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15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION
18

19 EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

20 v.

21 APPLE INC.,

22 Defendant,
23 Counterclaimant.
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27
28

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

**APPLE INC.’S NOTICE OF MOTION AND
MOTION FOR JUDGMENT ON PARTIAL
FINDINGS PURSUANT TO FED. R. CIV. P.
52(c) AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 24, 2021 at 8:00 a.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Yvonne Gonzalez Rogers, Courtroom 1, 14th Floor, United States District Court, 1301 Clay Street, Oakland, California, Defendant Apple Inc. will and hereby does move the Court for judgment on partial findings in Apple's favor on Count 2.

This motion for judgment on partial findings (as set forth in the attached memorandum in support) is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities that follows, any reply papers that may be filed, and on the arguments of counsel.

DATED: May 24, 2021

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OTHER AUTHORITIES

Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property* (3rd ed. 2020 supp.).....3

1 Apple Inc. moves for judgment on partial findings on Epic Games, Inc.’s “essential facility”
 2 claim (Count 2). At trial, Epic adduced no proof in support of this claim—on the contrary, Epic’s
 3 principal expert expressly disclaimed any opinion on essential facility, and (in response to a direct
 4 question from the Court) rejected the notion that iOS should be treated as a public utility. The Court
 5 should enter judgment for Apple on this claim.

6 LEGAL STANDARD

7 “If a party has been fully heard on an issue during a nonjury trial and the court finds against the
 8 party on that issue, the court may enter judgment against the party on a claim or defense that, under the
 9 controlling law, can be maintained or defeated only with a favorable finding on that issue.” Fed. R.
 10 Civ. P. 52(c). This rule “expressly authorizes the district judge to resolve disputed issues of fact.”
 11 *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). “In deciding whether to enter judgment
 12 on partial findings under Rule 52(c), the district court is not required to draw any inferences in favor
 13 of the non-moving party; rather, the district court may make findings in accordance with its own view
 14 of the evidence.” *Id.*

15 DISCUSSION

16 Epic contends that Apple has violated Section 2 of the Sherman Act “through its unlawful denial
 17 to Epic and other app distributors of an essential facility—access to iOS.” Dkt. 1 ¶ 197. Epic’s experts
 18 did not opine on whether iOS is an essential facility, or whether Epic has been denied access to iOS.
 19 Rather, Dr. Evans *admitted* in his written direct testimony that Epic and other developers are provided
 20 “access to the tools and permissions for writing iOS apps.” Ex. Expert 1 ¶ 100 (Evans). And on the
 21 stand, Dr. Evans *admitted* that he was not “expressing any opinion on anything termed an essential
 22 facility or anything related to an essential facility claim in this case.” Trial Tr. 1673:8–11 (Evans); *see*
 23 *also* Trial Tr. 2390:16–2391:2 (Evans). Having completed its case-in-chief, Epic has no factual, expert,
 24 or legal support for its theory of essential facility, and has effectively abandoned this claim. Apple is
 25 therefore entitled to judgment on Count 2.*

26
 27
 28 * The essential facility doctrine is addressed in more detail in Apple’s proposed conclusions of law.
 See Dkt. 405 COL ¶¶ 374–419.

1 **A. iOS Is Not an Essential Facility**

2 Under Ninth Circuit precedent, the first and second elements of an essential facility claim
3 require Epic to show that Apple is “a monopolist in control of an essential facility,” and that Epic “is
4 unable reasonably or practically to duplicate the facility.” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*,
5 836 F.3d 1171, 1185 (9th Cir. 2016). These elements essentially collapse into one another: “[T]he
6 second element is effectively part of the definition of what is an essential facility in the first place. That
7 is to say, if the facility can be reasonably or practically duplicated it is highly unlikely, even impossible,
8 that it will be found to be essential at all.” *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380
9 (9th Cir. 1992). Because Epic failed to prove that iOS is an essential facility, it cannot meet either of
10 these elements.

