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24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **OAKLAND DIVISION**

27 EPIC GAMES, INC.,

Plaintiff,

28 vs.

APPLE INC.,

Defendant.

No. 3:20-CV-05640-YGR

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
PLAINTIFF EPIC GAMES INC.'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

Date: August 24, 2020, 3:00 p.m.

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

1 Pursuant to the Court’s Order Permitting Limited Reply Brief (ECF No. 38), Epic Games,
2 Inc. (“Epic”) submits this response to address certain issues and arguments in Apple’s opposition
3 brief that are “relate[d] to the *Unreal Engine*, and the revocation of Epic’s developer tools”.
4 Epic also submits as attachments to the Declaration of M. Brent Byars, submitted herewith
5 (“Byars Decl.”), the agreements identified in the Court’s Order.¹

6 Specifically, this response addresses the following points in Apple’s Opposition.

7 *First*, Apple argues that Epic’s requested relief relating to the *Unreal Engine* and the
8 revocation of developer tools is mandatory rather than prohibitory. (Opp’n 12.) That is
9 incorrect. Epic asks only that the Court preserve the status quo so that Epic continues to have the
10 same access to software, software development kits (“SDKs”), application programming
11 interfaces (“APIs”) and other developer tools that it has today.

12 *Second*, Apple argues that its actions with respect to the *Unreal Engine* and its revocation
13 of access to all developer tools and developer accounts are authorized by contract. (Opp’n 1.)
14 They are not. That argument fails to acknowledge the multiple contracts between Apple and
15 Epic affiliates and programmers. Apple has alleged a breach of only one such agreement, and
16 that agreement does not govern Epic’s access to developer tools for the *Unreal Engine*, the
17 distribution of apps that are used for development purposes by *Unreal Engine* licensees or
18 various other Epic Developer Program accounts. Even if those contracts did not violate the
19 antitrust laws, an alleged breach of the specific Developer Program License Agreement²
20 governing *Fortnite* would not justify Apple’s actions with respect to other Developer Program
21 accounts (including the account related to the *Unreal Engine*) or to the revocation of developer
22 tools, all of which are governed by separate agreements. Instead, the breadth of Apple’s
23 retaliation is itself an unlawful effort to maintain its monopoly and chill any action by others who
24 might dare oppose Apple.

25
26 ¹ Epic’s response is limited to addressing “the issues and arguments raised in Apple’s
27 opposition *only* as it relates to the *Unreal Engine*, and the revocation of Epic’s developer tools.”
(ECF No. 38 at 1.) Epic does not, through its silence on other issues, concede the accuracy of
any legal arguments or factual assertions in Apple’s Opposition.

28 ² Epic’s Complaint and Motion refer to the Developer Program License Agreement as the
“Developer Agreement”.

1 *Third*, Apple argues that Epic has not “provided evidence showing that the Unreal Engine
2 business will be significantly harmed”. (Opp’n 16.) In fact, Epic’s motion was accompanied by
3 two declarations, including one from its CEO, that addressed this point in detail. Further, with
4 the passage of time since the filing of Epic’s motion, more evidence on this point has become
5 available, as more developers become aware of Apple’s actions and comprehend their
6 significance to their businesses. Thus, Epic submits herewith a declaration regarding multiple
7 inquiries it has received from concerned developers as well as a declaration from the General
8 Manager of Gaming Developer Experiences at Microsoft Corp. addressing this issue.

9 *Fourth*, Apple argues that the balance of equities tips in its favor. (Opp’n 23-24.) But
10 Apple does not argue why that is so—and in fact it is not so—with respect to the *Unreal Engine*
11 or the revocation of developer tools.

12 *Fifth*, Apple argues that an injunction would harm the public interest. (Opp’n 24-25.)
13 Again, however, Apple’s arguments do not address the *Unreal Engine* or the revocation of
14 developer tools. Epic’s requested relief on those issues is very much in the public interest.

