

1 Paul J. Riehle (SBN 115199)
2 paul.riehle@faegredrinker.com
3 **FAEGRE DRINKER BIDDLE**
4 **& REATH LLP**
5 Four Embarcadero Center
6 San Francisco, California 94111
7 Telephone: (415) 591-7500
8 Facsimile: (415) 591-7510

Christine A. Varney (*pro hac vice*)
cvarney@cravath.com
Katherine B. Forrest (*pro hac vice*)
kforrest@cravath.com
Gary A. Bornstein (*pro hac vice*)
gbornstein@cravath.com
Yonatan Even (*pro hac vice*)
yeven@cravath.com
Lauren A. Moskowitz (*pro hac vice*)
lmoskowitz@cravath.com
M. Brent Byars (*pro hac vice*)
mbyars@cravath.com
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Attorneys for Plaintiff and Counter-defendant Epic Games, Inc.

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**

16 EPIC GAMES, INC.,
17 Plaintiff, Counter-defendant,
18 v.
19 APPLE INC.,
20 Defendant, Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH
Case No. 4:11-cv-06714-YGR-TSH
Case No. 4:19-cv-03074-YGR-TSH

**EPIC GAMES, INC.’S MOTION FOR
ADMINISTRATIVE RELIEF TO
ACCESS SEALED FILINGS IN
RELATED CASES**

21 IN RE APPLE IPHONE ANTITRUST
22 LITIGATION.

Northern District Civil Local Rule 7-11
Judge: Hon. Yvonne Gonzalez Rogers

24 DONALD R. CAMERON, et al.,
25 Plaintiff,
26 v.
27 APPLE INC.,
28 Defendant.

EPIC'S MOTION TO ACCESS SEALED FILINGS IN RELATED CASES

1 Although trial in *Epic v. Apple* has concluded, the parties in the related class actions
2 continue to brief many issues that are, in Apple’s words, “fundamentally the same” as those the
3 Court is considering in connection with its post-trial decision. (*Cameron*, Dkt. 379 at 23-24.)
4 At Apple’s insistence, however, Epic is in the dark. Despite the Court’s statement during the
5 *Epic v. Apple* trial that “One of the reasons why I ordered that class cert . . . be filed was so that
6 I could see what they were saying, all of the developers beyond Mr. Sweeney who are in that
7 class” (Trial Tr. 4084:10-12), Apple created a blockade by withholding the unredacted class
8 certification filings from Epic, and demanding that the class plaintiffs follow suit. It is clear
9 from the publicly available versions of the filings that Apple is making representations and
10 arguments to the Court about the proceedings in *Epic v. Apple* while simultaneously refusing to
11 provide Epic visibility into what is being said. Without leave to amend the Coordination Order,
12 which requires the sharing of expert disclosures, Apple has unilaterally taken the position that
13 “it is no longer appropriate to coordinate discovery efforts with Epic pursuant to the Court’s
14 [Coordination] Order”. (Bornstein Decl. ¶ 3, Ex. A.) Apple’s obstruction is prejudicial and
15 baseless. Epic respectfully requests that the Court grant Epic access to all unredacted filings by
16 Apple and the class plaintiffs in the related class actions.

17 BACKGROUND

18 The Coordination Order governing these related actions requires that “[f]uture
19 discovery requests, future responses to discovery requests, and future discovery produced in
20 response to such requests by parties and non-parties in any of the Related App Store Actions
21 shall be served on counsel for all parties in the Related App Store Actions.” (*Cameron*,
22 Dkt. 80, ¶ 2.) It also requires that “all disclosures made pursuant to Fed. R. Civ. P. 26(f) (i.e.,
23 initial disclosures *and expert disclosures*) shall also be served on *counsel for all parties in the*
24 *Related App Store Actions.*” (*Id.* ¶ 6 (emphasis added).) Consistent with the Coordination
25 Order, as well as the Amended Protective Orders in *Epic v. Apple* and the class actions (*Epic v.*
26 *Apple*, Dkt. 274; *Pepper*, Dkt. 381; *Cameron*, Dkt. 252), the parties in the related actions have
27 shared confidential information for nearly a year.