11 Essential facilities typically are limited to physical infrastructures of a finite availability (such
12 as a bridge or a power network) that are not capable of being replicated by competitors and serve as a
13 necessary conduit without which transmission or distribution is impossible. *See United States v.*
14 *Terminal R.R. Ass’n*, 224 U.S. 383, 392–94 (1912). “Essential means essential,” not “‘best,’ ‘most
15 profitable’ or ‘preferable.’” *JamSports & Entm’t, LLC v. Paradama Prods., Inc.*, 336 F. Supp. 2d 824,
16 839 (N.D. Ill. 2004). Only preexisting “bottlenecks” (such as bridges and infrastructure networks)
17 typically have been deemed essential facilities by the courts. *See MCI Commc’ns Corp. v. Am. Tel. &*
18 *Tel. Co.*, 708 F.2d 1081, 1148 (7th Cir. 1983). Unlike bridges and power grids—which function
19 essentially as public utilities—iOS is a proprietary operating system that is not an “essential” facility.

20 Notably, Dr. Evans testified in response to a question from the Court that he would not
21 characterize iOS as a “utility.” Trial Tr. 2382:8–13 (Evans). Dr. Evans elaborated, explaining that
22 “oftentimes when economists looking at the history of regulation talk about utilities, we really are
23 talking about a situation in which there is – there is one company, and it’s an absolutely, positively
24 essential service,” Trial Tr. 2382:24–2383:2 (Evans), but he acknowledged that “at this point in time,
25 I don’t want to suggest that as foundational platforms [iOS and Android] are – they are so – they are
26 something where I would say to Congress that you should think about regulating these companies like
27 we would regulate electric utilities in the past,” Trial Tr. 2383:13–18 (Evans); *see also* Trial Tr.
28 2390:21–2391:2 (Evans) (Dr. Evans explaining that his use of the words “gateway” or “toll booth” is

1 not synonymous with “essential facility”). Epic’s own expert thus refused to equate iOS with a public
2 utility, and therefore conceded the predicate of Epic’s essential facility claim.

3 A proprietary operating system encompassing features and functionalities protected by patent,
4 copyright, and other intellectual property laws cannot constitute an essential facility. Intellectual
5 property is protected by a discrete legal regime, which gives the owner the power to exclude others
6 from using or profiting from the owner’s intellectual property. As the leading antitrust treatise
7 recognizes, there has been “*no case in which a United States court* consciously held that an intellectual
8 property right was itself an essential facility that must be licensed on reasonable and nondiscriminatory
9 terms.” Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to*
10 *Intellectual Property* § 13.03 [C][2] (3rd ed. 2020 supp.) (emphasis added). This Court should not be
11 the first.

12 Epic does not dispute that “Apple’s intellectual property gave Apple the right to prevent all
13 third parties from writing apps for use on iOS.” Dkt. 407 COL ¶ 226; *see also* Apple Ex. Depo. 5 at
14 46:15–23, 25 (Penwarden). A firm that elects to design its own operating system cannot be compelled
15 to provide public access to that operating system once it proves workable and desirable for other
16 competitors. *See* Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles*
17 *Applied to Intellectual Property* § 13.03 [C][2] (3rd ed. 2020 supp.). It is the firm’s prerogative to
18 decide whether and to what extent to make its operating system available to others, and a firm’s
19 decision to restrict access (or to set terms of access) is not a basis for antitrust liability. Epic cannot
20 “just demand the right to piggyback on its larger rival” through these proceedings, rather than
21 “investing [or] innovating” itself. *Novell*, 731 F.3d at 1073.

