and the violation found." *Optronic*, 20 F.4th at 486 (cleaned up); 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 653b, at 92 (1996). Importantly, "the reviewing court only asks if the relief is a reasonable method of eliminating the consequences of the illegal conduct." *Optronic*, 20 F.4th at 486 (cleaned up).

We start our analysis with Google's challenges to the two remedies directed at unwinding the consequences of Google's anticompetitive conduct: catalog access and app-store distribution. As part of our discussion of these remedies, we also address Google's objections to the formation of the Technical Committee. Then, we proceed to Google's broader efforts to vacate the entire injunction and contest its nationwide effect.[12] In recognition of the discretion historically afforded to the entry of equitable

[12] Beyond contesting the injunction's factual basis, geographic scope, and Epic's Article III standing, Google does not challenge the district court's prohibitions on its prior anticompetitive arrangements. Because the district court clearly outlined its factual and legal bases for concluding that anticompetitive conduct had occurred and acted within its authority to "restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed," we conclude that those measures survive review. *Zenith Radio*, 395 U.S. at 132.

antitrust remedies, we conclude that the injunction should be affirmed.

C. Catalog Access

We begin with the catalog-access approach to restoring competition in Android app distribution. We agree with the FTC and DOJ that our review must account for "the particular characteristics of digital markets, which can allow monopolists that achieved or maintained dominance through exclusionary conduct to perpetuate entry barriers and maintain monopoly power long after that conduct has stopped." Given these realities, we recognize the district court's "large discretion" to meet the "special needs" of the case, which must include the nature of the market. *Ford Motor*, 405 U.S. at 573, 577–78 (cleaned up).

The district court repeatedly emphasized that the catalog-access remedy is intended to ameliorate consequences "intertwined with the network effects" that Google has enjoyed as a monopolist in a two-sided platform market. Specifically, the court cited evidence about the Play Store's advantaged position between a critical mass of app developers and a critical mass of app users, quoting directly from Google's internal presentations that "Users come to Play because we have by far the most compelling catalog of apps/games"; "Developers come to Play because that's where the users are"; and even formidable competitors like "Amazon will struggle to break those network effects.'" As the district court explained, the catalog-access remedy seeks to "overcome" the Play Store's illegally amplified network effects by "giv[ing] rival stores a fair opportunity to establish themselves" with a competitive catalog of software applications. The provision temporarily opens up the Android app-distribution market, by giving app stores a

three-year window to access the singular catalog that Google accumulated and leveraged during the Play Store's dominance of the market. As the district court put it, "[a]ll that the catalog access does is level the playing field for a discrete period of time so that rival app stores have a fighting chance of getting off the ground."

Google objects to the catalog-access provision on the grounds that (1) it illegally imposes a duty-to-deal requirement "to design new products and services tailor-made for [Google's] competitors"; and (2) it imposes that requirement without identifying a "significant causal connection" to Google's anticompetitive conduct.

Neither of these challenges carries the day, and together they misconstrue our longstanding deferential approach to equitable antitrust remedies. In light of the digital two-sided market at issue, the remedy represents "a reasonable method of eliminating the consequences of [Google's] illegal conduct" that we must affirm as the reviewing court. *Optronic*, 20 F.4th at 486 (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 698 (1978)).

1. No Impermissible Duty to Deal

To start, it is not true that courts cannot and have never compelled antitrust defendants to deal with rivals, notwithstanding Google's attempt to characterize catalog access as an impermissible "duty to deal." Google's reliance on the Supreme Court's *Trinko* decision for the proposition that "forced sharing" creates "tension with the underlying purpose of antitrust law" is misplaced. *Verizon Commc'ns. Inc. v. Law Off. of Curtis v. Trinko, LLP*, 540 U.S. 398, 407–08 (2004). That case addressed the question of whether a unilateral refusal to deal with rivals violates Section 2 of the Sherman Act—*not* the legality of compelling a defendant

already found liable under that statute to deal with its competitors. We accept *Trinko*'s lesson that a single entity's decision not to deal with competitors can be legal under the Sherman Act, but it is well established that antitrust remedies can and often must proscribe otherwise lawful conduct to unwind and further prevent violators' anticompetitive activity. *See, e.g.*, *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 697–98 ("In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations."). No wonder, then, that the Court in *Ford Motor* affirmed an order forcing Ford not only to divest an illegally acquired spark-plug manufacturer, but thereafter to "purchase one-half of its total annual requirement of spark plugs from the divested plant." 405 U.S. at 572. More recently, in *Optronic*, we also upheld an order requiring a telescope manufacturer to service a designer and marketer of telescopes on non-discriminatory terms. 20 F.4th at 486–87. These cases underscore that, after establishing liability, the district court had within its basket of remedial powers the authority to require Google to deal with parties harmed by its anticompetitive conduct, including its competitors.

Google tries to differentiate these previously upheld injunctions by claiming that the district court improperly ordered Google to "design *new* products" (emphasis added), rather than "sell existing products." As a practical matter, this argument mischaracterizes what exactly the catalog-access remedy asks Google to do—which is to allow app-store developers to access *existing* data and data-processing resources that, until now, Google restricted the developers

from accessing.[13] Google is not being asked to develop a new product or service from scratch. Notwithstanding its complaints about the burden of implementing the catalog-access remedy—*i.e.*, in having "to create entirely new infrastructure to serve as the backend administrator for any number of third-party app stores"—the record confirms that Google can make the existing Play Store's app catalog available to other app stores at a cost of under $1 million, by using existing metadata servers and technical procedures.[14] As Epic's expert explained, "Google already has the catalog data on hand stored in an accessible server." Google's expert not only agreed with the practicability of modifying these systems—"I'm not disputing the feasibility"—but also offered a six-to-nine-month estimate for implementation, in keeping with the injunction's eight-month timeline.

[13] Google's purported distinction between having to offer "existing" and "new" services appears to reflect the distinction between *prohibitory* injunctions (seeking to preserve the status quo) and *mandatory* injunctions (requiring parties to perform certain acts). But the Supreme Court has expressly declined to read such a distinction into the scope of equitable relief available under Section 16. *Cal. v. Am. Stores Co.*, 495 U.S. 271, 279–84 (1990) (observing that prior decisions have "upheld injunctions issued pursuant to § 16 regardless of whether they were mandatory or prohibitory in character"). That the district court simply required Google to configure its services differently is a permissible form of relief. *Id.* at 283 (citing *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 345, 365 (1963) (reinstating judgment compelling defendants to install private wire connections)).

[14] The court extensively questioned experts from both parties about the so-called "Alley Oop" process that Google has already made available to select developers. That scalable process "embed[s] a button that will enable the installation of an app from the Play Store" in a way that could conform to the demands of the catalog-access remedy. Google's expert did not contest that "they already have mechanisms to put that in place."

2. Significant Causal Connection

Google also objects that the district court committed a legal error by failing to make a specific finding that "the company's competitive advantage—here, network effects—would have existed even without the anticompetitive conduct." Google highlights its first-mover status in the Android app-distribution market to claim that some of the Play Store's network effects must owe to "that lawful advantage," rather than any illegal conduct. Neither we nor the district court discount this argument. Nonetheless, it fails.

First, initial innovation notwithstanding, a first mover is "not entitled to maintain and magnify" the relevant network effects by entrenching its dominance through anticompetitive conduct.

Second, Google misconstrues the responsibility of the district court. The district court was obligated to ensure only that the conduct enjoined or mandated by the catalog-access provision (here, Google's technical and contractual exclusion of other app-store developers from the Play Store) had a significant causal connection to "*the violation found*" (here, the creation or maintenance of a monopoly). *Optronic*, 20 F.4th at 486 (emphasis added) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001). The district court fulfilled that obligation when it stated: "[T]he question is whether Google engaged in anticompetitive conduct that had the consequence of entrenching and maintaining its monopoly power in a two-sided market. The jury answered that question in the affirmative." *Optronic* does not require that an injunction only touch the consequences of a defendant's conduct. Rather, it asks for a "reasonable method" of redressing

problems with a "significant causal connection to that conduct." *Id.* As the district court pointed out, Google is barking up the wrong tree.

Likewise, Google's objection that the catalog access provision lacks a significant causal nexus falls short. The court plainly stated: "Google unfairly enhanced its network effects in a way that would not have happened but for its anticompetitive conduct." This is an unambiguous finding of a "significant causal connection" between Google's illegal conduct and the strength of the network effects benefiting Google in the app-distribution market. *Id.* at 486 (citation omitted).

Google does not argue that the district court clearly erred in its factual findings on causation. For good reason. The record was replete with evidence that Google's anticompetitive conduct entrenched its dominance, causing the Play Store to benefit from network effects. The district court established that, as Google "erect[ed] barriers to insulate the Play Store from competition," it did so with the awareness that "to get more developers, Amazon needs more users." Google was specifically interested in preventing Amazon from "break[ing] those network effects." Its anticompetitive conduct was forward-looking, with the purpose—and ultimately the consequence, according to the jury's verdict—of preserving the market dominance that led to those network effects. The court's citations to Google's own internal communications illustrate how "benefits from network effects" motivated and flowed from anticompetitive activity "entrenching and maintaining" the Play Store's dominant position in a two-sided market. Far from a "plainly weak" causal relationship, 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 653c4, at 97, the record demonstrates substantial support for the district court's finding that

Google's anticompetitive conduct caused the creation or maintenance of its monopoly power and "unfairly enhanced" the relevant network effects.

Once the court established, based on the trial evidence, that network effects were among the consequences of Google's anticompetitive conduct, the court was permitted to shape relief targeted to those effects. Section 16 authorizes courts to "deny to the defendant the fruits of its statutory violation." *Optronic*, 20 F.4th at 486 (quoting *Microsoft Corp.*, 253 F.3d at 103). The network effects that resulted from Google's entrenchment of the Play Store in the two-sided app-distribution market are among those fruits. Because the catalog-access remedy ultimately offers a "reasonable method" of counteracting the Play Store's dominance and reducing the network effects it enjoys by temporarily lowering barriers to entry, we uphold that provision. *Optronic*, 20 F.4th at 486 (citation omitted).

D. App-Store Distribution

The district court's injunction also restricts Google from "prohibit[ing] the distribution of third-party Android app distribution platforms or stores through the Google Play Store," in direct response to Google's practice of freezing other app stores out of the Play Store and barring them from users. Google is still entitled to charge a "reasonable fee" for any "reasonable measures" it takes to ensure that the app stores distributed on its platform "are safe from a computer systems and security standpoint, and do not offer illegal goods or services . . . , or violate Google's content standards."

Google raises the same two challenges here as it did with respect to the catalogue-access provision—that the district court exceeded its authority, and that it failed to make a

causation finding. For the same reasons discussed above, we disagree with Google's causation argument. And for many of the same reasons as the catalog-access provision, we hold that the app-store-distribution remedy was within the district court's authority.

In its discussion about Google's "unfairly enhanced" network effects, the district court laid bare how market entrants faced hurdles on *both* ends of the two-sided market for Android app distribution. The yin and yang of this symbiotic relationship locked other app stores out of the Play Store, while app developers and users were locked in. Google knew that competitors would "struggle" not just because "their catalog of apps/games is very limited," but also because "they don't have users." That is why Google worked in various ways to keep users tied to the Play Store, by making it difficult to download apps outside of the platform and by engaging OEMs to install the Play Store as the default app store on Android smartphones. It also explains why the court sought to "undo the consequence of Google's ill-gotten gains" on that side of the market, by giving competitors a chance to reach users now anchored to the Play Store.

As the explanatory order put it, app-store distribution "lower[s] the barriers for rival app stores to get onto users' phones by enjoining Google from prohibiting the presence of rival app stores in the Google Play Store." The remedy enables this intervention while still permitting Google to charge a "reasonable fee" for any security measures that are "comparable to the measures Google is currently taking for apps proposed to be listed in the Google Play Store." Taken together, the district court's approach represents a "reasonable method of eliminating the consequences of [Google's] illegal conduct" on the user side of the Android

app-distribution market, just as the catalog-access remedy did on the developer side. *Optronic*, 20 F.4th at 486 (quoting *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 698). So again, we affirm.

Google's complaints about these "duties to deal" are even less convincing here than in the context of the catalog-access remedy. By ordering Google to allow rival app stores from Amazon, Samsung, or any other competitor onto the Play Store, the injunction only compels that Google treat those software products the same way that it treats other products already offered on the platform. "App stores are themselves just a type of app," as Epic notes, and some third-party app stores were already carried on the Play Store before Google updated its terms to have them excluded. Though Google may decry the inconvenience of having to design "new protocols" to address the security risks of carrying app stores, its own expert conceded that Google would be able to meet these difficulties with the same technological criteria it uses for other third-party software applications already on the Play Store.

Google offers an additional challenge to the app-store-distribution remedy's pricing clause, which provides: "Google may require app developers and app store owners to pay a reasonable fee" for its security procedures. Google asks that we follow our decision in *Image Technical Services v. Eastman Kodak* to modify the provision about "reasonable prices" and require only "nondiscriminatory pricing." 125 F.3d at 1195, 1225 (9th Cir. 1997). This argument is unconvincing because there our intervention was motivated by a concern about Kodak's intellectual property assets and its attendant "right to earn monopoly profits." *Id.* Google cannot explain why it is similarly "entitled" to charge supracompetitive prices for security reviews. *Id.* While

Google seeks to transform *Kodak* into a "legal rule" that prohibits "direct price administration," it overlooks *Kodak*'s recognition that pricing is "*generally* [*i.e.*, not always] considered beyond our function." *Id.* (emphasis added). Indeed, the Supreme Court has expressly approved "reasonable" pricing restrictions in remedial orders. *See, e.g.*, *United States v. Glaxo Grp. Ltd.*, 410 U.S. 52, 62 (1973) (requiring defendant "to grant patent licenses at reasonable-royalty rates"); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 261, 255 (1959) (affirming a "compulsory leasing provision" requiring defendants to lease their premises for a "fair and reasonable" rental rate); *United States v. Nat'l Lead Co.*, 332 U.S. 319, 349–50 (1947) (affirming decree ordering defendants to grant patent licenses for a "reasonable royalty," reasoning, "that conception is one that already has been recognized both by Congress and by this Court").

We conclude that the district court not only acted within its discretion to mandate a "reasonable fee," but also chose the right price level to ensure the pro-competitive function of the app-store distribution remedy. Whereas *Kodak* determined that the modified, "nondiscriminatory pricing" would work just as well to keep the defendant in that case from harming competitors and charging exorbitant fees, here that standard could still allow Google to keep third-party app stores off the Play Store by charging them all the same unreasonably high price. *Id*. at 1225. The FTC and DOJ warn against this possibility in their amicus brief, where they argue that the reasonable-fee provision "plainly prevents Google from undermining the decree by charging rival app stores exorbitant rates that could undermine their competitiveness." Google objects that it has "no established history of [] abusing the pricing of [its security procedures]

to restrain trade," but that does not answer the question whether it could instrumentalize that price lever in the future, when Google is enjoined from excluding third-party app stores simply as a matter of policy.[15]

The Supreme Court put this point bluntly: "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of [its] violation more completely than the court requires." *Int'l Salt Co. v. United States*, 332 U.S. 392, 400 (1947). As Epic explains, "Google has not been and does not want to be in the business of carrying app stores at all." So now that the jury found Google liable for restraining trade through other means, it falls squarely within the district court's discretion to "ensure that there remain no practices likely to result in monopolization in the future." *Optronic*, 20 F.4th at 486 (citation omitted). Because that discretion encompasses the power to craft "forward-looking" restraints like the reasonable-fee provision, and because that provision enhances the restorative and pro-competitive effect of the app-store-distribution remedy without causing undue harm to Google or its business, it survives our review. *Mass. v. Microsoft Corp.*, 373 F.3d 1199, 1215 (D.C. Cir. 2004).

E. Rule 65 Vagueness and the Technical Committee

We next consider whether the injunction meets the procedural requirements of Rule 65(d), which sets out that every injunctive order must: "(A) state the reasons why it

[15] Google's counsel was queried at oral argument and offered no procompetitive reason why a non-discriminatory pricing restraint would be workable, where a reasonable one would not. Oral Argument at 1:00:20 (No. 24-6256), ca9.uscourts.gov/media/video/?20250203/24-6256/.

issued; (B) state its terms specifically; and (C) describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). We follow the Supreme Court's guidance in considering whether the injunction provides "fair and precisely drawn notice of what the injunction actually prohibits." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (emphasis removed) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444 (1974)). However, and in keeping with the statutory requirement for "reasonable detail," we do not set aside injunctive provisions "unless they are so vague that they have no reasonably specific meaning." *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985). Here, on de novo review, the district court's injunction easily clears that bar.

Google also invokes Rule 65 in objecting to the district court's decision to set up the framework for a Technical Committee, contending that (1) these injunctive provisions leave open too many questions about compliance, and (2) the Technical Committee is an inappropriate mechanism for clearing up those ambiguities. We disagree on both counts. The district court not only used clear language to put Google on notice of "what the injunction actually prohibits," *Fortyune*, 364 F.3d at 1087, but in the remedy also took additional pains to establish a reasonably clear process for "review[ing] disputes or issues relating to [] technology and processes."

1. Catalog Access and App-Store Distribution are Clear Remedies

We attend first to the terms of the challenged remedies. The catalog-access remedy states that "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." This language articulates the reason for the order (*i.e.*, so third-party app stores "may offer the Play Store apps") and explains in plain terms what Google is "restrained or required" to do. Fed. R. Civ. P. 65(d)(1). For those downloads that will be processed by Google Play, Google must "permit users to complete the download" of apps available only on the Play Store "on the same terms as" if that download were made directly from the platform. Google must "provide developers with a mechanism for opting out of inclusion in catalog access for any particular third-party Android app store." And Google must develop "the technology necessary to comply with this provision" within eight months. Rather than identify any ambiguity rendering the catalog-access provision "too vague to be enforceable," *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1150 (9th Cir. 2011), Google points to outstanding questions about app-store "eligibility criteria" and technological implementation, such as "what metadata . . . Google must make available" and "how often to refresh that data." These practical specifics go well beyond the "reasonable detail" required by Rule 65(d), since the district court need not "elucidate *how* to enforce the injunction" or "provide [Google] with explicit instructions on the appropriate means to accomplish this directive." *Fortyune*, 364 F.3d at 1087. The injunction provides details that stem from the evidence, and the district court cannot be expected to give Google a cookbook on the specifics of complying with the injunction. Were the court to take that approach, Google would squawk that the injunction was too overbearing.

The same necessary detail can also be found in the app-store distribution remedy. That provision sets forth in clear

terms that "Google may not prohibit the distribution of third-party Android app distribution platforms or stores through the Google Play Store," but allows Google 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." Google objects that it does not know which app stores fall within the scope of the order or what "technical and content requirements" may be imposed. But what is it about "third-party Android app distribution platforms or stores" that Google doesn't get? The parties intimately understand what the injunction covers, and a quick review of the remedial hearings reveals the backdrop in excruciating detail.[16] Again, Google's desire for extra detail does not demonstrate that the app-store-distribution remedy is missing so much information as to have no "reasonably specific meaning." *Holtzman*, 762 F.2d at 726 (citation omitted). The provision gives fair notice that Google cannot turn away app-distribution platforms that meet its technical requirements, and that those technical requirements must be benchmarked against existing ones (*i.e.*, by making them "comparable to the measures Google is currently taking for apps"). That level of "reasonable

[16] The language that Google complains about in the app-store distribution remedy actually reflects the district court's concession to Google's position, where there was much discussion about whether technical security procedures for third-party app stores should differ from those already in place for other third-party apps. Epic pushed for consistency between how Google vets Android app stores on and off the Play Store; Google insisted, "we would want the level of safety for these third-party app stores to be [] close to the Google Play safety." The injunction adopts Google's stance by allowing "reasonable measures to ensure that the platforms or stores, and the apps they offer, are safe," so long as they are "comparable to the measures Google is currently taking for apps."

detail" meets the specificity requirements set forth by Rule 65(d).

