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6 **IN THE COMPETITION**  
7 **APPEAL**  
8 **TRIBUNAL**  
9

Case No:1673/7/7/24, 1408/7/7/22, 1378/5/7/20

10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP

13 Monday 23<sup>rd</sup> June 2025

14  
15 Before:  
16 Bridget Lucas KC

17  
18 (Sitting as a Tribunal in England and Wales)

19  
20 BETWEEN:

21  
22 **Professor Barry Rodger**

**Class Representative**

23  
24 - And -

25  
26 **Elizabeth Coll**

**Class Representative**

27  
28 - And -

29  
30 **Epic Games, Inc. & Others**

**Claimants**

31  
32 - V -

33  
34 **Alphabet Inc. & Others**  
35 **Google LLC & Others**

**Defendants**

36  
37 **A P P E A R A N C E S**  
38

39  
40 David Scannell KC and Hugh Whelan on behalf of Epic Games, Inc & Others (Instructed by  
41 Norton Rose Fulbright LLP)

42  
43 Kassie Smith KC and Jack Williamson on behalf of the Defendants (Instructed by RPC)

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(10.30 am)

Housekeeping

THE CHAIR: Good morning. I will just read the normal announcement. Some of you are joining us on live stream on our website so I must start, therefore, with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

MR SCANNELL: Good morning, Madam. Before I begin --

THE CHAIR: Good morning, Mr Scannell. I see Ms Smith is also standing up, which --

MR SCANNELL: She is. There are some issues --

THE CHAIR: If there are disputes about who gets to start --

MS SMITH: Well, (overspeaking) --

MR SCANNELL: We are the Claimants and so assumed that, in the conventional manner, we would go first.

THE CHAIR: Well, I wanted to have a word about timing to start with, anyway. We have one day today; there's no potential for running over. I was hoping you are going to come in and say, "Agreement had broken out between you", but plainly that's not the case. Do we think we'll finish today? I am not saying that may be a reason for not starting. I am just wondering how you manage the day.

MR SCANNELL: I mean, there is certainly a great deal to get through, madam Chair.

MS SMITH: Yes.

MR SCANNELL: There are a large number of disclosure requests from Epic. There is, actually, when you consider the breakdowns, a large number from Google as well. All I can suggest in relation to that is that we do our best to get through the most of

1 requests. Now, there may be moments during the day when you intervene and  
2 suggest that we should leave the room, perhaps for ten minutes, and see if we can  
3 hammer out what remains between us. But subject to that, I am afraid we are just  
4 going to have to power through.

5 THE CHAIR: Okay, so my next question is going to be: are there any timing issues or  
6 priorities? I am afraid I don't have the timetable for trial in my head. Are there any of  
7 the disclosure requests particularly pertinent to a stage that has to be achieved in the  
8 next few weeks?

9 MS SMITH: I don't think so, my Lady. The date for the Rodger disclosure under the  
10 consolidated order is 5 September, outstanding witness statements in October and  
11 expert reports in December. So certainly we want to draw a very firm line under  
12 disclosure in the consolidated proceedings by the beginning of September. As to  
13 timing today --

14 THE CHAIR: So there's no need to particularly prioritise one or two requests because  
15 they're needed for a particular purpose?

16 MS SMITH: My Lady, all I would say in that regard is that our requests -- there are  
17 only four outstanding. We started with six. We've managed to agree two of those and  
18 Epic has agreed disclosure under two of them, and we've agreed to not to pursue part  
19 of one. So there's only four outstanding requests. They are all relating to issues with  
20 which your Ladyship is already very familiar, because they are requests for resolutions  
21 of issues outstanding from the last time I was in front of you in December of last year  
22 and the January 2025 order. In my submission, we should be able to deal with those  
23 outstanding requests relatively quickly because I won't have to take you through the  
24 background to them. That was the basis upon which I proposed to my learned friend  
25 this morning that we go first. I think we should be able to deal with our requests  
26 relatively quickly, but obviously we're in your Ladyship's hands in that regard.

1 THE CHAIR: I have to say, I think there is a certain degree of sense in Google going  
2 first, only because I think if I look at it logically in my own head, timing wise, it does  
3 seem to me that these are outstanding issues that were put into abeyance in certain  
4 respects from the last hearing, and it would be sensible to get those resolved. And  
5 Epic's requests, I think, they're all new, and --

6 MR SCANNELL: They're not new, but not in any sense, less pertinent and important  
7 for that.

8 THE CHAIR: No. And I'm certainly not suggesting that. We just have to work out  
9 which one's going to -- who's going to start and I think it probably is best if Ms Smith  
10 starts.

11

12 Submissions by MS SMITH

13 MS SMITH: Thank you, my Lady. Can I ask you, then, to start perhaps by turning  
14 up -- I think it's the most efficient way of dealing with it -- the summary that we have  
15 produced. You may have picked up, it's not been agreed by Epic but it has been  
16 produced by us, a summary of the Redfern Schedule rather than ploughing through  
17 the very detailed Redfern schedules. I'll only take you to the detailed Redfern  
18 Schedule if I need to. The summary is in your Supplemental Bundle 1 and it starts on  
19 page 19 of the Supplemental Bundle, I hope you have. Do you have all the bundles  
20 electronically, madam?

21 THE CHAIR: I do have them all electronically. I'm just trying -- it's not an open tab for  
22 me, which doesn't mean it's not here. Oh yes, I have two supplementals, is that right?

23 MS SMITH: Yes, it's the first supplemental. The first supplemental is document  
24 (overspeaking) --

25 THE CHAIR: Supplemental Bundle 1, yes.

26 MS SMITH: And it starts on SB1.

1 THE CHAIR: Yes.

2 MS SMITH: Page 19. Sorry, it starts on 17. So as I've said, there are only four  
3 outstanding requests from Google. They have been referred to as G1, G3, G4, and  
4 G5. Now, I've set out the background to our outstanding requests in a little detail in  
5 our skeleton. I'm not going to repeat that, the Tribunal is familiar with it. But I would  
6 stress four points. I'll make them at a high level now and come back to them in detail  
7 if I need to when I address the outstanding issues.

8 First, the disclosure sought by Google relates to two categories of disclosure, which  
9 the Tribunal has already decided are relevant to pleaded issues in the case and has  
10 already decided disclosure is necessary in their regard. You will recall, madam, those  
11 are category A, "The profitability of the Epic Games Store", or EGS, and category B,  
12 "Epic's strategy for distribution of its apps and of its Games Store by means other than  
13 Google Play", including the launch of EGS on Android and Epic's use of other  
14 distribution channels.

15 Google's request G5 picks back up category A -- that's the profitability of Epic Games  
16 Store -- and Google's requests G1, G3 and G4 relate to category B -- that's the app  
17 distribution channels.

18 You'll recall, madam, that those two categories of disclosure are relevant, respectively,  
19 to Epic's unfair and excessive pricing claim, where it argues Google should be required  
20 by injunction to reduce its commission rates to equivalent levels charged by the Epic  
21 Games Store -- that's zero and 12 per cent -- and Epic's essential facilities case,  
22 whereby it argues that the Play Store is an essential facility and there are no other  
23 feasible distribution channels available to it. So that's my first point. You've already  
24 decided, madam, in my submission, that disclosure is relevant and necessary as  
25 regards these categories.

26 The second point is that having ordered specific limited disclosure as regards those

1 two categories in your order of 10 January, you left it open and in fact, specifically  
2 ordered that Google may come back to the Tribunal should that disclosure be  
3 inadequate. And you set out an order for that in a timetable for that, in your order of  
4 23 May.

5 Now, that leads to my third point, which is that unfortunately Google has found what  
6 are, in its view, serious inadequacies and gaps in the disclosure made by Epic in this  
7 regard. And we've set them out in detail in our detailed Redfern Schedule.