28 On June 1, 2021, shortly after the *Epic v. Apple* trial ended, the class plaintiffs in both

1 related actions filed their motions for class certification. (*Pepper*, Dkt. 441; *Cameron*,
2 Dkt. 332.) As required by the applicable protective orders, the class plaintiffs made those
3 filings under seal, with redacted versions made publicly available. On the morning of June 2,
4 2021, after reviewing the public filings and seeing discussion of the record developed at the
5 *Epic v. Apple* trial, Epic requested that the class plaintiffs provide unredacted copies of the
6 class certification papers. The next day, Apple instructed the class plaintiffs not to provide
7 those filings to Epic, notwithstanding that Epic already possesses all or nearly all the
8 documents sought to be sealed or the confidential information the filings discuss. (Bornstein
9 Decl. ¶ 4, Ex. B.) Apple stated that it “sees no reason or basis for Developer Plaintiffs to share
10 their sealed class certification submission with Epic’s counsel”, and insisted “that Consumer
11 and Developer Plaintiffs [in the related class actions] should not send any new materials to
12 Epic’s counsel” created or produced in connection with the related class actions—including all
13 filings and discovery. (*Id.* ¶ 4, Ex. B.) Apple thereby unilaterally, and improperly, purported to
14 terminate the Court’s Coordination Order as it applies to Epic.¹

15 The parties exchanged letters and telephonically met and conferred, but Apple gave no
16 ground. (*Id.* ¶¶ 5, 6, 8, 9, Exs. C, D.) On August 10 and 11, 2021, Apple filed its oppositions
17 to the class certification motions and related materials. Epic requested Apple’s unredacted
18 filings on August 13, 2021, and Apple refused to provide them. (*Id.* ¶ 11, Ex. F.)

19 DISCUSSION

20 Apple’s withholding of the full class certification filings is unjustifiable and prejudicial
21 to Epic. These filings address issues that overlap with the issues presented to the Court in the
22 *Epic v. Apple* trial. While that matter remains *sub judice*, Epic should be able to see what the
23 parties in the class actions are telling the Court, just as Apple can.

24 The parties in the class actions frequently cite Epic documents and witnesses,
25 characterize the trial record in *Epic v. Apple*, and use Epic as an example. The following

26
27 ¹ Epic’s outside counsel possesses the unredacted copies of the Consumer Plaintiffs’ class
28 certification motion and the accompanying expert report found at *Pepper*, Dkt. No. 443, which
the Consumer Plaintiffs provided before Apple issued its instruction on June 3, 2021. But
Epic’s outside counsel does not have unredacted copies of any of the other sealed filings.

1 arguments by Apple are illustrative:

- 2 • “Plaintiffs launch fundamentally the same assault as did Epic on Apple’s business
3 model—alleging that Apple monopolized a single-brand iOS app distribution market by
4 requiring developers to sell iOS apps through the App Store, and seeking an order
5 forcing Apple to provide a compulsory license to its IP.” (*Cameron*, Dkt. 379 at 23-24.)
- 6 • “Following roughly in the footsteps of Dr. Evans in the Epic case . . . Professor
7 Economides proceeds to make a set of arbitrary assumptions regarding competitive
8 entry and its consequences for operating profits that are unsupported by economic
9 theory or evidence and employs them to come up with a completely indefensible
10 competitive benchmark rate. Professor Lafontaine’s description of Dr. Evans’ similar
11 analysis applies here as well: what Professor Economides ‘has produced in reality is an
12 algebraic exercise, not an economic analysis.’” (Schmalensee Decl. ¶ 82 (quoting
13 Lafontaine Written Direct ¶113, filed in *Epic v. Apple*.)
- 14 • “Even with its below-cost commission, EGS can only attract developers with a spate of
15 incentives, like minimum guarantees, such that Epic’s 12% commission does not
16 accurately reflect its pricing.” (*Pepper*, Dkt. 479 at 11.)
- 17 • “[T]he EGS commission rate [cannot] be divorced from Epic’s ‘Project Liberty’
18 campaign, including its litigation against Apple.” (*Id.* at 12.)