2. The Technical Committee is Proper

The injunction's directive to form a three-person Technical Committee does nothing to compromise the integrity of the catalog-access and app-store-distribution remedies. The Technical Committee offers a helpful resource to attend to the "nuts-and-bolts issues" that Google raises in this challenge, which the district court identified as too "granular" for the injunction and beyond its level of technical expertise. The Technical Committee is hardly a backstop for the injunction. It comports with federal courts' long history of utilizing appointed experts and provides a process to review and resolve inevitable disputes between the parties—ideally without further need for judicial intervention.

This arrangement is not at all uncommon in disputes that demand a high degree of specialized knowledge, as this one certainly does, and both we and our sister circuits have sanctioned the appointment of technical advisors and special masters. *See, e.g.*, *A&M Recs., Inc. v. Napster, Inc.*, 284 F.3d 1091, 1097 (9th Cir. 2002) (upholding injunction under Rule 65 and deeming proper the district court's use of a technical advisor); *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 590 (9th Cir. 2000) ("In those rare cases in which outside technical expertise would be helpful to a district court, the court may appoint a technical advisor."); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008) (endorsing FTC divestment order that "carefully" appointed a third-party monitor "to determine how assets must be divided to effectuate the order and its general remedial purpose"). One court reviewing the establishment

of such a committee observed that "the Government's ability to enforce the decree is clearly strengthened, not diminished," by that body. *Microsoft Corp.*, 373 F.3d at 1244.

Google's assertion that "no U.S. court has *ever* imposed a technical committee by judicial fiat" is a fiction, as is its suggestion that the district court's Technical Committee "violates not just Rule 65, but basic principles of Article III adjudication." The Supreme Court upheld a similar arrangement in *Besser Manufacturing Co. v. United States*, another monopolization case. 343 U.S. 444, 447–48 (1952). There, against defendants' objection that the injunction "deprive[d] them of their property without due process," the Court affirmed the district court's use of a committee to fix royalty rates for patent licenses. *Id.* at 448. The committee structure paralleled that of the Technical Committee here, being composed of members selected by each party, plus an additional member selected by those members. *Id.* What's more, just as the district court in that case retained its authority to resolve any "deadlock," *id.* at 449, the district court has done so here by acknowledging that "[i]f the Technical Committee cannot resolve a dispute or issue, a party may ask the Court for a resolution."[17] We are confident that the district court has not abdicated its Article III function, and we see no reason to depart from *Besser*'s assessment that this kind of arrangement represents an "entirely reasonable and fair" mechanism for dispute resolution. *Id.* Nor does supplementing the injunction with the Technical Committee undermine the sufficiency of the

[17] The injunction also curtails the Technical Committee's power to "extend any deadline set in this order," allowing only that it "may recommend that the Court accept or deny a request to extend."

catalog-access and app-store-distribution remedies under Rule 65.

F. Sufficient Factual Findings Underlie the Injunction

Having addressed the arguments targeted specifically at the catalog-access and app-store-distribution remedies, we turn to Google's attempt to vacate the entire injunction. Google disputes the factual findings underlying the remedy, using that frame to gather various claims that the district court: (1) failed to explain why it did not impose less burdensome contractual restrictions; (2) declined to consider Google's settlement agreement with the States; and (3) overlooked the security and intellectual property interests of non-parties.

Before addressing each of these claims, we reiterate that our standard of review for factual findings is clear error. *Wash.*, 853 F.3d at 962. We also add that there is little precedent for this sort of factual-basis challenge, in that injunctions have been modified or vacated for reasons *related* to specific factual matters, but rarely due to insufficient findings alone.[18] Here, though, there is no oversight resulting in a "clear error of judgment." *La Quinta*, 762 F.3d at 879 (citation omitted). The district court based its determinations on a vast record built throughout the

[18] For example, in the trademark case *La Quinta Worldwide LLC v. Q.R.T.M., S.A.de C.V*), we vacated an injunction after holding that a factual omission "le[ft] us uncertain whether the district court considered all relevant factors in assessing the balance of hardships." 762 F.3d 867, 880 (9th Cir. 2014). There, the court failed to weigh a key consideration related to the circumstances in which the parties would be able to continue doing business under their names in the United States and Mexico. Google points to no analogous absence of factfinding here.

trial and remedial hearings, and the injunction reflects due consideration of "all relevant factors." *Id.* at 880.

Again, we emphasize that the district court conducted extensive proceedings before issuing the injunction and the accompanying order. Courts crafting Section 16 relief are "usually in a superior position to appraise and weigh the evidence," and this case is no exception. *Zenith Radio*, 395 U.S. at 123 (reviewing factual findings under the appropriate "clearly erroneous" standard and reversing the appellate court's decision to set aside parts of a treble-damage award). In addition to the jury's specific findings on liability under Sherman Act Section 1, corresponding to paragraphs four through ten of the injunction, the district court supported the liability verdict with further findings of fact and law in the JMOL order. The court also gave the parties ample opportunity to state and refine their positions on the appropriate remedy. Over several months, the court reviewed Google's "blunderbuss of comments and complaints" in 90-plus pages of objections to the proposed injunction. The court also held evidentiary hearings with the parties' experts; received statements from the parties' economists, technology experts, and engineers; accepted an amicus brief from the FTC; and heard closing arguments on the remedy. We pay heed to all this evidence—and the district court's proximity to it.

1. The Contractual Restrictions Need No Further Explanation

Google's first complaint about unduly burdensome contractual restrictions is without merit. The thrust of Google's argument is that the district court failed to explain why it did not adopt certain modifications proposed by Google and did not consider ways to redress Google's

anticompetitive agreements without imposing unnecessary constraints. For starters, just because Google didn't get something that it proposed is no basis to upend the injunction. The district court did not blindly adopt all of Epic's proposals either, and instead crafted an injunction that responded to the evidence. The court followed our precedent by using the parties' proposals to tailor a remedy that would "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." *Optronic*, 20 F.4th at 486 (citation omitted).

Google specifically protests: (1) how the restriction on conditional agreements "prohibits certain incentives to OEMs regarding Play's specific placement on Android devices, even if the incentive places no condition on whether the OEM deals with Play's app distribution rivals or the OEM itself is an Android app distribution rival"; and (2) how the prohibitions on revenue sharing apply to lump-sum payments and not just agreements to share a percentage of Play Store revenue. But these provisions help unwind the Play Store's monopolization of the Android app-distribution market and prevent "acts which are of the same type or class as unlawful acts . . . found to have been committed." *Zenith Radio*, 395 U.S. at 132. The prohibition on OEM incentives lowers barriers to entry by keeping Google from using its clout to have the Play Store pre-downloaded on Android smartphones. The revenue-sharing provision ensures that Google does not simply enhance advantages that it previously obtained by allocating fixed sums instead of percentages of its Play Store revenue. Neither remedy constitutes a "clear error of judgment" on the part of the district court. *La Quinta*, 762 F.3d at 879 (citation omitted).

2. The State Settlement Was Duly Considered

As for Google's pretrial settlement with the States, the district court was well aware of that development. An expert statement detailed why the States' settlement "d[id] not fully prohibit the conduct found to be anticompetitive at trial" or "attempt to undo the effects of Google's past anticompetitive conduct," and the court plainly resolved that the injunction would be "the floor" dictating the settlement's baseline—not the other way around. That approach was entirely appropriate and within the court's remedial discretion: The States made a considered decision to settle and accept equitable relief plus a payment of $700 million. The district court was under no obligation to let the settlement cabin the injunction following the finding of liability against Google, nor was the court required to pay lip service to the settlement as a proxy for the public interest. Google's suggestion that the States' settlement somehow should have driven the terms of the injunction simply has no basis in law or fact. Even more to the point, Google offers no concrete explanation why the coexistence of the State settlement and the injunction harms the public interest.

3. The Injunction Weighs Non-Parties' Intellectual Property and Security Interests

Google's final two fact-based arguments do not accord with the record or the terms of the injunction, in that they raise intellectual property and security concerns that the court was quite cognizant of and addressed in its remedy. With respect to non-parties' intellectual property interests, the court heard expert testimony about those rare "one-in-a-million situations," wherein an Android app developer might not want its products to be distributed over app stores other than Google Play. Google proposed an opt-in mechanism,

whereas Epic offered the opt-out mechanism that the court ultimately adopted: "Google will provide developers with a mechanism for opting out of inclusion in catalog access for any particular third-party Android app store." This approach reflects due consideration of developers' intellectual property interests as one of the many "relevant factors" in crafting the injunction. Google swats at a gnat and misses in its effort to bring down the injunction. *La Quinta*, 762 F.3d at 880.

The same is true with respect to the injunction's treatment of non-parties' security interests. Even setting aside amici's arguments that Google's fear mongering around security is "pretextual"—or that a more open Android ecosystem could bring long-term security *benefits*—the court had before it a robust record on the potential security risks attendant to the catalog-access and app-store distribution remedies.[19] As the explanatory order laid out, that is why the injunction explicitly addresses these risks in the app-store-distribution remedy, by allowing

[19] Amicus briefs weighed in on both sides of the security issues. Former national security officials warned that the injunction would "drastically lower[] the barriers for potentially malicious third-parties to gain access to the Google Play Store," and the Chamber of Progress and other interest groups worried that it "does not address what security protections Google can provide for the new services it has been ordered to supply." In contrast, however, Microsoft proffered that "the idea that Google's restrictive practices are necessary to address [security] risks is untenable," noting that regulatory intervention in Europe has already forced Google to permit in-app payment methods other than Google Play Billing "without a security or privacy catastrophe." The Electronic Frontier Foundation went even further, suggesting that Google's "feudal" security model would be improved by the injunction in the long run, because "the security offered by a monopolist is more fragile than what a competitive market can provide."

Google "to ensure that the platforms or stores, and the apps they offer, are safe from a computer systems and security standpoint." It is also why the district court established the Technical Committee to review and resolve "technical issues about security and the like." Again, these remedial measures offer plainly articulated responses to the relevant factor of non-parties' security interests. They reflect an engagement with the evidence presented in the record and, like all the injunction's remedies, a clear basis in that extensive factual record.

G. Epic Has Standing

Lastly, Google misses the mark by challenging Epic's Article III standing to seek nationwide injunctive relief, including the provisions that address catalog access, app-store distribution, and the billing and anti-steering policies that prohibit the Play Store from requiring or otherwise favoring Google Play Billing. This argument goes to the scope of the injunction, despite Google's efforts to cloak it as a jurisdictional issue and rope it into the current controversy surrounding nationwide injunctions, recently addressed by the Supreme Court in *Trump v. CASA, Inc.*, 606 U.S. ----, No. 24A884, 2025 WL 1773631, at *4 (U.S. June 27, 2025). Google's framing departs from the case law, and the scope of a permanent injunction following a finding of antitrust liability is hardly comparable to that of a preliminary injunction on a constitutional question. *CASA*'s holding about district courts' authority under the Judiciary Act of 1789 has no bearing on whether the district court here exceeded its equitable powers under Section 16 of the Clayton Act. The *CASA* court remarked at the outset that individual plaintiffs' standing was not at issue in that case. *Id.* at n.2. It also clarified that a restriction on "universal injunctions" does nothing to change the fact that "a

traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court." *Id.* at n.1 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952)).

The redressability element of standing—which Google challenges here—is a question of "the relief that federal courts are *capable* of granting." *Kirola v. City & Cnty. of S.F.*, 860 F.3d 1164, 1176 (9th Cir. 2017); *see also Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 63 (9th Cir. 2024) ("[A plaintiff] need only show that the court could fashion an injunction that could redress its injuries."). This determination is distinct from the merits determination. *Kirola*, 860 F.3d at 1175 ("[Article III's] standards exist apart from the merits, and are well established."). Google's citations to *Murthy* are inapposite; unlike that situation, no one contends that this injunction would be "unlikely to affect the [alleged wrongdoer's] decisions." *Murthy v. Mo.*, 603 U.S. 43, 74 (2024).

As for Google's suggestion that Epic has shown no risk of repeated injury caused by Play Store's billing policies because "Epic has not distributed apps on Play for years," we note that it was precisely Epic's attempt to launch *Fortnite* on the Play Store that led to this litigation. And Google's argument about the anti-steering provision is foreclosed by *Apple*. 67 F.4th at 972 (upholding injunction against anti-steering provision "because Epic is a competing games distributor and would earn additional revenue but for Apple's restrictions"). Contrary to Google's contentions, the district court specifically noted trial evidence showing "the anticompetitive nature of these anti-steering restrictions." Those anticompetitive effects, if the restrictions were not enjoined, would continue to harm competition in the defined markets of Android in-app billing and Android app distribution, in which Epic is undisputedly a player. Nothing

more is needed to fulfill the constitutional minimum for standing.

The ultimate scope of an injunction is reviewed for abuse of discretion and is based on the merits—"not redressability." *Seattle Pac.*, 104 F.4th at 63. To the extent that Google challenges the district court's exercise of discretion in crafting the injunction, we disagree. The nationwide prohibitions fit squarely within the district court's "large discretion" to craft equitable antitrust remedies. *Ford Motor*, 405 U.S. at 573 (citation omitted). These remedies and their scope are supported by the record and the nature of the market, and we uphold them along with the liability verdict and the entire injunction.

AFFIRMED.

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

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

MDL Case No. 21-md-02981-JD
Member Case No. 20-cv-05671-JD

ORDER RE UCL CLAIM AND INJUNCTIVE RELIEF

This order gives the reasons for the permanent injunction to be entered in *Epic Games, Inc. v. Google LLC et al.*, Member Case No. 20-cv-05671-JD. It also resolves Epic's equitable claims against Google under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.

BACKGROUND

In the order denying Google's post-verdict motion for judgment as a matter of law or a new trial, Dkt. No. 984 (JMOL Order),[1] the Court discussed in detail the jury's unanimous verdict against Google and the trial evidence that supported the verdict. In summary, after testimony by forty-five witnesses about Google's Play Store practices presented over fifteen days of trial, the jury found in favor of Epic on: (1) monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) unlawful restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the California Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq.; and (3) tying under Section 1 of the Sherman Act and the Cartwright Act. *Id*. at 3-4; Dkt. No. 866 (Jury Verdict). Epic's

[1] Unless otherwise noted, all docket number references are to the ECF docket for *In re Google Play Store Antitrust Litigation*, Case No. 21-md-02981-JD.

equitable claim under the California Unfair Competition Law is for the Court to decide.[2]

Epic seeks an injunction as the remedy on the jury verdict. To help determine an appropriate injunction, the Court held extensive post-verdict hearings on what an injunction should seek to accomplish, and where it should refrain from acting. Epic kicked off the proceedings by filing a proposed injunction. Dkt. No. 952. Google responded with more than 90 pages of objections. Dkt. No. 958. To ensure a fully developed record on the remedy, the Court invited each side's experts to present their views in concurrent expert evidentiary hearings. One hearing involved testimony by four economists, two for each side of the case. Dkt. No. 978. A second hearing involved technology experts sponsored by Epic, and three Google engineers. Dkt. No. 1001. In each hearing, the witnesses were directed to focus their comments on issues specific to the jury verdict and the facts in evidence at trial. *See* Dkt. Nos. 977, 1000. In conjunction with the hearings, the parties filed statements by the economists, Dkt. Nos. 952, 957, and the technology experts and engineers. Dkt. Nos. 981, 985. The Federal Trade Commission filed an amicus brief, which the Court accepted. Case No. 20-cv-05671-JD, Dkt. No. 686-1. After the evidentiary hearings concluded, the Court heard closing arguments from the parties on the issue of the remedy. Dkt. No. 1000 at 95:18-155:1.

Overall, each side had a virtually unlimited opportunity to present its views about the scope and content of an injunction. Google's request for even more discussion is not well taken. *See, e.g.*, Dkt. No. 958 at 11. Google took full advantage of the Court's open-ended procedures, as the voluminous post-verdict docket entries readily attest. As the Court noted in the JMOL Order, it bears mention that Google has, on several occasions, fired a blunderbuss of comments and complaints that are underdeveloped and consequently unhelpful in deciding the issues. *See* Dkt. No. 984 at 4. More of the same is not warranted at this closing stage of the case.

DISCUSSION

I. THE UCL CLAIM

Before turning to the injunction, Epic's final claim under the California Unfair

[2] The Court is advised that the parties have resolved Google's breach of contract counterclaim and there are no remaining counterclaims or defenses for resolution. Dkt. No. 1002.

Competition Law (UCL) must be resolved. The UCL prohibits "any [1] unlawful, [2] unfair or [3] fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Epic has alleged that Google violated the unlawful and unfair prongs of the UCL. Dkt. No. 378 ¶¶ 295-96. These are equitable claims entrusted to the Court's sound discretion. *See Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cnty.*, 9 Cal. 5th 279, 292 (2020) ("the causes of action established by the UCL . . . are equitable in nature and are properly tried by the court rather than a jury").

The disposition of the unlawful prong is straightforward. The jury concluded that Google's Play Store conduct violated the Sherman Act and Cartwright Act. *See* Dkt. No. 866. As Google has rightly said, this means that Google necessarily violated the unlawful prong of the UCL. *See* Dkt. No. 1000 at 152:2-21; *see also Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) ("By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable.") (citation omitted).

The unfair prong is more nuanced because it is "intentionally framed in . . . broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000 (9th Cir. 2023) (internal quotations and citations omitted). California state courts have formulated two tests relevant here. To support "any finding of unfairness to competitors," the Court decides 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." *Cel-Tech*, 20 Cal. 4th at 186-87. To support a finding of unfairness to consumers, the Court balances "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Progressive W. Ins. Co. v. Yolo Cnty. Superior Court*, 135 Cal. App. 4th 263, 285-86 (2005) (citation omitted). The inquiries are not "mutually exclusive" and will have some

substantive overlap. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) (citing *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144 (2000)).[3]

Whether Epic is characterized as a competitor (such as the provider of a competing in-app billing service) or a customer (such as a developer and distributor of Android apps, including for a time on the Google Play Store), the unfairness prong has been violated. The jury found that Google's conduct violated the antitrust laws and substantially harmed competition in the relevant markets, and directly injured Epic. The jury rejected Google's proffered procompetitive justifications for its conduct. Consequently, the Court concludes that Epic has prevailed on the UCL claim against Google under the unlawful and unfair prongs. Judgment will be entered in favor of Epic.

II. THE INJUNCTION

A. Legal Standards

1. The Federal Antitrust Laws

An injunction on the federal antitrust verdict is governed by Section 16 of the Clayton Act, 15 U.S.C. § 26. Under Section 16, "[a]ny person, firm, corporation, or association" is entitled to "injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, . . . , when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." To warrant an injunction, a plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). Injunctive relief is "wholly proper" when there is "nothing indicating that" a clear violation of the antitrust laws that has already been found

[3] In *Lozano*, our circuit acknowledged that the question of "how to define 'unfair' in the consumer action context after *Cel-Tech*" has not been completely settled by the California courts. 504 F.3d at 736 (emphasis omitted). More recently, our circuit stated that "[u]nder the UCL's unfairness prong, courts consider either: (1) whether the challenged conduct is 'tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law,'; (2) whether the practice is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,'; or (3) whether the practice's impact on the victim outweighs 'the reasons, justifications and motives of the alleged wrongdoer.'" *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214-15 (9th Cir. 2020) (internal citations omitted).

"had terminated or that the threat to [plaintiff] inherent in the conduct would cease in the foreseeable future." *Id.* at 131-32.

The plain words of Section 16 must be read with the purpose of the antitrust laws in mind. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *see also North Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 502 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structures.") (citing *Topco*, 405 U.S. at 610). The question has been asked whether our tech-based economy has outgrown the federal antitrust laws, which date back to 1890 when the Sherman Act was signed into law. In the Court's view, it has not. The broad provisions of the Sherman Act provide all of the tools needed to address the issues presented in this case, as they have for over a century in a constantly changing national economy. Google has not suggested otherwise.