8 But the fourth and final point is this: that in addition to those inadequacies and gaps,  
9 the need for further disclosure from Epic has been put into sharp focus by two  
10 particular developments since the Tribunal made its order in January. And those are  
11 the following: that as regards category A disclosure -- that's the profitability of the Epic  
12 Games Store -- on 7 March of this year, Epic inadvertently disclosed what is described  
13 in paragraph 53 of its skeleton as a document containing financial forecasts. We say  
14 that document is inconsistent with Epic's pleaded case to the effect that the Games  
15 Store will become profitable between 2026 and 2028.

16 Epic's position is that it disclosed that document inadvertently. It didn't need to  
17 disclose the document under the terms of the 10 January order, because it didn't rely  
18 on that particular document in order to plead that EGS will be profitable between 2026  
19 and 2028. It relied upon different documents in that regard.

20 And we say it's both inappropriate and self-serving for Epic to cherry pick documents  
21 which it perceives to be favourable to its case to rely upon and to disclose only those  
22 documents. And such an approach, we say, is certainly not helpful to the Tribunal.

23 I'll return to that point but by way of general introduction, this approach to disclosure  
24 by Epic, which we say is withholding from disclosure relevant documents of which it's  
25 aware, should cause concern as to its general approach to disclosure so far.

26 The second issue relates to category B disclosure -- that's the distribution channels

1 for Epic's apps and app store. Epic produced the second witness statement of  
2 Mr Steven Allison on 5 March, which we'll note is at C, tab 16.

3 THE CHAIR: I haven't looked at that. Do I need to read the (overspeaking) --

4 MS SMITH: I will take you back to the detail insofar as I need to, but just by way of  
5 general introduction, this witness statement was produced after your Ladyship's  
6 previous order on 5 March 2025, and I will show you that Mr Allison gives updating  
7 evidence on the launch of EGS on Android and of recent discussions between his  
8 team and third-party developers, OEMs and carriers as regards the distribution of the  
9 Epic Games Store on Android and via other distribution channels as a PC store.

10 Now, Epic's solicitors have confirmed in open correspondence, perhaps surprisingly,  
11 that, and I quote:

12 "Mr Allison did not refer to and was not referred to any documents for the purpose of  
13 providing that evidence."

14 For your note, madam, that's D, tab 61, page 214.

15 Now, on 10 June, Mr Allison made a supplementary witness statement -- I'll take you  
16 to that, if necessary but for your note, it's at Bundle C, tab 17 -- which contained  
17 various corrections, significant corrections, to the evidence he'd previously given in his  
18 second witness statement as regards the distribution of the Epic Games Store on  
19 Android. Those corrections were made because, and I quote:

20 "During further discussions with members of my team and the Epic partnerships team  
21 that occurred after Allison 2 was finalised, I realised that my understanding of the  
22 details of certain topics was not fully accurate, so I corrected my answers to fix those  
23 inaccuracies."

24 For your note, my Lady, that's Bundle C, tab 17, page 432.

25 Now, in those circumstances, madam, we say that it's essential that Epic provides  
26 adequate disclosure of documents which go to its strategy for its launch of EGS on

1 mobile, its distribution of EGS and its apps via other means, and discussions with third  
2 parties such as developers, OEMs and carriers in these regards. Proper disclosure  
3 on those matters is required to enable Google and, perhaps more importantly the  
4 Tribunal, to test the evidence of Epic's witnesses, including in particular Mr Allison, on  
5 those issues.

6 So having set the scene by way of introduction, can I move on to the specific requests  
7 and I'll deal with them as I indicated, under two headings.

8 First request G5, which is for financial forecasts for EGS and related material. Can  
9 I take you first to the inadvertently disclosed document. I am not going to refer to any  
10 of it. I'm simply going to ask your Ladyship to look at it because it is confidential.

11 THE CHAIR: Yes.

12 MS SMITH: I'm not going to say anything about it save asking your Ladyship to look  
13 at it. It's at Bundle A, tab 4, pages 95 to 96.

14 THE CHAIR: Yes.

15 MS SMITH: You'll see the whole document is marked as confidential but if I could ask  
16 your Ladyship to look at page 96.

17 THE CHAIR: Yes.

18 MS SMITH: The top half of the page. And if your Ladyship casts your eye over that  
19 material, say nothing more than that, your Ladyship will be able to see why -- sorry,  
20 madam, you'll be able to see why we say this document is adverse to Epic's pleaded  
21 case that EGS will be profitable by 2026 to 2028.

22 THE CHAIR: Yes.

23 MS SMITH: So our request for further disclosure, G5, perhaps most easily dealt with,  
24 madam, by looking at the Summary Redfern Schedule, which sets out the request in  
25 its most recently revised form. That's Supplemental Bundle 1, page 20.

26 THE CHAIR: Yes.

1 MS SMITH: And you'll see that request G5, (a) through to (f), on page 20 of the  
2 Supplemental Bundle 1. And you'll also see that request G5 is opposed in its entirety  
3 by Epic.

4 THE CHAIR: Yes.

5 MS SMITH: So, the request G5 is resisted by Epic, in summary, on the following  
6 bases. They say such disclosure, now sought under G5, was not required under the  
7 terms of the Tribunal's order of 10 January. They say it's not relevant and they say  
8 there has been ample prior disclosure of financial data regarding Epic Games Store,  
9 which is more than sufficient for the purpose of assessing the Epic Games Store  
10 profitability.

11 And in response to that, I make the following points. As regards the first point, matters  
12 have moved on since, madam, you made your order in January. If I could take you  
13 back to your order, which is at F, tab 7, page 71.

14 THE CHAIR: Yes.

15 MS SMITH: You'll recall, madam, in paragraph 4 of that order what you ordered.

16 THE CHAIR: I think that's crediting me for a better recollection of the detail, but yes.

17 MS SMITH: Yes. You'll recall, madam, that --

18 THE CHAIR: Yes.

19 MS SMITH: -- well, what I want to say, simply, is that paragraph 4, as you'll see, is  
20 perhaps deliberately narrowly drawn.

21 THE CHAIR: Yes.

22 MS SMITH: All it required was Epic to disclose all documents and financial data,  
23 including forecasts and assumptions, relied upon for the purpose of its pleading --

24 THE CHAIR: Yes.

25 MS SMITH: -- the EGS will become profitable by 2026/2028.

26 THE CHAIR: Yes.

1 MS SMITH: The position is we're now told by Epic that it did not rely upon the  
2 inadvertently disclosed document for the purposes of its pleading, but instead relied  
3 on other documents, and it has disclosed them. Of course, we -- Google -- did not  
4 know that when we agreed to the terms of the January order, paragraph 4.

5 But in any event, saying, "Well, we weren't required to disclose it under the terms of  
6 that narrowly drawn paragraph of that order", we say is not good enough. Regardless  
7 of the precise terms of the January order, whether EGS will become profitable in the  
8 future is clearly relevant to the issues in the case. That's particularly so, madam, you  
9 may recall, given the statements of the US District Court in the Epic Google  
10 proceedings in the US, which are cited at paragraph 22 of my skeleton. I don't need  
11 to take you back to them unless you want me to.

12 THE CHAIR: No, I'm all right.

13 MS SMITH: But you'll recall, madam, that the court there found that Epic's commission  
14 rate -- its 12 per cent commission rate -- was, and I quote:

15 "A 'below-cost price', which 'could be viewed as merely a litigation tactic'".

16 For your note, madam, that's the Authority's Bundle, tab 1, page 19 and page 78.

17 In those circumstances, Google needs disclosure to enable it properly to test Epic's  
18 case as to when the Game Store will become profitable, if ever, and to test the  
19 evidence of Epic's witnesses, including Mr Allison, who also gives evidence on when,  
20 in his view, EGS will become profitable.

21 That's Allison, paragraph 10(d). If I can just take you to that, madam, it's in Bundle C,  
22 tab 16. Mr Allison, second witness statement. If I can take you for these purposes, the  
23 profitability of EGS, to what he says on page 417 of the Bundle, paragraph 10(d).  
24 I won't read it out, but as to what he says about the expected future profitability of  
25 EGS.