15 **POINT #1 (nature of injunction)**

16 The relief Epic seeks is prohibitory, not mandatory. “A prohibitory injunction prohibits a
17 party from taking action and preserve[s] the status quo pending a determination of the action on
18 the merits.” *Faison v. Jones*, 440 F. Supp. 3d 1123, 1131 (E.D. Cal. 2020) (citation omitted).
19 “The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but
20 instead to the last uncontested status which preceded the pending controversy.” *Id.* (quoting
21 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000)). Here, as a regular part
22 of its business, Apple makes various software, SDKs, APIs and other developer tools widely
23 available for use by software developers. The relevant status quo is that, like countless other
24 developers, various Epic affiliates and their employees have access to those materials. Epic asks
25 that this status quo be preserved. Contrary to Apple’s contention (Opp’n Br. 12), Epic does not
26 seek an affirmative order requiring Apple to work with Epic on the *Unreal Engine* or anything
27 else. Rather, Epic seeks to *restrain* Apple from terminating Epic’s access to Developer Program
28 accounts that are currently active, including the account related to the *Unreal Engine*, and from

1 terminating Epic’s access to widely available materials necessary for the development of
2 software intended to run on Apple operating systems. Apple’s August 14, 2020 notice refers to
3 *future* action on those points, stating that Epic’s “Apple Developer Program account *will be*
4 *terminated*” and that “*If your membership is terminated . . . [y]ou will . . . lose access to the*
5 *following programs, technologies, and capabilities*”. (Sweeney Decl. Ex. B, ECF No. 17-10 at 2
6 (emphasis added).) Epic seeks an order prohibiting Apple from acting on that threat. That is a
7 prohibitory injunction.

8 **POINT #2 (contractual relationships)**

9 Apple has a variety of click-through, non-negotiable contracts that it uses to govern
10 membership in its Developer Program and access to software and other developer tools. Various
11 affiliates of Epic and their employees are parties to certain of these agreements. As set forth in
12 more detail below, Apple has alleged a breach of only one such agreement (under which *Fortnite*
13 was added to the App Store). That agreement does not govern access to the developer tools used
14 to create the *Unreal Engine*, nor does it govern the accounts used to distribute many of Epic’s
15 other apps, including those related to the *Unreal Engine*.

16 A. *Apple’s Agreements.*

17 There are three types of agreements implicated by Apple’s August 14 notice of
18 termination.

19 *First*, there is the Xcode and Apple SDKs Agreement (“SDKs Agreement”), an example
20 of which is attached as Exhibit U to the Byars Declaration. This agreement grants an individual
21 or company a license to use certain Apple software for specified purposes. (Byars Decl. ¶ 6, Ex.
22 U, § 2.2.) This agreement is entered into every time an individual downloads a copy of Xcode
23 and Apple SDKs to an Apple device, and by its terms binds the individual and the company that
24 employs her. (*Id.*, preamble (“YOU ARE AGREEING ON YOUR OWN BEHALF AND/OR
25 ON BEHALF OF YOUR COMPANY OR ORGANIZATION TO THE TERMS AND
26 CONDITIONS STATED BELOW”).) Over the years, thousands of such agreements were
27 necessarily clicked through by employees of Epic and its affiliates.
28

1 Among other things, the SDKs Agreement grants a license to use “Xcode Developer
2 Tools” to test and develop software, and a license to use SDKs for various Apple operating
3 systems to test and develop software for use on those platforms. (Byars Decl. ¶ 6, Ex. U, § 2.2.)
4 While this agreement permits testing and development of software, it generally does *not* allow
5 the distribution of that software to third parties through Apple’s App Store. As the
6 SDKs Agreement states, “You may not distribute any Applications developed using the Apple
7 SDKs (excluding the macOS SDK) absent entering into a separate written agreement with
8 Apple”. (*Id.* § 2.2(A)(iv).) Specifically, to distribute an application “for iOS, watchOS, iPadOS,
9 or tvOS” or “for macOS through the App Store,” the developer “must enter into a separate
10 written agreement with Apple (the Apple Developer Program License Agreement)”. (*Id.*, § 2.4.)