The tools available for a remedy are powerful. As the Supreme Court has emphasized, injunctive relief under Section 16 is meant to restore economic freedom in the relevant markets and break the shackles of anticompetitive conduct. "In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *Zenith*, 395 U.S. at 132 (cleaned up); *see also United States v. Loew's, Inc.*, 371 U.S. 38, 52 (1962) (relief should be "adequate to prevent the recurrence of the illegality which brought on the given litigation."). "The relief in an antitrust case must be effective to redress the violations and to restore competition. The District Court is clothed with large discretion to fit the decree to the special needs of the individual case." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (quotations and citations omitted). "Antitrust relief should unfetter a market from anticompetitive conduct and 'pry open to competition a market that has been closed by defendants' illegal restraints.'" *Id.* at 577-78 (citation omitted); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir.

2001) ("remedies decree in an antitrust case must seek to unfetter a market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.") (quotations and citations omitted).

To these ends, the Court is charged with making "a reasonable judgment on the means needed to restore and encourage the competition adversely affected by" the anticompetitive conduct. *Ford Motor*, 405 U.S. at 578; *see also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978) (district court is "empowered to fashion appropriate restraints on the [defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences."). A remedy is not limited simply to prohibiting conduct found to be anticompetitive. Rather, the Court has discretion to fashion a remedy directed to the effect of the anticompetitive conduct. *See Mass. v. Microsoft Corp.*, 373 F.3d 1199, 1209 (D.C. Cir. 2004). As our circuit has concluded, "[i]f the jury finds that monopolization or attempted monopolization has occurred, the available injunctive relief is broad, including to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 486 (9th Cir. 2021) (quotations and citation omitted).[4]

2. UCL

The UCL provides an independent state-law basis for an injunction. "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." Cal. Bus. & Prof. Code § 17203. For Google's UCL violations, the Court may make "such orders . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition." *Id.* To be sure, "[e]ven where the UCL authorizes injunctive relief pursuant to state law, a federal court must also ensure that the

[4] The California Cartwright Act also provides for an antitrust injunction. *See* Cal. Bus. & Prof. Code Section 16750(a). The parties have treated Epic's Cartwright Act claims as being coterminous with the Sherman Act claims for purposes of both liability and remedy, and so no additional discussion of the Cartwright Act is needed here.

relief comports with 'the traditional principles governing equitable remedies in federal courts.' To issue an injunction, the court must find: '(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. Injunctive relief should be no 'more burdensome to the defendant than necessary to provide complete relief to the plaintiff[].'" *Epic Games*, 67 F.4th at 1002 (citations omitted).

Epic did not need to spell out this four-factor test in post-verdict briefing, for good reason. All of the elements were thoroughly established by the jury verdict and the evidence at trial. In pertinent part, Epic established that it suffered an irreparable injury. It was, in the language of the UCL, illegally and unfairly foreclosed from using its own in-app billing services while distributing its Fortnite app through the Google Play Store because of Google's anticompetitive practices. Epic was also illegally and unfairly foreclosed from competing in the market for Android in-app billing services for digital goods and services transactions, again because of Google's anticompetitive conduct. These harms are ongoing and cannot be made right simply by Google writing Epic a large check. Considering the balance of hardships between Epic and Google, a remedy in equity is warranted, and the public interest, which is perfectly aligned with the restoration of free and unfettered competition, would be well served by a permanent injunction.

Consequently, injunctive relief on the UCL claim is warranted, and the scope of that relief is coterminous with the injunction for the violations of the antitrust statutes. In setting the scope of the injunction, the Court has been mindful that Google must not be unduly inhibited in its ability to compete in legitimate ways by, for example, improving its products or its pricing.

B. Geographic Scope

The initial question for the injunction is where it will apply geographically. The jury found a relevant geographic market of worldwide except for China for both of the product markets, which was a conclusion that was amply supported by the evidence at trial. *See* JMOL Order at 14-15. Even so, the permanent injunction is limited to the United States.

This is due mainly to principles of comity and deference to the rights of other countries to address anticompetitive conduct under their own laws and regulations. The record indicates that enforcement agencies around the world are investigating Google's conduct with respect to the Play Store. *See, e.g.*, Dkt. No. 700 at 3 (granting Google's motion in limine to "exclude evidence or argument re foreign proceedings and investigations"); Dkt. No. 644-2 at ECF pp. 61-68 (discussing foreign investigations and regulatory reports); *see also* Dkt. No. 958 (Google's Objections) at 87-89 (describing extensive legal, investigative, regulatory, and other informal proceedings underway in foreign jurisdictions). It is neither the right nor the duty of a United States court to preempt the enforcement powers of other nations by imposing an injunction that would operate within their borders. Consequently, the Court elects, as a prudential matter, not to interfere in the administration of antitrust laws outside the United States. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) ("International comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'") (citation omitted).

C. Specific Provisions On Anticompetitive Conduct

"When it comes to fashioning an antitrust remedy, we acknowledge that caution is key." *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 106 (2021). Epic's proposed injunction made many good points, as did its economists in the post-verdict proceedings. But Epic's proposal also threatened a degree of judicial oversight that would amount to micromanagement of Google's business. It is not for the Court to decide the day-to-day business issues of Android app distribution and in-app billing. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (Court should not "assume the day-to-day controls characteristic of a regulatory agency") (quotations and citation omitted). Consequently, the Court declines to impose several of the injunction terms urged by Epic.

Even so, important remedial measures can be imposed that do not demand excessive judicial oversight. The trial made this determination a straightforward task. For example, in light of the jury verdict and supporting evidence, it is perfectly appropriate that Google be enjoined

from sharing Play Store revenues with current or potential Android app store rivals, and from imposing contractual terms that condition benefits on promises intended to guarantee Play Store exclusivity. Google itself agreed with these conduct remedies. *See* Dkt. No. 1000 at 120:16-19 (Google's counsel agreeing that "the two prohibitions . . . that Dr. Bernheim discussed, those can be a part of the injunction with certain modifications"); *id.* at 98:21-105:9 (Epic's counsel discussing Dr. Bernheim's two prohibitions). The prohibitions along these lines are stated in paragraphs 4 through 8 of the injunction, and they closely track the evidence of anticompetitive conduct at trial as summarized in the JMOL Order. *See* Dkt. No. 984 at 17-20.

The revenue share and contractual prohibitions will be in effect for a period of three years. This is because the provisions are designed to level the playing field for the entry and growth of rivals, without burdening Google excessively. *See Mass. v. Microsoft*, 373 F.3d at 1231-32 (Court's task is to redress the harm done to competition "by restoring conditions in which the competitive process is revived and any number of competitors may flourish (or not) based upon the merits of their offerings."). As competition comes into play and the network effects that Google Play unfairly enjoys are abated, Google should not be unduly constrained as a competitor. Some of the prohibited conduct might be legitimate when done by a company without monopoly power. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992) (Scalia, J., dissenting) ("Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist.") (citation omitted); *see also McWane, Inc., v. F.T.C.*, 783 F.3d 814, 836-37 (11th Cir. 2015) (same).

The injunction also includes provisions to remediate the anticompetitive "consequences" of Google's illegal conduct. *See Prof'l Eng'rs*, 435 U.S. at 697; *see also Optronic Techs.*, 20 F.4th at 486 (Court may order relief that represents a "reasonable method of eliminating the consequences of the illegal conduct."); *U.S. v. Microsoft*, 253 F.3d at 103 (injunction should "deny to the defendant the fruits of its statutory violation.").

The consequences to be remediated are intertwined with the network effects of Google's dominant position in the relevant markets. The Court instructed the jury, without objection by either side, that the Google Play Store is a "two-sided platform market" that "offers products or services to two different groups who both depend on the platform to intermediate between them." Dkt. No. 850 (Final Jury Instructions) at ECF p. 22 (No. 18). For the Play Store, "developers who wish to sell their apps" are on one side of the market and "consumers that wish to buy those apps" are on the other. *Id*. "Network effects" in this context means that the greater the number of developers, the greater the number of users, and vice versa. As Google put it in an internal slide that was introduced at trial, Google understood that "Users come to Play because we have by far the most compelling catalog of apps/games," and "Developers come to Play because that's where the users are." Trial Tr. at 1211:23-1212:1.

Senior Google executive Jamie Rosenberg testified about network effects in connection with the slide deck entitled, "Amazon competitor deep dive," which was presented to Rosenberg's team in 2017. Trial Tr. at 1207:13-22; Dkt. No. 886-50 (Trial Ex. 682). The slides discussed the threat posed by the Amazon app store, a potential competitor of the Google Play Store. Trial Tr. at 1207:24-1208:1. Under the heading, "Good News," Google said that "Amazon is yet to establish critical mass" and noted that "Play benefits from network effects." *Id*. at 1211:7-22. As Google acknowledged in the slides, "Amazon will struggle to break those network effects": "Users won't go to Amazon because their catalog of apps/games is very limited"; and "Developers won't focus on Amazon because they don't have users." Trial Tr. at 1212:5-9. Other evidence along these lines was also presented to the jury.

The picture drawn by this evidence is telling. Even a corporate behemoth like Amazon could not compete with the Google Play Store due to network effects. Consequently, the injunction must overcome the effects by providing access to the catalog of Play Store apps for a period of time sufficient to give rival stores a fair opportunity to establish themselves. This will be three years on the terms stated in the injunction.

Google's main objection to catalog access is that the anticompetitive conduct found by the jury was not proven to be a significant cause of these network effects. *See* Dkt. No. 1000 at 122:9-

11. Google says that any network effects in the relevant market are attributable to its role as a first mover in the markets, and so are not subject to remediation.

The point is not well taken. The network effects presented during trial are a feature of any two-sided market such as the Google Play Store. Although Google may legitimately claim some early mover advantage, it was not entitled to maintain and magnify network effects, and thereby entrench its dominant position, through the anticompetitive conduct found by the jury. It bears emphasis that Rosenberg's testimony and the Amazon slides concerned events in 2017, well after the original launch of the Play Store and the start of the relevant time period in August 2016. Eight months into the time period in which Google engaged in anticompetitive conduct, it was well aware that "to get more developers, Amazon needs more users." *Id*. at 1213:18-20. This frank admission was made precisely while Google was erecting barriers to insulate the Play Store from competition.

Consequently, the salient question is not whether Google's anticompetitive conduct caused the network effects. Rather, the question is whether Google engaged in anticompetitive conduct that had the consequence of entrenching and maintaining its monopoly power in a two-sided market. The jury answered that question in the affirmative. In effect, Google unfairly enhanced its network effects in a way that would not have happened but for its anticompetitive conduct.

This is why the injunction must not only prohibit the specific anticompetitive conduct that Google engaged in, but also undo the consequence of Google's ill-gotten gains. As the FTC aptly said in an amicus brief, "[n]etwork effects can confer a powerful incumbency advantage to dominant digital platforms, creating barriers to entry and to competition. . . . The incumbent platform operator -- which had been motivated to attract both users and developers by offering innovative, low-cost services before establishing dominance -- may become less incentivized to compete after it achieves market power and builds a moat insulating itself from competition." Dkt. No. 686-1 at 9. The injunction must bridge the moat.

Even so, the catalog access provision is narrowly tailored to remediate the unfairly enhanced network effects Google reaped without unfairly penalizing its success as a first mover. To that end, if a rival app store does not have a relationship with a developer and so cannot fulfill

a download request by a user, the rival will direct the download request to the Google Play Store. In that case, the Google Play Store will fulfill the download request and keep the associated revenue, if any, and the download will be made pursuant to the Google Play Store's policies. All that the catalog access does is level the playing field for a discrete period of time so that rival app stores have a fighting chance of getting off the ground despite network effects and the disadvantage of offering a "catalog of app/games" that is too "limited" to attract users and developers in a two-sided market. Trial Tr. at 1212:6-7.

So too for the injunction provision that prevents Google from excluding rival app stores from the Play Store. Witness Rosenberg testified that another barrier faced by the Amazon app store was a "significant hurdle to switching to Amazon APK." Trial Tr. at 1214:18. This referred to the fact that, to get the Amazon store on their Android device, a user would need to "sideload" it (*i.e.*, download it from a website or platform other than the Play Store), which subjected the user to a "quite complex" process imposed by Google that "involve[d] 14 steps." *Id*. at 1214:21-1216:22. Rosenberg agreed that "Google recognized at the time that as a result of the unknown source warning [resulting in at least 14 steps], the hurdles [to download] were too high for most users." *Id*. at 1216:23-1217:2. Rosenberg also agreed that, because the "Google Play Store is preloaded on the home screen of virtually every Android phone through the MADA," and rival stores were excluded, a user trying to download a rival app store outside the Play Store would almost always face the barrier of the "unknown sources install flow." *Id*. at 1206:9-22. Other witnesses at trial including other Google executives testified that the "friction" Google built into acquiring apps outside the Play Store was highly effective in discouraging users from even trying. *See, e.g.*, Trial Tr. at 762:20-763:2, 1361:11-13. So for a limited period of time, the injunction will lower the barriers for rival app stores to get onto users' phones by enjoining Google from prohibiting the presence of rival app stores in the Google Play Store.

As Google has suggested, there are potential security and technical risks involved in making third-party apps available, including rival app stores. The Court is in no position to anticipate what those might be, or how to solve them. Consequently, Google will have room to engage in its normal security and safety processes. To the extent Google imposes requirements

along these lines on rival app stores, it will be bear the burden when challenged of establishing that the requirements were strictly necessary to achieve safety and security for users and developers.

Google has said on many occasions that catalog access and hosting rival store apps amount to forcing it to do business with rivals, in contradiction of "the general rule" that "even monopolists 'are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.'" *Viamedia, Inc., v. Comcast Corp.*, 951 F.3d 429, 454 (7th Cir. 2020) (quoting *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009)). Not so. The Court has fully agreed for the duration of this case that a refusal to deal with a potential rival may not be the basis of antitrust liability. The jury was expressly instructed on that point. Dkt. No. 850 at ECF p. 33 (No. 24). Nothing in the verdict or the evidence at trial condemned Google for not extending a helping hand to a rival.

The problem for Google is that the case is now in the remedy phase, not the liability phase. The question at hand is not whether Google violated the antitrust laws by failing to aid rivals, but what measures are necessary to restore fair competition in the face of the barriers found by the jury. The jury heard abundant evidence that Google used a variety of means to ensure that the Play Store was the only fully developed Android app marketplace for users and developers. This evidence included the MADA and RSA agreements and Google's conditioning of access by OEMs to Google's Android services on preinstallation of the Google Play Store on the home screen of Android devices. The use of burdensome "scare screens" to discourage sideloading of apps is another example of evidence heard by the jury. Requiring Google to allow other app stores to be distributed through the Play Store for a discrete period is a modest step to correct the consequence of unlawfully preventing rival stores from reaching users and developers.

In this context, Google's frequent mentions of *Trinko* are misplaced. The Supreme Court affirmed the district court's dismissal of a complaint alleging monopolization under Section 2 against Verizon for not sharing access to its telephone network with competitors as required by Congress in the Telecommunications Act of 1996. *Trinko*, 540 U.S. at 401-02. The Supreme Court declined to extend the reach of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S.

585 (1985), with the famous remark that "*Aspen Skiing* is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409. But the Court also re-affirmed the holding of *Aspen Skiing* that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Id.* at 408 (quoting *Aspen Skiing*, 472 U.S. at 601). The Court added that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Id.*

The Court ultimately determined that the situation in *Trinko* did not rise to that level based on the specific characteristics of the telecom industry. As the Court instructed, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Id.* at 411. A factor of "particular importance" was that Congress had already created a regulatory structure in the Telecommunications Act "designed to deter and remedy anticompetitive harm." *Id.* at 412. The protective hand of such regulation meant that any additional benefit of antitrust enforcement would be "small," and that the "'regulation significantly diminishes the likelihood of major antitrust harm.'" *Id.* (quoting *Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990)). The Court also noted that the complaint did not allege facts indicating that Verizon's conduct was prompted by "anticompetitive malice" or "dreams of monopoly." *Id.* at 409.

None of this has anything to do with the injunction here. As discussed, this is not a case in which a refusal to deal with a rival was the basis of Section 2 liability. The facts, markets, and regulatory environment here are also starkly different. Google seems to find a "vibe" in *Trinko* to the effect that the remedy for a monopolist's anticompetitive conduct cannot involve affirmative conduct with respect to a rival. *Trinko* says nothing of the sort, and Google's frequent mention of the case is simply a red herring.

Google also overlooks the fact that an antitrust remedy may trump what might be deemed traditional boundaries of property rights. "Even constitutionally protected property rights such as patents may not be used as levers for obtaining objectives proscribed by the antitrust laws." *Ford Motor*, 405 U.S. at 576 n.11. Section 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. Rather, the statutory

language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." *California v. American Stores Co.*, 495 U.S. 271, 281 (1990) (cleaned up). Consequently, the "purpose of relief in an antitrust case is 'so far as practicable, (to) cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.' Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies." *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (U.S. 1973) (citations omitted). The Court may "consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations. [¶] The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *Prof'l Eng'rs*, 435 U.S. at 697-98. It is "entirely appropriate" for an injunction to "go[] beyond a simple proscription against the precise conduct previously pursued." *Id.* at 698. If a well-grounded fear arises that the injunction is too broad, "the burden is upon the proved transgressor to bring any proper claims for relief to the court's attention." *Id.* (quotations omitted).

Our circuit's conclusions in *Optronic Technologies* further undermine Google's position. There, the jury "properly found that Orion had been forced to pay inflated prices as a result of the market power exerted by Sunny and Synta following the unlawful Meade acquisition," and so ordering Sunny to supply Orion on non-discriminatory terms was a "reasonable method of remedying the harm to [Orion]." *Optronic Techs.*, 20 F.4th at 486. This was true because the district court "can order conduct to 'avoid a recurrence of the [antitrust] violation and to eliminate its consequences.'" *Id.* (quoting *Prof'l Eng'rs*, 435 U.S. at 698). The same goes here.

During closing arguments on the remedy, Google also relied on *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), stating that "in that case, the Ninth Circuit said that the district court had erred when it ordered Kodak to sell parts that were manufactured by someone else." Dkt. No. 1000 at 127:21-25. In Google's view, "it's the same thing here. It's legal error to order Play to have to distribute someone else's app store. Same reasoning as in *Kodak*." *Id.* at 128:1-3.

This is an odd position to take. The circuit's reasoning in *Kodak* had nothing to do with Kodak's freedom not to deal with its rivals. The circuit modified the portion of the district court's injunction that "require[d] Kodak to sell all parts for Kodak equipment, whether or not Kodak manufactures those parts." *Kodak*, 125 F.3d at 1225. The circuit believed that the "'all parts' requirement creates barriers for non-Kodak original-equipment manufacturers by requiring them to price replacement parts at levels necessary to attract ISOs away from Kodak's parts counter. It also unnecessarily entrenches Kodak as the only parts supplier to ISOs." *Id*. As was the case with Google's reliance on *Trinko*, none of this bears on the facts and issues in this case.

As discussed, the Court has no intention of running Google's business as a "central planner." *Trinko*, 540 U.S. at 408; *see also* Dkt. No. 1000 at 127:8-10 ("I have no intention of having a highly detailed decree that ends up impairing competition or micromanaging as a central planner."). The terms of the injunction are plainly worded and largely self-executing, and will not embroil the Court in day-to-day business operations. To the extent technical issues about security and the like come up, the injunction establishes a Technical Committee made up of one person selected by each side, plus a third person to be selected by the parties' two nominees, to resolve the issue in the first instance. The Court will act only as needed to resolve issues that cannot be resolved by the committee.

D. Tying

Overall, the injunction breaks the illegal tie by prohibiting Google from requiring that developers use Google Play Billing in apps distributed on the Google Play Store. Epic asked the Court to also prohibit what it called an "economic" tie, *see*, *e.g.*, Dkt. No. 977 at 92:23-93:1, which would have ensnared the Court in a detailed rate-setting exercise beyond its proper role. *See Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990). There is no need for the Court to take on that task because the remedy for the monopoly violation under Section 2 will also resolve the tying violation found by the jury. The restoration of free competition in the relevant markets is the best medicine for correcting fees and prices.