26 THE CHAIR: Yes.

1 MS SMITH: You'll recall, madam, as I said, in correspondence, Epic solicitors  
2 confirmed he hadn't had reference to any documents in preparing his witness  
3 statements. So of course we need to be able to put to him documents going to his  
4 evidence on the future profitability -- which are relevant to his evidence on the future  
5 profitability of Epic Games Store.

6 So the inadvertently disclosed document, as I will call it, demonstrates that other  
7 relevant and material forecasts as to EGS's future profitability exist over and above  
8 the documents already disclosed by Epic on 20 December 2024, and we seek an  
9 order for such further disclosure.

10 The details of that order that we seek are set out -- if I can take you back to SB1,  
11 page 20, you'll see subparagraphs (a) through to (f). To illustrate the first of those  
12 requests at (a), if I could ask you to look at the document itself -- which you'll recall is  
13 in Bundle A, page 95 -- you'll see within the document references that indicate there  
14 must be other material relevant to this document within the possession of Epic. That's  
15 on page A95, just next to the top hole punch.

16 THE CHAIR: Yes. Sorry, the terms of the order you're seeking -- where do I find  
17 those?

18 MS SMITH: Those are set out -- well, they're in the Summary Bundle 1, page 20.

19 THE CHAIR: Supplemental Bundle 1.

20 MS SMITH: Supplemental Bundle 1, page 20, G5.

21 THE CHAIR: Okay.

22 MS SMITH: Would you like a hard copy of the Supplemental Bundle? We've got it in  
23 A3. It may be easier to read.

24 THE CHAIR: Yes, that would be helpful.

25 MS SMITH: It's just a Summary Bundle. Sorry, it's just a summary (overspeaking).

26 THE CHAIR: Oh, don't worry about that, then. I've got that. I have that already printed

1 out. Thank you.

2 MS SMITH: Thank you, madam.

3 THE CHAIR: Okay. Yes.

4 MS SMITH: My Lady, you'll see --

5 THE CHAIR: As amended in the left-hand column.

6 MS SMITH: Yes.

7 THE CHAIR: Yes.

8 MS SMITH: In fact, I don't think this one has been amended, because there's been  
9 no movement either way from Epic on this request. The highlights are confidentiality  
10 highlighting.  
11 Paragraphs (a) through to (d) relate to material as to the forecasts, as to profitability.  
12 (e) and (f) arise -- madam, I'll try to explain this without breaching confidentiality -- (e)  
13 to (f) arise from, if you look back at the inadvertently disclosed document, page 95 --

14 THE CHAIR: Yes.

15 MS SMITH: -- you'll see that there are comparisons with other entities, red in the  
16 document. Highlighted red in the document.

17 THE CHAIR: Yes.

18 MS SMITH: The requests at subparagraphs (e) and (f) arise from that aspect of the  
19 document. (Pause)

20 THE CHAIR: Yes. I mean there is an issue here, isn't there? As I understand it, Epic  
21 say, "Well, this doesn't actually say what you think it says". In relation to, for example,  
22 subparagraph (b), where you're seeking other forecasts prepared by Epic ...

23 MS SMITH: Yes.

24 THE CHAIR: I mean, there is a quite a problem there, isn't there, because forecasts  
25 are prepared for so many different purposes and what you really need to see is the  
26 realistic forecast, not the worst case or the stratospheric case. You need to

1 understand what the forecasting is that the company is working on the basis of and  
2 working towards.

3 MS SMITH: My Lady, yes. At the moment we have two documents and the only basis  
4 from Epic -- the only basis upon which those have been disclosed are that they have  
5 been disclosed on the basis that they support their pleaded case that it will become  
6 profitable between 2026 and 2028.

7 Mr Allison doesn't say anything about the documents or forecasting internally. He  
8 doesn't say, "These are our best case scenario. These are our worst case scenario".  
9 All we know is that they support the pleaded case. We need to see documents that  
10 do not support -- or potentially do not support -- the pleaded case and be able to put  
11 them to Epic's witnesses to be able to understand what those forecasts show, for what  
12 purposes they were prepared, what assumptions are taken into account, what  
13 assumptions are not taken into account, what material is taken into account in  
14 preparing those forecasts and what are not, so that the Tribunal can reach the  
15 conclusion, and it's really a question for the Tribunal as to which are the most realistic  
16 forecasts as to when EGS will become profitable.

17 We say that the Tribunal cannot reach that conclusion without looking at the other  
18 forecasts, not just the two that possibly present the most optimistic case, which led to  
19 the pleading. We don't know. We do know there are other materials produced,  
20 because we have seen them, or at least we have seen one of them. We want (a) the  
21 other materials that go to this particular document that was inadvertently disclosed,  
22 and we want other forecasts, so that the Tribunal has before it a full and proper picture  
23 of Epic's forecasting and views as to the future profitability of EGS, so that the Tribunal  
24 can reach its own conclusion as to what the most realistic forecasts are.

25 I would also make the point, my Lady, that Google has produced a number of its  
26 forecasts, different forecasts of its costs, its profitability and its financial data produced

1 for various different purposes. We have not cherry-picked in the way that we suggest  
2 Epic has cherry-picked on the basis of the narrow drawing of the previous paragraph 4  
3 of the January order.

4 THE CHAIR: Yes.

5 MS SMITH: So, my Lady, I don't know whether you want me to go on to the other -- the  
6 second category of disclosure that we seek, which is in G1 to 4, now, or to deal up  
7 front with G5.

8 THE CHAIR: I think it will assist my brain if we deal with each one in turn.

9

10 Submissions by MR SCANNELL

11 MR SCANNELL: Madam Chair, before I begin, on the assumption that I would  
12 address you this morning before my learned friend, I had intended to make a number  
13 of preliminary remarks. If you will indulge me, I would like to make one of the  
14 preliminary remarks that I was going to make before my learned friend stood up.

15 THE CHAIR: Mr Scannell, I wouldn't stop you if you wanted to make all of your  
16 preliminary remarks, because I completely understand that you probably want to put  
17 all of these applications in context.

18 MR SCANNELL: The second of my preliminary remarks pertains primarily to Epic's  
19 requests for disclosure. I don't want to confuse the Tribunal at that point, but I will  
20 make it before I address you on our disclosure request.

21 The first point, that I wanted to make this morning was that I was not going to go  
22 through all of the correspondence. There isn't time to do that. But we do make  
23 a number of introductory remarks in our skeleton argument for today's hearing, and  
24 those are, in the main, designed to illustrate the frustration that Epic has felt as to the  
25 overall approach taken to disclosure by Google. That approach, in the main, has been  
26 uncooperative and unhelpful, and I'm afraid that it has continued all the way up to this

1 hearing.

2 Under the consent order that the Tribunal made last month, the steps to be taken by  
3 the parties in advance of this hearing were clearly set out. Under that consent order,  
4 Google agreed to file a consolidated Redfern before the parties exchanged skeleton  
5 arguments for this hearing. What Google actually did was it filed each party's reply  
6 Redfern Schedule back to back -- with its own going first -- before the skeleton  
7 arguments, and then after the skeleton arguments were exchanged, it purported to file  
8 the Summary Redfern Schedule at which my learned friend has just referred. It did  
9 that without giving Epic any meaningful opportunity to see it or to comment on it.

10 My instructing solicitors, Norton Rose Fulbright, have reviewed that summary  
11 document and they're satisfied that it is neither accurate nor neutral. It doesn't give  
12 an accurate account of the outstanding arguments before you. On that basis,  
13 Norton Rose requested in the strongest possible terms that it not be filed. That request  
14 has been ignored, and all of that has been the subject of correspondence. I'm not  
15 going to trouble you with that, but I will not be referring to the Google Summary  
16 Redfern in my remarks. That's the first of the points I was going to make this morning,  
17 and I think that is important context for you when you're considering the application.

18 THE CHAIR: If it's any comfort to you, I did realise that this was controversial from  
19 some correspondence received by the Tribunal, so my preparation was done on the  
20 basis of the Redfern Schedule itself. I've referred to the summary for the first time  
21 when Ms Smith has referred to it in court. I understand that you say that's her  
22 summary and it may not accurately reflect the position.

