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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 **IN RE GOOGLE PLAY STORE**
17 **ANTITRUST LITIGATION**

18 THIS DOCUMENT RELATES TO:

19 *Epic Games, Inc. v. Google LLC et al.*,
20 Case No. 3:20-cv-05671-JD

21 *Match Group, LLC et al., v. Google LLC et al.*,
22 Case No. 3:22-cv-02746-JD

Case No. 3:21-md-02981-JD

23 **EPIC AND MATCH’S JOINT**
24 **OPPOSITION TO GOOGLE’S MOTION**
25 **FOR A STAY**

26 Judge: Hon. James Donato
27 Date: April 20, 2023
28 Time: 10:00 a.m.
Courtroom: 11

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6 2022), available at [https://android-developers.googleblog.com/2022/11/continuing-our-](https://android-developers.googleblog.com/2022/11/continuing-our-commitment-to-user-choice-billing.html)

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1 Plaintiff Epic Games, Inc. (“Epic”) and Plaintiffs Match Group, LLC; Humor Rainbow, Inc.;
2 PlentyofFish Media ULC; and People Media, Inc. (collectively, “Match”) submit this joint opposition
3 to Defendants’ (“Google’s”) Motion to Defer or Stay Trial (MDL Dkt. 467).

4 On August 13, 2020, Epic filed the first lawsuit in the country challenging Google’s
5 anticompetitive app store practices. *Epic does not seek damages*, but instead seeks an injunction to
6 end Google’s anticompetitive conduct. That conduct—which includes illegal ties and *per se* unlawful
7 agreements involving payments not to compete—prevents competition for app distribution and in-app
8 payment solutions on billions of Android devices. This harm is substantial and ongoing: Google
9 actively prevents the development of alternative app stores that would benefit developers and
10 consumers, extracts billions of dollars in monopoly rents each year, and denies developers and
11 consumers the benefits of lower prices and increased innovation that competition would bring. Epic’s
12 injury is incontestable: Google removed Epic’s *Fortnite* app from Google Play, thwarted Epic’s
13 attempts to preload its apps on Android phones and effectively foreclosed Epic from launching the
14 Epic Games Store on Android.

15 When Google threatened to similarly remove Match apps from Google Play starting June 1,
16 2022, Match filed suit on May 9 challenging the same conduct by Google seeking injunctive relief and
17 damages. The following day, Match sought a temporary restraining order to enjoin Google’s conduct.
18 As with Epic, Google is hindering Match’s product development, harming Match’s users and its
19 relationship with them, and forcing Match and its users to pay supracompetitive prices.

20 These harms are ongoing and will continue until Google’s antitrust violations are enjoined.
21 With its opportunistic motion, Google seeks to prolong its anticompetitive conduct by delaying
22 plaintiffs’ day in court again, this time potentially *for years*. It should not be permitted to do so.

23 At the outset of this case, more than two and a half years ago, the parties—including Google—
24 jointly proposed an April 26, 2022 trial date. (*Epic* Dkt. 87.) Epic preferred that its own trial proceed
25 on an earlier date, but it agreed to a joint trial on April 26, 2022 in the interest of cooperation and
26 efficiency. That trial date has now been pushed back *four times*—not once because of a request by
27 Epic—resulting in the current trial date, November 6, 2023, over three years after Epic filed its
28 complaint. Google now seeks to postpone the trial indefinitely because of an interlocutory appeal of

1 the *consumers*' class certification motion that has *no bearing* on Epic's or Match's claims. Google
2 represents that its proposal would "in all likelihood, result in only a modest postponement of the trial".
3 (Google Br. 1.) That is disingenuous; Google cannot credibly or definitively predict the length of time
4 the Ninth Circuit will take to render its decision (or how long any attendant remand or subsequent
5 appeal could take). In fact, Rule 23(f) appeals in the Ninth Circuit typically last for more than a year.¹
6 But the stay Google seeks would last much longer; if Google succeeds on its appeal, this Court would
7 likely need to hold additional class certification proceedings, and those could again be appealed. And
8 if the Ninth Circuit affirms, Google reserves the right to take a further appeal.

9 Google's burden for obtaining a stay is steep. It must show that it would suffer irreparable
10 harm absent a stay and that a stay will not harm Epic, Match or the public. Google does not even come
11 close to meeting its burden. It ignores the manifest prejudice that Epic, Match and the public would
12 suffer if Google's ongoing antitrust violations continue unabated for additional years, while Google
13 and the consumers resolve their class certification issues—which pertain to monetary damages for past
14 conduct, but have no bearing on the injunctive relief plaintiffs seek (indeed, Epic seeks *only* injunctive
15 relief). The Rule 23(f) appeal has *nothing* to do with the illegality of Google's conduct. Nor does it
16 have anything to do with Epic's or Match's cases, which will go to trial no matter how the appeal is
17 resolved. Google does not argue otherwise; instead, it relies on this Court's statements about the
18 benefits of holding a single trial, which were made before any Rule 23(f) appeal and in the context of
19 cases that could proceed, in their entirety, on similar schedules. That is no longer true, but a joint trial
20 on antitrust issues common to all parties, including Epic, Match, the States, and the consumers, can
21 still proceed as scheduled as outlined in the consumers' and States' oppositions.