11 The SDKs Agreement is an integrated contract that “constitutes the entire agreement
12 between the parties” with respect to the subject matter thereof. (*Id.* § 8.7.) The integration
13 clause expressly addresses the circumstance in which developers are party to both the
14 SDKs Agreement and a Developer Program License Agreement (“PLA”), providing, “to the
15 extent that You have entered into the Apple Developer Program License Agreement (PLA) with
16 Apple and are validly licensed by Apple to exercise additional rights, or to use additional
17 features or functionality of the Apple Software or Apple Services under the PLA, You
18 acknowledge and agree that *the PLA shall govern Your use of such additional rights and*
19 *privileges*”. (*Id.* (emphasis added).) Thus, the SDKs Agreement and the PLA cover different
20 sets of rights; the additional rights provided by the PLA are governed solely by that agreement.
21 Further, the SDKs Agreement states that it terminates if (and only if) a developer “fail[s] to
22 comply with any term(s) of *this Agreement*” (*id.* § 5 (emphasis added))—and does not provide
23 for termination upon breach of any other agreement.

24 *Second*, there is the PLA mentioned above. As noted, the PLA provides additional rights
25 beyond the rights granted by the SDKs Agreement, including the right for a developer to test its
26 apps on iOS devices (*see* Byars Decl. ¶ 4, Ex. I § 2.1 (granting a license to incorporate “Apple
27 Certificates issued to You pursuant to this Agreement for purposes of digitally signing Your
28 Applications”); *id.* § 5.1 (noting that “[a]ll applications must be signed with an Apple Certificate

1 in order to be installed on Authorized Test Units”)), seek to “notarize” applications for macOS
 2 (*id.* § 5.3) and submit applications for distribution through the App Store (*id.* § 6.1). The PLA is
 3 the agreement that contains Apple’s restrictions on how in-app payments may be processed. (*Id.*
 4 § 3.2.2.) The PLA also requires compliance with Apple’s App Store Review Guidelines (*id.*
 5 Sch. 1, § 6.3(iv)), which in turn have further restrictions relating to in-app payments (*see* Riehle
 6 Decl. Ex. B, ECF No. 17-3, § 3.1.1).

7 The PLA is also an integrated contract that “constitutes the entire agreement between the
 8 parties” with respect to the subject matter thereof. (Byars Decl. ¶ 4, Ex. I § 14.11.) The PLA’s
 9 integration clause expressly addresses the circumstance in which a developer is also a party to
 10 the SDKs Agreement, providing that the PLA “will govern in the event of any inconsistencies
 11 between the two with respect to the same subject matter; provided, however, that [the PLA] is
 12 not intended to prevent You from exercising any rights granted to You in the” SDKs Agreement.
 13 (*Id.*)

14 *Third*, there is the Apple Developer Enterprise Program License Agreement. (Byars
 15 Decl. ¶ 4, Ex. O.) This agreement authorizes companies or other organizations to develop
 16 applications for use on Apple products “and to deploy these Applications only for internal use by
 17 employees within Your company, organization or educational institution or for limited use as
 18 expressly set forth herein”. (*Id.* at 1.)³

19 B. *Epic Affiliated Developer Accounts.*

20 There are six Epic affiliates that are parties to a PLA, each of which has a separate
 21 account in the Apple Developer Program. (Byars Decl. ¶ 5, Ex. T.)⁴ The account that submitted
 22 *Fortnite* and certain other apps to the App Store has a “Team ID” number ending in ‘84, and is
 23 governed by a PLA between Apple and Epic Games, Inc., a Maryland corporation. (*Id.*) The

24 ³ There is also an Apple Developer Agreement. (Schiller Decl. Ex. A, ECF No. 37-1.) This
 25 agreement is mentioned in, and attached to, the Schiller Declaration submitted with Apple’s
 26 opposition, but Apple has not identified it as a basis to justify its actions with respect to the
 27 *Unreal Engine* or the revocation of developer tools, so Epic does not discuss it further in this
 limited reply brief. The references in Epic’s Complaint and Motion to a “Developer Agreement”
 mean the PLA, *not* the agreement attached to the Schiller Declaration.

28 ⁴ In addition, one Epic entity is party to a Developer Enterprise Program License Agreement
 relating to applications for Epic’s internal use, as opposed to uploading apps to the App Store.
 (Byars Decl. ¶ 4 & Ex. O.)

1 account that submitted certain apps related to *Unreal Engine* development has a “Team ID”
2 number ending in ‘3Y, and is governed by a PLA between Apple and Epic Games International
3 S.à r.l., a Swiss entity. (*Id.*) The remaining accounts are held by other entities and were used by
4 Epic’s affiliates to submit other apps to the App Store, such as the Houseparty app. Separately
5 from the PLAs, Epic and its programmers have entered into thousands of agreements for Apple
6 software and SDKs made widely available under the SDKs Agreement. (Byars Decl. ¶¶ 5-6 &
7 Ex. T.)

8 Apple admits that Epic Games, Inc. and Epic Games International S.à r.l. have separate
9 PLAs and separate accounts. (Schiller Decl., ECF No. 37 ¶ 6.) Although Apple claims that Epic
10 “administers these two accounts as if they are one” (*id.*), it cannot and does not deny the
11 existence of two separate agreements. Indeed, Apple acknowledges that it charges a separate
12 “annual program fee” for each account (*id.*), showing independent consideration for each
13 agreement. Further, Apple’s assertion that the PLAs for each account were “renewed within a
14 minute of each other” (*id.*) proves the point: they were not renewed at the same time with the
15 same mouse click, because they are separate agreements. This is true not just for the PLAs to
16 which Epic Games, Inc. and Epic Games International S.à r.l. are parties, but for all six of the
17 PLAs between Apple and an Epic affiliate, as well as the Developer Enterprise Program License
18 Agreement between Apple and Epic Games, Inc. Each is an independent and integrated
19 agreement, each was executed by a different legal entity, and each is subject to a separate
20 “annual program fee”. (Byars Decl. ¶¶ 3-5 & Exs. H-T.)

21 C. *Apple’s Overbroad Retaliation.*

22 Apple stated its intent to revoke access to all developer tools and all accounts used by
23 Epic affiliates, noting specifically the impact to the *Unreal Engine*, in a notice posted on
24 August 14, 2020 to the Epic Games, Inc. Developer Program account with the Team ID ending
25 in ‘84. (Grant Decl., ECF No. 17-5 ¶ 15; Sweeney Decl. Ex. B, ECF No. 17-10.) That notice
26 purports to identify “several violations of the [PLA]” but did not claim a breach of any other
27 agreement. (Sweeney Decl. Ex. B, ECF No. 17-10 at 2.) Each of the alleged PLA violations in
28 that notice relates exclusively to *Fortnite*, and does not implicate the *Unreal Engine* or any other

1 part of Epic’s business. For example, the August 14 notice states that “your app”—*i.e.*,
2 *Fortnite*—“is in direct violation of” the PLA and refers to “introducing new payment
3 functionality”, an “unauthorized payment system” and “allowing users to purchase digital items
4 within the app without using the In-App Purchase API”. (*Id.*)

5 Even if the contractual provisions purportedly breached by *Fortnite* were lawful, Apple’s
6 revocation of all accounts affiliated with Epic and all access to developer tools (including for the
7 *Unreal Engine*, which is not an App Store app), reaches far beyond the Team ID ‘84 account and
8 the Epic Games, Inc. PLA. *First*, the August 14 notice states that Epic “will lose access to
9 [a]ll Apple software, SDKs, APIs, and developer tools” and “[p]re-release versions of iOS, iPad
10 OS, macOS, tvOS [and] watchOS”. (*Id.*) Revoking access to all of these materials would extend
11 beyond the rights covered by the PLA and sweep in materials to which Epic (and all other
12 developers and programmers) have access under the SDKs Agreement, which Apple has not
13 claimed Epic breached. The PLA applies *only* to those “additional rights” not covered by the
14 SDKs Agreement (Byars Decl. ¶ 6, Ex. U § 8.7) and “is not intended to prevent” the exercise of
15 rights provided in the SDKs Agreement (Byars Decl. ¶ 4, Ex. I § 14.11).

16 *Second*, even if Epic Games, Inc. breached *its* PLA in connection with *Fortnite*, that
17 would not establish a breach by Epic Games International S.à r.l. of its separate PLA. Nor would
18 it establish that any of the four other Epic entities identified in Exhibit T to the Byars Declaration
19 breached any of their PLAs, or that Epic Games, Inc. breached its Developer Enterprise Program
20 License Agreement. Apple does not contend that any other Epic app or the *Unreal Engine*
21 violated any of Apple’s policies. Indeed, the *Unreal Engine* is far removed from the payment
22 processing issue of which Apple complains; it is not a consumer-facing product and is not
23 distributed through the App Store (though a few optional tools are distributed through the App
24 Store for use by third-party developers). Instead, the *Unreal Engine* is a tool licensed for use by
25 other software developers and is downloaded directly from its own website.

26 Apple does not dispute any of this. Instead, Apple asserts the right to revoke all Epic
27 entities’ access to developer tools and to terminate all PLAs with all Epic entities because in
28 certain prior instances, when Apple has terminated a developer account, it has “also terminated

1 accounts that [it] know[s] to be affiliated with the offending account”. (Schiller Decl., ECF
2 No. 37 ¶ 16.) The fact that Apple has overreached in the past is further evidence of Apple’s
3 unlawful flexing of its monopoly power. But the fact that Apple has overreached in the past does
4 not justify doing it again here.

5 **POINT #3 (evidence of harm)**

6 Apple contends that Epic failed to present sufficient evidence of the harm that Apple’s
7 actions would cause to the *Unreal Engine* business. (Opp’n Br. 16.) In fact, Epic presented
8 substantial evidence on this point and presents now even more evidence that has become
9 available since its opening brief.

10 In its opening brief, Epic explained, through the declaration of its founder and CEO,
11 Mr. Timothy Sweeney, that the revocation of development tools would mean that “Epic would
12 be unable to develop future updates to the *Unreal Engine* for use on iOS and macOS”, which
13 would be “an existential threat to the *Unreal Engine*”. (Sweeney Decl., ECF No. 17-8 ¶¶ 24-25.)
14 Mr. Sweeney further attested that without compatibility with iOS and macOS, the *Unreal Engine*
15 would become significantly less attractive to developers, while “third-party developers who rely
16 on Epic’s engine and support” would be in jeopardy. (*Id.*) And Epic’s Vice President of
17 Engineering, Mr. Nicholas Penwarden, declared that the *Unreal Engine* has been installed on
18 nearly half a million Macs. (Penwarden Decl., ECF No. 17-7 ¶ 4.)

19 Epic’s opening brief was filed shortly after Apple notified Epic of its retaliatory actions.
20 Since then, further substantial evidence of harm to the *Unreal Engine* and the developers relying
21 on it has been accumulating. Specifically, over the past week, multiple *Unreal Engine* licensees
22 have contacted Epic expressing grave concern over Apple’s actions and its impact on their iOS
23 and macOS-bound projects. (Penwarden Reply Decl. ¶¶ 2-3.) Microsoft, itself an
24 *Unreal Engine* licensee, confirms these concerns. In a declaration submitted herewith,
25 Kevin Gammill, Microsoft’s General Manager of Gaming Developer Experiences, attests that
26 there are “very few other options available for creators” that offer “as many features and as much
27 functionality as *Unreal Engine* across multiple platforms, including iOS” (Gammill Decl.
28 ¶ 2(d)), and that Apple’s revocation of developer tools “will place *Unreal Engine*” and games

1 that use it “at a substantial disadvantage” (*id.* ¶ 3). Mr. Gammill also explains that
2 “*Unreal Engine*’s sudden loss of support for iOS and macOS would create significant costs and
3 difficult decisions” for game creators, who “would have significant sunk costs and lost time
4 using *Unreal Engine* for game creation, and would have to choose between (a) starting
5 development all over with a new game engine, (b) abandoning the iOS and macOS platforms, or
6 (c) ceasing development entirely”. (*Id.* ¶ 5(a).) Publicly available statements in the press and on
7 social media share that sentiment, noting that Apple’s actions would seriously impair the
8 *Unreal Engine* and jeopardize the work of thousands of developers. (Byars Decl. ¶ 7, Ex. V.)
9 One developer interviewed by the *Washington Post* said that she “already invested thousands for
10 a new Mac to port an Unreal 3 iOS game over to a 64-bit program” and that “[n]ow that project
11 is dead in its tracks.” She suggested that “Apple seems to be pushing iOS developer to use
12 Xcode, Apple’s own integrated software development program” that is “not anywhere near the
13 league of Unreal Engine.” Gene Park, *Apple cuts off Epic from its tools, endangering future*
14 *Unreal Engine projects on iOS and Mac*, *Washington Post* (Aug. 17, 2020), available at
15 <https://wapo.st/2FH2Zfc>.

16 None of this is “speculative”, as Apple claims. (Opp’n Br. 16.) It is abundantly clear
17 that Apple’s retaliatory steps are intended to harm Epic and its licensees, and harm them they
18 will. Even if Apple, following a final judgment on the merits in this action, were required to
19 make these tools available to Epic once again, it will be too late to save all the projects that were
20 shelved while that support was unavailable. How successful they might have been, and how
21 much in royalties Epic would have earned as a result (Sweeney Decl. ¶ 18), is impossible to
22 calculate. That is why this harm to Epic (and others) is irreparable. (*See* TRO Br. 12-14.)

23 **POINT #4 (balance of equities)**

24 Apple’s argument that the balance of equities tips in its favor does not address the portion
25 of Epic’s requested relief that relates to the *Unreal Engine* and the revocation of developer tools.
26 In particular, while Apple claims that “the harm to Apple and the App Store from an injunction
27 would be substantial”, its harm argument relates entirely to a supposed “flood” of other app
28 developers seeking to offer alternative payment options to consumers. (Opp’n Br. 23-24.)

1 Apple cannot and does not contend that it will be harmed if Epic continues developing and
2 supporting the *Unreal Engine* for use on Apple platforms. Similarly, Apple’s claims that Epic
3 has unclean hands and that it “created the circumstances about which it now complains” (*id.*)
4 have nothing to do with the *Unreal Engine* or any other part of Epic’s business.

5 In fact, with respect to the *Unreal Engine* and the revocation of developer tools, the
6 balance of equities tips strongly toward Epic, because Apple will not suffer any harm from the
7 *Unreal Engine*-related relief, Apple does not contend that Epic breached any contract in
8 connection with the *Unreal Engine*, and Apple’s intention to cut off access to developer tools
9 and cripple the *Unreal Engine* is a naked effort to exert business leverage over Epic to try to get
10 Epic to back down from challenging Apple’s unlawful conduct.

11 **POINT #5 (public interest)**

12 None of Apple’s public interest arguments speak to Epic’s requested relief relating to the
13 *Unreal Engine* and the revocation of developer tools. For example, Apple argues that the public
14 interest would be disserved if its App Store model is put at risk (Opp’n 24-25), but it does not
15 even attempt to show that the App Store model would be jeopardized if Epic retains access to
16 developer tools and continues to be able to support the *Unreal Engine* on Apple platforms.

17 Apple also fails to address the substantial harm to the public interest that would occur if
18 Apple revoked Epic’s access to developer tools and blocked further development and support of
19 the *Unreal Engine* on Apple platforms. As shown above, numerous third-party developers
20 would be harmed if Apple takes those steps.

1 Dated: August 23, 2020

2 Respectfully submitted,

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