



1 early ruling of likelihood of success on the merits. Epic Games has strong arguments regarding  
 2 Apple's exclusive distribution through the iOS App Store, and the in-app purchase ("IAP") system  
 3 through which Apple takes 30% of certain IAP payments. However, given the limited record,  
 4 Epic Games has not sufficiently addressed Apple's counter arguments. The equities, addressed in  
 5 the temporary restraining order, remain the same.

## 6 **I. BACKGROUND**

7 The Court summarizes the limited record before it on this motion for preliminary  
 8 injunction. To expedite issuance of this Order, the Court cites to some of the basic background  
 9 from its prior order<sup>2</sup> as the background is equally relevant here. The Court notes disputes in the  
 10 evidence where otherwise appropriate.

### 11 **A. The Players**

12 With respect to Epic Games:

13 Epic Games is a United States-based tech-company that specializes in  
 14 video games, including, as relevant here, the popular multi-platform<sup>3</sup>  
 15 game, *Fortnite*. *Fortnite* is structured around "seasons," whereby  
 16 narratives, themes, and events are introduced for a limited time.  
 17 Cross-platform play is enabled for all users so long as those users  
 18 remain on the same version of the game. . . .

19 Epic Games International, S.a.r.l ("Epic International") is a related  
 20 company based in Switzerland and hosts, among others, the Unreal  
 21 Engine. The Unreal Engine is a graphics engine created by Epic  
 22 International to assist in its development of video games that it later  
 23 began licensing to other developers. The Unreal Engine 4, the current  
 24 version of the engine on the market, is used by third-party developers  
 25 for the development of video games for both console and mobile

26  
 27 STATES HOUSE OF REPRESENTATIVES, (Oct. 6, 2020). The Court finds it appropriate to take  
 28 judicial notice of public documents generated by Congress, although the Court does not consider  
 29 the content therein for purposes of this motion. See *Vasserman v. Henry Mayo Newhall Mem'l*  
 30 *Hosp.*, 65 F. Supp. 3d 932, 942-43 (C.D. Cal. 2014) (noting that court can take notice of "[o]fficial  
 31 acts of legislative, executive, and judicial departments of the United States"); *Del Puerto Water*  
 32 *Dist. v United States Bur. of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (taking  
 33 judicial notice of House Reports).

34  
 35 <sup>2</sup> See *Epic Games, Inc. v. Apple Inc.*, 4:20-cv-05640-YGR, 2020 WL 5073937 (N.D. Cal.  
 36 Aug. 24, 2020) (Dkt. No. 48).

37  
 38 <sup>3</sup> These platforms include Android, iOS, macOS, Windows, Sony PlayStation 4, Microsoft  
 39 Xbox One, Nintendo Switch. *Fortnite* is also available for download through the Epic Games  
 40 Store, as discussed herein.

1 platforms, including for games currently offered in the iPhone App  
2 Store. These third parties range from smaller game developers to  
3 larger corporations, such as Microsoft Corporation. The Unreal  
4 Engine has also been used by third parties for architecture projects,  
5 film and television production, and medical training.

6 *Epic Games*, 2020 WL 5073937 at \*1 (Dkt. No. 48 at 2). Epic Games has released twenty-five  
7 (25) updates to Unreal Engine since 2014, and anticipates releasing future updates to ensure that  
8 Unreal Engine remains compatible with new versions of Apple’s software, such as the now  
9 released iOS 14. Developers can use Unreal Engine commercially on a royalty model or  
10 negotiated license, but it is otherwise free for non-commercial use. Although more applications on  
11 the iOS platform are powered by a rival game engine, Unity, a significant number of iOS  
12 applications are constructed based on Unreal Engine, including *Fortnite* competitor  
13 *PlayerUnknown’s Battlegrounds* (“PUBG”).

14 Epic Games also maintains or controls other affiliates including: Epic International, Life  
15 on Air, Inc. (both in San Francisco, California and Austin, Texas), KA-RA S.a.r.l., Psyonix LLC,  
16 and Quixel AB (collectively, “Epic Affiliates”). The Epic Affiliates maintain control over certain  
17 applications and software within the Epic Games business. These identified applications include:  
18 Unreal Engine, Unreal Remote 2, Unreal Match 3, Action RPG Game Sample, Unreal Remote,  
19 Live Link Face, and House Party, among others. Meanwhile, Epic Games itself controls *Battle*  
20 *Breakers*, *Infinity Blade Stickers*, *Spyjinx*, and, as relevant here, *Fortnite*.

21 Beyond these games and applications, Epic Games also operates a digital marketplace to  
22 sell game software called the Epic Games Store. As pled in the operative complaint: the Epic  
23 Games Store was created to compete against the leading multi-publisher digital video game  
24 marketplace on computer platforms, Steam, which is operated by Valve Corporation. The Epic  
25 Games Store provides access to more than 250 games from more than 200 developers. Like other  
26 video game digital distribution platforms, the Epic Games Store offers personalized features,  
27 including friends list management and game matchmaking services. As alleged, absent Apple’s  
28 alleged anti-competitive conduct, Epic Games would also create an analogous Epic Games Store  
29 for the iOS platform independent of Apple’s digital marketplace.