22 Google has failed to meet its burden as to a trial on Epic's or Match's claims, and its motion
23 should be denied. The Court should therefore proceed as currently planned with the November 6, 2023
24 jury trial to resolve Epic's and Match's cases and any portion of the other plaintiffs' cases that are
25 unaffected by the Rule 23(f) appeal.

26
27 ¹ Indeed, the Ninth Circuit guidance Google cites states that civil appeals are typically *set for*
28 *argument* "approximately 6 - 12 months from the notice of appeal date, or approximately 4 months
from completion of briefing". Frequently Asked Questions, <https://www.ca9.uscourts.gov/general/faq>.
The court's decision can then come many months or even a year or more after argument.

BACKGROUND

I. Epic’s Case

On August 13, 2020, Epic initiated this lawsuit, bringing claims for injunctive relief against Google under Sections 1 and 2 of the Sherman Act, the California Cartwright Act, and the California Unfair Competition Law. (*Epic* Dkt. 1.) Epic alleges that Google dominates the markets for app distribution and in-app payment solutions on Android as a result of contractual and technical restraints that Google imposes on Android developers and original equipment manufacturers. Among other things, Google requires that Google’s own app store, Google Play, be preinstalled on virtually all Android devices; makes downloading competing app stores prohibitively difficult; forces developers to use Google’s payment solution, Google Play Billing (“GPB”), when they sell digital content within their own Android apps; and, for most transactions, takes a supracompetitive 30% fee on in-app purchases. These actions foreclose Epic and other developers from offering their own app stores and in-app payment solutions. Epic does not seek any monetary damages from Google. Instead, Epic seeks only to bring an end to the ongoing, irreparable harm caused by Google’s anticompetitive practices and to open up the Android ecosystem to fair competition.

From the outset of this case, Epic sought a speedy trial. Epic initially negotiated an April 26, 2022 trial date and jointly proposed it to the Court with Google and the other plaintiffs.² (*Epic* Dkt. 87.) Epic has never sought to push the trial beyond that date. However, in the spirit of compromise and coordination, Epic acquiesced to the trial date being moved back four times, to accommodate the needs of parties other than Epic:

1. After the State plaintiffs filed their case against Google, the parties proposed a new schedule to accommodate the State plaintiffs’ entry to the case. Although Epic preferred to maintain the original trial date, it agreed to jointly propose with the other plaintiffs September 21, 2022 for a trial on liability issues (but not damages), while Google proposed an October 25, 2022 date. (MDL Dkt. 91 at 5, 12.) On October 22, 2021, the Court entered a scheduling order setting an October 17, 2022 date for a joint trial. (MDL Dkt. 122.)
2. On December 9, 2021, the consumers and Google sought an extension of time for Rule 23 issues. (MDL Dkt. 159 at 1.) These issues had no relation to Epic’s case, but Epic accommodated the request. The parties proposed a January 30, 2023 trial. (MDL Dkt. 181, Ex. A.) The Court ordered an April 3, 2023 trial. (MDL Dkt. 191 at 2.)

² The Court did not enter the scheduling order, but the parties proceeded accordingly.

- 1 3. On August 3, 2022, all plaintiff groups except Epic sought an extension of the case
 2 schedule that would include a later trial date. (MDL Dkt. 307, 309.) During an August 4,
 3 2022 hearing, Epic told the Court that the then-current April 2023 date was “already
 4 30 months from the initial case management conference”, and that further delay would
 5 prejudice Epic. (8/4/2022 Tr. 50:20-51:9.) Epic made clear: “We are ready. We want to
 6 go [to trial]”. (*Id.* at 51:12-19.) Nonetheless, in an effort to coordinate with the other
 7 parties, Epic agreed to a proposal joined by all parties for a June 5, 2023 trial (MDL
 8 Dkt. 329), which the Court ordered on October 5, 2022 (MDL Dkt 338).
- 9 4. In late 2022, Google asked to reopen discovery based on modest amendments to Epic’s and
 10 Match’s complaints. Epic and Match disagreed but acceded to Google’s request. Based on
 11 Google’s representations regarding its discovery needs, the parties proposed a July 31, 2023
 trial date, which would give Google time to meet deadlines Google demanded for “Google
 to serve [a] supplemental expert report relating to Epic’s and Match’s amended complaints”
 and “completion of third-party depositions relating to Epic’s and Match’s amended
 complaints”. (MDL Dkt. 392 at 3.) The Court did not enter the July 31, 2023 trial date,
 but rather instructed the parties that the trial should be held in the fall. On January 18,
 2023, the Court set the currently scheduled trial date of November 6, 2023, instructing “that
 “[t]his date should be regarded as firm”. (MDL Dkt. 421.)³

