

MATTHEW J. ADLER (SBN 273147)
Matthew.Adler@dbr.com
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center, 27th Floor
San Francisco, California 94111-4180
Telephone: 415-591-7500
Facsimile: 415-591-7510

JEFFREY S. JACOBSON (*pro hac vice*)
Jeffrey.Jacobson@dbr.com
FAEGRE DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas, 41st Floor
New York, New York 10036-2714
Telephone: 212-248-3140
Facsimile: 212-248-3141

Attorneys for Defendant
EPIC GAMES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

K.W., a minor and through K.W.'s guardian,
Jillian Williams, and JILLIAN WILLIAMS,
individually, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

EPIC GAMES, INC.,

Defendant.

Case No. 3:21-cv-00976-CRB

**EPIC GAMES, INC.'S OPPOSITION
TO L.R. 3-12 ADMINISTRATIVE
MOTION TO RELATE CASES**

Action Filed: February 8, 2021
Trial Date: None set

1 Defendant Epic Games, Inc. (“Epic Games”) respectfully opposes this attempt by Plaintiffs
2 K.W. and Jillian Williams to relate their case to the dismissed matter of *White v. Epic Games, Inc.*,
3 No. 4:19-cv-3629-YGR (N.D. Cal.), for two reasons, in addition to the fact that Plaintiffs filed this
4 motion in the wrong matter and without satisfying the relevant procedural rules.¹ First, Epic Games
5 opposes this motion because all of the claims K.W. and Ms. Williams allege will be resolved by a
6 class action settlement that received preliminary approval today in another action—a settlement
7 joined in and supported by the attorneys who had been lead counsel in *White*—and the case should
8 be stayed in the interim. This *K.W.* case was filed by **former** counsel in *White*, **after** they learned
9 of the impending settlement, and **after** they had served an “attorneys’ lien” for fees allegedly owing
10 related to the *White* case. Second, Epic Games opposes this motion because, in the unlikely event
11 this *K.W.* case is not extinguished by the class settlement, it shares few facts in common with *White*,
12 so few (if any) efficiencies would result from judicial reassignment.

13 **The claims in this *K.W.* case would be extinguished by a class action settlement that**
14 **received preliminary approval today and the *K.W.* case should be stayed while those**
15 **settlement proceedings unfold.** Regardless of which jurist presides over this new lawsuit, it
16 should be stayed and may quickly be resolved by a nationwide class action settlement in another
17 matter. Earlier today, Epic Games and the plaintiffs in *Zanca, et al. v. Epic Games, Inc.*, No. 21-
18 CVS-534 (N.C. Super. Ct., Wake County), orally received preliminary approval for a nationwide
19 class action settlement agreement that encompasses all of the claims K.W. and Ms. Williams assert
20 in this matter. (The hearing occurred remotely because of COVID-19 protocols; the judge advised
21 the parties of the content of the formal order and said it would be signed and entered on Thursday,
22 February 25, upon the judge’s return to the courthouse.) Wake County is where Epic Games is
23 headquartered and the venue where the *Fortnite* End User License Agreement (“EULA”) requires
24 non-arbitrable disputes between *Fortnite* players and Epic Games to be heard. The settlement,
25 which the *Zanca* parties negotiated with the assistance of a highly experienced JAMS mediator—

26 _____
27 ¹ Pursuant to Local Rule 3-12(b), Plaintiffs should have filed this motion in *White v. Epic Games*,
28 “the lowest-numbered case.” The motion can be rejected for that reason alone. Plaintiffs’ motion
also failed to comply with Local Rule 7-11(a). It included neither a proposed order nor a declaration
explaining why they could not obtain the stipulation required by Local Rule 7-12.

1 the Hon. Wayne Andersen, former U.S. District Judge for the Northern District of Illinois—
2 includes all those who purchased *Fortnite* in-game virtual currency and other items. It expressly
3 addresses, and provides substantial benefits for, minors who purchased those items with their own
4 money and claim a right of contractual disaffirmation. The putative settlement class thus includes
5 Plaintiffs and all those they seek to represent, and provides relief for the exact claims they assert.

6 This new *K.W.* case is a blatant and knowing attempt to interfere with the *Zanca* settlement.
7 Class Counsel in *Zanca* include Deepali Brahmbhatt, who had been lead counsel in *White v. Epic*
8 *Games* (the assertedly “related” case) before dismissing *White* upon signing the *Zanca* class
9 settlement agreement. Ms. Brahmbhatt formerly had been a partner in the firm of OneLLP, which
10 on January 6 served an attorneys’ lien for fees related to *White*. OneLLP filed this case after they
11 became aware that the parties in *Zanca*, including Ms. Brahmbhatt, filed a notice in the North
12 Carolina court on January 25 of their upcoming motion for approval of a class settlement. The
13 precipitous filing of this new *K.W.* suit, therefore, may be nothing more than an attempt to gain
14 leverage in a fee dispute among plaintiffs’ counsel. The Court should not allow its resources to be
15 misused for such purposes.