1 With respect to Apple:

2 Apple is a ubiquitous tech-company that makes products ranging  
3 from hardware to software. Apple, as relevant here, maintains an App  
4 Store for the iOS platform that is geared for its mobile devices, the  
5 iPhones [and iPads]. The App Store allows third-party developers an  
6 opportunity to create and thereafter sell applications to iPhone [and  
7 iPad] users. Apple generally takes 30% of the sale of the application  
8 or of the IAP made within the third-party application itself. Apple's  
9 agreements with developers and the App Store guidelines do not  
10 generally permit third-party developers to circumvent the IAP system.

11 *Id.* at \*2 (Dkt. No. 48 at 2). In addition to preventing developers from circumventing the IAP  
12 system, developers are also prohibited from distributing applications outside of the App Store on  
13 the iOS platform.<sup>4</sup> In short: Apple maintains the iOS platform as a walled garden or closed  
14 platform model, whereby Apple has strict and exclusive control over the hardware, the operating  
15 system, the digital distribution, and the IAP system.

16 In order to access the App Store and to obtain developer tools, developers are required to  
17 comply with Apple's rules and regulations through a web of agreements and guidelines:

18 As relevant here, Apple maintains separate developer agreements and  
19 developer program licensing agreements between Epic Games, Epic  
20 International and four other affiliated entities. Apple also maintains  
21 a separate agreement, "Xcode and Apple SDKs Agreement,"  
22 regarding its developer tools (software development kits, or "SDKs").

23 *Epic Games*, 2020 WL 5073937 at \*1 (Dkt. No. 48 at 2-3). These agreements have broad  
24 language including terminable at-will clauses.<sup>5</sup>

25 The relationship between Epic Games and Apple dates to at least 2011, when Epic Games  
26 released its first *Infinity Blade* game on the iOS platform. Epic Games and Apple collaborated for  
27 several Apple events, showcasing Epic Games' iOS games and the earlier iterations of the Unreal  
28 Engine running on the iOS and macOS platforms. Following the success of *Fortnite* on other

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29 <sup>4</sup> For purposes of this motion, the parties refer to the operating system for both iPhones  
30 and iPads as iOS. (*See* Opp'n at 4, n.2 (Dkt. No. 73 at 10).) Moreover, Epic Games pleads that  
31 there are no differences between iOS and iPadOS to the allegations in the complaint. (Compl. ¶  
32 39, n.1 (Dkt. No. 1).) Similarly, this Order refers to iOS to refer to both the iPhone and iPad  
33 platforms, and references to iPhones generally also apply to iPads.

34 <sup>5</sup> The record also contains two enterprise account agreements for Epic Games and  
35 YEVVO Entertainment, Inc. The parties do not otherwise discuss the significance of these  
36 agreements.

1 video game platforms, Epic Games launched *Fortnite* on iOS in April 2018, where it remained on  
2 the platform until, as discussed below, August 13, 2020. During this time period: (i) 116 million  
3 iOS device users accessed *Fortnite*, spending more than 2.86 billion hours in the game; (ii) the  
4 daily average users numbered approximately 2.5 million daily iOS players, representing nearly  
5 10% of *Fortnite*'s total average daily players; and (iii) 63% of iOS players on *Fortnite* have only  
6 accessed *Fortnite* from an iOS device. Finally, iOS users accounted for more IAPs within  
7 *Fortnite* than those on the Android platform, but iOS users spend less on IAPs than those on the  
8 console platforms, including the Sony PlayStation 4 and Microsoft Xbox One.

9 **B. Relevant Background**

10 On June 30, 2020, the developer program licensing agreements for the Epic Games  
11 account, the Epic International account, KA-RA S.a.r.l. account, and the Epic Games enterprise  
12 account were renewed by the payment of separate consideration.<sup>6</sup> That same day, Epic Games  
13 founder and Chief Executive Officer (“CEO”) Tim Sweeney sent an email to Apple executives,  
14 including Apple CEO Tim Cook, requesting the ability to offer iOS consumers: (1) competing  
15 payment processing options, “other than Apple payments, without Apple’s fees, in *Fortnite* and  
16 other Epic Games software distributed through the iOS App Store”; and (2) a competing Epic  
17 Games Store app “available through the iOS App Store and through direct installation that has  
18 equal access to underlying operating system features for software installation and update as the  
19 iOS App Store itself has, including the ability to install and update software as seamlessly as the  
20 iOS App Store experience.” (Sweeney Decl. ¶ 14, Ex. A (Dkt. No. 65-1 at 2).) Mr. Sweeney  
21 highlights that these two offerings would allow consumers to pay less for digital products, and  
22 allow developers to earn more money. Mr. Sweeney also wrote that he “hope[d] that Apple  
23 w[ould] also make these options equally available to all iOS developers in order to make software  
24 sales and distribution on the iOS platform as open and competitive as it is on personal computers.”  
25 (*Id.*) In this email, Mr. Sweeney does not provide any offer to pay Apple any portion of the 30  
26

27 \_\_\_\_\_  
28 <sup>6</sup> The renewal price for the enterprise accounts were each \$299; the other agreements were  
each renewed at a price of \$99.

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