The Court has addressed Google's main contentions with respect to the injunction. As noted, Google's modus operandi in this case has been to deluge the Court in an ocean of

comments, many of which were cursory and undeveloped. The Court declines to take up Google's objections that were not fully developed in their presentation to the Court.

CONCLUSION

A permanent injunction will be entered against Google for Epic's Sherman Act, Cartwright Act, and UCL claims. The effective date of the injunction is November 1, 2024, to give Google time to bring its current agreements and practices into compliance. After Epic's attorney's fees and costs are awarded, *see* 15 U.S.C. § 26, judgment will be entered for Epic on the Sherman Act, Cartwright Act, and UCL claims, and this MDL member case, *Epic Games, Inc. v. Google LLC et al.*, No. 20-cv-05671-JD, will be closed.

IT IS SO ORDERED.

Dated: October 7, 2024

JAMES DONATO
United States District Judge

United States District Court
Northern District of California

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

ORDER RE GOOGLE'S RENEWED MOTION FOR JUDGMENT AS MATTER OF LAW OR FOR NEW TRIAL IN *EPIC* CASE

After 15 days of trial, a jury found in favor of plaintiff Epic Games Inc. on its antitrust claims against Google. *See* Dkt. No. 866.[1] Google had moved for judgment as a matter of law at an appropriate stage of the trial, which the Court denied. Dkt. Nos. 825, 831. Google renewed the motion post-verdict under Federal Rule of Civil Procedure 50(b), with a motion in the alternative for a new trial under Rule 59. Dkt. No. 925. The Court denied both motions. Dkt. No. 951. This order provides a detailed explanation for that decision.

BACKGROUND

The Court presented the background of this multidistrict antitrust litigation in other orders. *See, e.g.*, Dkt. Nos. 383, 588. In pertinent part, Epic is a well-known video game and software developer, and its apps include Fortnite, a popular online game. Fortnite can be played on a variety of consoles and devices, including smartphones running the Android mobile operating system.

Epic distributed a Fortnite Android app through the Google Play Store for a handful of months starting in April 2020, until Epic's relationship with Google broke down in August 2020.

[1] All docket number references are to the ECF docket for *In re Google Play Store Antitrust Litigation*, Case No. 21-md-02981-JD.

A particular sticking point was Epic's objection to Google's requirement that Epic use Google's billing system and pay Google a 30% fee on all in-app purchases made by Fortnite users. Epic wanted to use its own in-app payment solution and not pay Google a 30% cut, which Google refused to allow. Epic then deployed a "hotfix," which was in effect a covert app update that allowed Fortnite users to use Epic's payment system. Google responded by removing Fortnite from the Google Play Store.

On the day that Fortnite was removed from the Google Play Store, Epic filed this lawsuit against Google LLC and certain of its affiliates alleging that Google had engaged in anticompetitive conduct in violation of the antitrust laws in connection with the Google Play Store. Dkt. No. 1. As alleged in its second amended complaint (SAC), Epic presented claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; the California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.; and the California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq. Dkt. No. 378. Epic sought injunctive relief only, and no monetary damages. *Id*. Google filed counterclaims against Epic, including for breach of the Google Play Developer Distribution Agreement (DDA). Dkt. No. 386.

Epic's lawsuit was consolidated into a multidistrict litigation action along with similar antitrust complaints filed by Google Play Store users and developers, and the attorneys general of many states. A substantial period of litigation ensued for all of the member cases, and several important issues were resolved in the pretrial stage. One was a determination that Google had willfully failed to preserve relevant, substantive business communications that were made by employees on the Google Chat system. This determination required an extensive inquiry by the Court that culminated in an evidentiary hearing featuring witness testimony and documents, and extensive findings of fact. *See* Dkt. No. 469. Testimony at trial adduced even more troubling evidence of improper assertions of the attorney-client privilege by Google's employees, including its CEO, to keep communications secret, and a widespread understanding within the company that discussions of sensitive topics should be done in a way that evaded preservation. *See, e.g.*, Trial

Tr. at 964:21-23, 991:16-992:8, 1075:20-1076:12, 1321:17-24.[2] Another important pretrial determination was whether Google could evade a jury altogether by asking for a bench trial at the very last moment. The Court concluded, based on Google's own conduct, that it had consented to a jury trial. *See id.* at 6:13-7:16.

In time, the other cases went into settlement proceedings. Epic's case was tried by a jury of nine citizens in November and December 2023. The parties put on forty-five witnesses, including nine expert witnesses, over the course of fifteen days of testimony. More than three hundred documents were admitted into evidence. *See* Dkt. Nos. 622, 623, 624. The final jury instructions totaled fifty-five pages. Dkt. No. 850. The instructions were based on extensive discussions with, and submissions by, the parties. *See*, *e.g.*, Dkt. Nos. 487, 528, 554, 564, 847, 848, 849.

At the conclusion of deliberations, the jury returned a unanimous verdict in favor of Epic. Dkt. No. 866. For the monopolization claim under Section 2 of the Sherman Act, the jury found that Epic had proved two relevant product markets: a market for the distribution of Android apps, and for Android in-app billing services for digital goods and services transactions. The jury also found that Epic had proved for both of these markets that the geographic scope was worldwide excluding China. The jury further concluded that Epic had proved that Google willfully acquired or maintained monopoly power by engaging in anticompetitive conduct in each of the product markets, and that Epic had proved it was injured as a result of Google's violation of the antitrust laws. *Id.* at 1-4. For the unlawful restraint of trade claim under Section 1 of the Sherman Act and California state law, the jury found that Epic had proved that Google entered into one or more agreements that unreasonably restrained trade in the same two product markets as for the

[2] "Trial Tr." references are to the trial transcript, which consists of 17 volumes with 3,442 total pages that are consecutively numbered. The transcript can be found at Dkt. No. 834 (Vol. 1; pages 1-116); Dkt. No. 835 (Vol. 2; pages 117-322); Dkt. No. 836 (Vol. 3; pages 323-578); Dkt. No. 837 (Vol. 4; pages 579-788); Dkt. No. 838 (Vol. 5; pages 789-1036); Dkt. No. 839 (Vol. 6; pages 1037-1302); Dkt. No. 840 (Vol. 7; pages 1303-1539); Dkt. No. 841 (Vol. 8; pages 1540-1785); Dkt. No. 842 (Vol. 9; pages 1786-1866); Dkt. No. 843 (Vol. 10; pages 1867-2103); Dkt. No. 844 (Vol. 11; pages 2104-2291); Dkt. No. 845 (Vol. 12; pages 2292-2518); Dkt. No. 846 (Vol. 13; pages 2519-2763); Dkt. No. 847 (Vol. 14; pages 2764-2854); Dkt. No. 848 (Vol. 15; pages 2855-3065); Dkt. No. 849 (Vol. 16; pages 3066-3293); and Dkt. No. 867 (Vol. 17; pages 3294-3442).

monopolization claim. The jury determined that the illegal agreements were Google's DDA agreements; agreements with alleged competitors or potential competitors under Project Hug and the Games Velocity Program; and agreements with original equipment manufacturers (OEMs) that sell mobile devices, including the MADA and RSA agreements. Epic was found to have proved antitrust injury from these violations. *Id*. at 5-6. For the tying claim under Section 1 of the Sherman Act and California law, the jury determined that Epic had proved that Google unlawfully tied the use of the Google Play Store to the use of Google Play Billing, and that Epic again had been injured by this conduct. *Id*. at 7.

Epic's UCL claim was not presented to the jury and was reserved for the Court's decision. Google's breach of contract counterclaim also was not presented to the jury pursuant to the parties' agreement, and the Court will decide Epic's illegality defense, with the parties' stipulated facts to be treated as proved. *See* Dkt. No. 850 at 1. Also reserved for the Court's decision is the issue of an injunctive remedy under the Sherman Act and Cartwright Act in light of the jury's verdict. The remedy proceedings are currently underway. *See* Dkt. No. 978.

Google has fired a barrage of objections and allegations of error in an effort to escape the judgment of the jury. This approach has been Google's modus operandi throughout the case, and often results in headline-style arguments that lack useful development. The 90 pages of objections that Google filed to Epic's proposed injunction in the remedy proceedings are the latest manifestation of this problem. *See* Dkt. No. 958. In the ensuing discussion, the Court addresses Google's attacks on the verdict even when Google's argument was little more than a passing comment or two.

As the Supreme Court has observed, the "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (citation omitted). It is on this basis, and the trial record as a whole, that the Court concludes Google is not entitled to undo the jury's verdict under Rule 50(b) or Rule 59.

LEGAL STANDARDS

Under Rule 50(b), a party that has previously made a motion for judgment as a matter of law during a jury trial, as Google did, may "file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). Judgment as a matter of law is appropriate when "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002) (citation omitted); *see also Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 803 (9th Cir. 2009) ("JMOL is . . . appropriate when the jury could have relied only on speculation to reach its verdict."). The "district court must uphold the jury's award if there was any 'legally sufficient basis' to support it." *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014) (citation omitted); *see also Dunlap v. Liberty Nat. Prod., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) ("A jury's verdict must be upheld if it is supported by substantial evidence that is adequate to support the jury's findings, even if contrary findings are also possible.") (citation omitted). In making this determination, the Court is to "consider[] all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party," and it "may not make any credibility determinations or reweigh the evidence." *Experience Hendrix*, 762 F.3d at 842. Put more plainly, the Court must "draw all inferences in favor of the verdict." *Id*. at 845.

Rule 59 permits the Court to grant a new trial on all or some of the issues, and to any party, "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Although for a Rule 59 motion, the Court is "not required to view the trial evidence in the light most favorable to the verdict," *Experience Hendrix*, 762 F.3d at 842, the Court "may not grant a new trial simply because it would have arrived at a different verdict." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001). Our circuit has stated that "[a] trial court may grant a new trial only if the verdict is against the clear weight of the evidence." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002) (citing *Silver Sage*, 251 F.3d at 818-19).

Google presented its JMOL and new trial arguments in a single, interwoven fashion. *See* Dkt. No. 925. The Court will follow suit, while being mindful of the different standards that govern each rule.

DISCUSSION

I. ANDROID-ONLY RELEVANT MARKETS

For the monopolization claim, the jury found that Epic had proved the existence of two relevant product markets: (1) an "Android app distribution market," and (2) a market for "Android in-app billing services for digital goods and services transactions." Dkt. No. 866 at 3 (Question No. 2). The jury found the same two relevant product markets for Epic's unlawful restraint of trade claim. *See id.* at 6 (Question No. 8). Google proposes two reasons why, in its view, Epic should not have been permitted to argue for these relevant markets that were "limited to Android devices." Dkt. No. 925 at 1-7.

A. Issue Preclusion

To start, Google says that it is entitled to judgment as a matter of law on all claims submitted to the jury because of the preclusive effect of *Epic Games, Inc. v. Apple Inc.* ("*Apple I*"), 559 F. Supp. 3d 898 (N.D. Cal. 2021), and *Epic Games Inc. v. Apple Inc.* ("*Apple II*"), 67 F.4th 946 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 682 (2024). *Apple II* affirmed in part and reversed in part *Apple I*. Google says that the *Apple I* court found a "market for mobile game transactions in which both Google and Apple competed," which was a market definition the circuit affirmed. Dkt. No. 925 at 2-3. Consequently, in Google's view, Epic had "already litigated and lost" the issue of "competition between Apple's App Store and Google Play." *Id.* Because Epic did not propose at trial a market that included Apple, Google contends that Epic failed to prove a valid relevant market at all, which necessarily doomed all of its antitrust claims. *Id.* at 4.

This is not the first time Google has tried to make this point. It is in effect a re-do of the same argument that the Court rejected in prior proceedings because Google had failed to establish the elements of preclusion. Dkt. No. 700 at 2. Nothing has happened since to change the Court's conclusion.

"Issue preclusion, which bars the relitigation of issues actually adjudicated in previous litigation, applies where four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 864 (9th Cir. 2021) (cleaned up).

The market definition issues that were litigated in *Apple I* and *Apple II* were plainly not the same as the issues litigated here. In the case against Apple, Epic "proposed two single-brand markets: the aftermarkets for iOS app distribution and iOS in-app payment solutions, derived from a foremarket for smartphone operating systems." *Apple II*, 67 F.4th at 970 (emphasis omitted). The district court rejected Epic's proposed single-brand markets mainly because there was a "failure of proof." *Id*. Epic "presented no evidence regarding whether consumers unknowingly lock themselves into Apple's app-distribution and IAP restrictions when they buy iOS devices." *Id*. On appeal, the circuit court determined that the district court "did not clearly err in rejecting Epic's proposed relevant markets"; "[i]n 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." *Id*. at 973.

Epic took a very different approach to the markets in this case. It did not, for obvious reasons in a case that did not include Apple, advocate for "aftermarkets for iOS app distribution and iOS in-app payment solutions, derived from a foremarket for" iOS devices. *Id*. at 970 (emphasis omitted). Nor did it argue for aftermarkets for Android app distribution and Android in-app payment solutions, derived from a foremarket for Android devices. It took a wholly different approach for the antitrust claims against Google, and offered wholly different evidence about relevant markets than that offered in the case against Apple. The holdings in *Apple I* and *Apple II* about Epic's proposed foremarket/aftermarkets for Apple products, and Epic's deficient evidentiary support for those markets, have no preclusive effect here.

Consequently, Epic was perfectly free at trial to argue for Android-only relevant markets, just as Google was free to argue for a different result. Each side took maximum advantage of this freedom to hotly dispute the definition of the product markets for Epic's antitrust claims. The jury

was presented with evidence sponsored by each side, including witness testimony, documents, and expert witness opinions, on the question of the relevant product markets. Google took every opportunity to tell the jury that Google and Apple compete, and so should be considered to be in the same relevant market. If there was one theme Google pressed relentlessly to the jury, it was this one. Epic presented substantial evidence showing that the Android-only product markets made factual and economic sense for this case. For example, Epic's economics expert, Professor Douglas Bernheim, testified that the fact that Apple and Android compete in the market for smartphones does not mean that they are in the same market for app distribution. Trial Tr. at 2423:23-2424:1. The jury also heard from Dr. Bernheim that, based on a SSNIP test and other widely accepted analytical tools, his conclusion was that the Apple App Store does not compete in the same relevant market as the Google Play Store. *Id*. at 2424:17-2427:16, 2462:2-16.

In the end, the jury did precisely what it was called upon to do by resolving the hotly disputed evidence to define the product markets as stated in the verdict. The possibility that the jury might have come out differently is no basis for judgment as a matter of law in Google's favor. *See White*, 312 F.3d at 1010. Google also has not demonstrated that the product market verdicts were clearly contrary to the weight of the evidence.

B. Aftermarket Theory

Despite the plain record of what happened at trial, Google says that Epic was actually proposing a "'single-brand aftermarket' theory of market definition" that it failed to prove. Dkt. No. 925 at 5. This is a rather odd argument because Epic never presented or even mentioned a "single-brand aftermarket" in this case, and Google's suggestion to the contrary is utterly bereft of any evidence.

To start, there was no "single brand" in play here. As the parties stipulated in the final jury instructions, Android is a mobile operating system; it is not a brand. *See* Dkt. No. 850 at ECF p. 16 (Instruction No. 12 (Stipulations of Fact)) ¶ 15. The undisputed evidence showed at trial that Android devices are manufactured by many companies, including Google, Samsung, Motorola, OnePlus, Xiaomi, and other OEMs. This is in sharp contrast to iOS devices, which are manufactured by Apple alone. *See Apple II*, 67 F.4th at 966. Epic expressly argued for a single-

brand aftermarket in the Apple case for iOS devices, and the circuit stated that, "in some instances one brand of a product can constitute a separate market." *Id*. at 976 (cleaned up). That observation, and the discussion that followed it, are not relevant here because Epic never proposed or argued for a market consisting of only "one brand of a product" with respect to Google. *Id*.

Google says that it doesn't matter that there are multiple brands of Android devices because "Google generates significant revenue from Android devices." Dkt. No. 945 at 2. Even taking that as true for discussion purposes, it hardly explains why many different and competing OEM brands should be treated as a single brand. Google certainly did not present any evidence, or case law or other authority, in support of that proposition. There simply is no evidentiary or legal reason to treat Epic as though it had pursued a foremarket/aftermarket theory that it did not propose, or to penalize it for not proving that theory at trial.

This case also differs from the Apple case in that the Apple App Store is the only app store for iOS devices, which is not true for Android devices. Substantial evidence was presented at trial that multiple Android app stores can be, and on occasion have been, available to consumers. Google's efforts to suppress rival app stores was another key theme at trial. To that end, an internal Google document asked the "existential question": "How do we continue to keep Play as the preeminent distribution platform for Android?" Trial Tr. at 920:24-921:14. Other documents referred to a "market" consisting of Android app developers only, *see id*. at 922:13-923:18, and spoke of "store rivals" that were Android app stores. *Id*. at 952:3-13. Google's CEO, Sundar Pichai, testified that each Android OEM "had the potential to have an app store" which "would compete with Google Play." *Id*. at 1343:1-5.

Overall, the evidence at trial demonstrated that the markets for Android app distribution and in-app payment systems are different from the markets for Apple/iOS app distribution and in-app payment systems that were at issue in *Apple II*. Epic did not pursue a "single-brand aftermarket" here.

II. JURY INSTRUCTIONS RE RULE OF REASON

Google requests a new trial because of alleged legal errors in the jury instructions relating to the Rule of Reason. Dkt. No. 925 at 7-11. Its arguments are not well taken.

A. Step One

On Step 1 of the Rule of Reason, Google says the jury was impermissibly allowed to "conclude that individually lawful acts are unlawful in the aggregate." Dkt. No. 925 at 10.

The record demonstrates otherwise. Before trial, the Court granted summary judgment for Google on "'plaintiffs' claims that Google unlawfully prohibits the distribution of other app stores on Google Play.'" Dkt. No. 700 at 1 (quoting Dkt. No. 483 at 6). Because governing case law makes clear that Google had no duty to deal, the Court stated that plaintiffs could reference § 4.5 of the Developer Distribution Agreement by way of background and context only, but they could not "argue or suggest that § 4.5 is unlawful either on its own *or in combination with other alleged practices*." *Id.* (emphasis added) (citing *Verizon Communications, Inc. v. Trinko,* 540 U.S. 398 (2004)).

The same guidance was stated in the jury instructions. The jury was instructed that "[i]t is not unlawful for Google to prohibit the distribution of other app stores through the Google Play Store, and you should not infer or conclude that doing so is unlawful in any way." Dkt. No. 850 at ECF p. 33 (Instruction No. 24). For the anticompetitive conduct required for Epic's Section 2 claim, the jury was instructed that, "[i]n determining whether Google's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether *the conduct* is consistent with competition on the merits, whether *the conduct* provides benefits to consumers, and whether *the conduct* would make business sense apart from any effect it has on excluding competition or harming competitors." *Id.* at ECF p. 30 (Instruction No. 23) (emphases added). Nothing in the instructions invited the jury to consider Google's alleged conduct in the aggregate, or gave them permission to consider whether independently legitimate conduct may have combined to create an anticompetitive effect.

The verdict form underscored this by directing the jury to consider each type of conduct separately. For Epic's Section 1 claim, the jury was called upon to answer separately for three types of agreements -- (1) DDA agreements; (2) agreements with Google's alleged competitors or potential competitors under Project Hug or Games Velocity Program; and (3) agreements with

OEMs that sell mobile devices (including MADA and RSA agreements) -- whether each type of agreement was an "unreasonable restraint(s) of trade." Dkt. No. 866 at 5 (Question No. 7).

As the record established, and contrary to Google's argument, the jury was in fact "guided . . . to consider each category of conduct individually." Dkt. No. 925 at 10.

B. Step Two

Google says that on Step 2 of the Rule of Reason analysis, "[t]he jury should have been instructed to consider cross-market justifications," *i.e.*, procompetitive benefits not limited to the relevant product markets at issue. Dkt. No. 925 at 7-8. But in *Apple II*, our circuit expressly took up the issue of the "cognizability of cross-market rationales." 67 F.4th at 989. There, Epic had argued 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." *Id.* (emphasis in original).