12 II. Match’s Case

13 Match suffers significant harm each day this litigation goes unresolved. For more than a
 14 decade, Google permitted Match apps to offer their own payment solutions alongside or instead of
 15 GPB. (*Match* Dkt. 12-2, Decl. of Peter Foster (“Foster Decl.”) ¶¶ 29-37.) But that ended in
 16 March 2022, when Google began enforcing a new policy mandating exclusive use of GPB that requires
 17 payment of a supracompetitive 15-30% “service fee” on all digital transactions (*id.* ¶¶ 4, 39). Google
 18 then began rejecting Match app updates in April (*id.* ¶ 57 (rejecting an app update from OkCupid on
 19 April 20, 2022); *id.* ¶ 58 (rejecting app updates from Match and OurTime on April 25, 2022); *id.* ¶ 59
 20 (rejecting an app update from Tinder on April 28, 2022)); and threatened to remove Match apps from
 21 the Play Store in June for non-compliance (*id.* ¶ 107; *id.* Exs. 7, 11 (“Starting June 1st, any app that is
 22 still not compliant will be removed from Google Play.”)).

23 These changes and the threatened expulsion from the Play Store forced Match to file suit
 24 against Google on May 9, 2022, seeking injunctive relief and damages, and file a request for a
 25 temporary restraining order the following day. (*Match* Dkts. 1, 12.) Match’s case was coordinated
 26

27 ³ Google represented at the time that it needed additional time to conduct multiple depositions and
 28 to supplement its expert reports. Having obtained a delay of the schedule, Google never supplemented
 its expert reports and just last week purported to notice only a single additional deposition.

1 with Epic’s and two other related cases with a trial date less than a year away, and in the first hearing
 2 after Match filed suit, the Court directed Match to “bend” and “[w]ork something out so that we can
 3 keep our schedule.” (5/12/2022 Tr. 15:21-25 (noting the Court’s “main priority” of maintaining the
 4 schedule).) Match therefore expended significant resources to comply with the Court’s request under
 5 extraordinary time constraints. It completed fact discovery and served opening expert reports on an
 6 expedited basis, within four and five months, respectively, of filing suit. This required, among other
 7 things, foregoing depositions that Match would have otherwise participated in and accelerating
 8 Match’s discovery responses, including responding to and producing documents for 182 requests for
 9 production and responding to a total of 44 interrogatories.⁴

10 Match also negotiated a partial, temporary solution to prevent Google from removing Match’s
 11 apps from the Play Store premised on an April 2023 trial. But while this solution prevents Google
 12 from removing Match’s apps from the Play Store by paying \$40 million into an escrow account, it also
 13 preserves components of Google’s anticompetitive conduct that continue to harm Match, which allows
 14 Google to continue collecting Match’s and its users’ data. (*See Match* Dkt. 26 ¶¶ 1, 2.c, 3, 5; MDL
 15 Dkt. 191 at 2.) Match continues to be in limbo throughout the pendency of this case, and Match must
 16 maintain and work to further enable GPB as a payment option and continues to pay supracompetitive
 17 monopoly rents in the form of a 15-30% “service fee” on every GPB transaction. (*Match* Dkt. 26 ¶ 3.)
 18 This has required Match to delay projects and incur substantial, additional, and otherwise unnecessary
 19 costs, time and effort to comply with Google’s illegal activity. (*See Foster* Decl. ¶ 74.) Match has also
 20 been forced to delay its development roadmap pending resolution of its claims at trial, while
 21 competitors get a leg up on Match by entering deals and promotions with Google that are not available
 22 to Match. (*See Android Developers Blog, Continuing Our Commitment to User Choice Billing* (Nov.
 23 10, 2022), available at [https://android-developers.googleblog.com/2022/11/continuing-our-](https://android-developers.googleblog.com/2022/11/continuing-our-commitment-to-user-choice-billing.html)
 24 [commitment-to-user-choice-billing.html](https://android-developers.googleblog.com/2022/11/continuing-our-commitment-to-user-choice-billing.html) (“Pilot participants can offer an additional billing system
 25 alongside Google Play’s billing system for their users in select countries. . . . We’re also excited
 26 that Bumble [a competitor of Match] has joined to partner with us in our user choice billing pilot.”);

27
 28 ⁴ Meanwhile, it took Google almost four weeks to produce to Match documents it had already
 produced to other Plaintiffs. (MDL Dkt. 309 at 2; MDL Dkt. 377 ¶ 2.)

1 *see also Match* Dkt. 26 ¶¶ 2.c, 3.) In the highly competitive dating app space, Match’s customers
 2 depend on the continuous improvement of their products. Without these improvements, Match could
 3 lose customer relationships and market share. (Foster Decl. ¶¶ 68–71.) Only a trial on the merits can
 4 address these ongoing harms, and Google retains the ability to terminate the stipulation on 60 days’
 5 notice. (*Match* Dkt. 26 ¶ 7(b).)

