

1 THEODORE J. BOUTROUS JR. (SBN 132099)
2 tboutrous@gibsondunn.com
3 RICHARD J. DOREN (SBN 124666)
4 rdoren@gibsondunn.com
5 DANIEL G. SWANSON (SBN 116556)
6 dswanson@gibsondunn.com
7 JAY P. SRINIVASAN (SBN 181471)
8 jsrinivasan@gibsondunn.com
9 GIBSON, DUNN & CRUTCHER LLP
10 333 South Grand Avenue
11 Los Angeles, CA 90071-3197
12 Telephone: 213.229.7000
13 Facsimile: 213.229.7520
14
15 VERONICA S. LEWIS (*pro hac vice*)
16 vlewis@gibsondunn.com
17 GIBSON, DUNN & CRUTCHER LLP
18 2100 McKinney Avenue, Suite 1100
19 Dallas, TX 75201
20 Telephone: 214.698.3100
21 Facsimile: 214.571.2900
22
23 CYNTHIA E. RICHMAN (*pro hac vice*)
24 crichman@gibsondunn.com
25 GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: 202.955.8500
Facsimile: 202.467.0539
26
27 E. JOSHUA ROSENKRANZ (*pro hac*
vice)
28 jrosenkranz@orrick.com
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
Telephone: 212.506.5000
Facsimile: 212.506.5151
29
30 WILLIAM F. STUTE (*pro hac vice*)
31 wstute@orrick.com
32 ORRICK, HERRINGTON &
33 SUTCLIFFE LLP
34 1152 15th Street, N.W.
35 Washington, DC 20005-1706
36 Telephone: 202.339.8400
37 Facsimile: 202.339.8500
38
39 **Attorneys for Defendant Apple Inc.**

PAUL R. RIEHLE (SBN 115199)
paul.riehle@faegredrinker.com
FAEGRE DRINKER BIDDLE &
REATH LLP
Four Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 591-7500
Facsimile: (415) 591-7510
40
41 CHRISTINE A. VARNEY (*pro hac vice*)
42 cvarney@cravath.com
43 KATHERINE B. FORREST (*pro hac*
vice)
44 kforrest@cravath.com
45 GARY A. BORNSTEIN (*pro hac vice*)
46 gbornstein@cravath.com
47 YONATAN EVEN (*pro hac vice*)
48 yeven@cravath.com
49 LAUREN A. MOSKOWITZ (*pro hac*
vice)
50 lmoskowitz@cravath.com
51 M. BRENT BYARS (*pro hac vice*)
52 mbyars@cravath.com
53 CRAVATH, SWAINE & MOORE LLP
54 825 Eighth Avenue
55 New York, New York 10019
56 Telephone: (212) 474-1000
57 Facsimile: (212) 474-3700

Attorneys for Epic Games, Inc.

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
OAKLAND DIVISION**

EPIC GAMES, INC.,
Plaintiff and Counter-Defendant,

vs.

APPLE INC.,
Defendant and Counterclaim Plaintiff.

No. 4:20-CV-05640-YGR
JOINT STATEMENT

Pursuant to this Court's Order Setting Compliance Deadline re: Schedule of September 18, 2020 (ECF No. 85, the "Order"), Plaintiff and Counter-Defendant Epic Games, Inc. ("Epic") and Defendant and Counterclaim Plaintiff Apple Inc. ("Apple", and together with Epic, the "Parties"), by and through their respective counsel, hereby submit this Joint Statement.

Pursuant to the Order, the Parties met and conferred on September 22, 2020, and on September 23, 2020, concerning the extent of discovery required prior to a trial on the merits and a schedule. The Parties' respective positions on a schedule through an initial bench trial are laid out below.