Our circuit noted that the "Supreme Court's precedent on this issue is not clear," even though on occasion it "has considered cross-market rationales in Rule of Reason and monopolization cases." *Id.* The circuit "decline[d] to decide this issue here." *Id.* The circuit also determined that Apple's procompetitive justifications related to the relevant market. *Id.* at 990.

Consequently, there was no legal mandate to expressly require the jury to consider cross-market justifications, such as "Google's competition with Apple in smartphones," Dkt. No. 925 at 9, as Google urges. Contrary to Google's argument, this is not at all a situation where the circuit has not yet "stated 'explicitly' a legal point that 'was implicit in [its] past decisions.'" Dkt. No. 945 at 4 (citing *Dang v. Cross*, 422 F.3d 800, 807-08 (9th Cir. 2005)). It also bears repeating that Google spared no opportunity at trial to tell the jury of its views about competition with Apple.

C. Step Three

Google makes another argument contrary to circuit law for Step 3 of the Rule of Reason analysis by stating that the Court improperly invited the jury to balance competitive effects. Dkt. No. 925 at 11. But as Google acknowledges, *Apple II* expressly "held that Ninth Circuit precedent

requires balancing." *Id.*; *see Apple II*, 67 F.4th at 994 ("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."). There was no error in the Court's balancing instruction to the jury.

III. SUFFICIENCY OF EVIDENCE SUPPORTING JURY VERDICT

Google's primary claim for judgment as a matter of law or a new trial is that the verdict is "unsupported by legally sufficient evidence." Dkt. No. 925 at 11-27. True to form, Google objects to just about everything adduced at trial that impugned Google's conduct. The Court has undertaken the laborious task of reviewing the record in light of Google's many complaints, as the ensuing discussion details. Some prefatory observations are in order. The true crux of Google's argument isn't that the verdict was not based on substantial evidence, but rather that the jury didn't see the evidence in the way Google wanted. This is not a situation where the verdict was based on speculation or where the evidence would allow only one conclusion that is contrary to what the jury decided.

Another problem is that Google ignores in practice the standards for granting JMOL or a new trial. For Rule 50, as discussed, all reasonable inferences are made in favor of the verdict and Epic, as the nonmoving party. *See Experience Hendrix*, 762 F.3d at 842, 845. This is so irrespective of whether the evidence might have supported a different result. *See Pavao*, 307 F.3d at 918 ("A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion."). Google subverts this by asking in effect that all inferences be drawn for its benefit. For Rule 59, where the review is free of inferences for either side, the jury verdict will stand unless it is "against the clear weight of the evidence." *Silver Sage*, 251 F.3d at 819. Google slights this by insisting that a new trial is warranted simply because some evidence was disputed and the jury might have decided differently.

A. Relevant Market

1. Limitation to Android In-App Payments

The jury found a market consisting of "Android in-app billing services for digital goods

and services transactions." Dkt. No. 866 at 3, 6 (Question Nos. 2, 8). Google says that "[t]he evidence does not support the jury's decision to exclude out-of-app payment systems from the relevant product market," highlighting websites in particular as a "reasonable substitute" that should have been included in the relevant market. Dkt. No. 925 at 11-12.

Not so. Epic's economics expert, Dr. Steven Tadelis, testified that the relevant product market was properly limited to "any product that could do what Google Play Billing does," *i.e.*, "any payment solution provider for digital content on Androids." Trial Tr. at 2553:1-4. He further testified that "web purchases are not a viable substitute for in-app purchases" because of "friction" -- whereas in-app purchases can be completed in two to three steps by the user, web store purchases required at least eight steps. *Id*. at 2554:4-2556:15. This increased friction was likely to lead to increased dropoff along the process, where users do not complete the purchase. *Id*. at 2556:19-2557:10. Google executive Purnima Kochikar was taken through the 18 steps a user would have had to go through "to have the Amazon App Store show up on the Home Page of their Android device." *Id*. at 746:3-752:8. Kochikar called the sideloading experience "abysmal," *id*. at 753:22-755:5, and agreed that "the number of steps makes for a bad user experience," and "where there's friction, people [often] fall out and don't complete purchases." *Id*. at 762:20-763:2. Witness Eric Chu testified that YouTube engineers worked to "reduce the number of clicks," asking themselves, "[f]rom the moment the user wants to buy something[,] what can we do to reduce [the] number of clicks and make it easier for them to purchase something[?]" *Id*. at 1441:2-1442:11; Dkt. No. 915-1 at ECF p. 85. The "[r]eason for that is obvious that the more friction there is[,] the more likely we lose users along the buy flow." *Id*.

The jury was instructed, without objection by Google, that "[i]n determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view." Dkt. No. 850 at ECF p. 22 (Instruction No. 18). This means "they must be, as a matter of practical fact and the actual behavior of consumers (meaning users and developers), substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other." *Id*. The jury reasonably relied on the testimony summarized

above, and similar evidence at trial, to conclude that from the developers' and users' points of view, out-of-app payment systems were not reasonable substitutes for in-app payment systems.

Google's citation to *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001), is misdirected. Google cites it for the proposition that consumers' personal preferences are not relevant. But *Tanaka* involved a highly unique personal preference -- literally the preference of just plaintiff Tanaka, a "star high school soccer player" who wanted to "remain in the Los Angeles area" so she could "be close to her family." 252 F.3d at 1061, 1063. Tanaka challenged an intercollegiate athletic association rule that discouraged intra-conference transfers, and although the association was national in scope, she alleged that the "relevant geographic market is Los Angeles and the relevant product market is the 'UCLA women's soccer program,'" based purely on her personal desires. *Id*. at 1063. The circuit concluded that Tanaka's personal preference to be near her family could not be a proper basis for defining the "'area of effective competition' for student-athletes competing for positions in women's intercollegiate soccer programs." *Id*.

The facts here could not be more different. This is not a case of one person trying to define a purely personal market. Substantial evidence was presented at trial to the effect that an out-of-app payment solution would not meet a developer's or user's needs as well as an in-app payment solution. The evidence showed that this was not a matter of mere preference or taste, but a product of design and function. Out-of-app payment solutions are a cumbersome mechanism for sales, and so are not likely to be viewed by developers or users as reasonable substitutes for in-app payment systems. The jury's finding of an Android in-app payment solutions product market was not against the great weight of the evidence.

2. Geographic Scope

Substantial evidence supported the jury's finding that the relevant geographic market was "worldwide excluding China." Dkt. No. 866 at 3, 6 (Question Nos. 2, 8). The jury was instructed that the "relevant geographic market is the area in which Google faces competition from other firms that compete in the relevant product markets and to which customers can reasonably turn for purchases." Dkt. No. 850 at ECF p. 23 (Instruction No. 19). The jury was further instructed that

"[w]hen analyzing the relevant geographic market, you should consider whether changes in prices or product quality in one geographic area have substantial effects on price or sales in another geographic area, which would tend to show that both areas are in the same relevant geographic market." *Id*. Contrary to Google's argument, there is no absolute "legal test" of "'consumer substitution.'" Dkt. No. 945 at 6.

Epic's economics expert, Dr. Douglas Bernheim, testified that the appropriate geographic boundary for the relevant market was "global, excluding China." Trial Tr. at 2445:16-24. This was because "competitive conditions" in different countries "are largely similar," and Google's challenged conduct in this case was "global, excluding China." *Id*. at 2446:1-11. It was appropriate to carve out China because China was "very dissimilar" in that Google Android, Google Play, and Google's challenged conduct, were "not in China." *Id*. at 2446:18-23. Dr. Tadelis agreed with Dr. Bernheim's analysis, and also concluded that the geographic market was "global excluding China." *Id*. at 2560:10-16.

Other witnesses at trial also testified to these facts. For example, Google witness James Kolotouros testified that Google Play is not permitted in China and is not preinstalled on smartphones distributed there. *See id*. at 1070:7-17. On the flip side, "every Android smartphone outside of China comes preinstalled with Google Play." *Id*. at 1070:18-21. Kolotouros also testified that Google faced competition from companies such as Samsung, Xiaomi, Oplus, and Vivo, which "had the potential to have app stores that competed with Google Play in markets outside of China." *Id*. at 1079:16-1080:24; *see also id*. at 1207:13-1210:11 (Google witness Jamie Rosenberg's testimony re internal Google document discussing Amazon App Store's growing popularity in Japan, and Google's concern that Amazon might "scal[e] up and go[] global," becoming a more global threat to Google Play). Similarly, for in-app payment solutions, there was trial testimony that Google Play Billing is "not offered in China," and Google faces competition from companies such as PayPal, Square, and Braintree outside of the United States. *Id*. at 2586:21-2588:25. The jury's geographic market findings were supported by adequate evidence and were not against the great weight of the evidence.

B. Anticompetitive Effect of Google's Conduct

For Epic's monopolization claim, the jury was instructed that "[a]nticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market." Dkt. No. 850 at ECF p. 30 (Instruction No. 23). For Epic's restraint of trade claim, the jury was instructed that "[a] harmful effect on competition, or competitive harm, refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, or higher product quality." *Id*. at ECF p. 37 (Instruction No. 28). The jury was further instructed to consider the following factors: "(1) the effect of the challenged restraint on prices, output, product quality, and service; (2) the purpose and nature of the challenged restraint; (3) the nature and structure of the relevant market; (4) the number of competitors in the relevant market and the level of competition among them, both before and after the challenged restraint was imposed; and (5) whether Google possesses market power." *Id*.

After considering the evidence in light of these instructions, the jury found that Google "willfully acquired or maintained monopoly power by engaging in anticompetitive conduct." Dkt. No. 866 at 3 (Question No. 3). The jury also found each of these agreements to have been unreasonable restraints of trade (and so impliedly to have had anticompetitive effects): (1) "DDA agreements"; (2) "Agreements with Google's alleged competitors or potential competitors under Project Hug or Games Velocity Program"; and (3) "Agreements with OEMs that sell mobile devices (including MADA and RSA agreements)." *Id*. at 5 (Question No. 7).

Each of these findings was supported by substantial evidence, and was not against the great weight of the evidence. There was substantial evidence at trial that Google had engaged in conduct, "other than competition on the merits, that ha[d] the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market." Dkt. No. 850 at ECF p. 30 (Instruction No. 23). It bears mention that Google does not contest that Epic presented sufficient evidence on Google's market power or the barriers to entry that existed in both of the relevant markets found by the jury. *See* Dkt. No. 932 at 15, n.11; *compare with* Dkt. No. 945.

The jury heard a great deal of testimony about Google's agreements with existing or potential competitors in connection with Project Hug.[3] Activision Blizzard King (ABK) was a developer that signed a Project Hug deal. The developer of mobile games such as Candy Crush and Call of Duty, ABK "had the highest estimated spend by users of all of the Project Hug developers." Trial Tr. at 445:5-13. ABK had been "quite vocal [in] complaining about Google Play's 30 percent fee," and Google witness Koh testified that it had been communicated to Google that ABK was considering the option of starting its own Android app store. *Id*. at 445:14-22, 463:5-8. Google estimated that it faced a risk of losing $243 million per year if ABK were to pull its content from the Google Play Store. *Id*. at 463:24-464:9. Google internally discussed this risk, as well as the possible "contagion risk" if ABK were to launch its own store and "attract[] more content from other developers." *Id*. at 463:5-464:24.[4] Google then offered ABK a Project Hug deal for $360 million. *Id*. at 465:3-466:8. Google witness Kochikar testified about Google's concern that ABK might launch its own Android app store, and Google's hope that a Project Hug deal would prevent that. *See id*. at 804:7-807:12. Riot Games was another developer that was offered and took a Project Hug deal. An internal Google document stated, "A year ago, we pulled all the stops, promised them $10 million co-marketing for before they signed GVP, for example, to get Riot Games to stop their in-house app store effort." *Id*. at 811:6-812:12.

In exchange for significant payments from Google, developers who signed a Project Hug agreement "could not launch [an app] either first or exclusively on any competing Android distribution platform." Trial Tr. at 442:23-443:2. Developers who agreed to Project Hug also could not "launch a materially different version of the game that it had on Google Play on a competing Android app distribution platform." *Id*. at 444:10-15. Epic's expert, Dr. Bernheim, testified to the anticompetitive effects of these provisions. In his view, these provisions

[3] The Games Velocity Program was a continuation of Project Hug. *See* Trial Tr. at 491:13-14; *id*. at 410:13-15 (Google witness Lawrence Koh affirming that "Project Hug was later renamed the Games Velocity Program").

[4] Witness Koh testified that the "contagion risk" had to do with Google's concern that "once top developers took their gaming content off of Google Play, that other developers would potentially follow suit." Trial Tr. at 422:14-16.

"prevent[ed] any significant differentiation," disincentivized developers from creating valuable content, and would also have discouraged Project Hug developers from entering the app store market themselves. *Id*. at 2403:7-2410:7.

There was also substantial evidence of the anticompetitive effects of Google's agreements with OEMs, specifically the Mobile Application Distribution Agreement (MADA) and Revenue Share Agreements (RSA). The MADA is an agreement that Google enters into with Android OEMs. Pursuant to the MADA, OEMs must place Google Play on the default home screen of their Android devices. Trial Tr. at 1351:14-21. Virtually all OEMs that manufacture Android smartphones have entered into a MADA, and so Google Play is preinstalled on the default home screen of nearly all Android smartphones. *Id*. at 1351:22-1352:8. Google's CEO, Sundar Pichai, acknowledged that "[t]ypically," placement on the default home screen tends to lead to more usage of an app. *Id*. at 1352:9-12. Preinstallation of Google Play on the default home screen is a precondition for an OEM to have access to other key Google GMS apps and Android APIs without which many Android applications cannot function. *Id*. at 1355:1-1356:4. Restrictions like these made it difficult for competitors like Amazon to obtain "premium placement" for apps such as its own app store, Dkt. No. 915-1 at ECF p. 107, and so it was difficult for alternative app stores to get off the ground.

The terms of the Google Revenue Share Agreements with OEMs were even more aggressive. The RSA 3.0 agreements are the third iteration of that contract, and they offer OEMs the opportunity to enroll their devices in three different tiers. Trial Tr. at 1053:1-9. For the "premier tier," which offers the highest revenue share, an OEM "may not install any app store on their device other than Google Play." *Id*. at 1053:7-24. Epic's expert, Dr. Bernheim, testified that this kind of profit-sharing with a competitor disincentivizes competition, and so is anticompetitive. *Id*. at 3189:22-3190:14.

There was additional trial testimony to the same effect. Google witness Kolotouros testified that, with the exception of Samsung, most of Google's major Android OEM partners executed RSA 3.0 agreements. *Id*. at 1092:4-6. OnePlus was one such OEM, and outside of China and India, OnePlus enrolled the vast majority of its devices in the premier tier. *Id*. at

1094:3-17. Although OnePlus wanted to enter into a partnership with Epic Games whereby the Epic Games Store app would be preloaded onto OnePlus devices, Google declined to grant a waiver to the premier tier restrictions. After that, OnePlus decided to "take Google's revenue share payments and keep nearly all of its devices outside of India in the premier tier instead of preinstalling the Epic Game Store app." *Id*. at 1094:18-25, 1098:24-1099:13.

The jury heard more evidence from which it could reasonably conclude that the RSA 3.0 agreements were anticompetitive. This included an internal Google document in which Google employees discussed how "Google cannot stop OEMs from preloading the Amazon App Store due to anticompetitive concerns on the MADA 2.0 only," but "[w]e can do this through revenue share deals." Trial Tr. at 1074:8-17. The employees agreed that having "stricter placement restrictions through revenue share" was something that would "help stem the tide of emerging app stores." *Id*. at 1074:22-1075:19. In the course of this discussion, another Google executive inquired about why Google "doesn't put everything in the MADA" and asked, "Is it anticompetitive concerns or something more than that?" Witness Kolotouros responded, "This might be better discussed in person as opposed to writing." *Id*. at 1075:20-1076:12. This and much other evidence supported a verdict against Google on the "purpose and nature of the challenged restraint," namely the RSA 3.0 agreements.

There was additional evidence at trial that Google worked to suppress competition by actively impeding users from "sideloading" competing app stores through increased "friction" and "scare screens." "Sideloading" referred to a direct installation process whereby a user "find[s] an app via a mechanism that is not billing itself purely as an app store." Trial Tr. at 2128:4-6. "Friction" meant "the screens, the dialogues, the warnings that an operating system is going to put up and show to users and sort of force the user to click through or interact with before the user can actually accomplish the intended task." *Id*. at 2113:21-25. Google's CEO, Sundar Pichai, acknowledged that "the more friction there is, the less likely the user completes that flow," *id*. at 1361:11-13, and there was evidence that Google viewed friction as a means of impeding users from sideloading third-party app stores. For example, a Google internal document titled, "Amazon competitor deep dive," noted that "Amazon [was] emerging as a major challenge to Play

in gaming globally." Dkt. No. 886-50 (Trial Ex. 682) at ECF pp. 1-2. Another slide was titled, "Amazon strongly promoting its 15%+ discount on IAPs available via Play, but for now switching hurdle too high for most users." *Id.* at ECF p. 11. Under the heading, "Significant hurdle to switching to Amazon apk," the Google document stated, "Process is quite complex, involves 14 steps (but motivated users will follow walkthroughs like this on YT)." *Id.*

For the DDA agreements, Google says that "Epic failed to prove, and no reasonable jury could have found, that the anti-steering restrictions in the DDA were anticompetitive because they merely prevent developers who choose to use valuable Google services and intellectual property in the Play store from depriving Google of compensation for that value." Dkt. No. 925 at 22. But this objection ignores the trial evidence about the anticompetitive nature of these anti-steering restrictions and the DDA in general. For example, there was testimony that Paddle, a company that offers to developers in-app payment solutions, was prevented from more effectively entering the in-app payment services market because "Google Play's terms of services for developers [*i.e.*, the DDA] expressly prohibit the usage of a third-party payment method." Trial Tr. at 653:3-11.

This and similar trial evidence demonstrate that the jury's findings on Google's anticompetitive conduct were well supported. There was sufficient evidence for the jury to agree with Dr. Bernheim that Google "impairs competition without preventing it entirely," Trial Tr. at 3181:1-3185:12, thereby satisfying the requirement that Google's conduct "frustrat[ed] the efforts of other companies to compete for customers within the relevant market." Dkt. No. 850 at ECF p. 30 (Instruction No. 23). Because the evidence discussed above is adequate to support the jury's verdict, the Court declines to address Google's other arguments on the anticompetitive effect element of Epic's antitrust claims.

C. Tying

Substantial evidence supported the jury's finding in favor of Epic on its tying claim, namely that "Google unlawfully tied the use of the Google Play Store to the use of Google Play Billing." Dkt. No. 866 at 7 (Question No. 10).

The jury heard evidence that the Google Play Store and Google Play Billing are separate products. It was not necessary for Epic to prove that there was separate demand for Google Play

Billing as a standalone product; rather, it was enough for Epic to prove that there was demand for in-app billing services separate from the demand for app distribution services. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984) (a "tying arrangement cannot exist unless two separate product markets have been linked"; "in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services"). Epic presented substantial evidence on this element. Epic witness Steven Allison testified, for example, that in the case of the Epic Game Store, developers can use Epic Direct Pay, which is Epic's in-app payment solution, or "they can bring their own if they've set their game up to do so." Trial Tr. at 227:5-12. Down Dog's CEO, Benjamin Simon, testified that he would prefer Stripe or PayPal over Google Play Billing, and if he "had the ability at Down Dog to use PayPal or Stripe on [Down Dog's] Android app," he would do so. *Id*. at 303:2-10.

There was substantial evidence that Google coerced its customer -- here, developers -- to buy the tied product (Google Play Billing) in order to obtain the tying product (Google Play Store). Numerous witnesses testified that developers whose apps are on the Google Play Store are required through the DDA to use only Google Play Billing to sell any digital content that is to be used inside of the app. *See, e.g.*, Trial Tr. at 887:7-13, 889:9-21, 1185:18-21.