6 **III. Certification of the Consumer Class and Google’s Rule 23(f) Appeal**

7 On November 28, 2022, the Court certified a class in the consumer case under Rule 23(b)(3).
 8 (MDL Dkt. 383.) On February 27, 2023, the Ninth Circuit granted Google’s Rule 23(f) petition to
 9 appeal the Court’s class certification order. (Dkt. 10, No. 22-8014 (9th Cir. 2023).) In the appeal,
 10 Google challenges whether the Court applied the correct legal standard in determining whether
 11 individualized injury and damages questions will predominate over common class-wide questions, and
 12 particularly whether the consumers have an adequate model for showing that absent class members
 13 suffered injury and are entitled to damages. (Dkt. 1 at 1, No. 22-8014 (9th Cir. 2023).) Only the
 14 consumers are a party to the Rule 23(f) appeal.

15 On March 9, 2023, Google informed plaintiffs that it would seek a stay of the November 6,
 16 2023 trial dates in all cases in this MDL. All plaintiffs informed Google that they would oppose any
 17 delay of their trials, but that they would accommodate any proposal to bifurcate trial as to issues
 18 unaffected by the Rule 23(f) appeal. On March 16, 2023, Google moved to stay the trial in each action
 19 in this MDL pending its Rule 23(f) appeal. (MDL Dkt. 467.)

20 **LEGAL STANDARD**

21 Rule 23(f) appeals “do not automatically stay district court proceedings.” *Lambert v.*
 22 *Nutraceutical Corp.*, 870 F.3d 1170, 1180 (9th Cir. 2017), *rev’d on other grounds*, 139 S. Ct. 710
 23 (2019). To the contrary, even in class actions where a Rule 23(f) appeal is taken, the Ninth Circuit has
 24 stated that “stays will be infrequent”. *Id.* (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832,
 25 835 (7th Cir. 1999) (Easterbrook, J.)). To obtain a stay of trial pending appeal, the party seeking a stay
 26 “bears the burden of showing that the circumstances justify an exercise of judicial discretion”. *Flores*
 27 *v. Barr*, 977 F.3d 742, 745 (9th Cir. 2020) (citation and brackets omitted). That party must make this
 28 showing with respect to the case it is seeking to stay, and not merely with respect to the action subject

1 to appeal. “Rule 23(f) is drafted to avoid delay” and “should not unduly retard the pace of litigation.”
 2 *Blair*, 181 F.3d at 835. That is especially true where, as here, a defendant attempts to use a Rule 23(f)
 3 appeal in one case as a basis for staying different cases that are unaffected by the issues on appeal.

4 In deciding whether to grant a stay, courts consider: “(1) whether the stay applicant has made a
 5 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably
 6 injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties
 7 interested in the proceeding; and (4) where the public interest lies”. *Nken v. Holder*, 556 U.S. 418, 434
 8 (2009). “[I]f a stay applicant cannot show irreparable harm, a stay may not issue, regardless of the
 9 petitioner’s proof regarding the other stay factors.” *Doe v. Trump*, 957 F.3d 1050, 1061 (9th Cir.
 10 2020) (citation omitted, emphasis added); *see id.* at 1070 (lack of irreparable harm “is dispositive”);
 11 *Flores*, 977 F.3d at 749 (similar). The mere “possibility of irreparable injury fails to satisfy the second
 12 factor”. *Nken*, 556 U.S. at 434-45 (citation and quotation marks omitted). The party seeking a stay
 13 must show that irreparable harm is “probable, not merely possible”. *Trump*, 957 F.3d at 1059. It
 14 “cannot meet this burden by submitting conclusory factual assertions and speculative arguments”. *Id.*

15 Google contends that when deciding whether to issue a stay, some courts apply the factors from
 16 *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). But none of the cases Google cites involved
 17 stays pending Rule 23(f) appeals. As this Court has held, a motion to stay based on Rule 23(f) “is
 18 controlled by *Nken*”. *In re Facebook Biometric Info. Priv. Litig.*, 2018 WL 2412176, at *1 (N.D. Cal.
 19 May 29, 2018); *see also In re Packaged Seafood Prod. Antitrust Litig.*, 2020 WL 2745231, at *2 (S.D.
 20 Cal. May 27, 2020) (“Most district courts in this circuit apply the standard articulated in *Nken*.”). The
 21 Ninth Circuit does the same. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*,
 22 No. 19-565514, Dkt. 36 (9th Cir. Jun. 1, 2020) (denying motion “to stay proceedings in the class cases
 23 in the district court pending appeal *See Nken*”); *Williams v. Warner Music Group Corp.*, No. 20-
 24 55419, Dkt. 9 (9th Cir. Jun. 30, 2020) (citing authority that uses the same factors as *Nken*).⁵

25
 26 ⁵ Even if the Court applied the *Landis* factors, that analysis would support denying a stay. *See, e.g.,*
 27 *Owino v. CoreCivic, Inc.*, 2021 WL 3186500, at *2 (S.D. Cal. July 28, 2021) (rejecting argument to
 28 apply *Landis*, noting “the majority of district courts within the Ninth Circuit apply the *Nken* standard in
 assessing motions to stay pending a Rule 23(f) appeal”, and explaining that “the *Landis* factors
 essentially are subsumed within the *Nken* factors”). Those factors are “the hardship or inequity which