23 MR SCANNELL: I'm very grateful.

24 Could I then turn to request G5. There are two aspects of this request that I want to  
25 address. The first is the suggestion that Google makes in the Redfern Schedule, and  
26 in its skeleton argument, that Epic has withheld or is withholding the disclosure that it

1 is required to give. The second is the implication that Epic is knowingly withholding  
2 documents, which it knows to be highly relevant and useful and on that basis,  
3 disclosure should be ordered, even if it hasn't been ordered before.

4 As to the first of those points, there is in fact no truth whatsoever in the suggestion that  
5 Epic or its legal advisers have failed in any respect to comply with the January order.  
6 Can we turn up that order, because a large swathe of it has been ignored by my  
7 learned friend? Again, it's at F7, page 71.

8 At paragraph 1, Epic was ordered to "file a witness statement which addressed  
9 financial data that it holds at the general ledger level or equivalent in relation to  
10 allocated and unallocated costs of the Epic Games Store". [as read]

11 Then, at paragraph 2, it was required to "disclose financial data Epic holds at the  
12 general ledger level, as described in the witness statement in paragraph 1, in relation  
13 to allocated and unallocated costs of the EGS". [as read]

14 Then, at paragraph 3, "to the extent not covered by the existing disclosure or  
15 disclosure referred to at (2) above, Epic shall provide details of the costs of  
16 development and maintenance of the Epic Games Store". [as read]

17 THE CHAIR: Yes.

18 MR SCANNELL: Now, as to the first of those paragraphs, Epic filed that witness  
19 statement on 13 December. That's the second witness statement of Mr Boyle. It's in  
20 the Bundles at C14. There's no need to turn that up, but it's replete with highly  
21 confidential information relating to the financial state of the Epic Games Store. All of  
22 the disclosure in paragraph 2 and paragraph 3 has been given, and I understand that  
23 to be common ground. It's very important to appreciate, at the outset, when  
24 considering G5, that the material that Epic has disclosed, pursuant to paragraphs 1 to  
25 3 of the January order, has been voluminous and comprehensive. When combined  
26 with all of the other financial data that Epic has given, which we've set out at page 87

1 to 89 of the Redfern, it amounts to approximately 2.25 million documents. Now, that's  
2 an extraordinary volume of documentation for anybody to disclose, let alone  
3 a Claimant.

4 Then at paragraph 4 of the order, which is the sole paragraph that my learned friend  
5 went to, Epic was asked to identify the documents that it had relied on in making the  
6 plea at 13(d) of its amended reply. Epic had relied on two documents in that respect.  
7 As to what they are, that is set out in a letter that Norton Rose wrote to RPC, and that's  
8 in the D Bundle at tab 60, if you could turn that up, please. Page 209. (Pause)

9 THE CHAIR: Yes. Yes, I have that.

10 MR SCANNELL: I'm conscious of the need not to infringe the confidentiality  
11 requirements, so it's better for the Tribunal to read these points. But at paragraph 6,  
12 you can see that the two documents in question. (Pause)

13 Now, those two documents which you disclosed, and the document that Google now  
14 purports to rely on as the basis for its wide-ranging disclosure requests under  
15 G5 -- first, it was not a document that was relied on to make the pleading at 13(d) of  
16 the re-amended reply. It wasn't disclosable under paragraph 4 of the January order,  
17 and no question can arise as to whether Epic has fallen below the standard of full  
18 compliance with that order.

19 THE CHAIR: Yes.

20 MR SCANNELL: Now, as to the second point, the fact that there was an inadvertent  
21 disclosure of the document, whose three initials are highlighted in red at the bottom of  
22 page 86 of the Redfern, is irrelevant. When RPC was asked to delete that  
23 inadvertently disclosed document, as it was asked to do by Norton Rose Fulbright, it  
24 should have done so, just as Norton Rose has done in respect of documents  
25 inadvertently disclosed by Google in the course of these proceedings. But that too is  
26 irrelevant.

1 The only relevant question is whether the inadvertently disclosed document is, as my  
2 learned friend says in her skeleton argument, obviously relevant and material, or  
3 relevant material and adverse. It is neither of those things. For that reason, my  
4 learned friend is emphatically wrong to suggest that Epic considers itself entitled to  
5 cherry pick documents it perceives to be favourable to its case, without disclosing  
6 unfavourable documents. The further disclosure requests under G5 should be  
7 dismissed.

8 My learned friend identifies a single issue at which she says the inadvertently  
9 disclosed document is relevant to. That's at paragraph 21 of her skeleton argument,  
10 and that is whether the Epic Games Store is a plausible comparator with the Google  
11 Play Store for the purposes of assessing whether Google's commissions on app  
12 purchases and in-app purchases of digital content are excessive and unfair.

13 She adds at paragraph 22 of her skeleton that:

14 "[Those] issues cannot be properly considered by the Tribunal without an  
15 understanding of [Epic Games Store's] finances, to see whether its rates are plausible  
16 comparators."

17 Now we agree with that. We don't disagree with that. But what is needed to  
18 understand Epic Games Store's finances is the GAAP and non-GAAP general ledger  
19 material that has been disclosed by Epic under paragraphs 1 to 3 of 10 January order.

20 The experts will, of course, have to reach their own views based on that massive  
21 amount of GAAP and non-GAAP ledger material. The views of others as to what that  
22 says are completely irrelevant, and it will be quite inappropriate for any expert to rely  
23 on those views in expressing an expert opinion. What the inadvertently disclosed  
24 document actually is, is simply an internal document that's put together by individuals  
25 within the Epic business, extracting data from the general ledger material, configuring  
26 that in particular ways, making assumptions about commercial decisions the business

1 may or may not take in future, and about whether, and if so, how investments will be  
2 made within the business to prioritise one thing or another thing. Entirely irrelevant to  
3 any question that an expert would have to opine on.

4 In other words, it may or may not be relevant for an expert to ask whether Epic Games  
5 Store is profitable, in deciding whether it's a suitable comparator. But on no account  
6 is the question whether Epic has formed a view as to whether it will be profitable in the  
7 future relevant to that analysis, particularly when Epic has derived that view from the  
8 same ledger material that the experts will have to review to determine the same  
9 question.

10 Finally, as to whether it is in fact relevant for an expert to ask whether the Epic Games  
11 Store is profitable, in deciding whether it's a suitable comparator, that is an open  
12 question. It's one to be determined by the Tribunal when considering the expert  
13 evidence. My learned friend, in her skeleton argument, points to Professor Fletcher's  
14 expert report in the Rodger collective proceedings, and observes that Epic Games  
15 Store's pricing structure is relied on by Professor Fletcher in her analysis. That's  
16 actually not the case. Professor Fletcher considers Epic Games Store to be a good  
17 comparator, for reasons that don't relate to its profitability. So she does not put  
18 profitability in issue at all, and then, once she has opined that the Epic Games Store  
19 is a good comparator, she doesn't rely on Epic Games Store's pricing structures. She  
20 just relies on what its commission level is. That's all.

21 The only expert who does rely on profitability to assist in the question of whether Epic  
22 Games Store is a good comparator is Mr Noble, Google's expert in the Coll  
23 proceedings. But even then he doesn't undertake an analysis of Epic Games Store's  
24 profitability. He simply takes Dr Holt, the Coll class representatives' expert, at his word  
25 in that respect. Dr Holt doesn't undertake a profitability analysis either, so none of the  
26 expert evidence to date actually depends on a review of the 2.25 million financial

1 documents Epic has already disclosed relating to its financial position. That's the  
2 context in which you're now asked to add substantially more to that mountain. Neither  
3 Dr Holt nor Mr Noble purport to rely on anything other than Epic's current financial  
4 position, incidentally. They don't say that Epic's future position is relevant, let alone  
5 internal Epic predictions as to what that position might be.