22 Epic’s own experience, as established by the trial evidence, confirms that there is nothing
23 “essential” about iOS. *Fortnite* was a success before it was made available on the App Store, Trial Tr.
24 1337:19–21 (Weissinger), and *Fortnite*’s revenues from iOS (prior to its removal) accounted for just
25 7% of its total revenue, DX-4766. And native apps are not the only way Epic can reach iOS
26 customers—it also is free to distribute its products (including by selling V-Bucks) to iOS customers
27 over the internet. PX-2790.1; *see also* Trial Tr. 476:20–477:12, 524:8–15 (Patel) (Nvidia has plans to
28 offer *Fortnite* through its web app for iOS in October). Moreover, Epic can and does reach customers

1 of all types on PCs and Macs—including through the Epic Games Store—as well as through game
2 consoles, tablets, and other mobile devices. Ex. Expert 6 ¶¶ 35, 151 & fig. 6 (Hitt). iOS thus cannot
3 be an essential facility because Epic has already “achieved success on *multiple* platforms.” *Blix Inc.*
4 *v. Apple, Inc.*, No. 19-CV-1869, 2020 WL 7027494, at *7 (D. Del. Nov. 30, 2020) (emphasis in
5 original) (dismissing essential facility claim related to the Mac App Store).

6 When asked by the Court what Epic’s “backup plan” was if the Court did not grant the requested
7 relief, Mr. Sweeney did not suggest that Epic would be out of business, but instead testified that Epic
8 simply “would have to live with” its ejection from the App Store, “without supporting the iOS
9 platform.” Trial Tr. 347:25–348:11 (Sweeney). That is another concession that iOS is not an essential
10 facility. Unlike a single bridge linking two land masses, Epic—and other developers—have many
11 avenues to reach customers. Those avenues might not be identical to one another (just as a bridge is
12 not identical to a tunnel), but they plainly provide alternatives for developers. Regardless of whether
13 transactions on other platforms are substitutable or interchangeable for purposes of market definition,
14 the standard for identifying an essential facility is different (and higher): Epic’s essential facility theory
15 required it to prove that iOS is *essential*—necessary, indispensable, non-replicable, etc. *See JamSports*,
16 336 F. Supp. 2d at 839; *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 543 (9th
17 Cir. 1991) (explaining that an essential facility may exist where a firm has “eliminated *all possibility*
18 of competition in the downstream market” (emphasis added)). But the evidence at trial, including the
19 testimony of Epic’s own witnesses, did not even come close to satisfying that standard. Therefore
20 Apple is entitled to judgment on the essential facility claim.

21 **B. Epic Has Access to iOS**

22 Even if iOS could constitute an essential facility, Epic’s claim still fails because Epic *does* have
23 access to iOS, pursuant to the terms of the DPLA. Denial of access to the alleged essential facility is
24 an element of an essential facility claim. *See Aerotec*, 836 F.3d at 1185. “[W]here access exists, the
25 [essential facility] doctrine serves no purpose.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V.*
26 *Trinko, LLP*, 540 U.S. 398, 411 (2004).

27 There is no dispute that Epic actually has access to iOS. Epic, like all other developers, may
28 obtain “access to the tools and permissions for writing iOS apps,” and may distribute those apps through

1 iOS, by agreeing to the DPLA. Ex. Expert 1 ¶ 100 (Evans). And Epic clearly *did* (prior to Project
2 Liberty) distribute its apps through iOS and the App Store. So do millions of other developers. “[T]he
3 access factor cannot be read to mean that the courts will secure a better deal for an antitrust plaintiff.”
4 *City of Coll. Station, Tex. v. City of Bryan, Tex.*, 932 F. Supp. 877, 888 (S.D. Tex. 1996). As Mr.
5 Sweeney testified, Apple’s license agreements set forth the specific terms of Epic’s access to iOS and
6 its use of Apple’s intellectual property. Trial Tr. 167:15–23 (Sweeney). Having identified the alleged
7 essential facility as iOS, and then having affirmatively offered evidence that it (and other developers)
8 has access to iOS, Epic has no basis on which to maintain its essential facility claim. Indeed, Epic and
9 its subsidiaries have developed a number of native iOS apps using Apple’s proprietary software,
10 including access to iOS, pursuant to the DPLA.