ARGUMENT

Google’s motion to further delay the jury trial should be denied. Epic and Match would suffer enormous prejudice and substantial injury if their trial-ready cases were stayed by at least a year, and potentially much longer, while completely unrelated consumer class certification issues are resolved through appeal and subsequent additional proceedings. In particular, without the injunctive relief that plaintiffs seek, Google’s anticompetitive conduct will continue, causing harm to developers, competing app distributors, competing payment providers and the public. On the other hand, Google has not shown—as it must—that it would be irreparably harmed if Epic’s and Match’s claims went to trial as currently scheduled. The sole argument Google can muster for staying Epic’s and Match’s cases is that Google wants a single trial with all plaintiffs, and that the Court previously indicated the same preference. Google’s preference for a joint trial after a Rule 23(f) appeal does not translate to irreparable harm or justify an indefinite and no doubt lengthy stay of Epic’s and Match’s cases, which Google does not and cannot argue will be affected by its Rule 23(f) appeal.⁶ Indeed, even a joint trial on antitrust issues common to Epic, Match, the States, and the consumers, can proceed as scheduled as outlined in the consumers’ Opposition. A stay of the trial therefore should be denied.

I. A Stay Would Cause Substantial Injury to Epic, Match and the Public.

Google fails to even address the specific prejudice to Epic or Match that would result from a stay of their trial date, instead devoting three cursory paragraphs to the harm that *all* plaintiffs would suffer if their cases were stayed. (Google Br. 9.) Google falls far short of meeting its burden.

Google baldly asserts that “Plaintiffs do not face any material harm or prejudice from a delay in the trial date”. (*Id.*) That is clearly wrong with respect to Epic and Match. As noted, Epic filed its lawsuit not to recover monetary damages (which it does not seek), but to bring an end to Google’s antitrust violations. Google’s restraints cause enormous and ongoing harm to Epic and the Android community, and they can be remedied only by an injunction. For that very reason, Epic has sought an

a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay”. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted).

⁶ Because Google fails to establish irreparable harm with respect to Epic’s or Match’s cases, this Opposition does not address the merits of Google’s Rule 23(f) appeal. *See Trump*, 957 F.3d at 1061.

1 expeditious trial schedule from the outset. (*See, e.g., Epic Dkt. 55* at 17 (“Time is of essence in this
 2 case The longer *Fortnite* remains off the Google Play Store, the greater the harm.”).) With
 3 respect to Match, a delay in trial irreparably harms Match’s market share. Because of the stipulation,
 4 Match has been forced to delay its own projects and priorities and instead incur substantial and
 5 otherwise unnecessary costs to maintain and further enable GPB as a payment option, which allows
 6 Google to continue collecting Match’s and its users’ data. (*See Match Dkt. 26* ¶¶ 1, 2.c, 3, 5.) In the
 7 highly competitive dating app space, these differences matter and contribute to a loss in market share
 8 for which Google will never be able to repay Match, while Google continues to make deals and
 9 promotions with Match’s competitors that are not available to Match. *See Am. Rena Int’l Corp. v. Sis-*
 10 *Joyce Int’l Co.*, 534 F. App’x 633, 636 (9th Cir. 2013) (finding irreparable harm based on “threatened
 11 loss of . . . customers”). Google will also be unable to compensate Match for the accompanying harm
 12 to its reputation and goodwill developed over more than a decade. (Foster Decl. ¶ 91; *Rent-A-Ctr., Inc.*
 13 *v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“[I]ntangible
 14 injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.”).)

15 Google brushes aside the delay it seeks—which could last years—as a “modest deferral”.
 16 (Google Br. 9.) That is a gross understatement. Since January 2019, the average Rule 23(f) appeal in
 17 the Ninth Circuit has taken approximately *16 months* from the date when the petition was granted until
 18 the date of the decision. Google attempts to elide this problem by claiming that it would seek an
 19 expedited appeal—but **only if** “this Court agree[s] to set trial for after the Ninth Circuit’s decision”.
 20 (*Id.*) Nothing stops Google from seeking an expedited appeal **now**; but it has not done so. And there is
 21 of course no guarantee the Ninth Circuit would grant a request to expedite. Even if it did, expedited
 22 Rule 23(f) appeals in the Ninth Circuit can still take **over a year** to resolve. *See, e.g., Moorer v.*
 23 *Stemgenex Medical Grp., Inc.*, No. 19-56500 (9th Cir.) (13 months). Moreover, the Rule 23
 24 proceedings may not end with a ruling from the Ninth Circuit. Google or the consumers could—and
 25 likely would—seek *en banc* review or *certiorari*. The Ninth Circuit could also remand for further
 26 Rule 23 proceedings, which would themselves take time and could lead to a subsequent Rule 23(f)
 27 petition and even more delay. Indeed, Google’s lead argument on appeal is that the Court misapplied
 28 the legal standard for class certification. (Rule 23(f) Pet. 1.) If Google prevails, a remand is far more

1 likely than outright reversal. As such, the opportunity to seek relief at trial could be delayed yet again
2 for *multiple years*—which is not a “modest deferral”. Epic’s and Match’s cases will be ready for trial
3 as currently scheduled in November 2023, and they should not be stalled by an appeal in a different
4 case that has no application whatsoever to their cases.