EVENT	EPIC'S 6-MONTH TO TRIAL SCHEDULE	APPLE'S 10-MONTH TO TRIAL SCHEDULE¹	EPIC'S COMPROMISE 8-MONTH TO TRIAL SCHEDULE
Last day to meet and confer re: initial disclosures	October 5, 2020		October 5, 2020
Complete initial disclosures or state objection	October 12, 2020		October 12, 2020
(Substantial or Full) Completion of Document/Data Production	n/a	January 8, 2021	January 4, 2021
Deadline to File Discovery Motions	n/a	February 1, 2021	n/a
Parties' Expert Disclosures	December 7, 2020	n/a	January 22, 2021
Close of Fact Discovery	December 21, 2020	March 1, 2021	February 5, 2021
Opening Expert Reports	January 11, 2021	March 1, 2021	February 19, 2021
Rebuttal Expert Reports	February 1, 2021	April 15, 2021	March 19, 2021
Expert Discovery Cutoff	February 16, 2021	May 14, 2021	April 2, 2021
Dispositive Motions	n/a	May 28, 2021	March 8, 2021

¹ Where Apple has not included an explicit date for an event in Epic's schedule, Apple proposes use of the default deadlines set forth in the Federal Rules of Civil Procedure, the local rules, and Judge Gonzalez Rogers' Standing Orders.

EVENT	EPIC'S 6-MONTH TO TRIAL SCHEDULE	APPLE'S 10-MONTH TO TRIAL SCHEDULE ¹	EPIC'S COMPROMISE 8-MONTH TO TRIAL SCHEDULE
Dispositive Motion Opposition Brief	n/a	June 14, 2021	March 22, 2021
Dispositive Motion Reply Brief	n/a	June 21, 2021	March 29, 2021
Motions <i>in limine</i> and Trial Exhibits Exchanged	February 19, 2021	n/a	April 9, 2021
Pretrial Meet and Confer	February 26, 2021	n/a	April 16, 2021
Court-mandated Compliance Hearing	n/a	June 25, 2021	April 23, 2021
Joint Pretrial Conference Statement, Motions <i>in limine</i> , and Proposed Findings of Fact and Conclusions of Law	March 5, 2021	July 2, 2021	April 23, 2021
Oppositions to Motions <i>in limine</i>	March 10, 2021	n/a	April 28, 2021
Motions <i>in limine</i> Binder and Joint Trial Readiness Binder	March 12, 2021	n/a	April 30, 2021
Pretrial Conference and Hearing on Dispositive Motions	March 19, 2021	July 16, 2021	May 7, 2021
Final Set of Exhibits	March 26, 2021	n/a	May 21, 2021
Trial Start	March 29 to April 1, 2021; April 5 to April 8, 2021	August 2, 2021	May 24, 2021

Epic's Position:

Apple has informed Epic that, in the related *Cameron* and *Pepper* actions, Apple has produced approximately three million documents from the files of 15 custodians. Despite Epic's repeated requests to Apple on August 29, 2020 and September 17, 2020 (among other dates), however, neither Apple nor Lead Plaintiffs in the related cases have disclosed to Epic the list of custodians from whose files documents were produced, the document requests pursuant to which

1 Apple's documents were produced, or other information about the scope of Apple's document
2 production. In this case, Apple has stated that it intends to produce only from six custodians, only
3 two of whom overlap with the custodians from whom Apple collected documents in the related
4 cases, and that the remainder of the 13 custodians from the related class actions are "irrelevant" to
5 this case. Epic remains hopeful that the discovery already conducted in the related cases could be
6 leveraged to conserve the Parties' resources and aid both Parties in achieving an expedited case
7 schedule, and will further assess that possibility if and when Apple provides it with information
8 about that prior discovery.

9 For its part, Epic is prepared to meet the discovery schedule that Epic proposes. Epic has
10 provided a list of 15 proposed Epic custodians to Apple. Epic already has collected documents for
11 certain of these custodians and is in the process of collecting documents for the others.