The jury had an ample evidentiary basis for rejecting Google's business justification defense as pretextual, and finding that Epic had successfully proven the existence of less restrictive alternatives. The trial testimony established, for example, that developers who sold digital content for use outside of the app were exempted from the requirement to use Google Play Billing, which weakened Google's business justification argument. *See* Trial Tr. at 1185:22-25. Similarly, developers who sold physical goods were also exempted. *See* Dkt. No. 886-94 (Trial Ex. 1436); *see also* Trial Tr. at 936:3-9.

Epic also adduced evidence that the Google Play Store was so profitable that Google did not need to tax developers a 30% fee through Google Play Billing to be fully compensated for its IP and other costs for the Google Play Store. For example, the jury saw an internal Google document showing that some developers paid "more than a hundred million dollars per year more than the value that they have obtained from Google"; and for the 100 most negative developers

(whose payments to Google exceeded the estimated value they received from Google), Google internally estimated that on average, they "receiv[ed] a value equivalent to 19 percent," but "still were required to pay Google a 30 percent revenue share." Trial Tr. at 608:6-611:22. Based on Google Play's revenue numbers, this worked out to $1.43 billion per year that the top 100 most negative developers were overpaying to Google. *See id.* at 612:3-613:11. There was additional evidence at trial that Google was concerned about public criticism calling out "Google's 30 percent fee on in-app purchases made on apps distributed through Google Play" as "highway robbery." *Id.* at 417:17-418:24; *see also, e.g.*, *id.* at 708:18-21 (internal Google document stating that "the team estimates that if you compare the value of nonSearch-driven discovery versus revenue share paid, Tinder is now deriving only 10 percent of the revenue share value versus the 30 percent share they pay."). Overall, the jury had more than enough evidence at the balancing step to conclude that any benefit from Google's tie was outweighed by its competitive harms.

It was not improper for the jury to consider the DDA as an unreasonable restraint of trade and to additionally consider Epic's tying claim. The tying claim focused on Google's coercive tie of Google Play Billing to the Google Play Store, while Epic's challenge to the DDA also encompassed the DDA's anti-steering provisions. Multiple legal claims may be based on the same underlying conduct, and Google has not presented any authority to the contrary.

D. Substantially Less Restrictive Alternatives

Google challenges the jury's implicit finding in favor of Epic on Step 3 of the Rule of Reason, and says that no reasonable jury could find that Epic satisfied its burden to identify substantially less restrictive alternatives that would be virtually as effective in serving Google's objectives without significantly increased cost. Dkt. No. 925 at 24-27.

Google overlooks the fact that the jury might simply have rejected Google's proffered justifications. The jury had ample evidence to do so. There was evidence at trial, for example, to support Epic's theory that the exclusionary provisions in the MADA and RSA agreements were put into those agreements for anti-competitive reasons, rather than any legitimate business reasons. *See, e.g.*, Trial Tr. at 2920:19-2921:7 (Google witness Gennai testifying that RSA 3.0 premier tier was developed "to respond to increasing app store competition from OEMs and large platforms

like Epic"); *id*. at 1078:3-1079:19 (changes to RSA proposed "to protect Google from key strategic risks," including risks of revenue loss due to "Chinese OEMs and Samsung . . . actively investing in creating own app and services ecosystems"); *id*. at 1073:6-1076:12 (internal Google document stating that "Google cannot stop OEMs from preloading the Amazon App Store due to anticompetitive concerns on the MADA 2.0 only," but could "prevent OEMs from preloading competitive app stores" through "revenue share deals").

For the sideloading warnings, there was evidence at trial that the increased friction built in by Google were not related to Google's assessment of the security risk posed by the material the user was trying to sideload. Google CEO Pichai agreed that "[s]ome websites, such as those from reputable developers, actually present very low security risks," and yet "Google's unknown sources flow does not distinguish between those trusted developers and every other website." Trial Tr. at 1365:2-8; *see also id*. at 1693:11-1695:21 (sideloading / "unknown source" install flows of 14 or 17 steps applied equally to apps from companies such as Microsoft or Adobe, which are known to Google). Epic's mobile security expert, Dr. James Mickens, testified that any legitimate benefit of increased security protections for users could have been accomplished through less restrictive means such as fewer screens, or a notarization process that differentiated among the types of security risks presented by different apps or companies. *See id*. at 2149:2-7, 2151:6-8, 2152:4-6, 2157:2-24. His overall opinion, which the jury could reasonably have credited and believed, was that the friction Google imposes is unwarranted and disproportionate, and that Google could reduce the amount of friction while preserving the status quo on security.

For the parity provisions in Project Hug and the anti-steering provisions in the DDA, as discussed above in Section III.B. *supra*, sufficient trial evidence supported a conclusion by the jury that those were motivated by anticompetitive reasons, rather than legitimate business ones.

IV. EVIDENTIARY RULINGS AND ADVERSE INFERENCE INSTRUCTION

Google says that three evidentiary rulings entitle it to a new trial. Dkt. No. 925 at 27-29. The record demonstrates otherwise.

A. Google Employees' Use of Attorney-Client Privilege

To start, Google says the Court "permitted Epic to question witnesses about markings

related to attorney-client privilege on produced documents." Dkt. No. 925 at 27. Google also claims, quite brazenly and wrongly in light of its willful conduct to hide material evidence, that it had not "improperly withheld any document on the basis of privilege" and so "Epic's questioning of Google witnesses regarding privilege markings on documents gave the jury the incorrect impression that Google had improperly asserted the attorney-client privilege." *Id*.

Google's remarks are ill made. After the Court's findings of fact against Google for willfully failing to preserve Google Chat evidence, *see* Dkt. No. 469, more evidence emerged at trial of a frankly astonishing abuse of the attorney-client privilege designation to suppress discovery. CEO Pichai testified that there were occasions when he "marked e-mails privileged, not because [he was] seeking legal advice but just to indicate that they were confidential," as he put it. Trial Tr. at 1321:17-24. He knew this was a misuse of the privilege. *Id*. at 1323:5-17. Emily Garber, a Google in-house attorney, testified that there was a practice at Google of "loop[ing] in" a lawyer based on a "misapprehension about the rules of privilege," and that Google employees "believed that including [an in-house lawyer] would make it more likely that the email would be considered privileged." *Id*. at 964:21-966:5. Garber called this "fake privilege," a practice that she appears to have found amusing rather than something a lawyer should have put an immediate and full stop to. *Id*. at 964:21-23; Dkt. No. 887-86 (Trial Ex. 6487) at EXHIBIT pp. 012-013.

On this record, there was no error in the Court's evidentiary ruling that Epic could "present fake privilege" and make arguments to the jury about it. *Id*. at 785:5-6. The Court was crystal clear that Epic could not "do anything else with privilege," and it commended the parties for not saying "anything about" documents that had been "branded privileged" even though it should not have been subject to an assertion of privilege. *Id*. at 785:8-12.

B. Preclusion of Outcome of *Epic v. Apple*

Google repackages the prior preclusion argument as an ostensible evidentiary objection to say: "the Google Play store's primary competitor is free to use the same basic service fee model explains why it is important for Google to use that same model. The Court erred by preventing Google from introducing evidence that Apple was unlikely to change its existing model in light of

the outcome of *Epic v. Apple* -- a market fact that supports Google's procompetitive justifications for that model and the alleged tie." Dkt. No. 925 at 28.

The point fares no better as an evidentiary objection than it did in the prior version. *See* Section I.A., *supra*. In addition, for the same reason that there was no error in the jury's decision to exclude Apple from the relevant product markets it found, these outside facts about Apple are not nearly as relevant and important as Google urges.

C. Adverse Inference Instruction

Google's comments on the permissive inference instruction are even more poorly taken that those about the attorney-client privilege. The Court determined after an evidentiary hearing held before trial that Google had willfully failed to preserve relevant Google Chat communications, and allowed employees at all levels to hide material evidence. Dkt. No. 469. The evidence presented at trial added more fuel to this fire. As discussed, Google in-house attorney Garber testified about the company practice of asserting a fake privilege to shield documents and communications from discovery. Other witnesses also amplified the seriousness and pervasiveness of Google's preservation abuses. For example, Google employee Margaret Lam, who worked on RSA issues, said in a Chat message that she didn't have a specific document because "competition legal might not want us to have a doc like that at all :)." Trial Tr. at 991:16-992:8 (smiley face emoji in original). She was a party to other Chats where, in a discussion about MADA, she asked to turn history off because of "legal sensitivity"; she requested to turn history off in a different conversation about RSAs, so there would be no "trail of us talking about waivers, etc." Dkt. No. 887-83 (Trial Ex. 6464), Dkt. No. 888-23 (Trial Ex. 8020). Witness Lam also testified that the decision of which Chats to preserve had been left in her hands, but she had "no idea" what was or was not relevant. Trial Tr. at 1012:6-1014:9.

Overall, there was an abundance of pretrial and trial evidence demonstrating "an ingrained systemic culture of suppression of relevant evidence within Google." *Id*. at 1044:15-17. The Court had advised the parties before trial that an appropriate sanction might include a permissive inference instruction to the jury. Dkt. No. 700 at 3-4. After the additional evidence of malfeasance emerged during trial, the Court raised the question of whether a mandatory adverse

inference instruction would be more fitting. Trial Tr. at 1044:4-22. Even then, despite the mountain of evidence against Google, the Court held an evidentiary hearing on the question outside of the presence of the jury.

The results of this hearing were disappointing. Google's chief legal officer, Kent Walker, was the main witness. Despite the seriousness of these issues, and the likelihood that they could affect other litigation matters where Google is a party, Walker showed little awareness of the problems and had not investigated them in any way. Trial Tr. at 1834:18-1835:17. Much of his testimony was in direct opposition to the facts established at the prior Google Chat hearing. *See, e.g.*, *id*. at 1829:16-1830:3. Overall, Walker did nothing to assuage the Court's concerns.

In these circumstances, the salient question was not whether an adverse inference instruction should be given at all, but whether the inference should be permissive or mandatory. The Court would have been well within its discretion to order a mandatory inference, given the volume of evidence of Google's misconduct. Even so, the Court took the conservative approach of permitting the jury to make an adverse inference rather than requiring it to. The parties had a fair and balanced opportunity during trial to present evidence and arguments about Google Chat preservation and Google's conduct, and both sides took full advantage of that. The jury was free to make or decline an inference as it saw fit. To further ensure fairness, the Court instructed Epic that it could not make arguments about Google's conduct predating August 2020. *See* Trial Tr. at 3237:4-8. If Epic opened that door, Google would have been permitted to respond, *see id*., but Epic followed that instruction in its closing argument. *See id*. at 3352:3-3386:14, 3430:19-3435:7.

In light of this record, Google's complaints about the inference instruction are wholly misdirected. It has not provided anything close to a good reason to conclude otherwise.

V. ADVISORY JURY

Google says, rather disingenuously, that the Court has not clarified "whether it was going to treat the jury's verdict as binding or advisory," and requests that the Court treat the verdict as advisory. Dkt. No. 925 at 29. It argues further that it "did not consent to a jury trial," and even if it did, it withdrew that consent. *Id*. at 29-30.

Google again ignores that it already made these arguments to the Court prior to the start of trial, and lost, for good reason. The Court expressly denied Google's request to "abandon a jury trial" on the eve of trial. Trial Tr. at 6:13-7:16. Google is in effect seeking reconsideration of that ruling, for no good reason.

To summarize the prior proceedings on this issue, under Federal Rule of Civil Procedure 39(c)(2), "[i]n an action not triable of right by a jury, the court, on motion or on its own: . . . (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial." Google consented to a jury trial of Epic's antitrust claims against it. A party's consent under Rule 39(c)(2) can be express or implied. *See, e.g.*, *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 52 (3d Cir. 1989); *Thompson v. Parkes*, 963 F.2d 885, 889 (6th Cir. 1992) (en banc); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 795-96 (9th Cir. 1999); *Broadnax v. City of New Haven*, 415 F.3d 265, 271-72 (2d Cir. 2005); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000).

Google gave unambiguous express and implied consent to a jury trial. The express consent can be found in documents such as the parties' Joint Submission re Trial Proposal, which stated, for "Issues Triable to a Jury": "The parties agree that all claims by all Plaintiffs are triable to a jury, with the exception of the claims brought under California's Unfair Competition Law, . . . , and claims that the States have brought under the laws of 38 states other than California." Dkt. No. 505 at 3. The record also shows that the Court and the parties contemplated a jury trial for Epic's antitrust claims for years, without objection by Google and with its active participation in the filing and discussion of jury instructions, proposed voir dire, and motions in limine.

Google's filing on November 1, 2023, one day before jury selection and two court days before the start of trial, was the first time it said it was "withdraw[ing] that consent." *See* Dkt. No. 730 at 7. That was far too late. *See Bereda*, 865 F.2d at 55 ("Rule 39(c) does not permit the district court to withdraw its prior consent to the litigants' request for a nonadvisory jury."); *Thompson*, 963 F.2d at 889 ("Even if the court was correct that no jury trial right existed in this case, F.R.Civ.Pro. 39(c) permits both sides to stipulate to a jury trial. To be sure, a district court

does not have to go along with the stipulation, but once that occurs, it does not have unbridled discretion to change its mind."); *see also AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965) (where parties had stipulated to a jury trial that was set to begin on March 1, abuse of discretion for district court to vacate the jury trial on February 28 and re-set the case for a bench trial, based on court's conclusion that the parties were not entitled to a jury trial as of right).

Allowing Google to withdraw its consent two court days before trial would have caused immense prejudice to Epic, which had been awaiting its day before a factfinder since filing its case years prior, and which had spent many months preparing for a jury trial. A jury trial was proper, and the jury's verdict is properly treated as binding.

CONCLUSION

Google's motion did not present good grounds for judgment as a matter of law or for a new trial.

IT IS SO ORDERED.

Dated: July 3, 2024

JAMES DONATO
United States District Judge

United States District Court
Northern District of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 12 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: Google Play Store Antitrust Litigation _____ EPIC GAMES, INC., a Maryland Corporation, Plaintiff - Appellee, v. GOOGLE LLC; et al., Defendants - Appellants.	No. 24-6256 D.C. Nos. 3:21-md-02981-JD 3:20-cv-05671-JD Northern District of California, San Francisco ORDER

EPIC GAMES, INC., Plaintiff - Appellee, v. GOOGLE LLC; et al., Defendants - Appellants.	No. 24-6274 D.C. No. 3:20-cv-05671-JD Northern District of California, San Francisco

EPIC GAMES, INC., a Maryland Corporation, Plaintiff - Appellee, v. GOOGLE LLC; et al., Defendants - Appellants.	No. 25-303 D.C. No. 3:20-cv-05671-JD Northern District of California, San Francisco

Before: McKEOWN, FORREST, and SANCHEZ, Circuit Judges.

The panel has unanimously voted to deny Google LLC's petition for rehearing. Judge Forrest and Judge Sanchez have voted to deny the petition for rehearing en banc, and Judge McKeown so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for rehearing and rehearing en banc are **DENIED**.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Google Play Store Antitrust Litigation

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EPIC GAMES, INC., a Maryland Corporation,

Plaintiff - Appellee,

v.

GOOGLE LLC; GOOGLE IRELAND, LTD.; GOOGLE COMMERCE, LTD.; GOOGLE ASIA PACIFIC PTE, LTD.; GOOGLE PAYMENT CORP.,

Defendants - Appellants.

No. 24-6256

D.C. Nos. 3:21-md-02981-JD 3:20-cv-05671-JD Northern District of California, San Francisco

ORDER

EPIC GAMES, INC., *Plaintiff - Appellee*, v. GOOGLE LLC; GOOGLE IRELAND, LTD.; GOOGLE COMMERCE, LTD.; GOOGLE ASIA PACIFIC PTE, LTD.; GOOGLE PAYMENT CORP., *Defendants - Appellants*.	No. 24-6274 D.C. No. 3:20-cv-05671-JD Northern District of California, San Francisco
EPIC GAMES, INC., a Maryland Corporation, *Plaintiff - Appellee*, v. GOOGLE LLC; GOOGLE IRELAND, LTD.; GOOGLE COMMERCE, LTD.; GOOGLE ASIA PACIFIC PTE, LTD.; GOOGLE PAYMENT CORP., *Defendants - Appellants*.	No. 25-303 D.C. No. 3:20-cv-05671-JD Northern District of California, San Francisco

Filed September 12, 2025

Before: M. Margaret McKeown, Danielle J. Forrest, and Gabriel P. Sanchez, Circuit Judges.

ORDER

Google LLC's Motion for a Stay of Permanent Injunction Pending Google's Forthcoming Petitions for Rehearing and, if Necessary, Certiorari is denied. The request for a stay pending a petition for rehearing is moot because the court issued an administrative stay pending decision on the petition for rehearing and the court denied that petition on September 12, 2025.

The Permanent Injunction ("Injunction") was issued on October 7, 2024. This is not a situation in which Google must comply with key provisions of the Injunction immediately upon issuance of the mandate. Rather, the district court recognized that a lag time between the judgment and imposition of the key provisions of the Injunction would be appropriate. To facilitate the spirit of that ruling, on August 1, 2025, we stayed the Injunction pending appeal, despite the district court's denial of Google's motion for a stay.

For the key provisions that Google attacks—paragraphs 11 and 12 of the Injunction related to "restor[ing] competition in the Android app-distribution market with the catalog-access and app-store-distribution remedies," Op. at 40—Google has eight months from the issuance of the mandate to comply with the Injunction. However, by this Order we modify the Injunction to extend the time for compliance with paragraphs 11 and 12 to ten months following issuance of the mandate. Also, per Google's request in its initial Emergency Motion for Partial Stay of

the Permanent Injunction, we extend the short-term compliance deadlines, contained in paragraphs 4-7 and 9-10 of the Injunction, until thirty days after the issuance of the mandate. (The thirty-day compliance deadline contained in paragraph 13 remains intact.)

Under the terms of the Injunction, either party "may request a modification of the injunction for good cause." This provision continues to apply except with respect to paragraphs 11 and 12; Epic may not request a compliance deadline shorter than the ten-month deadline imposed by this Order. Google's motion does not encompass paragraph 8 of the Injunction; Google has represented that it already made the contractual changes ordered with respect to carriers and phone manufacturers. Imposition of the verdict has already been suspended more than twenty months since the December 2023 jury verdict in favor of Epic and almost a year since the Permanent Injunction. We also note that Google has represented that it will file any petition for certiorari within forty-five days of a decision on its stay motion.

To obtain a stay of the mandate pending certiorari under Federal Rule of Appellate Procedure 41(d), Google is required to show 1) "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari[;]" 2) "a significant possibility of reversal of the lower court's decision;" and 3) "a likelihood that irreparable harm will result if that decision is not stayed." *White v. Florida*, 458 U.S. 1301, 1302 (1982). We recognize that Google need not demonstrate "exceptional circumstances . . . to justify a stay," *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989), because it is "often the case" that our court issues

a stay pending certiorari, *United States v. Pete*, 525 F. 3d 844, 850 (9th Cir. 2008).

Although we stayed the Injunction pending appeal, in our comprehensive sixty-seven-page opinion, our unanimous panel upheld the jury's finding of antitrust liability and the district court's Injunction. We emphasize that this Order is issued after a jury trial and multitudinous district court proceedings. Unlike many stay orders, this Order does not relate to a stay pending issuance of a preliminary injunction but rather relates to a stay request following a jury trial, a permanent injunction, and a final judgment. Following a fifteen-day jury trial with forty-five witnesses in which the jury found Google violated federal and state antitrust laws, the district court undertook additional testimony and hearings and issued detailed findings with respect to the Injunction.

Google's primary contention on appeal focuses on factual disagreements with the district court, an effort to shoehorn the results of the *Epic v. Apple* litigation into this case, and a misapprehension of essential antitrust principles. As for security concerns, we held that the Injunction "explicitly address these risks" through adoption of reasonable measures "to ensure that the platforms or stores, and the apps they offer, are safe from a computer systems and security standpoint." Op at 64–65. In addition, the Injunction provides for a Technical Committee to assist in resolving technical disputes, including security concerns.