6 But the main point is this: if Mr Noble or any other expert in these proceedings wanted  
7 to conduct a review or an analysis of Epic Games Store's profitability, then the only  
8 material that would be relevant to the expression of an opinion on those matters is the  
9 underlying general ledger material under paragraphs 1 to 3 of the order that I showed  
10 you. Documents like the inadvertently disclosed document would be entirely irrelevant  
11 and, as I say, it would be quite inappropriate for an expert to rely on that material  
12 instead of a firsthand review of the general ledger material, particularly as the Epic  
13 view is based on the same core data.

14 Now, fundamentally, what all of this means is that there is actually no basis for G5 at  
15 all. For that reason, we suggest that it should be dismissed.

16 THE CHAIR: Can I just ask you a question as a matter of practicality? Is the slide  
17 deck that's referred to in paragraph 6(a) of the letter, is that something that's prepared  
18 on an annual basis? Do you happen to know whether it would be prepared on an  
19 annual basis or regular basis?

20 MR SCANNELL: I'm not in a position to say that --

21 THE CHAIR: No.

22 MR SCANNELL: -- I'm afraid.

23 THE CHAIR: Okay. Thank you.

24 MR SCANNELL: I would say that the instinctual point that you made, madam Chair,  
25 as to how one can tweak the levers and the pulleys to reach completely different  
26 forecasts is, of course, correct. A business meeting that takes place on a Monday

1 might assume (a), (b), and (c), but not (d), (e), and (f). A meeting on Wednesday might  
2 assume (d), (e) and (f), but not (a), (b) and (c), and different results will come out of  
3 that. But where does that get one? I'd suggest that it gets one nowhere, and it's  
4 certainly not going to assist the Tribunal in deciding the pleaded issues between the  
5 parties.

6 THE CHAIR: I mean, there will be some that have more reliability than others, if any  
7 forecast can ever be reliable. So, for example, ones that are used or adopted in the  
8 governing managing strategy for the business, they would be -- and I can see exactly  
9 what you say about other forecasts prepared for different internal meetings -- but there  
10 would be some that would have more depth and weight to them than others.

11 MR SCANNELL: Well, there are two points to make in relation to that, madam Chair.  
12 The first is that, of course, the premise of that question is that the forecasts are  
13 relevant.

14 THE CHAIR: Yes, I have your -- yes, I have your point on that.

15 MR SCANNELL: We don't at all accept that. The forecasts are simply not relevant  
16 and Google has identified no reason why these forecasts are actually relevant. For  
17 the excessive pricing case what is relevant is profitability today and how are the  
18 experts -- and even then I would suggest the profitability today may be a complete red  
19 herring, because to date, all of the experts have not relied on profitability when they're  
20 deciding whether EGS is or isn't a good comparator. I can't exclude the fact that in  
21 some later expert reports somebody may rely on profitability and say it proves or  
22 disproves that it's a good comparator, but even then, what would be relied on by any  
23 expert making that point would be: (a) profitability today. Profitability today would be  
24 ascertained by reviewing all of the disclosure under paragraphs 1 to 3 of the January  
25 order.

26 If one thinks about it, and if one thinks about the function of an expert in the

1 proceedings, it would be a dereliction of the expert's duty and to say, "Well, even  
2 though I have all of the general ledger data, I'm not going to rely on any of that", or  
3 "I'm going to somehow supplant my firsthand review of that material, because I can  
4 see that somebody, somewhere has forecasted profitability," without knowing  
5 precisely what was relied on within the general ledger data to reach that conclusion.  
6 So the first problem is forecasting is a red herring, I would suggest. The second -- and  
7 really the more fundamental problem -- is that we're looking at the wrong data pool  
8 when we're asking ourselves these questions. What we need to look at is the general  
9 ledger data, which is absolutely voluminous, more than enough for any expert to form  
10 the sort of views that we're discussing, and that's not gainsaid by Google and not the  
11 kind of forecasts that we're mentioning, even the very high level forecasts, if they exist.  
12 But to suggest that Epic should now go on a hunt for all of those forecasts, whenever  
13 they have come into existence, is really disproportionate.

14 MS SMITH: Madam, can I make three brief points by way of reply?

15 THE CHAIR: Yes.

16

17 Reply submissions by MS SMITH

18 MS SMITH: In the light of the surprising submission that forecasts are not relevant,  
19 can I take you back to Epic's pleaded case? That's Bundle B, their reply pleading  
20 which is at tab 3 of Bundle B, page B/152, paragraph 13(d).

21 THE CHAIR: Sorry, could you just give me the page reference again?

22 MS SMITH: B/152. This is Epic's re-re-amended reply. At the bottom of page 152,  
23 paragraph 13(d) there's a denial that the comparators identified by Google are  
24 appropriate and then it says, halfway down that paragraph:

25 "As to the Epic Games Store, it is denied that commissions charged by Epic are not  
26 a suitable benchmark [so to get rid of the double negative, they are a suitable

1 benchmark, the Epic Games Store commissions] because Epic decided to adopt the  
2 88-12 per cent revenue share model in July 2018 and [and this is a positive pleading]  
3 Epic expects the Epic Games Store to achieve positive operating income between  
4 2026 and 2028, subject to certain assumptions [I'd underline that, subject to certain  
5 assumptions] using the current fee structure and commission rates." [as read]

6 So this is Epic's pleading. We need to be able to understand, and the Tribunal needs  
7 to be able to understand, what assumptions are applied by Epic to its general ledger  
8 data, to its data, in order to make that assertion. We need to be able to understand  
9 and challenge those assumptions.

10 That leads me then to my second point, which is, if I could ask your Ladyship to go  
11 back to the letter you were taken to by Mr Scannell, his instructing solicitors' letter of  
12 10 June, which is in the Correspondence Bundle D, starts on page 208. And if I can  
13 take you to page 210 under the heading, "Financial forecasting and the inadvertently  
14 disclosed document", can I ask you to read the first line of paragraph 9.

15 THE CHAIR: Yes.

16 MS SMITH: And then, as regards the inadvertently disclosed document itself,  
17 paragraph 10(a) and particularly (b). If I could ask you to look at the date for the  
18 inadvertently disclosed document and what's said at the bottom, that sentence that  
19 starts at the bottom of page 210 and over the top of page 211, and then at (c), it's not  
20 just the pleading, but it's Mr Allison's statement.

21 THE CHAIR: Yes. Let me just read that. (Pause)

22 Yes.

23 MS SMITH: Can I emphasise two points that I want to draw out of that letter. First of  
24 all, can I draw your Ladyship's attention to the dates of the documents that were  
25 disclosed in response to your previous order, the date you can find in the confidential  
26 material in paragraph 6(a) of this letter, page 209. If I could ask you to note, perhaps

1 underline, that date of the disclosure that was given in response to your January 2025  
2 order, and compare that to the date of the inadvertently disclosed document, which  
3 comes in the penultimate line on page 210.

4 THE CHAIR: Yes.

5 MS SMITH: Then can I make the second general point, which is what is said in this  
6 letter about the various different documents and the pleaded case, Epic's pleaded  
7 case, and Mr Allison's statement. What is fundamental, in our submission, and what  
8 is pleaded by Epic, is that subject to certain assumptions, its case is that we should  
9 rely -- the Tribunal should rely on the Epic Games Store commission rates, inter alia,  
10 because Epic Games Store will become profitable between 2026 and 2028 on the  
11 basis of certain assumptions.

12 Google needs to be able to challenge Epic's evidence, in particular Mr Allison's  
13 evidence, as to the assumptions and the basis on which he makes forecasts as to  
14 Epic's future profitability by reference to internal Epic documents which use different  
15 bases and different assumptions in order, as I've already said, for the Tribunal to be  
16 able to reach the conclusion as to which are the appropriate assumptions to be applied  
17 in determining whether or not Epic will become profitable by 2026 or 2028, or whether,  
18 on the other hand, as the US court held, the commission rates charged by EGS are  
19 below cost and the rates are simply a litigation tactic.

20 THE CHAIR: If you want to find out whether the rates are below cost, don't you need  
21 to go to the granularity of the general ledger information?

