

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EPIC GAMES, INC.,
Plaintiff,
vs.
APPLE INC.,
Defendant.

Case No. 4:20-cv-05640-YGR

**ORDER GRANTING IN PART AND DENYING
IN PART MOTION FOR TEMPORARY
RESTRAINING ORDER**

Re: Dkt. No. 17

United States District Court
Northern District of California

Plaintiff Epic Games, Inc. (“Epic Games”) brings this action against Apple Inc. (“Apple”), alleging violations of the Sherman Act, California’s Cartwright Act, and California’s Unfair Competition Law relating to Apple’s App Store policies. Specifically, Epic Games contests Apple’s in-app purchase (“IAP”) system through which Apple takes 30% and further prevents its game, Fortnite, from offering its own IAP outside of Apple’s system.

Now before the Court is Epic Games’ motion for a temporary restraining order requesting broad relief with respect to all of its products, including those managed by affiliates. Apple opposes the motion. Based on a preliminary review of the briefing, the Court permitted a reply on the issues relating to the graphics engine, the Unreal Engine, and Apple’s stated intention of revoking Epic’s developer tools. The Court heard oral arguments on the motion via the Zoom platform on August 24, 2020.

Having carefully reviewed the parties’ briefing, and the parties’ oral arguments, and for the reasons set forth more fully below, the Court **GRANTS IN PART** and **DENIES IN PART** Epic’s motion for a temporary restraining order.

I. BACKGROUND

Due to the expedited nature of Epic’s motion, the Court only summarizes the facts relevant

to the disposition of the motion. Thus,

1 Epic Games is a United States-based tech-company that specializes in video games,
2 including, as relevant here, the popular multi-platform¹ game, Fortnite. Fortnite is structured
3 around “seasons,” whereby narratives, themes, and events are introduced for a limited time.
4 Cross-platform play is enabled for all users so long as those users remain on the same version of
5 the game. Fortnite’s next season starts on Thursday, August 27, 2020, and will require an update
6 of the game to play.

7 Epic Games International, S.a.r.l (“Epic International”) is a related company based in
8 Switzerland and hosts, among others, the Unreal Engine. The Unreal Engine is a graphics engine
9 created by Epic International to assist in its development of video games that it later began
10 licensing to other developers. The Unreal Engine 4, the current version of the engine on the
11 market, is used by third-party developers for the development of video games for both console and
12 mobile platforms, including for games currently offered in the iPhone App Store. These third
13 parties range from smaller game developers to larger corporations, such as Microsoft Corporation.
14 The Unreal Engine has also been used by third parties for architecture projects, film and television
15 production, and medical training.

16 Apple is a ubiquitous tech-company that makes products ranging from hardware to
17 software. Apple, as relevant here, maintains an App Store for the iOS platform that is geared for
18 its mobile devices, the iPhones. The App Store allows third-party developers an opportunity to
19 create and thereafter sell applications to iPhone users. Apple generally takes 30% of the sale of
20 the application or of the IAP made within the third-party application itself. Apple’s agreements
21 with developers and the App Store guidelines do not generally permit third-party developers to
22 circumvent the IAP system.

23 As relevant here, Apple maintains separate developer agreements and developer program
24 licensing agreements between Epic Games, Epic International and four other affiliated entities.
25 Apple also maintains a separate agreement, “Xcode and Apple SDKs Agreement,” regarding its
26

27
28

¹ These platforms include Android, iOS, macOS, Windows, Sony Playstation, Microsoft Xbox, Nintendo Switch. Fortnite is also available for download through the Epic Games Store.

1 developer tools (software development kits, or “SDKs”).

2 On Thursday, August 13, 2020, Epic Games made the calculated decision to breach its
3 allegedly illegal agreements with Apple by activating allegedly hidden code in Fortnite allowing
4 Epic Games to collect IAPs directly. In response, Apple removed Fortnite from the App Store,
5 where it remains unavailable to the date of this Order. Later that same day, Epic Games filed this
6 action and began a pre-planned, and blistering, marketing campaign against Apple.

7 The following day, Apple responded sternly. It informed Epic Games that, based on its
8 breaches of the App Store guidelines, and the developer program license agreement, it would be
9 revoking all developer tools, which would preclude updates for other programs, including the
10 Unreal Engine. On Monday, August 17, 2020, Epic Games filed the instant motion. The next
11 day, the parties filed a stipulation in the matter, *Donald Cameron, et. al. v. Apple Inc.*, 4:19-cv-
12 03074-YGR (“*Cameron*”), requesting that this action be deemed a related case to *Cameron*. The
13 Court agreed and the matter was reassigned.

14 **II. LEGAL STANDARD**

15 Preliminary injunctive relief, whether in the form of a temporary restraining order or a
16 preliminary injunction, is an “extraordinary and drastic remedy,” that is never awarded as of right.
17 *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). “It is so well settled as
18 not to require citation of authority that the usual function of a preliminary injunction is to preserve
19 the status quo ante litem pending a determination of the action on the merits.” *Tanner Motor*
20 *Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963). A temporary restraining order is “not
21 a preliminary adjudication on the merits but rather a device for preserving the status quo and
22 preventing the irreparable loss of rights before judgment.” *Sierra On-Line, Inc. v. Phoenix*
23 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (citation omitted).