11 The real basis for Epic’s claim is that it does not like the terms of the access it *does* have. But
12 Apple did not deny access to an essential facility by merely refusing to deal in a manner “conducive to
13 [Epic’s] existing business model,” *MetroNet Servs. Corp.*, 383 F.3d at 1130, “in the most profitable
14 manner” to Epic, *id.*, or on Epic’s preferred terms, *Aerotec Int’l, Inc.*, 836 F.3d at 1185 (plaintiff had
15 access to facility even where process for doing so was “Kafkaesque” and inferior to “certain [other]
16 customers”); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir.
17 1988) (rejecting claim because plaintiff did not outbid its competitors for access to facility).

18 Apple’s terms of access have benefited Epic greatly. Epic made over \$700 million through its
19 distribution of the native iOS *Fortnite* app through the App Store. Ex. Expert 6 ¶ 73 & fig. 14 (Hitt);
20 *see also* Trial Tr. 1999:10–12 (Schmalensee) (Well, if [Epic] want[s] to access iOS, they have to go
21 through the store. But they do, and they make a lot of money going through the store.”). The essential
22 facility doctrine does not require that Apple change its business model based on Epic’s desires. *See*
23 *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1367 (9th Cir. 1992) (the city’s “demand that [the
24 utility] turn over its facility to a city simply because the city could save money by obtaining cheaper
25 power stands the essential facility doctrine on its head”). Epic has access to iOS, but it seeking better
26 *terms* of access. That is not the role of the essential facility doctrine.

27 The essential facility doctrine does not require a firm to provide its competitors with unfettered,
28 unlimited, or uncompensated access to its property. *Cf.* Dkt. 407 COL ¶ 233. Take, for example, one

1 of the classic examples of an essential facility—a railroad bridge at the only crossable portion of a
2 river. *Cf. Terminal R.R. Ass’n*, 224 U.S. at 392–94. If all other elements of the essential facility
3 doctrine are satisfied, the operator of the bridge may be required to provide access to competitors who
4 wish to move freight across the bridge. Those competitors, however, will still have to pay the operator
5 to use the bridge, and may be required to abide by certain terms (weight limits, timing restrictions,
6 prohibitions on carrying hazardous waste, etc.).

7 Here, viewing iOS as a “bridge” (among other options, as noted above) between developers and
8 iOS users, what Epic is demanding is that it be permitted to use the bridge at any time of day at no cost
9 and with no limitations on its terms of access. *See, e.g.*, Dkt. 276-1 at 3 (seeking an injunction enjoining
10 Apple from restricting the “downloading, executing, installing and/or updating [of] iOS apps and app
11 stores from a distribution channel other than the App Store”). That is not what the essential facility
12 doctrine requires. Epic is free to access iOS (and distribute native iOS apps) in accordance with the
13 terms of access set forth by Apple in the DPLA. “[W]here access exists, the [essential facility] doctrine
14 serves no purpose.” *Trinko*, 540 U.S. at 411. Judgment should therefore be entered against Epic on its
15 Count 2.

16 * * *

17 The Court’s preliminary injunction order put Epic on notice that the essential facility claim had
18 not been adequately developed and thus could be a candidate for early resolution. Dkt. 118 at 17 n.17.
19 During trial, the Court noted that Epic had not addressed or briefed adequately its essential facility
20 claim. Trial Tr. 1996:25–2000:1 (Schmalensee). And at the end of Epic’s case-in-chief, the Court
21 once again observed that Epic had not offered evidence on this claim. Trial Tr. 2621:18–2622:11.
22 Accordingly, Epic has had plenty of notice that this claim is vulnerable to summary disposition, and
23 dismissing it at this time would simplify the issues for post-trial resolution.

24 CONCLUSION

25 For the foregoing reasons, the Court should grant judgment on partial findings in favor of Apple
26 and against Epic on Count 2 of Epic’s complaint.

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DATED: May 18, 2021

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