22 MS SMITH: We will, my Lady, and that leads me to my third point, which is that my  
23 learned friend relied upon Mr Boyle's witness statement and Epic's previous disclosure  
24 under paragraphs 1 to 3 of the order.

25 Mr Boyle's witness statement is at C/14, if I could just take your Ladyship to that. It's  
26 a two-page, essentially, three-page statement. Bundle C, tab 14. This was the

1 witness statement of Mr Boyle that was produced in response to your Ladyship's order.  
2 It starts on page 402. It is all confidential but it simply explains the data.  
3 The data that was disclosed pursuant to paragraph 1 through to 3 of your previous  
4 order, and explained in Mr Boyle's witness statement, is financial data, cost data,  
5 regarding Epic Games Store and general ledger data, which is, and I stress,  
6 backward-looking data. It's about Epic Games Store's current and past profitability,  
7 and that is borne out by -- if you've still got it open -- Mr Boyle's witness statement on  
8 the very last paragraph on page 405, paragraph 16, if I could ask you just to look at  
9 that, what he says about the data that is being disclosed, this is the data that's  
10 disclosed pursuant to paragraphs 1 to 3 of your Ladyship's previous order.  
11 So what is important is that of course we need that data, but that data is  
12 backward-looking. What we also require is material which enables us to look at future  
13 profitability, forecasts of future profitability. Material that makes forecasts using certain  
14 assumptions that go to support or not support Epic's pleaded allegation that the  
15 Games Store will be profitable between 2026 and 2028. We need not only the past  
16 data, hard data, as to what the costs are, we need to be able to understand what  
17 assumptions should be applied to that data in order to make forecasts as to future  
18 profitability and it's the future profitability -- Google's case on future profitability that we  
19 need to be able to challenge and determine.  
20 So it's not sufficient to say, "You've had the past data under paragraphs 1 to 3, and  
21 you've had a couple of documents that we chose to disclose to you under paragraph 4,  
22 on the basis solely that those were the documents we relied upon in order to make our  
23 pleaded case", we need to be able to see, having now understood there are other  
24 documents which are adverse, in our view and our submission, to Epic's pleaded case  
25 as to future profitability, we need to be able to understand what other documents and  
26 material is available as to the Epic Games Store's future profitability, and that's the

1 basis upon which we seek the material sought in our request G5.

2 THE CHAIR: And what do you say about the argument that actually it's the experts  
3 who will be looking at profitability and whether it's a suitable comparator?

4 MS SMITH: (Inaudible)

5 THE CHAIR: That it's the experts who will need to be looking at the issue of future  
6 profitability and they won't be looking at forecasts.

7 MS SMITH: Well, my Lady -- obviously we're in the middle of the expert process. It's  
8 not simply an issue that is to be looked at by the experts. It's an issue on which  
9 evidence has been given by the factual witnesses, Epic's factual witnesses, including  
10 Mr Allison. We need to be able to test that evidence. But also, as regards the experts,  
11 they will need to look not only at the past data contained in the general ledger data,  
12 but they will also need to come to a view on what assumptions should be applied to  
13 that data and it is, in my submission, of high relevance to expert evidence experts as  
14 well as to what assumptions the parties apply to the data, because it is these parties  
15 who are -- the parties themselves, Epic in effect, who is making forecasts as to its  
16 future profitability.

17 So it's highly relevant to the experts to understand how the company itself looks at and  
18 determines what it thinks its future profitability will be. In my submission, Madam, this  
19 sort of material is of high relevance not just to the factual evidence but also, in my  
20 submission, to the expert evidence.

21 THE CHAIR: Right. Thank you. We are coming up to a short break for the transcript  
22 writer anyway or are we just being recorded? I think we're probably just being  
23 recorded, aren't we? Yes. There is a transcriber. Okay, so I will rise now until quarter  
24 to.

25 (11.33~am)

26 (A short break)

1 (11.45~am)

2 THE CHAIR: Right, in relation to request G5, obviously there have been some quite  
3 detailed submissions. My view at the moment is that it is correct that Epic has not  
4 breached the order that did only require information to be produced, being the  
5 information on which Epic relied when pleading its case in relation to profitability being  
6 reached in the period 2026 to 2028.

7 But in relation to whether forecasts should now be provided, my preliminary view is  
8 that some forecasts should be. Forecasts presented at an executive level -- I'm  
9 expressing this very broadly and Epic will need to go away and decide what will fall  
10 within this kind of definition -- forecasts presented at executive level and used for the  
11 basis of strategic decision-making for EGS.

12 So I'm envisaging something more than a back of the envelope or a blue-sky thinking  
13 forecast. I'm thinking of something that's actually meaningful and that people refer to  
14 as being the forecast or the plan. Obviously, that will also need to include the  
15 assumptions on which it's based. I do consider this is relevant to the pleaded case  
16 regarding Epic's expected profitability and to the issue of whether it's an appropriate  
17 comparator.

18 I don't think that providing disclosure of forecasts more generally would necessarily be  
19 of assistance. I think there is a real risk that it will become disproportionate and I'm  
20 not satisfied that forecasting which isn't at the more formal end of things will be  
21 relevant.

22 I think we need to hear some submissions on the date range, unless that can be  
23 agreed between you. That is my preliminary view on G5.

24 Mr Scannell, does that give you enough to work with?

25 MS SMITH: My Lady, just so that Mr Scannell knows our position. We're happy with  
26 that proposal. I will take instructions on date range.

1 THE CHAIR: I'm not envisaging there necessarily will be a huge number of these  
2 forecasts. They have to be something that's meaningful to the organisation. (Pause)

3 MS SMITH: My Lady, as to date range, can I propose that -- we're happy with the  
4 substantive proposal that your Ladyship makes -- as to the date range, it might be  
5 most efficient, perhaps, to take instructions on that over lunch, but obviously, I'm in the  
6 hands of what my learned friend and his instructing solicitors want to do.

7 THE CHAIR: And Mr Scannell, if you wanted to consider over lunch, putting a bit more  
8 flesh on what I've tried to articulate and get some instructions as to what may be  
9 available, we could try and start nailing down a definition, or you may want to go away  
10 at the end of the day and try and start nailing down a definition. But yes, if you wanted  
11 to discuss it further with your team over lunch.

12 MR SCANNELL: I'm grateful.

13 THE CHAIR: Yes.

14 MR SCANNELL: Thank you.

15 THE CHAIR: I think that takes us to the next Google request.

16 MS SMITH: Yes, my Lady. That takes us to requests G1, G3 and G4, which I may  
17 deal with together if I may, my Lady.

18 THE CHAIR: Yes.

19 MS SMITH: I will ask you to refer to the Summary Redfern Schedule, which I should  
20 note was actually produced at the request of counsel, so I'll take responsibility for any  
21 complaints about that.

22 The Summary Redfern Schedule, which is in the Supplementary Bundle 1 starting on  
23 page 17 -- request G1 is set out on page 17, and you'll see that's a request for further  
24 custodial disclosure relating to Epic's strategy for the distribution of EGS on mobile.

25 Request G2 has been partially agreed by Epic and partially withdrawn by Google, so  
26 we don't need to worry about that. You can put a line through that.

1 G3, which is on page 18, relates to and follows on effectively from G1. It's disclosure  
2 of documents evidencing communications, et cetera, with third parties in connection  
3 with the release of EGS on mobile. You'll see that's opposed in its entirety by Epic.

4 Then G4 is on page 19 of SB1, and that is a request for documents relating to Epic's  
5 app distribution strategy other than EGS on mobile, a general request in (a), a request  
6 for effectively updating disclosure on the release and distribution of Fortnite through  
7 GeForce NOW in (c), and a request for effectively updating disclosure relating to  
8 Epic's consideration of the Samsung Auto Blocker and its decision to remove Fortnite  
9 from the Samsung Galaxy Store in (c).