5 Courts in this Circuit have consistently recognized that “staying a suit seeking injunctive relief
6 against ongoing or future harm causes a more significant hardship against a plaintiff resisting a stay
7 than a suit for damages”. *Aldapa v. Fowler Packing Co., Inc.*, 2016 WL 6124216, at *1 (E.D. Cal.
8 Oct. 20, 2016); *see Lockyer*, 398 F.3d at 1112. Here, Google has illegally foreclosed competition in
9 the Android app distribution and in-app payment solutions markets, causing harm to Epic and Match in
10 their capacities as app developers and competitors in the markets for app distribution (in Epic’s case)
11 and in-app payment solutions (for Epic and Match) on Android. This harm is substantial and ongoing,
12 and it worsens every day that Epic and Match await trial. If Google’s motion is granted as to Epic and
13 Match, then both developers and other would-be competitors will continue to be foreclosed from these
14 markets, and the Android ecosystem (and its approximately 3 billion users) will be denied the benefits
15 of competition that the antitrust laws are designed to protect.

16 Google remarkably argues that because Epic and Match amended their complaints to add new
17 *per se* claims, they were not concerned with a previous delay and therefore would not be prejudiced by
18 the enormous delay that Google now seeks. (Google Br. 9.) In fact, *Google sought that previous*
19 *delay*, not Epic or Match. Google claimed it needed time to serve a supplemental expert report and
20 take third-party depositions. And yet, as noted above, that request proved to be a pretextual excuse for
21 delay. Google never served a supplemental report and has sought only one deposition (which it
22 purported to notice just last week, after filing its motion to stay). Google’s motion to stay Epic’s and
23 Match’s cases because of unrelated Rule 23 issues in a different case is more pretext for delay.

24 **II. Maintaining the November 2023 Trial Date Is in the Public Interest.**

25 These same reasons show why the public interest weighs heavily against a stay. Epic and
26 Match seek injunctive relief that would benefit the public—both similarly foreclosed developers and
27 app distributors, as well as users. The public interest favors enforcement of the antitrust laws. *See In*
28 *re Packaged Seafood*, 2020 WL 2745231, at *10 (denying stay of antitrust case and finding “[t]he

1 public has an interest in the efficient prosecution of antitrust actions and seeking to hold alleged
 2 corporate wrongdoers accountable, especially in the area of consumer products”); *Boardman v. Pac.*
 3 *Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (holding that an injunction against an acquisition
 4 that “could substantially lessen competition” was “in the public interest”, and the antitrust laws
 5 “recognize [competition] as *vital to the public interest*” (citation omitted, emphasis in original));
 6 *Williams v. Warner Music Grp. Corp.*, 2020 WL 2303099, at *3 (C.D. Cal. Apr. 14, 2020) (quoting
 7 Fed. R. Civ. P. 1) (stating with respect to a case that had been pending for two years, a stay “will also
 8 have the effect of delaying the resolution of this case. Accordingly, the Court finds that the public
 9 interest is better served by the prompt determination of this action than by a stay.”).

10 **III. Google Has Failed to Show Irreparable Injury.**

11 **A. Google Would Not Be Irreparably Harmed if Epic’s and Match’s Cases Went to** 12 **Trial as Scheduled.**

13 To prevail on its motion, Google must show that it will suffer probable irreparable injury if
 14 Epic’s and Match’s cases are tried on November 6, 2023. *Trump*, 957 F.3d at 1059. Despite seeking
 15 an extraordinary remedy—a stay of two cases based on an unrelated appeal in a different case—
 16 ***Google does not make a single argument for why it would be irreparably harmed if Epic’s or***
 17 ***Match’s cases went to trial on schedule.*** (See Google Br. 7-8 (focusing exclusively on harms from the
 18 consumer class action going to trial).)

19 Irreparable harm is a heavy burden. Ninth Circuit law is clear that “being required to defend a
 20 suit, without more”, does not warrant a stay. *Lockyer*, 398 F.3d at 1112; *Melnik v. Dzurenda*, 2020
 21 WL 1324993, at *2 (D. Nev. Mar. 20, 2020) (“[T]he mere fact of going to—and preparing for—trial
 22 does not constitute irreparable injury.”); *Pac. Cheese Co. v. Advanced Coil Tech., LLC*, 2019 WL
 23 1062369, at *4 (D. Nev. Mar. 6, 2019) (“[T]he Court is not persuaded by [the] argument that the mere
 24 fact of going to—and preparing for—trial constitutes irreparable injury.”). Indeed, the *Landis* case on
 25 which Google relies states that “[o]nly in rare circumstances will a litigant in one cause be compelled
 26 to stand aside while a litigant in another settles the rule of law that will define the rights of both”. 299
 27 U.S. at 255. Here, a stay is even less appropriate because the Ninth Circuit’s ruling will **not** define
 28 Epic’s or Match’s rights, and Google does not contend otherwise.