16 Regardless of the motivation behind the filing of this new *K.W.* case, Epic Games will be
17 moving the Court to stay this *K.W.* case while the settlement process in North Carolina unfolds.
18 Epic Games has prepared that motion and will file it immediately upon receipt of the *Zanca* court’s
19 formal preliminary approval order. If the *K.W.* plaintiffs do not agree with the terms of the *Zanca*
20 settlement, they have the same options as all other class members: They may opt out of the
21 settlement class or object to the proposed settlement. If they do neither, or if their objections are
22 overruled, their claims will be extinguished by the *Zanca* settlement. The case should be stayed in
23 the interim.

24 **In the unlikely event this *K.W.* case is not extinguished by the *Zanca* settlement and**
25 **must be litigated, it shares little in common with *White* and should not be reassigned to the**
26 ***White* court.** Neither Local Rule 3-12(a) factor to relate the case to *White v. Epic Games* is satisfied
27 here. Although the defendant is the same, the plaintiffs are not. The same “transactions” are not
28 at issue, either.

1 The two cases share only one fact in common: Like the minor plaintiff in *White*, minor
2 Plaintiff K.W. seeks a declaration that Cal. Family Code § 6710 allows him to disaffirm purchases
3 he claims to have made from Epic Games while playing *Fortnite*. The facts underlying K.W.'s
4 claim, however, will be very different from those that had been at issue in *White*. Epic Games
5 significantly changed its in-game purchasing practices after the *White* court partially denied Epic
6 Games' motion to dismiss that case, opining that minor plaintiff in *White* could proceed with his
7 claim under Family Code § 6710. For the past year, Epic Games has (1) prohibited minors from
8 entering credit card information in connection with payments, (2) required parents/guardians to
9 enter their own payment information, and (3) required parents/ guardians to affirmatively accept
10 the *Fortnite* EULA when entering payment information and authorizing in-game transactions.
11 These new practices were not at issue in *White*, but they were in effect when K.W. made his alleged
12 purchases. These changes are a primary reason why Epic Games agreed to a settlement in *Zanca*,
13 to put to rest disputes over a past practice that cannot and will not arise in the future.

14 If this *K.W.* case is not extinguished by the *Zanca* settlement, a likely first step will be a
15 motion or motions to compel arbitration and/or to transfer the case to North Carolina, both as
16 required by the *Fortnite* EULA. Unlike *White*, this case features an adult plaintiff (Ms. Williams)
17 suing in her own capacity despite having bound herself to the *Fortnite* EULA and its arbitration
18 and venue requirements even if the minor plaintiff convinces the Court that he is not. The basis for
19 the *White* court's decision not to compel arbitration of the claims in *White* (*i.e.*, the minor's
20 purported ability to disaffirm his acceptance of it) would not apply to Ms. Williams. For this and
21 other reasons, whether some or all of K.W.'s and Ms. Williams' claims should be compelled into
22 arbitration, or transferred, will turn on facts unique to the Plaintiffs, including the circumstances of
23 Plaintiffs' purchases and how Plaintiffs navigated Epic Games' new procedures. Plaintiffs are free
24 to argue that the decisions made in *White* should inform the outcome, just as they could make that
25 argument about any non-controlling precedent. The Court, however, will have to consider the
26 specific circumstances of these Plaintiffs' transactions in ruling on arbitration and transfer.

27 For the same reasons, the decisions in *White* would have limited relevance to any Rule
28 12(b)(6) motion to dismiss K.W.'s and Ms. Williams' Complaint for failure to state a claim upon

1 which relief may be granted. Should such a motion be necessary, the Court's consideration of
2 whether K.W. may disaffirm his alleged purchases, made at a different time and following different
3 procedures than those at issue in *White*, will have to address those different facts. Whether or not
4 the decisions in *White* may be citable as persuasive authority, it is not true that an "unduly
5 burdensome duplication of labor" necessarily would result from a different jurist presiding over
6 K.W., as Local Rule 3-12(a) contemplates. Any "conflicting result" would stem from the entirely
7 proper reason that the facts and parties are not the same as those in *White*.

8 Other than the request for declaratory relief regarding purported disaffirmation rights
9 (which, as noted above, will turn on facts different from those at issue in K.W.), the *White v. Epic*
10 *Games* complaint and the instant complaint are not comparable. Attached as Exhibit A to the
11 accompanying Declaration of Jeffrey S. Jacobson is a redline comparison of the two complaints.
12 Exhibit A makes clear that virtually nothing about the two complaints is identical or even similar.
13 Presumably, K.W. and Ms. Williams elected to plead their claims differently because the *White*
14 court dismissed the bulk of the claims alleged in the *White* complaint. Accordingly, should Epic
15 Games have to file a Rule 12(b)(6) motion in the instant case, the Court will have to consider the
16 new facts and legal claims pleaded in the instant complaint on their own merits. Again, although
17 each side will be free to argue that the prior decisions in *White*—like any non-controlling
18 precedent—should inform the outcome of a dismissal motion in this case—the Court will have to
19 decide these new claims on their own unique merits.

20 CONCLUSION

21 For these reasons, Epic Games respectfully submits that *White* and the instant case should
22 not be considered related pursuant to Local Rule 3-12.

23 Dated: February 22, 2021

FAEGRE DRINKER BIDDLE & REATH LLP

24
25 By: /s/ Jeffrey S. Jacobson

Jeffrey S. Jacobson (*pro hac vice*)

Matthew J. Adler

26
27 Attorneys for Defendant
28 EPIC GAMES, INC.