In view of the rationale and details laid out in our opinion, we conclude that Google has not met the requirements under Federal Rule of Appellate Procedure 41(d) regarding a meritorious petition for certiorari or the significant possibility of reversal. In addition, Google's

claim for irreparable harm is unfounded in light of trial testimony. Finally, we are unpersuaded by Google's claim that market confusion, monetary expenditures, and national security support a claim of irreparable harm.

Motion for stay of mandate denied; motion for stay of mandate pending filing of petition for rehearing denied as moot; and Permanent Injunction issued October 7, 2024, modified in accordance with this Order.

Volume 17

Pages 3294 - 3442

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION,	)	**NO. 21-md-02981-JD**
THIS DOCUMENT RELATES TO:	)	
EPIC GAMES, INC., Plaintiff,	)	
VS.	)	**NO. 3:20-cv-05671-JD**
GOOGLE, LLC., et al., Defendants.	)	

San Francisco, California

Monday, December 11, 2023

TRANSCRIPT OF PROCEEDINGS

STENOGRAPHICALLY REPORTED BY:

Kelly Shainline, CSR 13476, RPR, CRR
Official United States Reporter

THE CLERK: The doors are locked, Your Honor.

THE COURT: Thank you.

Okay. Everybody set? All right.

THE COURT: Instruction 1, Duty of the Jury. Members of the jury, now that you have heard all of the evidence, it is my duty to instruct you on the law that applies in this case. You have each been given a copy of these instructions to refer to during your deliberations.

It is your duty to find the facts from all of the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You should also not be influenced by any person's race, color, religion, national ancestry, or gender.

All of this means is that you must decide the case solely on the evidence before you, and please keep in mind you took an oath to do so.

Do not read into these instructions, or anything I may say or do or did or said during trial, that I have an opinion about the evidence or what your verdict should be. That is for you to decide.

I will give you a brief summary of the position of the parties.

The plaintiff, as you know, is Epic Games. The defendants

are Google LLC and certain of its affiliates, which we've been calling Google collectively.

Epic contends that defendant Google has violated federal and state antitrust laws through a variety of means that foreclose competition in an alleged market for Android app distribution and in an alleged market for in-app billing services on Android devices.

Epic alleges that Google's conduct harms mobile app developers and consumers by increasing prices and reducing quality and innovation.

Google denies Epic's claims.

Google contends that the relevant market is not limited to Android but also includes Apple's iOS and other platforms where users and developers can engage in transactions for digital content.

Google also contends that its conduct has not foreclosed competition but rather has promoted competition by enabling Android to compete with iOS and other platforms. Google contends that its conduct benefited users and developers.

Now, Google has also brought a counterclaim against Epic alleging that Epic breached the Developer Distribution Agreement called the DDA. Epic and Google have now stipulated to the following:

One, Epic incorporated its own payment solution into Fortnite on Google Play as an alternative to Google Play

Billing which violated the terms of the DDA.

Two, Epic did not pay Google the amount of $398,931.23 in fees that Google would have received if transactions processed using Epic's payment solution were used instead -- were instead processed through Google Play Billing.

So on the basis of these stipulations, you will no longer be asked to address Google's counterclaim.

Corporations and Fair Treatment. The parties in this case are corporations. All parties are equal before the law, and a corporation is entitled to the same fair and conscientious consideration by you as any party.

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers; therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of their authority.

An act is within the scope of a person's authority if it is within the range of reasonable and foreseeable activities that an employee, agent, director, or officer engages in while carrying out that person's business.

Now, the evidence you are to consider in deciding what the facts are consists of, one, the sworn testimony of any witness; two, the exhibits that are admitted into evidence; three, any facts to which the lawyers have agreed; and, four, any facts that I may instruct you to accept as proved.

Now, in reaching your verdict, you may consider only the testimony and exhibits received into evidence, any facts to which the lawyers have agreed, and any facts that I may instruct you to accept as proved.

Certain things are not evidence and you may not consider them in deciding what the facts are. I will tell you what those things are.

One, arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

Two, questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or the Court's ruling on it.

Three, testimony that was excluded or stricken or that you may have been instructed to disregard is not evidence and must not be considered. In addition, some evidence was received only for a limited purpose; and when I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

Four, anything that you may have seen or heard when court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Now, evidence may be direct or circumstantial. Direct evidence is direct proof of a fact such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

Now, there are rules of evidence that control what can be received into evidence. When a lawyer asked a question or offered an exhibit into evidence and a lawyer on the other side thought that it was not permitted by the rules of evidence, that lawyer objected. If I overruled the objection, the question was answered or the exhibit received. If I sustained the objection, the question was not answered or the exhibit was not received.

Whenever I sustained an objection to a question, you must ignore the question and must not guess what the answer might have been. Now, sometimes I ordered you to disregard or ignore that evidence. That means that when you are deciding the case, you must not consider the stricken evidence for any purpose.

Now, during the trial, you heard testimony by witnesses in

the form of previously recorded trial and deposition testimony rather than live here in court. A deposition is the sworn testimony of a witness taken before trial. The witness was placed under oath to tell the truth and lawyers for each side asked questions. The questions and the answers were recorded. Insofar as possible, you should consider deposition testimony presented to you in court in lieu of live testimony in the same way as if the witness had been present to testify.

On deciding the facts in the case, you may need to decide which testimony to believe and which testimony not to believe. You may believe everything a witness said or part of it or none of it. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to see or hear or know the things testified to; the witness' memory; the witness' manner while testifying; the witness' interest in the outcome of the case, if any; the witness' bias or prejudice, if any; whether other evidence contradicted the witness' testimony; the reasonableness of the witness' testimony in light of all the evidence; and any other factors that bear on believability.

Now, sometimes a witness may have said something that is not consistent with something else he or she said. Sometimes different witnesses gave different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember

it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony. However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were and how much weight you think their testimony deserves.

Now, you heard testimony from expert witnesses who testified to opinions and the reasons for their opinions. This opinion testimony was allowed because of the education or experience of the expert witness. Such opinion testimony should be judged like any other testimony. You may accept it, reject it, or give it as much weight as you think it deserves considering the witness' education and experience, the reason given for the opinion, and all the other evidence in the case.

Now, during trial, certain charts and summaries were shown to you in order to help explain the content of books, records, documents or other evidence in the case. Some of those charts or summaries may have been admitted into evidence while others were not. Charts and summaries are only as good as the

evidence supporting them. You should, therefore, give them only such weight as you think the evidence supporting them deserves.

Now, the parties have agreed to certain facts, and I'm going to read these to you now. You must treat these facts as having been proved. You don't have to worry about making a decision. These are carved in stone.

1, Google LLC is a wholly owned subsidiary of Alphabet Inc.

2, Google offers various products and services including Android OS, Chrome, Gmail, Drive, Maps, Play, Search, YouTube, Google Cloud, and Search Ads 360.

3, a mobile operating system called OS provides multipurpose computing functionality to a mobile device such as a smartphone or a tablet.

4, to be useful to consumers, a mobile OS must be able to run software applications or apps.

5, a mobile OS facilitates the use of apps through code, such as application programming interfaces, also known as APIs, which app developers use to create apps that are compatible with the OS.

6, an app is software separate from the mobile OS that runs on a mobile device and adds specific functionalities to a mobile device.

7, consumers use apps to perform a variety of tasks on

their mobile devices.

8, entities that manufacture mobile devices, such as Samsung or Motorola, are referred to as original equipment manufacturers or OEMs.

9, OEMs preinstall an OS on the mobile devices that they manufacture and sell.

10, instead of developing their own OS, almost all OEMs today license a third party's OS for their devices.

11, Apple does not license iOS to other OEMs.

12, the Google Play Store is an app store owned by Google that distributes apps on devices running the Android OS.

13, to distribute an app on the Google Play Store, app developers must first enter into Google's Developer Distribution Agreement, which we've called the DDA.

14, the predecessor to the Play Store was called Android Market.

15, Google acquired the Android mobile operating system in 2005.

16, Google launched Android Market in October 2008.

17, Google launched its in-app billing service in 2011.

18, Google's Android Market app store was rebranded as the Google Play Store in March 2012.

19, Tim Sweeney is Epic Games controlling shareholder, CEO, and board chairman.

20, in April 2020, Epic made the decision to make Fortnite

available for download through the Play Store.

21, Epic executed Google's DDA.

22, Epic incorporated its own payment solution into Fortnite on Google Play as an alternative to Google Play Billing, which violated the terms of the DDA.

23, Epic did not pay Google $398,931.23 in fees that Google would have received if transactions processed using Epic's payment solution were instead processed through Google Play Billing.

And, 24, on August 13, 2020, Epic filed its complaint in this case against Google.

You have seen evidence that Google Chat communications were deleted with the intent to prevent their use in litigation. You may infer that the deleted Chat messages contained evidence that would have been unfavorable to Google in this case.

Let's talk about the burden of proof now for the claims. When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence regardless of which party presented it.

Now, the purpose of the antitrust laws and the Sherman Act is to preserve free and unfettered competition in the

marketplace. The Sherman Act rests on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.

Now, Epic brings two types of antitrust claims, which I will now explain.

First, the antitrust laws prohibit companies from willfully acquiring or maintaining monopolies in relevant markets through anticompetitive conduct.

Second, the antitrust laws prohibit contracts or agreements that unreasonably restrain competition.

I will first explain Epic's monopolization claims under Section 2 of the federal Sherman Antitrust Act.

Epic alleges that it was injured by Google's unlawful monopolization of two alleged markets. Epic alleges that those markets are, one, an Android app distribution market; and, two, a market for Android in-app billing services for digital goods and services and transactions.

To prevail on a claim that Google has monopolized an alleged relevant market, Epic must prove each of the following elements by a preponderance of evidence for that market:

One, that the alleged relevant market is a valid antitrust market.

Two, that Google possesses monopoly power in the alleged relevant market.

Three, that Google willfully acquired or maintained its monopoly power in the alleged relevant market by engaging in anticompetitive conduct.

And, four, that Google was injured in its business or property because of Google's -- sorry -- that Epic was injured in its business or property because of Google's anticompetitive conduct.

If you find that Epic has failed to prove any of these elements with respect to either market, then you must find for Google and against Epic on the claim for unlawfully monopolizing that market.

If you find that Epic has proven each of these elements by a preponderance of the evidence for either market, then you must find for Epic and against Google on the claim for unlawful monopolizing that market.

Now, to prove a monopolization claim, Epic must prove that Google has monopoly power in a relevant antitrust market. Monopoly power is the power to control prices, restrict output, or exclude competition in a relevant antitrust market. More precisely, a firm is a monopolist if it can profitably raise or maintain prices substantially above or reduce or maintain quality substantially below the competitive level for a significant period of time. However, possession of monopoly power in and of itself is not unlawful.

I will provide further instructions to you about how you

may determine whether Epic has met its burden of proving monopoly power in a relevant market. We're going to start with the relevant product market.

In this case, Epic contends that there are two different relevant product markets: An Android app distribution market and a market for Android in-app billing services for digital goods and services and transactions.

You should consider whether Epic has proven by a preponderance of the evidence either or both of the markets it has alleged.

Now, in determining the relevant market the, quote, "area of effective competition," close quote, must be determined by reference to, one, a product market; and, two, a geographic market.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean two products must be identical to be in the same relevant market. It means they must be, as a matter of practical fact and the actual behavior of consumers, meaning in this case users and developers, substantially or reasonably interchangeable to fill the same consumer needs or purposes.

Two products are within a single market if one item could suit buyer's needs substantially as well as the other. What you are being asked to do is to decide which products compete

with each other.

The parties contend that one or more markets alleged in this case are markets for two-sided platforms. In a two-sided platform market, a platform offers services or -- products or services to two different groups who both depend on the platform to intermediate between them.

For example, an app store connects app developers who wish to sell their apps and consumers that wish to buy those apps. In this example, app developers may be one side of the market and consumers may be the other side of the market, and each are receiving services from the app store.

In order to define a relevant market involving a two-sided platform, you must take into account consumers on both sides of the market; in this case, both users and developers.

Now, the relevant geographic market is the area in which Google faces competition from other firms that compete in the relevant product markets and to which consumers can reasonably turn for purchases.

When analyzing the relevant geographic market, you should consider whether changes in prices or product quality in one geographic area would have a substantial effect on prices or sales in another geographic area, which would tend to show that both areas are in the same relevant geographic market.

A geographic market may be as large as global or nationwide or as small as a single town or neighborhood.

Now, Epic has the burden of proving the relevant geographic market by a preponderance of the evidence. In this case, Epic claims that the relevant geographic market is worldwide, excluding China.

In determining whether Epic has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors, including the geographical area in which Google sells and where Google's customers are located; geographic area to which Google's customers turn or can turn for supply of the product; geographic area in which Google's customers have turned or have seriously considered turning; the geographic areas that Google's customers view as potential sources of competition; and whether governmental licensing requirements, taxes, or quotas have the effect of limiting competition in certain areas.

If you determine that any of Epic's alleged markets are two-sided markets, then you should consider both sides of that market in determining the relevant geographic scope of that two-sided market.

Now, if you find that Epic has proven a relevant market, then you should determine whether Google has monopoly power in that market. You can consider two types of proof to determine whether Google has monopoly power. One, direct proof; and, two, indirect proof. I will explain these to you in the following instructions.

Let's start with direct proof. There are two ways to provide direct proof of monopoly power: Raising or maintaining prices above competitive levels. In order to provide direct proof of monopoly power, Epic has the burden of proving that Google has the ability to raise or maintain the prices that it charges for goods or services in the relevant market above competitive levels or to reduce or maintain the quality of goods and services in the relevant market below competitive levels.

Epic must prove that Google has the power to do so by itself; that is, without the assistance of and despite competition from any existing or potential competitors.

Epic also has the burden of proving that Google has the power to maintain prices above a competitive level or quality below a competitive level for a significant period of time. If Google attempted to maintain prices above competitive levels or reduce quality below competitive levels but would lose so much business to other competitors that the price increase or quality reduction would become unprofitable and would have to be withdrawn, then Google does not have monopoly power.

Power to Exclude Competition. In the alternative, in order to provide direct proof of monopoly power, Epic must prove that Google has the ability to exclude competition. For example, if Google attempted to maintain prices above competitive levels or reduce quality below competitive levels

but knew competitors could enter the market, relevant market, or existing competitors could expand their sales and take so much business that the price increase or quality reduction would become unprofitable and would have to be withdrawn, then Google does not have monopoly power.

The ability to earn high profit margins or a high rate of return does not necessarily mean that Google has monopoly power. Other factors may enable a company without monopoly power to sell at higher prices or earn higher profit margins than its competitors; such as superior products or services, low costs, or superior advertising or marketing.

However, an ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time may be evidence of monopoly power.

By contrast, evidence that Google would lose a substantial amount of sales if it raised prices or reduced quality substantially or that Google's profit margins were low compared to its competitors or that Google's profit margins go up or down or are steadily decreasing might be evidence that Google does not have monopoly power.

Let's talk about indirect proof. Epic may prove Google's monopoly power indirectly. I instructed you earlier monopoly power is the power to control prices and exclude competition in a relevant antitrust market. Epic has introduced evidence of

the structure of their proposed relevant markets to show that Google has monopoly power.

The evidence presented by the parties includes evidence of Google's market share, market share trends, barriers to entry and exit by other companies, and the number and size of other competitors.

If this evidence establishes that Google has the power to control prices and exclude competition in a relevant antitrust market, then you may conclude that Google has monopoly power in that market.

Let's talk about market share. The first factor that you should consider is Google's share of a relevant market. Based on the evidence that you have heard about Google's market shares, you should determine Google's market share as a percentage of total sales in the relevant market. Google must have a significant share of the market in order to possess monopoly power.

In evaluating whether the percentage of market share supports a finding of monopoly power, you should also consider other aspects of the relevant market, such as market share trends; the existence of barriers to entry, that is, how difficult is it for other producers to enter the market and begin competing with Google for sales; the entry and exit by other companies; and the number and size of competitors.

Along with Google's market share, these factors should

inform you as to whether Google has monopoly power. The higher the company share, the higher the likelihood that a company has monopoly power.

Now, with respect to market trends, the trend in Google's market share is something you may consider. An increasing market share may strengthen an inference that a company has monopoly power particularly where that company has a high market share while a decreasing share might show that a company does not have monopoly power.

And with respect to barriers of entry, you may also consider whether there are barriers to entry in the relevant market. Barriers to entry make it difficult for new competitors to enter the market in a meaningful and timely way.

Barriers to entry might include intellectual property rights, such as patents or trade secrets; the large financial investment required to build a plant required to satisfy government regulations; specialized marketing practices; and the reputation of the companies already participating in the market or the brand name recognition of their products.

Evidence of low or no entry barriers may be evidence that Google does not have monopoly power regardless of Google's market share because new competitors could enter easily if Google attempted to raise prices for a substantial period of time. By contrast, evidence of high barriers to entry along with high market share may support an inference that Google has

market power.

Now, the history of entry and exit in the relevant market may be helpful for you to consider. Entry of new competitors or expansion of existing competitors may be evidence that Google lacks monopoly power. On the other hand, departures from the market or the failure of firms to enter the market, particularly if prices and profit margins are relatively high, may support an inference that Google has monopoly power.

You may consider whether Google's competitors are capable of effectively competing. In other words, you should consider whether the financial strength, market shares, and number of competitors to act as a check on Google's ability to raise prices of its products. If Google's competitors are vigorous or have large or increasing market shares, this may be evidence that Google lacks monopoly power. On the other hand, if you determine that Google's competitors are weak or have small or declining market shares, this may support an inference that Google has monopoly power.

Now, if you find that Google has monopoly power in a relevant market, then you must consider the remaining elements of Epic's claim for monopolization of that market.

If you find that Google does not have monopoly power in any relevant market, then you must find for Google and against Epic on the claim for monopolizing that market.

Now, to prove the monopolization claims, Google must prove

that -- I'm sorry -- Epic must prove that Google willfully acquired or maintained monopoly power through anticompetitive acts or practices.

Anticompetitive acts are acts other than competition on the merits that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market.

Harm to competition is to be distinguished from harm to a single competitor or group of competitors which does not necessarily constitute harm to competition.

Some examples of harm to competition include increased prices, decreased production levels, and reduced quality. In evaluating alleged harm on a market that you have found to be two-sided, you must consider whether there is harm to the two-sided market as a whole.

Mere possession of monopoly power if lawfully acquired does not violate the antitrust laws. The acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck is not unlawful.

A monopolist may compete aggressively without violating antitrust laws and a monopolist may charge monopoly prices without violating the antitrust laws. A monopolist's conduct only becomes unlawful when it involves anticompetitive acts.

The difference between anticompetitive conduct and conduct

that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals or the achievements of these goals unlawful so long as a company does not use anticompetitive means to achieve these goals.

Now, determining whether Google's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.

In evaluating alleged benefits in a market that you have found to be two-sided, you must consider whether those benefits -- whether there are benefits to the two-sided market as a whole.

Now, the acts or practices that result in the acquisition or maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or commercial success. They must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason.

You may not find that a company willfully acquired or maintained monopoly power through anticompetitive means if it has acquired or maintained that power solely through the exercise of superior foresight and skill or because of natural advantages, such as unique geographic access to raw materials or markets or because of economic or technological efficiency, including efficiency results from scientific research, or by obtaining a lawful patent or patents, or because changes in cost or consumer preferences have driven out all but one supplier.

In summary, you must first determine whether Epic has proven that Google's conduct has caused substantial harm to competition in a relevant market. If Epic has done so, you must then determine whether Google has justified its conduct by proving that its conduct was reasonably necessary to achieve competitive benefits for consumers in that relevant market.

However, if Epic has proven that Google could have readily achieved the same benefits using reasonably available alternative means that would have created substantially less harm to competition, then those benefits cannot justify Google's conduct. In other words, if you find that Google has proven a pro competitive rationale, then you must determine if Epic has met its burden to prove the existence of a substantially less restrictive alternative to achieve Google's pro competitive rationale.