10 I'll come back to the details of that, but as regards these three requests, I've made the  
11 point already that the Tribunal has already determined that what was previously  
12 category B disclosure -- that's disclosure relating to Epic's app and app store  
13 distribution strategy -- is relevant and necessary to enable it to determine the pleaded  
14 issues in this case.

15 I'll deal first, if I may, with G1 and G3 together, because those relate to Epic's  
16 distribution of the Epic Games Store on mobile on Android. G1, as I've said, is about  
17 Epic strategy in that regard, and G3 relates to Epic's communications with third parties  
18 in that regard.

19 Now, these two categories reflect what was previously ordered by the Tribunal in  
20 response to requests 5 and 7, as they then were. Would your Ladyship like me to take  
21 you back to that, just to remind you, Madam, of that previous order?

22 THE CHAIR: Yes, please.

23 MS SMITH: It's in Bundle F, tab 7, starting on page 69. This is your order of  
24 10 January of this year. If you turn to page 72, you see under heading  
25 "Request" -- well, it's under the general heading of paragraph 35(b), that's "Category B  
26 disclosure of documents and data relating to Epic's app distribution strategy".

1 Request 5, paragraphs 7 through to 11, provide for various disclosure --

2 THE CHAIR: Yes.

3 MS SMITH: -- as regards Epic's strategy for distribution of EGS on Android.

4 THE CHAIR: Yes.

5 MS SMITH: On page 73, request 7. Again, paragraph 13 through to 18 --proposals  
6 for procedure -- a process for disclosure, you'll see in paragraph 13, documents  
7 including slide decks, presentations or similar, which evidence Epic's strategy in  
8 relation to the release of EGS on mobile.

9 Your Ladyship previously ordered disclosure going to these issues -- yes. You'll see  
10 in paragraphs 12 and 18, Madam, your previous order leaves open the possibility of  
11 Google coming back to the Tribunal if there's any disagreement as regards proposed  
12 search terms or custodians, following Google's review of Epic's request 5 disclosure  
13 and its review of the request 7 disclosure. That's paragraphs 12 and 18.

14 This process was envisaged by the Tribunal, that we review the disclosure, which we  
15 have now done, and come back to the Tribunal if there is still dispute over the search  
16 terms and custodians.

17 My Lady, as I've said, we have inspected the disclosure given by Epic in response to  
18 requests 5 and 7, and we have identified a large number of documents that are  
19 missing. Those are set out in detail in the full Redfern Schedule, but just to give you  
20 some examples, there were specific missing documents that we have been able to  
21 identify by name and which we formed the basis of our request G2.

22 THE CHAIR: Yes.

23 MS SMITH: We set those out in annex 2 to our Redfern Schedule, and Epic have now  
24 agreed to provide those specific named documents. But this is an example of  
25 documents that are missing.

26 We have also identified, insofar as we are able, further examples of missing

1 documents that are perhaps most conveniently set out in paragraph 44 of my skeleton  
2 argument. Just some examples of those, in paragraph 44 of my skeleton argument.

3 Can I ask your Ladyship to look at that, because some of it is confidential, but it's  
4 summarised there -- this is Bundle A, page 13 --

5 THE CHAIR: Yes.

6 MS SMITH: -- if you have it in the Bundle. Otherwise it's paragraph 44, if you have it  
7 separately.

8 They have given two examples here. We don't have a full and complete record of  
9 Epic's arrangements with Telefonica. You'll recall that issue that arose shortly after  
10 last December's hearing, about the agreement that Epic reached with Telefónica to  
11 pre-install the Epic Games Store on telephone devices in certain countries.

12 Then you'll see there's also documents as regards another arrangement that Epic has  
13 entered into with another entity, which is confidential, but this arrangement with this  
14 unnamed entity is addressed in Epic's evidence. Again, Mr Allison's witness  
15 statement.

16 Now, Epic has accepted that it will disclose the documents that we have been able to  
17 identify in paragraph 44, the agreements and the material as regards its relationship  
18 with Telefónica and with this other named entity. But my Lady, I point to these missing  
19 documents by way of illustration of what we say is the inadequacy of Epic's disclosure  
20 so far in this regard that has given rise to our request G1 and G3. So I'll deal with G1  
21 and G3 in turn, if I may.

22 THE CHAIR: Yes.

23 MS SMITH: As regards G1, which is further custodial disclosure as to Epic's strategy  
24 for the distribution of EGS on mobile, a measure of agreement has been reached  
25 between Epic and Google, and that is summarised in the Summary Redfern Schedule  
26 that we have prepared, our Summary Redfern Schedule on page 17 of Supplementary

1 Bundle 1. You'll see, at the top of that page, the specific documents that are referred  
2 to that Epic has agreed to disclose. Then, more generally, it has agreed to further  
3 custodial disclosure of documents relating to its strategy for the distribution of EGS on  
4 mobile, but there is dispute as to the date range, the custodians and the search terms,  
5 or at least partial agreement on some of them.

6 On the date range, we have asked that effectively the dates are updated. They should  
7 be given updated disclosure to the end of May 2025 to ensure that relevant up-to-date  
8 material is captured. That is consistent with Epic's requests, which also go to  
9 31 May 2025. We don't understand why Epic is resisting that extension of the date  
10 range, given that it makes the same requests for all of its disclosure requests. That's  
11 the date range.

12 Custodians: Epic is willing to offer a limited number of three custodians for certain  
13 requests. We have asked for further custodians, those listed -- effectively, if you take  
14 the list on page 17 of the following custodians that Epic is not willing to offer and you  
15 cut off the last three -- that's Jen Gong, Nate Nanzer and Matt Sparks -- we're not  
16 pursuing our request as regards those individuals.

17 I'll be very brief as to why we're pursuing our request as regards the others.  
18 Andrew Grant is a witness who gives evidence for Epic and will be cross-examined.  
19 So we make the point that we need custodial disclosure from him as a witness in these  
20 proceedings.

21 Mr Vogel, Mr Sussman, Tascan and Wassmer are all key individuals in Epic's  
22 executive team who we have identified from the existing disclosure but who have not  
23 given disclosure up until now, and we ask for custodial disclosure from them.

24 Mr Winterbottom -- the documents show that he was closely involved with the release  
25 of EGS on mobile. Mr Modon -- again, the documents show that he's been involved  
26 in Epic's partnerships with third parties. We pursue our request for custodial disclosure

1 as regards those individuals.

2 As regards search terms, again, there has been movement and a measure of  
3 agreement between the parties, Madam, and the search terms are currently set out in  
4 annex A to this summary, which is at page 22 of the Supplemental Bundle.

5 As regards our proposed further search terms, you will see that Epic has agreed  
6 numbers 2, 5, 6, 7, 8 and 9. We have proposed revised search terms, which we think,  
7 I hope, focus and are more restrictive. Again, Epic has objected to certain of these  
8 search terms and in its skeleton argument, for example, in paragraph 43(a) of Epic's  
9 skeleton argument, they object to the search term number 3 on the basis that -- is that  
10 really confidential? Sorry, let's go back to the skeleton. Perhaps I need to take you to  
11 paragraph 43 of the skeleton. Yes.

12 Epic's counsel's skeleton, on page 39 of Bundle A, paragraph 43(a) makes the point  
13 that "they are likely to give rise to huge volumes of irrelevant hits". And he gives the  
14 example of additional search term three, which includes reference to a particular  
15 entity. Your Ladyship, I hope, will understand why that entity is included in search  
16 term 3, along with the other similar entities of the same nature. But I would stress that  
17 the submission that this search term will give rise to huge numbers of false positives  
18 is difficult to understand given that the search term itself, you will see, does not just  
19 search for these names. It searches for these names within five words of Epic Games  
20 Store.

21 So this is a limited search. It's not going to turn up every document that just refers to  
22 these entities' names. It will only do so as regards there being a document about these  
23 entities' involvement with the Epic Games Store. So we don't understand the objection  
24 to the breadth of these search terms, which we have reformulated so as to try to tighten  
25 them, to make sure that you only get documents about the strategy as regards these  
26 third-party entities when it is relevant to the Epic Games Store.

