

## Epic Games set for last trial over Google monopoly claim

By Jonathan Lo

Daily Journal Staff Writer

After Match Group LLC announced a settlement to resolve its antitrust claims against Google LLC, Epic Games Inc. is the only plaintiff remaining in a multidistrict case against Google, accusing the search engine conglomerate of having a monopoly on Android apps and using that power to impose unreasonably high service fees on app developers.

Apple Inc. was also accused of partaking in similar anticompetitive conduct for the App Store, and Epic was one of the parties that sued Apple as well. According to news reports, Google has contended that the details surrounding Epic's case against it are not the same as Epic's case against Apple. Plaintiffs claimed Apple and Google restricted apps from having other in-app purchasing methods besides what the two companies offered, which came with a 15% to 30% cut of the revenue those apps generated.

While the two cases may share similar claims, they have panned out differently. The biggest difference is that Epic's case against

Apple was not consolidated into a larger case. Epic had sued Google alongside Match, a class of consumers and more than 30 states, and all of their cases ended up together in one large multidistrict litigation. While many of the same states sided with Epic over Apple, they only filed amicus briefs in support.

Another difference is how far the two cases have progressed.

U.S. District Judge James Donato oversees the antitrust litigation against Google, and has not issued any order regarding whether plaintiffs' claims should be dismissed.

The judge instead chose to leave deciding the merits of the case up to a jury, which began to be selected Thursday and will start hearing arguments Monday.

However, the judge gave the parties one last opportunity to argue whether the case should be decided by him or a jury, and briefs on the matter were filed Wednesday. *In re: Google Play Store Antitrust Litigation*, 21-md-02981, (N.D. Cal., filed Feb. 5, 2021).

Google, represented by Morgan Lewis & Bockius LLP and Munger Tolles & Olson LLP, claimed, "Epic seeks only injunctive relief, so its claims are not triable to the jury without Google's consent — and

Google has not consented." The company's attorneys argued that there must first be a jury trial for its counterclaims of revenue lost because Epic refused to follow its service fee policies; then the court can take up Epic's antitrust claims.

Epic, represented by Faegre Drinker Biddle & Reath LLP and Cravath Swaine & Moore LLP, responded that Google had demanded a jury trial on all claims so triable. "Although Epic had not originally requested a jury trial, Epic properly relied on that demand as it prepared its case over the subsequent two years," the video game publisher's counsel said. "During that time, Google repeatedly confirmed that this case should be tried to a jury." The attorneys asserted that changing to a bench trial at the last minute would cause serious prejudice to their client.

In Epic's antitrust case against Apple, U.S. District Judge Yvonne Gonzalez Rogers issued a split ruling in September 2021, finding that Apple did not have a monopoly on the mobile market. She also struck down nine of the 10 plaintiffs' claims, but found Apple engaged in anticompetitive behavior when it prevented apps from using other payment methods. *Epic Games Inc.*

*v. Apple Inc.*, 20-cv-05640, (N.D. Cal., filed Aug. 13, 2020).

Epic appealed Rogers' ruling, but in April a three-judge panel from the 9th U.S. Circuit Court of Appeals ruled 2-1 to uphold the split decision in full. Apple and Epic both appealed this opinion to the U.S. Supreme Court in July.

"For the second time in two years, a federal court has ruled that Apple abides by antitrust laws at the state and federal levels," Apple said in a statement following the opinion. "The App Store continues to promote competition, drive innovation, and expand opportunity, and we're proud of its profound contributions to both users and developers around the world. We respectfully disagree with the court's ruling on the one remaining claim under state law and are considering further review."

Epic CEO Tim Sweeney reacted to the ruling in a post on X, formerly Twitter, saying, "Fortunately, the court's positive decision rejecting Apple's anti-steering provisions frees iOS developers to send consumers to the web to do business with them directly there. We're working on next steps."

jonathan\_lo@dailyjournal.com