1 Google ignores this unambiguous authority, asserting with no basis that “[n]othing about the
2 Rule 23(f) appeal changes the efficiencies that are gained from a single trial”. (Google Br. 10.) That is
3 simply wrong. Forcing Epic and Match to wait years while an unrelated appeal is pending and further
4 proceedings take place would be *inefficient*. Contrary to Google’s assertions, getting these cases “trial
5 ready” in November 2023 would not mean the parties could just pick up where they left off when the
6 class certification issue is finally resolved in late 2024 or beyond. Epic and Match are seeking
7 forward-looking relief; by the time class certification is resolved, Google will no doubt argue that
8 circumstances have changed; that additional “refresh” discovery is needed; and that Epic and Match
9 cannot seek forward-looking relief based on discovery that is two, three or more years old.
10 Conversely, should a jury find for Epic and Match in November 2023, that outcome would greatly
11 simplify any future trial of the consumers’ claims. Thus, while the interest of efficiency may have
12 previously supported a unified trial, circumstances have materially changed, and efficiency and
13 fairness would now be served by proceeding with Epic’s and Match’s cases on the current schedule.

14 But in any event, the showing Google must make is not of “efficiency”, but of “irreparable
15 injury”. Google does not cite a single case holding that being denied a single consolidated trial
16 constitutes irreparable injury, or that a defendant has a right to a single consolidated trial across
17 separate cases simply because multiple plaintiffs challenge similar conduct. In fact, even if a single
18 trial were untenable here, there is nothing unusual—let alone irreparably injurious—about requiring a
19 defendant to face separate trials in separate cases under these circumstances.⁷ That is exactly what
20 Judge Gonzalez Rogers required in connection with Epic’s recent case against Apple.⁸ To take another
21 example, the defendant in *In re Packaged Seafood Products Antitrust Litigation* sought to stay all cases
22 in an MDL pending the resolution of a Rule 23(f) appeal. 2020 WL 2745231 (S.D. Cal. 2020). As
23

24 ⁷ Indeed, that is what every MDL contemplates; MDL coordination is for pretrial purposes, not trial.

25 ⁸ In August 2020, Epic filed a case in this district challenging Apple’s anticompetitive app store
26 practices, which was related to a consumer class action that challenged similar conduct. When it
27 became apparent that Epic was prepared to go to trial significantly sooner than the consumers, Judge
28 Gonzalez Rogers ordered a May 2021 trial for Epic’s case, while the consumer case proceeded on a
slower timeline. *See Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, Dkt. 116 (N.D. Cal.
2020). The consumer class action against Apple *still* has not been tried or even set for trial. *See*
Dkt. 640, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-6714-YGR (N.D. Cal. Apr. 21, 2022).

1 here, the MDL included individual plaintiffs who were “not parties to any of the class actions or the
2 pending appeal”. *Id.* at *9. The district court found “prejudice from the delay” to the individual
3 plaintiffs, *id.*, and further found harm to the public through its “interest in the efficient prosecution of
4 antitrust actions and seeking to hold alleged corporate wrongdoers accountable”, *id.* at *10. It denied
5 the defendant’s motion for a stay (there, even as to the class action claims). *Id.* The Ninth Circuit
6 denied a stay motion as well. *See Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods*,
7 19-56514, Dkt. 36 (9th Cir. 2020) (citing *Nken*).

8 Google nonetheless claims that a single trial at some unspecified date in the future with all
9 plaintiffs in the MDL would be the most “efficient way for the jury to sort out [supposedly] conflicting
10 theories of injury and damages” among Epic and Match on the one hand, and the consumers and States
11 on the other. (Google Br. 11.) That argument falls flat as to Epic and Match, because their theories of
12 injury—generally, and specifically in their capacity as competitors to Google—do not conflict with
13 those of any other plaintiff. The argument also rings hollow given that Google itself has already
14 *settled* the claims of one class of developers that was part of this MDL prior to settlement, with no
15 concurrent adjudication of claims from developers outside the class (like Epic and Match) or of
16 consumers. In any event, the potential need to adjudicate damages to different plaintiffs separately is
17 not irreparable harm, but the simple result of Google’s actions harming many stakeholders—and the
18 virtual impossibility of adjudicating the harms to all stakeholders in one fell swoop. Indeed, Google’s
19 suggestion that a “single trial” would provide some universal adjudication of its liabilities is illusory;
20 nothing would prevent other developers (other than members of the settling class), other competing
21 app store owners or other competing payment solution providers from challenging Google’s conduct in
22 new lawsuits that could be filed before or after the “single trial” Google now seeks.