19 Similarly, Apple’s declarations in support of its class certification filings reveal that
20 many of the redacted materials are documents produced by Epic and deposition transcripts of
21 Epic’s witnesses. (*See, e.g., Pepper*, Dkt. No. 475 at 1-5 (attaching as support for Apple’s
22 filings four deposition transcripts of Epic witnesses and six Epic documents).)²

23 Given the focus on *Epic v. Apple* in the unredacted portions of these filings, it is
24 reasonable to expect there is a similar focus in the redacted portions. And there is a lot of
25 redacted content. For example, Apple filed declarations from seven experts—four of whom

26
27 ² More broadly, Apple’s discovery strategy in the class actions appears to include re-
28 litigating *Epic v. Apple*. For instance, Apple recently moved to compel production of
communications between Epic’s counsel and the Developer Plaintiffs’ counsel. (*Cameron*,
Dkt. 370 (Joint Letter Brief).) Apple has also pressed Microsoft to produce communications
with Epic’s counsel and even with Epic’s experts. (Bornstein Decl. ¶ 7, Ex. E.)

1 were experts in *Epic v. Apple*—entirely under seal. (*Pepper*, Dkt. 478; *Cameron*, Dkt. 373.)
2 Based on the language Epic is able to see in partially redacted copies containing Epic’s
3 confidential information that Apple provided pursuant to Civil Local Rule 79-5(e), it is clear
4 that several of the Apple experts who also testified in *Epic v. Apple* not only rely on their
5 analyses and reports from that matter, but also inappropriately and repeatedly attempt to
6 relitigate their disputes with Epic’s experts. Professor Schmalensee frequently purports to
7 characterize the arguments Dr. Evans made in Epic’s case, both to criticize them and use them
8 as a benchmark when discussing the views of class plaintiffs’ experts. (*E.g.*, Schmalensee
9 Decl. ¶ 78 (“I agree with Professor Elhauge that the way to avoid the inverse *Cellophane*
10 *Fallacy*, to which Dr. Evans fell victim, is to use an estimate of the competitive price rather
11 than the prevailing price.”).) Dr. Hitt repeatedly refers to his *Epic v. Apple* report and attempts
12 to defend his prior arguments. (*E.g.*, Hitt Decl. ¶ 272.) And Drs. Hitt and Willig rely on a
13 study of Epic’s data that Dr. Hitt presented in Epic’s case. (*Id.* ¶¶ 257-259, App’x D ¶¶ 35-43;
14 Willig Decl. ¶¶ 132-135.) Epic is aware of these examples because they involve Epic’s
15 confidential information. But these four declarations contain numerous redactions (presumably
16 mostly for Apple confidential information), and Epic has no access at all to the declarations of
17 the remaining experts, two of whom (Mr. Malackowski and Dr. Rubin) testified in *Epic v.*
18 *Apple*. Epic is unambiguously entitled to these declarations.

19 Apple wishes to equate Epic with a run-of-the-mill third party in the related actions.
20 But that is neither the reality nor the law of the case, where discovery in these proceedings has
21 proceeded jointly under the Coordination Order—including the discovery that produced the
22 information Apple now seeks to hide from Epic. Because Apple (but not Epic) can access the
23 sealed versions of these filings, the parties are on unequal footing. Epic lacks the ability to
24 review for accuracy, or seek corrections of, the class action parties’ voluminous assertions
25 about *Epic v. Apple* and Epic’s business. By withholding this information from Epic, Apple
26 has manufactured circumstances where it can speak about Epic’s business and the *Epic v. Apple*
27 trial record under seal, and Epic has no ability to evaluate Apple’s assertions.

28 The prejudice to Epic is acute because Apple appears to have used its class certification

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.