24 Requests for temporary restraining orders are governed by the same general standards that
25 govern the issuance of a preliminary injunction. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*,
26 434 U.S. 1345, 1347 n.2 (1977); *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240
27 F.3d 832, 839 n.7 (9th Cir. 2001). In order to obtain such relief, plaintiffs must establish four
28 factors: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in

1 the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an
2 injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7,
3 20 (2008). With respect to the success on the merits and balance of harms factors, courts permit a
4 strong showing on one factor to offset a weaker showing on the other, so long as all four factors
5 are established. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).
6 In other words, “if a plaintiff can only show that there are serious questions going to the merits – a
7 lesser showing than likelihood of success on the merits – then a preliminary injunction may still
8 issue if the balance of hardships tips sharply in the plaintiff’s favor, and the other two *Winter*
9 factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir.
10 2013) (citations and quotations omitted).

11 **III. ANALYSIS**

12 The Court evaluates most of the factors through the lens of Apple’s actions with respect to
13 (i) Epic Games specifically, including the delisting of Fortnite and other games authorized under
14 Epic Games’ contract with Apple, and (ii) the anticipated suspension/termination of developer
15 rights authorized under other contracts, such as the one with Epic International.

16 Likelihood of Success on the Merits: Epic brings ten claims for violations of Sherman Act,
17 the California Cartwright Act, and California Unfair Competition. Based on a review of the
18 current limited record before the Court, the Court cannot conclude that Epic has met the high
19 burden of demonstrating a likelihood of success on the merits, especially in the antitrust context.
20 However, the Court also concludes that serious questions do exist. Indeed, the Court related this
21 action to the *Cameron* action because there are overlapping questions of facts and law, including
22 substantively similar claims based on the same Apple App Store policies: namely, the 30% fee
23 that Apple takes from developers through each application sale and IAP in the application.
24 *Compare Cameron*, Consolidated Complaint, Dkt. No. 53 with *Epic Games, Inc. v. Apple Inc.*,
25 Complaint, Dkt. No. 1. The Court considers this context in weighing the other factors.

26 Irreparable Harm: The issue of irreparable harm focuses on the harm caused by *not*
27 *maintaining the status quo*, as opposed to the separate and distinct element of a remedy under the

1 likelihood of success factor.² Here, the Court’s evaluation is guided by the general notion that
2 “self-inflicted wounds are not irreparable injury.” *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th
3 Cir. 2020) (quoting *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir.
4 2003)). Further courts generally decline to find irreparable harm that “results from the express
5 terms of [the] contract.” *See Salt Lake Tribune Publ’g Co., LLC v. AT&T Corp.*, 320 F.3d 1081,
6 1106 (10th Cir. 2003) (no irreparable harm where the alleged harm “results from the express terms
7 of [the] contract”). At its core, irreparable harm is harm or injury that cannot be repaired.

8 The Court finds that with respect to Epic Games’ motion as to its games, including
9 Fortnite, Epic Games has not yet demonstrated irreparable harm. The current predicament appears
10 of its own making. *See Second City Music*, 333 F.3d at 850 (“Only the injury inflicted by one’s
11 adversary counts for this purpose.”). Epic Games remains free to maintain its agreements with
12 Apple in breach status as this litigation continues, but as the Seventh Circuit recognized in *Second*
13 *City Music*, “[t]he sensible way to proceed is for [Epic to comply with the agreements and
14 guidelines] and continue to operate while it builds a record.” *Id.* “Any injury that [Epic Games]
15 incurs by following a different course is of its own choosing.” *Id.* Epic Games admits that the
16 technology exists to “fix” the problem easily by deactivating the “hotfix.” That Epic Games
17 would prefer *not* to litigate in that context does not mean that “irreparable harm” exists.

18 By contrast, Epic Games has made a preliminary showing of irreparable harm as to
19 Apple’s actions related to the revocation of the developer tools (SDKs). The relevant agreement,
20 the Apple Xcode and Apple SDKs Agreement, is a fully integrated document that explicitly walls
21 off the developer program license agreement. (*See* Dkt. No. 41-21 at 16.) Apple’s reliance on its
22 “historical practice” of removing all “affiliated” developer accounts in similar situations or on
23

24
25 ² Indeed, the cases mentioned in passing during the August 24, 2020 hearing and
26 unbriefed by Epic do not appear to change the analysis. These cases stand for the proposition that
27 the doctrines of unclean hands and *in pari delicto* are not recognized as a defense to antitrust
28 claims. *See generally Memorex Corp. v. Int’l Bus. Mach. Corp.*, 555 F.2d 1379,1381 (9th Cir.
1977); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 140 (1968). *See also Kaiser*
Steel Corp. v. Mullins, 455 U.S. 72, 83-84 (1982) (enforcement of “private agreements” is subject
to “the restrictions and limitations of the public policy of the United States”). The issue of
affirmative defenses is not currently before the Court.

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.