12 With respect to the case schedule, Epic proposed to Apple a schedule with a trial start date
13 (subject to the Court's availability) of March 29, 2021—6 months from the upcoming
14 September 28, 2020, hearing. Apple counter-proposed a schedule with a trial start date of
15 August 2, 2021—10 months from the September 28, 2020 hearing. During the meet and confer
16 between the parties, both Parties agreed these timelines would lead to a bench trial on Epic's
17 claims, with any trial on Apple's counterclaims, if necessary, to take place separately and later in
18 time. Below, it appears Apple may have now changed its position on this.

19 In an attempt to address Apple's concerns, Epic proposed to Apple that the Parties discuss
20 a modified compromise schedule with a trial start date of May 24, 2021—8 months from the
21 September 28, 2020 hearing, which is approximately the mid-point between Epic's preferred trial
22 date and Apple's proposed trial date. Apple stated that it is unlikely that the Parties could agree on
23 a schedule. Nonetheless, for the Court's benefit, both Epic's proposed 6-month schedule and an
24 8-month compromise schedule are reflected in the chart above.

25
26
27 *Apple's Position:*
28

1 By any reasonable measure, Apple has proposed an ambitious schedule to litigate the
2 parties' respective claims in this case, particularly in the midst of the current pandemic. Under
3 Apple's proposed schedule, the case will be tried ten months after resolution of Epic's motion for
4 preliminary injunction—less than a year after the filing of Epic's complaint, and a full 18 months
5 faster than the 29.3 month median time to trial for civil cases in this district.² Epic's proposal to
6 compress the schedule even more—with fact discovery closing in four months and trial in eight—
7 ignores practical realities of the discovery process.³ Notably, Apple served a document subpoena
8 on Epic in the *Cameron* matter more than five months ago—longer than the entire time period for
9 fact discovery in Epic's proposed schedule—and Epic has yet to produce a single document.
10 Epic's proposal is unachievable even where the parties are using their best efforts and so will
11 inevitably lead to motions for extension and discovery inefficiencies.
12

13
14 Although Apple has produced a significant number of documents in the *Pepper* and
15 *Cameron* cases—and agreed to work with Epic to identify the overlap and efficiencies between
16 that production and the one in this case—the economies end there. Depositions of Apple
17 witnesses have yet to occur in the other cases, expert witnesses have yet to be designated, and
18 third party discovery is only beginning to trickle in. And, of course, Epic has produced no
19 documents at all. Apple has taken all of these factors into account and nevertheless proposes a
20 very aggressive schedule that contemplates the completion of fact discovery in just five months,
21 completion of expert discovery in the subsequent 2.5 months, and dispositive motions briefed
22 simultaneously with the exchange of motions *in limine* and trial exhibits only weeks later.
23
24

25 ² U.S. District Court – Judicial Caseload Profile,
26 https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf.

27 ³ As Epic notes, it proposed two separate schedules to Apple—an initial one showing a trial
28 in six months and a revised proposal with a trial in eight months. Apple has understood
Epic's second, revised proposal to be its operative proposal.

1 Meeting this compressed schedule will no doubt present challenges for both parties. But Apple
2 believes that the schedule is achievable if Epic stays true to its representation to the Court that it
3 will use discovery from the class action cases “efficiently” and confine any new requests to “in-
4 app payment processing” and “limited targeted additional discovery and some depositions.”⁴ Aug.
5 24, 2020 Hr’g Tr. at 5.
6

7 Apple’s proposed schedule also leaves adequate time for the resolution of Apple’s seven
8 counterclaims in parallel with Epic’s antitrust causes of action, so long as the parties can agree on
9 the scope of discovery and the issues to be tried to the Court.⁵ Given the factual overlap between
10 these two sets of claims, proceeding in parallel could be more efficient than a bifurcated
11 proceeding in which only Epic’s antitrust claims are litigated first. But such efficiencies will not
12 be an option with any schedule that proceeds to trial in less than 10 months, given practical limits
13 on what can be achieved in the time allotted.
14