To qualify as a substantially less -- as substantially less restrictive, an alternative means must be virtually as effective in serving the defendant's pro competitive purpose without significantly increasing cost.

You must then balance any competitive harms that you found against any competitive benefits you found. In doing so, you may consider any harms or benefits on both sides of the market for any market you have found to be two-sided. If the harms to competition resulting from Google's conduct substantially outweigh the competitive benefits, then you must find that Google willfully acquired or maintained monopoly power through anticompetitive acts.

If you find that Google willfully acquired monopoly power through anticompetitive acts in a relevant market, then you must consider whether Epic has proved the remaining elements of its claim that Google monopolized that market.

If, however, you find that Google did not willfully acquire or maintain monopoly power through anticompetitive acts in a relevant market, then you must find for Google and against Epic on Epic's claim that Google monopolized that market.

As a general rule, businesses are free to choose the parties with whom they will deal as well as the prices, terms, and conditions of that dealing.

Now, you have heard evidence that Google's Developer Distribution Agreement, what we call the DDA, prohibits the

distribution of other app stores through the Google Play Store. It is not unlawful for Google to prohibit the distribution of other app stores through Google Play Store, and you should not infer or conclude that doing so is unlawful in any way.

Now, in addition to the monopolization claim, Epic challenges Google's conduct under Section 1 of the Sherman Act and California state law. Section 1 prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.

To establish a violation of Section 1 of the Sherman Act in California state law, Epic must prove the following:

One, the existence of a contract, combination, or conspiracy between or among at least two separate entities.

Two, that the contract, combination, or conspiracy unreasonably restrains trade.

And, three, that the restraint caused Epic to suffer an injury to its business or property.

Now, to prove an agreement or contract to restrain trade, Epic must prove both of the following elements by a preponderance of the evidence:

One, that an agreement or contract to restrain trade existed; and, two, that Google knowingly became a party to that agreement or contract.

To act knowingly means to participate deliberately and not because of mistake or accident or other innocent reason. The

basis of a contract or agreement is an understanding between two or more persons or entities. An agreement or understanding between two or more persons exists when they share a commitment to a common scheme.

To establish the existence of agreement, the evidence need not show that the persons or entities entered into a formal or written agreement. It is not essential that all persons acted exactly alike nor is it necessary that they all possess the same motive for entering the agreement.

It's also not necessary that all of the means or methods claimed by Epic were agreed upon to carry out the alleged agreement to restrain trade nor that all the means or methods that were agreed upon were actually used or put into operation.

It is the agreement or understanding to restrain trade in the way alleged by Epic that constitutes a potential violation of the antitrust laws. Therefore, you may find an agreement to restrain trade existed regardless of whether it succeeded or failed.

Now, Epic may prove the existence of the contract or agreement to restrain trade through direct evidence, circumstantial evidence, or both. Direct evidence is explicit and requires no inferences to establish the existence of a contract or agreement. Direct evidence of an agreement may not be available and, therefore, an agreement may also be shown through circumstantial evidence. You may infer the existence

of an agreement from the circumstances, including what you find the persons actually did and the words they used.

Now, in determining whether an agreement or understanding between two or more persons to restrain trade has been proved, you must consider the evidence as a whole and not in piecemeal fashion.

Now, under Section 1 of the Sherman Act, a restraint of trade is illegal only if it's found to be unreasonable. You must determine, therefore, whether any of the restraints challenged here are unreasonable. The restraints challenged here are the agreements that Google requires mobile app developers to enter into as a condition of distributing apps on Google Play Store, and these are called the DDA agreements; alleged agreements with Google's alleged competitors or potential competitors, including Activision and Riot Games under Google's Games Velocity Program or Project Hug; and agreements with original equipment manufacturers, OEMs, that sell mobile devices. These are the MADA and RSA agreements.

In making this determination, you must first determine whether Epic has proven that a challenged restraint has resulted in a substantial harm to competition in a relevant product or geographic market. If you find that Epic has proven that the challenged restraint results in a substantial harm to competition in a relevant market, then you must consider whether Google has proven that the restraints produced

countervailing competitive benefits.

If you find that they do, then you must balance the competitive harm against the competitive benefit. However, if you find that the competitive benefits could have been achieved through substantially less restrictive alternatives, then you may not consider those benefits when balancing harms against benefits.

The challenged restraints are illegal under Section 1 of the Sherman Act only if you find that the competitive harm substantially outweighs the competitive benefit.

Now let's break these steps down a little bit.

As I mentioned, to prove that the alleged restraint is unreasonable, Epic must first demonstrate that the restraint has resulted or is likely to result in substantial harm to competition. Although it may be relevant to the inquiry, harm that occurs merely to the individual business of the plaintiff is not sufficient by itself to demonstrate harm to competition generally. That is, harm to a single competitor or group of competitors does not necessarily mean that there has been harm to competition.

Epic must also show that the harm to competition occurred in an identified market known as a relevant market. As I've described, there are two aspects of a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market. It

is Epic's burden to prove the existence of a relevant market.

If you find that Epic has proven a relevant market, then you must determine whether Epic has also proven that the challenged restraint has or is likely to have a substantial harmful effect on competition in that market.

A harmful effect on competition or competitive harm refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, or higher product quality.

If the challenged conduct has not resulted in or is not likely to result in higher prices, decreased output, lower quality, or the loss of some other competitive benefit, then there has been no competitive harm and you should find that the challenged conduct was not unreasonable.

In determining whether the challenged restraint has produced or is likely to produce competitive harm in a market that you have found to be two-sided, you must consider harms to the two-sided market as a whole.

Now, in determining whether the challenged restraint has produced or is likely to produce competitive harm, you may look at the following factors:

The effect of the challenged restraint on prices, output, product quality, and service; the purpose and nature of the challenged restraint; the nature and structure of the relevant market; the number of competitors in the relevant market and

the level of competition among them, both before and after the challenged restraint was imposed; and whether Google possesses market power.

Now, the last factor, market power, has been defined as an ability to profitably raise prices for a substantial period of time above those that would be charged in a competitive market. A company that has monopoly power in a relevant market necessarily has market power in that market. However, a company can have market power in a relevant market even if it does not have monopoly power because market power requires less than monopoly power.

A firm that possesses market power generally can charge higher prices for the same goods and services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power.

An important factor in determining whether Google possesses market power is Google's market share; that is, its percentage of the products or services sold in the relevant market by all competitors.

Other factors that you may consider in determining whether Google has, or at relevant times had, market power include whether Google is capable of raising or maintaining prices above competitive levels, whether there are barriers to entering the market, and whether Google can exclude or has

excluded competition or prevented competitors or potential competitors from entering the market.

If Google does not possess a substantial market share, it is less likely that Google possesses market power. If Google does not possess market power, it is less likely that the challenged restraint has resulted or will result in a substantial harmful effect on competition in the market.

Now, if you find that Google has proven that a challenged restraint resulted in substantial harm to competition in a relevant market, then you must next determine whether Google has proven that the restraint also benefits competition in other ways.

If you find that the challenged restraint does result in competitive benefits, then you must also consider whether those competitive benefits were achievable through a substantially less restrictive means. To qualify as substantially less restrictive, an alternative means must be virtually as effective in -- let me start that again.

To qualify as substantially less restrictive, an alternative means must be virtually as effective in serving the defendant's pro competitive purpose without significantly increasing costs.

If Epic proves that any of the competitive benefits were achievable through substantially less restrictive means, then those benefits cannot be used to justify the restraint.

Now, if you find that a challenged restraint resulted in competitive benefits in a relevant market that were not achievable through substantially less restrictive means, then you must balance those competitive benefits against the competitive harm resulting from the same restraint.

If the competitive harm substantially outweighs the competitive benefits, then the challenged restraint is unreasonable.

If the competitive harm does not substantially outweigh the competitive benefits, then the challenged restraint is not unreasonable.

In conducting this analysis, you must consider the benefits and harm to competition and consumers in the market not just to a single competitor or a group of competitors.

If you have found a market that is two-sided, you must balance the harms and benefits on both sides of the two-sided market as a whole.

Epic bears the burden of proving by a preponderance of the evidence that the anticompetitive effect of the conduct substantially outweighs its benefits.

This will be the last claim. Epic also claims that Google engaged in an unlawful tying arrangement. A tying arrangement is one in which the seller will sell one product or service, referred to as the tying product, only on the condition that the buyer also purchase a separate product or service, referred

to as the tied product, from the seller, or at least agrees to not purchase the tied product or service from any other seller.

Now, in this case, Epic claims that Google's app distribution product, the Google Play Store, is the tying product and its in-app billing service, Google Play Billing, is the tied product.

Not all tying arrangements are unlawful. The essential characteristic of an invalid tying arrangement is a seller's exploitation of its market power over the tying product -- in this case, app distribution services -- to force a buyer to purchase the tied product -- in this case, in-app billing services -- that the buyer must have preferred to purchase elsewhere.

I'm going to discuss with you now how to determine whether if there was a tying arrangement, that alleged arrangement is unlawful.

Now, to prevail on the tying claim, Epic must prove each of the following elements by a preponderance of the evidence:

One, Android app distribution services like the Google Play Store and Android in-app billing services like Google Play Billing are separate and distinct products.

Two, Google will provide Android app distribution services through the Google Play Store only on the condition that app developers also use Google Play Billing for in-app transactions.

Three, Google has sufficient market power with respect to the Android app distribution services to enable it to restrain competition as to an alleged market for Android in-app billing services.

Four, the alleged tying arrangement has foreclosed a substantial volume of commerce as to an alleged market for Android in-app billing services.

Five, the tying arrangement was -- has unreasonably restrained trade in that it had a substantial adverse effect on competition as to an alleged market for Android in-app billing services.

And, six, Epic was injured in its business or property because of the tying arrangement.

If you find that the evidence is sufficient to prove all six of these elements, then you must consider Google's business justification defense, which I will instruct you on in a moment.

If you find for Epic on all six of these elements and against Google on Google's business justification defense, then you must find for Epic and against Google on Epic's tying claim.

If you find that the evidence is insufficient to prove any one of these elements, then you must find for Google and against Epic on Epic's tying claim.

Alternatively, if you find for Google on Google's business

justification defense, then you must find for Google on Epic's tying claim.

Now, to determine whether the Google Play Store and Google Play Billing are separate and distinct products, you should consider whether there would be demand for each of them if they were offered separately. If enough Android developers would want to use Google Play Store alone and Google Play Billing alone, then they are separate products.

On the other hand, if there is very little demand for one of the products by itself, that is, without the other product, then Google Play Store and Google Play Billing are not two separate products for the purpose of the tying claim even if they are sometimes sold separately.

Products may be separate products even if one of them is useless without the other. The relevant issue is whether there is sufficient demand from customers to induce sellers to provide them separately even if the customer needs to obtain both products from one or more suppliers.

You may find that a tying arrangement exists between the Google Play Store and Google Play Billing if Google refuses to distribute Android apps through the Google Play Store unless Android app developers agree to use Google Play Billing to facilitate the sale of digital goods or services in those apps.

You may also find that a tie exists if Google effectively coerced Android app developers into using only Google Play

Billing.

To prove coercion, Epic must prove by a preponderance of the evidence that Google exploited its control over the Google Play Store to force Android app developers to use Google Play Billing when the app developers either did not want to use Google Play Billing at all or might have preferred to use Google Play Billing on different terms and that any appearance of choice was illusory. Mere sales pressure or persuasion is not coercion.

If Google has made the use of the Google Play Store and Google Play Billing together the only viable economic option, you may find that Google has effectively tied the Google Play Store to Google Play Billing. However, there is no coercion if the Google Play Store and Google Play Billing are offered separately and separate use is economically feasible.

You must determine whether Google has market power with respect to the tying product in an alleged market for Android app distribution services. I've already instructed you on the meaning of market power, and you must apply that instruction here when determining whether Google has market power with respect to the tying product.

If you determine that Google Play Store and Google Play Billing are separate products that have been tied to one another and that Google has market power in Android app distribution, then you must determine whether Epic has proven

that Google has foreclosed a substantial amount of commerce with respect to Android in-app billing services.

In determining whether Google has foreclosed a substantial amount of commerce with respect to Android in-app billing services, you should first consider the total dollar amount Google earned from Google Play Billing by the tying arrangement in absolute terms.

If the dollar amount Google earned from Google Play Billing was substantial, you should next consider whether there has been a substantial adverse effect on competition with respect to Android in-app billing services due to the tying arrangement. If there is not a substantial adverse effect on competition and Android in-app billing services due to the tying arrangement, then you must find in favor of Google on the tying claim.

There is no substantial foreclosure if only a small percentage of sales in the alleged market for Android in-app billing services was effectively -- was affected by the tying arrangement. There is also no substantial foreclosure if you find that the Android app developers would not have used Android in-app billing services at all in the absence of tying arrangements. Google contends that the alleged tying arrangement is justified.

If you find that Epic has proven all of the elements of the tying claim, then you should consider whether Google has

proven by a preponderance of the evidence a business justification for the tying claim. Google has the burden of proof on this issue.

Google contends that the tying arrangement is justified because it enables Google efficiently to collect compensation for the use of its services and use of its intellectual property and ensures that Google can receive compensation for its services and intellectual property.

In determining whether the tying arrangement is justified, you must decide whether it serves a legitimate business purpose of Google. In making this determination, you should consider whether the justification Google offers is the real reason that it imposed the tying arrangement.

You must also consider whether Google's claimed objective could reasonably have been realized through substantially less restrictive means. If some type of constraint is necessary to promote a legitimate business interest, Google must not adopt a constraint that is more restrictive than reasonably necessary to achieve that interest.

In determining whether Google's claimed legitimate business purpose could reasonably have been achieved through substantially less restrictive means, you may assess such factors as whether other means to achieve Google's objectives were more or less expensive and more or less effective than the means chosen by Google.

To qualify as substantially less restrictive, an alternative means must be -- to substantially -- to qualify -- let me take that from the top.

To qualify as substantially less restrictive, an alternative means must be virtually as effective in serving the defendant's pro competitive purpose without significantly increasing costs.

If you find that Google could reasonably have achieved its claimed legitimate business purpose by a substantially least restrictive means, then you must -- then you may find, may find, that there was no business justification and find for Epic on the tying claims.

If you find that the tying arrangement serves a legitimate business purpose at Google and that there are not substantially less restrictive means reasonably available to achieve that purpose, then you must find for Google and against Epic on the tying claim.

Okay. We're getting towards the end.

If you find that Google has violated the antitrust laws as alleged by Epic, then you must consider whether Epic was injured as a result of Google's violations of the antitrust laws by applying the following elements. Epic is entitled to a verdict that Google is liable if it can establish these elements of injury and causation:

One, Epic was, in fact, injured as a result of Google's

alleged violations of the antitrust laws.

Two, Google's alleged illegal conduct was a material cause of Epic's injury.

And, three, Epic's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as injury in fact or fact of damage. For Epic to establish injury in fact or fact of damage, it must prove that it was injured as a result of Google's alleged violations of the antitrust laws.

Proving the fact of damage does not require Epic to prove the dollar value of its injury. It requires only that Epic proves that it was, in fact, injured by Google's antitrust violations.

Second, Epic must offer evidence that establishes by a preponderance of the evidence that Google's alleged illegal conduct was a material cause of Epic's injury. This means that Epic must have proved that some damage occurred to it as a result of Google's alleged antitrust violations and not some other cause.

Epic is not required to prove that Google's antitrust alleged antitrust violations were the sole cause of its injury nor need Epic eliminate all other possible causes of injury. It is enough if Epic has proved that the alleged antitrust violations were a material cause of its injury.

You should bear in mind that businesses may incur losses

for many reasons that the antitrust laws are not designed to prohibit or protect against, such as where a competitor offers better products or services or where a competitor is more efficient and can charge lower prices and still earn a profit.

Finally, Epic must establish that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as antitrust injury.

If Epic's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Epic's injuries are antitrust injuries.

On the other hand, if Epic's injuries were caused by heightened competition, the competitive process itself, or by acts that would benefit consumers, then Epic's injuries are not antitrust injuries and Epic is not entitled to a verdict that Google has violated the antitrust laws.

In summary, if Epic can establish that it was, in fact, injured by Google's conduct, that Google's conduct was a material cause of its injury, and that Epic's injury was the type that the antitrust laws were intended to prevent, then Epic is entitled to a verdict that Google has violated the antitrust laws.

Now, the relevant time period for the antitrust laws preclude recovery in this case for any injury caused by conduct that occurred prior to August 13th, 2016.

Now, you have heard evidence in this trial about agreements that Google reached before August 13th, 2016. Those agreements may be considered as background to help you understand the claims and counterclaims in this case, but you may not consider those agreements to be part of the conduct that Epic is challenging in this case. You may consider only Google's conduct that occurred after August 13th, 2016, in determining its liability in this case.

Now let's turn to your duties as deliberating.

When you begin your deliberations, you will elect one member of the jury as your presiding juror. If you watch TV dramas, that's often called the foreperson. In federal court we say "presiding juror." All right? So you're going to elect one person as your presiding juror who will preside over your deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether liable or not liable, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, sexual orientation, profession, occupation, economic circumstances, or position in life or in the community.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so.

During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong.

Now, because you must base your verdict only on the evidence received in the case and on these instructions, I'm going to remind you again, as we've done each day of trial, that you must not be exposed to any other information about this case or the issues it involves.

So except for discussing the case with your fellow jurors during your deliberations, do not communicate with anyone in

any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, or electronic means via e-mail, text messaging, or any Internet social media site, blog, website, or other feature.

This applies to communicating with your family members, your employer, the media or the press, and anybody who is involved in this trial.

If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss it and report the matter immediately to Ms. Clark, and I will take it up at that point.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it.

Do not do any research, such as consulting dictionaries, searching the Internet, or using any other reference materials.

And do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure that the parties have a fair trial based on the same evidence that each side has had an opportunity to address.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over.

Now, if any juror is exposed to any outside information, you should let Ms. Clark know right away.

Now, some of you have taken notes during trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only there to assist your memory. You should not be overly influenced by your notes or the notes of your fellow jurors.

And then, finally, if it becomes necessary to communicate during your deliberations with me, you can send a note to me through Ms. Clark. One of you needs to sign it. So you can send a signed note, hand it to Ms. Clark.

No member of the jury should ever communicate with me except by a signed writing. Okay? And I will respond to the jury concerning the case -- it says "only in writing or here in open court." I always do it in open court. It will be like the questions you asked during trial. Okay? Just put it down, sign it.

If you send out a question, I'll talk with the lawyers a little bit, which may take up some time. You should continue your deliberations while you're waiting for my response.

Remember, this is very important, on anything you send out of the jury room, do not tell anyone -- me, Ms. Clark, or anyone -- how you stand numerically or otherwise on any question submitted to you, including the questions of Google's liability or Epic's liability, until you have reached a

unanimous verdict or have been discharged. So don't say anything about, you know, "Here's the vote count. Here's how we're feeling." Just ask the question and sign it and send it out.

Now, you're going to have a verdict form in there. It will be waiting for you when the deliberations start. After you have reached a unanimous agreement on a verdict, your presiding juror will complete the verdict form according to your deliberations, sign it and date it, and advise Ms. Clark that you are ready to return to the courtroom, at which point everybody will get together again and I will read the verdict to the parties. Okay?

So that was a long reading. Let's take a 10-minute break and then -- okay. We'll go to 10:40. We'll take 15 minutes and we'll have our closings.

THE CLERK: All rise.

(Recess taken at 10:26 a.m)

(Proceedings resumed at 10:47 a.m)

(Proceedings were heard out of the presence of the jury:)

THE COURT: Okay. Bring in the jury.

(Proceedings were heard in the presence of the jury:)

THE CLERK: We're back on the record in Civil 20-5671, Epic Games, Inc. vs. Google LLC, and Multidistrict Litigation 21-2981, In re Google Play Store Antitrust Litigation.

THE COURT: Okay.

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, December 11, 2023

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter