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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 DONALD R. CAMERON, et al.,

15 Plaintiff,

16 v.

17 APPLE INC.,

18 Defendants.
19

Case No. 4:19-cv-03074-YGR

**GOOGLE LLC'S RESPONSE TO SUA
SPONTE JUDICIAL REFERRAL FOR
PURPOSES OF DETERMINING
RELATIONSHIP OF CASES**

1 Pursuant to Civil L.R. 3-12(c) and (e), Google LLC (“Google”) responds to the Sua
 2 Sponte Judicial Referral for Purposes of Determining Relationship of Cases ordered by Judge
 3 Chen in *Pure Sweat Basketball, Inc. v. Google LLC, et al.*, No. 20-cv-05792-EMC (N.D. Cal)
 4 (“*PSB-Google*”), ECF 16. Judge Chen has referred *PSB-Google* to Judge Donato and Judge
 5 Gonzalez Rogers to determine whether it is related to: *Epic Games, Inc. v. Google LLC et al.*,
 6 No. C-20-5671-JD (“*Epic-Google*”); *Cameron et al v. Apple Inc.*, No. C-19-3074-YGR
 7 (“*Cameron-Apple*”); or *Epic Games, Inc. v. Apple Inc.*, No. C-20-5640-YGR (“*Epic-Apple*”).

8 For completeness, Google advises the Court that two other actions should also be
 9 considered for “relation” under Local Rule 3-12: *Feitelson v. Google Inc.*, No. 14-cv-02007
 10 (“*Feitelson-Google*”)¹, which “was pending” before Judge Freeman; and *Carr v. Google LLC*,
 11 No. 20-CV-05761 (“*Carr-Google*”), which “is pending” before Judge Freeman.

12 As a threshold matter, Google believes the three Android-related cases filed recently—
 13 *Epic-Google* (Donato, J.), *Carr-Google* (Freeman, J.) and *PSB-Google* (Chen, J.)—all “relate” to
 14 each other under Local Rule 3-12(a). Solely for convenience and purposes of this Response,
 15 Google refers to these actions as “the Android/Google Cases.” Google also notes that under
 16 Local Rule 3-12, these three cases may be related to the earlier-filed Android case, *Feitelson-*
 17 *Google* (Freeman, J.), an action that “was pending in this District.” Civ. L.R. 3-12(b).

18 Google respectfully opposes relation of the Android/Google Cases to *Cameron-Apple* or
 19 *Epic-Apple* (together, for purposes of this Response, the “iOS/Apple Cases”). Although Android
 20 and iOS compete to attract app developers and end users, Google (through Android) and Apple
 21 (through iOS) use different business models, agreements, and policies to support competing
 22 ecosystems. The Android/Google Cases and iOS/Apple Cases thus do not concern “substantially
 23 the same parties, property, transaction or event.” Civ. L.R. 3-12(a)(1). Moreover, the cases sit in
 24 markedly different procedural postures—Google has not been served with the Complaints in
 25 *Epic-Google* and *Carr-Google*, and only two of five Google defendants have been served in *PSB-*
 26 *Google* (on August 21, 2020), whereas Apple has been engaged in continuous iOS-related

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 28 ¹ The *PSB-Google* complaint cites to the *Feitelson-Google* complaint when referencing relevant
 Mobile Application Distribution Agreements (“MADAs”). *PSB-Google* Complaint, ¶ 69 n.75.

1 litigation since 2011. It is therefore unlikely that conducting the Android/Google Cases and
 2 iOS/Apple Cases before different Judges will lead to “unduly burdensome duplication of labor
 3 and expense or conflicting results.” Civ. L.R. 3-12(a)(2).

4 DISCUSSION

5 An action is related to another when (1) the actions concern substantially the same parties,
 6 property, transaction, or event; and (2) it appears likely that there will be an unduly burdensome
 7 duplication of labor and expense or conflicting results if the cases are conducted before different
 8 judges. Civ. L.R. 3-12(a). The rule applies to any potentially related action “which is or was
 9 pending in this District.” Civ. L.R. 3-12(b) (emphasis added).

10 I. The Android/Google Cases Should Not Be Related To the iOS/Apple Cases

11 The Android/Google Cases and the iOS/Apple Cases lack the requisite “substantial” parity
 12 in parties, transactions, and operative facts. This Court has rejected relation of cases even where
 13 parties and claims were far more similar than they are here. *See Tecson v. Lyft*, No. 18-cv-06782,
 14 2019 WL 1903263, at *3 (N.D. Cal. Apr. 29, 2019) (Gonzalez Rogers, J.) (finding that TCPA
 15 cases against the *same* defendant did “not suffice to meet the substantial similarity threshold”
 16 because the cases involved “different facts and claims so the judge in each case would be focused
 17 on resolving separate issues of law and fact for different parties”).

18 ***Different Parties, Property, Transactions, and Events.*** The defendants in the
 19 Android/Google Cases are different from the defendants in the iOS/Apple Cases. This is
 20 significant; it means there is virtually no overlap in the “property, transactions, or event[s]” at
 21 issue. Civ. L.R. 3-12(a). This Court has recognized in the iOS/Apple Cases that having the same
 22 defendant in those cases resulted in “each case stem[ming] from the use of the exact same
 23 technology and the economics regarding the same technology.” *Pepper v. Apple*, No. 11-cv-
 24 06714-YGR, 2019 WL 4783951, at *1 (N.D. Cal. Aug. 22, 2019) (Gonazalez Rogers, J.) (finding
 25 “significant economies” in terms of case management and resolution of motions tied to an
 26 understanding of the technology, platform markets, and the transactions at issue). In contrast,
 27 Android and iOS do not use the “exact same technologies” and the business models of these two
 28

1 ecosystems, though in competition with each other, are materially different.

2 Android and iOS compete to attract app developers and end users, but the conduct
3 underlying their competition—and at issue in these two separate sets of lawsuits—is
4 distinct. While Apple’s iOS allows the distribution of apps only through Apple’s proprietary app
5 store, Android devices, in contrast: (1) can have multiple app stores simultaneously pre-installed
6 or downloaded and (2) allow for end users to sideload apps via the Internet. That means Android
7 app developers can distribute apps through multiple Android app stores, work directly with
8 OEMs or carriers to preload apps, and distribute apps to users directly from their own
9 websites. As a result, Apple and Google each have their own separate and unique negotiations
10 and contracts with app developers and original equipment manufacturers (OEMs). These
11 fundamental differences in the way Apple and Google support app distribution create key
12 distinctions in the claims and defenses in the iOS/Apple Cases and Android/Google Cases.²

13 Although there is some overlap with certain named plaintiffs—e.g., Epic has filed suit in
14 both *Epic-Apple* and *Epic-Google*—and the app developer classes—i.e., developers can create
15 both iOS and Android versions of their app—this overlap is insignificant from a “relation”
16 perspective. The operative facts relating to the business strategies and app distribution policies
17 that underlie the claims in the iOS/Apple Cases are different from those in the Android/Google
18 Cases. *See Tecson*, 2019 WL 1903263, at *3 (“Even if there was some overlap between classes,
19 the operative facts for the putative classes would still make them substantially different.”).

20 ***Little Duplication of Labor and Expense or Risk of Conflicting Results.*** The
21 Android/Google Cases and iOS/Apple Cases are in very different procedural postures, making it
22 unlikely there will be meaningful efficiencies created through relation. The iOS/Apple Cases are
23 related to a consumer class case, *In re Apple iPhone Antitrust Litigation*, No. 11-cv-06714-YGR,
24 that was filed in 2011 and is set for class certification proceedings in 2021 and trial in
25 2022. *Cameron-Apple* is proceeding on the same schedule. The *Epic/Apple* matter appears to be
26 proceeding on an expedited schedule. In contrast, no Google entity has been served in *Epic-*

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28 ² This Response does not suggest that claims against Apple in the iOS/Apple Cases have merit.

1 Google or Carr-Google and only two of five Google defendants were served in PSB-Google (on
 2 August 21, 2020). Once served, and only after the initial scheduling is worked out, Google will
 3 challenge the complaints, in large part based on circumstances unique to Android, just as it did in
 4 *Feitelson v. Google, Inc.*, 80 F. Supp. 3d 1019 (N.D. Cal. 2015). These differences in procedural
 5 posture make it unlikely that there will be an unduly burdensome duplication of labor and
 6 expense, and given the different defendants and operative facts, there is little risk of conflicting
 7 results. *Cf. Pepper*, 2019 WL 4783951, at *2 (relating cases when “[a]ll three cases are currently
 8 in a similar procedural posture and have yet to begin substantial discovery and so efficiency gains
 9 will be achieved in discovery” and “the fact that both sets of plaintiffs seek injunctive relief
 10 [against Apple] presents a sufficient risk of inconsistent results to warrant relation”).

11 II. The Android/Google Cases All Relate To Each Other

12 While the three Android/Google Cases are related to each other, Google believes that
 13 alongside Judge Chen’s referral to Judge Donato, under Local Rule 3-12, the cases also need to
 14 be referred to Judge Freeman as they “may be ... related” to *Feitelson-Google*.³ Civ. L.R. 3-
 15 12(b). These cases each allege claims against Google defendants based on Google’s contracts
 16 with app developers and its policies within the Android ecosystem. The chart below summarizes
 17 the *Feitelson-Google* case and each of the three Android/Google Cases in order of their filing.

18 Case, No. (Judge)	19 Plaintiff / Type	20 Defendants	21 Property, Transaction or Event
22 <i>Feitelson v. Google Inc.</i> , 23 No. 5:14-cv-02007 24 (Freeman, J.)	Gary Feitelson and Daniel McKee / Putative consumer class	Google, Inc.* *Converted to Google LLC in 2017	Android OS Google Search Google’s MADA Google Play Store
25 <i>Epic Games, Inc. v.</i> 26 <i>Google LLC et al.</i> , No. 27 3:20-cv-05671	Epic Games / Individual app developer	Google LLC Google Payment Corp. Google Ireland Ltd.	Android OS Google’s MADA Google Play Store

28 ³ Each of the plaintiffs in the recently-filed Android/Google Cases—Epic, Mary Carr, and Pure Sweat Basketball—agreed to litigate disputes with Google “exclusively” in Santa Clara County, i.e., in the San Jose Division for federal court cases. *See* Google DDA, §16.8, available at <https://play.google.com/about/developer-distribution-agreement.html>; Google Terms of Service, Section “Settling disputes, governing law, and courts”, available at <https://policies.google.com/terms?hl=en-US>. Judge Freeman is the only judge currently assigned an Android/Google Case (*Carr-Google*) who presides in the San Jose Division.

1 2	(Donato, J.)		Google Commerce Ltd. Google Asia Pacific Pte. Ltd.	Google's Developer Distribution Agreements ("DDA")
3 4 5	<i>Carr v. Google LLC et al.</i> , No. 5:20-cv-05761 (Freeman, J.)	Mary Carr / Putative consumer class	Google LLC Google Payment Corp. Google Ireland Ltd. Google Commerce Ltd. Google Asia Pacific Pte. Ltd.	Android OS Google's MADA Google Play Store Google's DDA
6 7 8	<i>Pure Sweat Basketball, Inc. v. Google LLC et al.</i> , No. 3:20-cv-05792 (Chen, J.)	Pure Sweat Basketball / Putative app developer class	Google LLC Google Payment Corp. Google Ireland Ltd. Google Commerce Ltd. Google Asia Pacific Pte. Ltd.	Android OS Google's MADA Google Play Store Google's DDA

9 The three recently-filed cases each concern the same open mobile OS (Android) and
10 challenge the same Google Play policies, so there is a potential risk of inefficiencies and
11 conflicting results if those cases are heard before different Judges. The earlier filed case,
12 *Feitelson-Google*, was pending in this district and dismissed by Judge Freeman in 2015. *See*
13 *Feitelson v. Google, Inc.*, 80 F. Supp. 3d 1019 (N.D. Cal. 2015) (granting motion to
14 dismiss). The same counsel who represented the *Feitelson* plaintiffs also represent the plaintiff in
15 *PSB-Google*, and both complaints allege the same theory of anticompetitive harm: Google's use
16 of MADAs to purportedly foreclose competition in the relevant markets alleged in each
17 complaint. Both complaints allege *inter alia* that under Google's MADA, OEMs can only
18 preload "must-have" Google apps if the OEM agrees to preload a bundle of Google apps
19 (including Google Play), which allegedly forecloses competitive apps from being preloaded. *See,*
20 *e.g., Feitelson-Google*, Dkt. No. 31, FAC ¶ 7; *PSB-Google*, Dkt. No. 1, Compl. ¶ 7. The *Epic-*
21 *Google* and *Carr-Google* cases allege substantially similar legal theories. *See, e.g., Epic-Google*,
22 Dkt. No. 1, Compl., ¶¶ 56-57; *Carr-Google*, Dkt. No. 1, ¶¶ 33-34.

23 * * *

24 Google therefore respectfully requests that the Court decline to relate *PSB-Google* to
25 *Cameron-Apple* or *Epic-Apple*.⁴

26 ⁴ Google has filed this initial Response in the lowest-numbered case identified on Judge Chen's
27 Sua Sponte Referral Order. Google also intends to file in due course: (1) a response to Judge
28 Chen's Sua Sponte Referral on the docket for *Epic-Google* (before Judge Donato), and (2) an
administrative motion as required by Civ. L.R. 3-12(b) to consider whether the Android/Google
cases "may be" related to *Feitelson-Google*, which "was pending" before Judge Freeman.

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By /s/ Brian C. Rocca
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