15 Meanwhile, Epic’s schedule—which proposes that the parties complete fact and expert
16 discovery and proceed to trial in only eight months—would certainly require bifurcation, and is
17 unworkable for a number of other reasons. For starters, Epic has indicated that it expects to
18 produce documents from at least 15 custodians and presumably expects Apple to produce from an
19 equivalent number, having already taken the position that the list of six key custodians Apple has
20

21
22
23 ⁴ Apple remains concerned that even its proposed document discovery deadline of
24 January 8, 2021 may not be achievable despite best efforts if the scope of the requested
25 documents is not contained. To the extent the parties are unable to meet whatever
26 document discovery deadline is ultimately agreed upon, all subsequent dates must be
27 revisited because all of the downstream deadlines and cut-offs depend on a timely
28 document production.

⁵ Contrary to Epic’s assertion, there was no agreement during the meet and confer on the
scope of the initial bench trial. In fact, the parties have not yet taken a position on whether
Apple’s counterclaims should be tried before the Court or a jury, which is an issue that
must be resolved before determining the scope of the initial trial.

1 identified to Epic so far is insufficient.⁶ In *Cameron* and *Pepper*, it took Apple roughly ten
2 months to substantially complete productions from 15 custodians, for a total of more than 3.5
3 million documents. There is no realistic way in which a similar scale of production could be
4 completed in the span of four months, let alone four months that include the holiday season.
5 Further, Epic has said that it will require a non-trivial (though unspecified) number of
6 depositions—Epic’s belief that all of these depositions can be taken in January 2021 defies all
7 experience—and that discovery from third parties will be necessary as well. Third-party discovery
8 is rarely quick even under the best of circumstances. For example, in *Cameron*, Google has been
9 working with Apple in responding to its document subpoena, but even there, it took Google
10 roughly five months to produce its internal documents, and its production remains far from
11 complete. And where the third party is being uncooperative, there is no shortage of delay. As
12 noted above, it has now been *more than five months* and counting since Epic received Apple’s
13 document subpoena without producing a single document in response. Similarly, Samsung has
14 been stonewalling since receiving Apple’s subpoena, and the parties are currently awaiting a
15 ruling on Apple’s motion to compel, *more than six months* after that subpoena was served.
16
17

18 Yet Epic proposes that all fact discovery, including third-party discovery, can be
19 completed in little over four months from today, with no articulation of how this can be achieved.
20 Epic’s proposed schedule also includes overlapping deadlines for expert reports and dispositive
21 motions, such that the briefing on the latter will be due and completed before the close of expert
22 discovery. The inevitable result of Epic’s proposal will be serial motions for extension and
23
24

25 ⁶ Contrary to Epic’s representations that “Apple has stated that it intends to produce only
26 from six custodians” and that “13 custodians from the related class actions are ‘irrelevant’
27 to this case,” Apple told Epic during the parties’ conferences that it has identified six
28 witnesses *to date* who are most likely to have information relevant to Epic’s claims.
Apple has never stated that it intends to produce documents only from six custodians or
that the other custodians in the class actions are irrelevant.

1 motions to amend or supplement when Epic’s deadlines are not met, create discovery
2 inefficiencies, or are otherwise unworkable. Epic’s schedule will therefore waste judicial and
3 party resources without achieving its intended purpose.

4 As the Court recognized in the Order Granting in Part and Denying in Part Epic’s Motion
5 for Temporary Restraining Order, “[t]he battle between Epic Games and Apple has apparently
6 been brewing for some time”—“[i]t is not clear why now became so urgent.” Dkt. 48 at 6.
7 Nevertheless, Apple has proposed a schedule that is quite aggressive and will provide Epic with an
8 amply expedited trial, and Apple respectfully requests that the Court enter its schedule.
9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 24, 2020

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

By: /s/ Katherine B. Forrest

Katherine B. Forrest

*Attorneys for Plaintiff and Counter-Defendant
Epic Games, Inc.*

Dated: September 24, 2020

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Jay P. Srinivasan

Jay P. Srinivasan

*Attorneys for Defendant and Counterclaim
Plaintiff Apple Inc.*