23 Google also surmises that it would be “efficient” to have plaintiffs from both sides of a two-
24 sided market in the same trial. (Google Br. 11.) But it points to no authority supporting this view or
25 examples of such joint trials. To the contrary, several prominent trials involving two-sided markets—
26 including *Epic v. Apple*—involved only one plaintiff on one side of the market. *See US Airways, Inc.*
27 *v. Sabre Holding Corp.*, No. 11-cv-2725, Dkt. 1209 (S.D.N.Y. May 25, 2022) (jury trial with one
28 plaintiff, an airline, that challenged conduct in a two-sided market that includes airlines and travel

agents); *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021).

Finally, Google claims that it “will incur substantial, unrecoverable time, money, and resources” if the *consumers*’ “case went to trial and the class were later decertified”. (Google Br. 7.) Google does not claim that this argument presents a basis for staying Epic’s or Match’s cases, nor could it. Epic and Match are not part of the Rule 23(f) appeal, and their cases will go to trial no matter how that appeal is resolved. Moreover, the law is clear that “monetary injury is not normally considered irreparable”. *Trump*, 957 F.3d at 1060 (citation omitted); see *In re Facebook Biometric Info*, 2018 WL 2412176, at *2 (“the ordinary costs of trying a case” do not justify a stay). The rare cases where courts credit monetary injury are those where the moving party faces a “threat of ‘extinction’” to its business. See *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022). That is not the case for Google.⁹ (See 4/1/2021 Tr. 22:2-4 (“The Court: I’m not really swayed by the idea that Google is resource constrained.”).) Google thus has not articulated a cognizable, non-conclusory theory of irreparable harm, and its Motion should be denied as to Epic and Match.

B. The Rule 23(f) Appeal Will Have No Effect on Epic’s or Match’s Cases.

Google has not argued that the Rule 23(f) appeal could impact Epic’s or Match’s cases in any way. Google cannot do so—its appeal has nothing to do with Epic’s or Match’s claims.

On a Rule 23(f) appeal, the *only* issues the Ninth Circuit may consider are those that are strictly necessary to resolving class certification issues. “Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (“Rule 23 grants courts no license to engage in free-ranging merits inquiries.”). In fact, “merits inquiries unrelated to certification *exceed* [the Ninth Circuit’s] *limited* Rule 23(f) *jurisdiction* We must police the bounds of our jurisdiction vigorously here as elsewhere, and so may not ourselves venture into merits issues unnecessary to the Rule 23 issue before us.” *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014) (emphasis added).

Google’s Rule 23(f) appeal has nothing to do with the merits of Epic’s or Match’s cases.

⁹ In fact, it is Google’s conduct that threatens developers’ businesses.

1 Google admits that its “petition focused on the extent to which the class includes—and consumer
2 plaintiffs’ expert’s model accounts for—uninjured class members”, and contends that “the Ninth
3 Circuit will necessarily scrutinize the consumer class’s damages and injury model that formed the basis
4 of their class certification motion”. (Google Br. 4.) More specifically, Google’s appeal focuses on a
5 theory that even if developers like Epic and Match were injured, that does not automatically mean that
6 all consumers were injured, because developers may not have “passed through” the supracompetitive
7 costs to consumers. (*See* Rule 23(f) Pet. 6.) In Google’s view, “most consumers were not injured
8 because most developers *would not* have charged consumers less money”, meaning developers alone
9 suffered injury because they assumed the entire cost of Google’s fee. (*Id.* at 9 (emphasis in original).)

10 Whether the consumers have established that they can prove pass-through using a class-wide
11 methodology is irrelevant to Epic’s and Match’s cases. Epic and Match are not consumers; they do not
12 rely on a pass-through model to show injury; they did not retain the consumers’ expert and do not rely
13 on his opinion; they are individual plaintiffs without class claims and do not need to prove injury to
14 absent class members; and Epic does not seek damages. Even if the Ninth Circuit agrees with every
15 argument Google makes and holds that the consumers’ pass-through theory is invalid, that decision
16 will have no effect on Epic’s or Match’s cases—let alone an effect so probable and severe that Google
17 would be irreparably harmed if Epic and Match went to trial while the Rule 23(f) appeal is pending.

18 Epic’s and Match’s claims should be tried in full on November 6, 2023 regardless of whether a
19 stay is warranted in the other plaintiffs’ cases. It is also entirely practicable for all plaintiffs to
20 participate in that trial, including any claims of the consumers and States that are not affected by the
21 Rule 23(f) appeal. The States’ and consumers’ briefs have presented efficient plans by which their
22 claims could be bifurcated so that they could try the issues they have in common with Epic and Match
23 that are not affected by the Rule 23(f) appeal in November 2023—and then, to the extent necessary, try
24 the remaining, consumer- and State-specific issues after the issues on appeal are finally resolved.

25 CONCLUSION

26 Google’s motion to stay should be denied as to Epic and Match, and the Court should maintain
27 the November 6, 2023 date for a jury trial of Epic’s and Match’s claims and any claims of the
28 consumers and States that are not affected by the Rule 23(f) appeal.

1 Dated: March 30, 2023

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I, Gary A. Bornstein, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(h)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

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