1 My Lady, again, I'm sorry we're going down into this sort of granular depth, but there  
2 is a measure of agreement there. We hope that it should be able to be an agreement  
3 between the parties as to this request G1.

4 But as request G3, can I take you back to that, which --

5 THE CHAIR: Is Mr Scannell in agreement with you on whether there's likely to be an  
6 agreement on custodians and search terms? I mean, do I need to decide that or are  
7 you proposing to have further discussions about it?

8 MS SMITH: There hasn't been any, although we did get a letter at 10.38 last  
9 night -- after I'd gone to bed, certainly -- from Epic's solicitors, moving on some of their  
10 requests. There hasn't been movement on our requests in light of our reformulated  
11 search terms, as far as I'm aware.

12 THE CHAIR: Can I just ask you something about the custodians? So if you  
13 have -- I think you said you had identified certain of them to be senior executives  
14 involved with this issue. Vogel, Sussman, Tascan --

15 MS SMITH: Vogel, Sussman, Tascan and Wassmer.

16 THE CHAIR: Yes. In one sense, if you've got the relevant disclosure for, well, anyone  
17 else who's serving in a similar department or capacity, you're likely to get a significant  
18 volume of relevant documents, aren't you?

19 MS SMITH: My Lady, we can certainly look at that, I think. I'll go back to the detail.  
20 But yes, one would hope that we can perhaps refine this further.

21 THE CHAIR: I have in mind -- I think there was an order I made in the Coll  
22 proceedings where instead of searching everybody who sat on a particular committee,  
23 there was an order -- they had to say who was likely to have access to most of them,  
24 most of the documents and emails, and only that person's (overspeaking). Oh, don't  
25 worry about it.

26 MS SMITH: My Lady (overspeaking). I'm reminded that each of these individuals was

1 chosen because they head up a particular team. They are the executive member for  
2 a particular team who deal with the EGS on mobile issues, so they're not just every  
3 executive team member we have found from the documents. They are the executive  
4 team member for separate teams. They are identified, I'm reminded, because they  
5 are likely to not pick up duplicative disclosure. We have identified them as a head of  
6 each -- different teams.

7 My Lady, if I could just deal with request G3, which is related to G1. It's about the  
8 release of EGS on mobile, but it's about disclosure of documents evidencing  
9 communication between Epic and third parties. That request for these external  
10 documents is opposed in its entirety by Epic.

11 First, it's opposed by Epic on the basis that this request corresponds with request 6 of  
12 the 2024 Redfern Schedule, which they say has already been considered and  
13 dismissed by the Tribunal last December, so it cannot now be renewed. Well, that can  
14 be dealt with briefly, my Lady. That's clearly mistaken and incorrect. If your Ladyship  
15 goes back to your ruling of 19 December 2024, Bundle F, tab 3, page 21 --

16 THE CHAIR: Yes.

17 MS SMITH: Bundle F, tab 3, page 21, paragraph 19. You make the point that you're  
18 not then ordering disclosure pursuant to request 6 because you are saying:

19 "The appropriate course is for Epic to provide its request 5 and 7 disclosure, for Google  
20 then to consider what has been provided to explain why it's deficient." [as read]

21 And you give Google permission to renew it, so that's not a good point. The second  
22 point, which is of more substance, is they say that:

23 "Such disclosure is not necessary or proportionate. We make the following points. [I'll  
24 just briefly highlight them and then I'll make them good]. Recent evidence from Epic,  
25 in the form of Mr Allison's second statement, makes it clear that there have been  
26 numerous recent and ongoing discussions between Epic and third parties as regards

1 the distribution of the Epic Games Store on mobile." [as read]

2 So it's clear that there have been these communications with third parties as to the  
3 release of Epic Games Store on mobile. Evidence is given -- quite detailed evidence  
4 I'll take you to in a moment -- by Mr Allison in that regard. We have reviewed the  
5 disclosure in response to requests 5 to 7, and it's become clear to us -- and I will show  
6 you this as well -- that there are clearly missing records of Epic's communications with  
7 OEMs, carriers and developers, and I'll show you that.

8 Epic suggests that as its communications with these third parties was primarily in  
9 person or on call. There's no need for disclosure of documents. We say that's clearly  
10 a bad point. The fact that some of the communications were primarily in person or  
11 calls means that there implicitly must have been some communications in writing, and  
12 there must also be documentary records. One would anticipate at least some  
13 documentary records of in-person meetings and calls.

14 So just to make good those three points, if I can take you first to Mr Allison's witness  
15 statement.

16 THE CHAIR: Yes.

17 MS SMITH: I've been promising I would take you to this for some time, so finally we  
18 get there. It's in hearing Bundle C, tab 16. I'm going to have to, my Lady, ask you to  
19 read a number of these paragraphs, which do include confidential material.

20 Tab 16 starts on page 414, and I've actually -- I'm sorry. I apologise. I've already  
21 taken it to you as regards the Epic Games Store profitability. Now I'm going to take  
22 you to the evidence that Mr Allison gives on the decision to launch EGS mobile. That  
23 starts on page 418. I would ask you to just highlight the last sentence of paragraph 14.

24 THE CHAIR: Yes.

25 MS SMITH: Then the detailed evidence he gives in that regard over the page, on  
26 page 419, under the heading, "Strategy of Launch of EGS on Android". That's EGS

1 on the mobile platform. If I could ask you to read what he says about discussions with  
2 third parties in paragraph 19. (Pause)

3 THE CHAIR: Yes.

4 MS SMITH: Also what he says, that is not confidential, in paragraph 21(b). He talks  
5 about discussions with a number of developers -- so the 'third party' here being  
6 developers -- about launching their apps on EGS on mobile. If I could ask you to read  
7 paragraph 21(b). (Pause)

8 That, if your Ladyship has read that, the discussions with developers, he gives further  
9 detailed evidence in that regard over the page, page 421, as regards -- it's set out in  
10 paragraph 23 through to 27. If your Ladyship could just -- I mean, I don't need you to  
11 read that in detail, but you'll see there that he gives details about the discussions that  
12 have taken place, last two sentences of paragraph 23.

13 THE CHAIR: Yes.

14 MS SMITH: He gives evidence in paragraph 24 on whether or not developers consider  
15 it worth their while to list their apps on EGS on mobile, and the costs that are  
16 associated with doing so. Then he gives evidence -- which is confidential -- in 25  
17 through to 26, which I think I can say effectively goes to the question of whether or  
18 not, in their conversations, developers have indicated that it would be worthwhile or  
19 not to put their apps on EGS on mobile.

20 This goes very much to the point that, Madam, you previously held was relevant, which  
21 is whether EGS on mobile is a viable distribution channel for Epic's apps and the Epic  
22 Games Store, which goes, in turn, to Epic's case of whether -- or Epic's pleaded case  
23 that the Google Play Store is an essential facility. We say it is not, because there are  
24 other viable distribution channels open to Epic. Epic says, "No, they are not viable  
25 distribution channels. The Google Play Store is an essential facility" and we say "No.  
26 Look, for example, at the distribution of EGS on mobile". This is evidence that goes

1 squarely to that issue as to whether or not that is a viable distribution channel for Epic's  
2 apps and app store, and Mr Allison gives detailed evidence as to his discussions with  
3 third parties about precisely that issue -- of course, which we will need to  
4 cross-examine him on by reference to the relevant material or by reference to relevant  
5 material.

6 He talks about discussions with developers regarding the launch of EGS on Android,  
7 section C2 of his evidence -- his witness statement. Over the page, on C423, he gives  
8 evidence under the heading C3, "Agreements with OEMs and Carriers regarding  
9 Distribution of EGS on Android". Again, if I could ask you to perhaps read  
10 paragraph 27 and particularly the last sentence of paragraph 27.

11 THE CHAIR: Yes.

12 MS SMITH: Again, that evidence, in my submission, goes squarely to the issue about  
13 whether this is a viable distribution channel for Epic's apps and app store. He gives  
14 further evidence on that in paragraphs 29 through to 32, and you'll see the evidence  
15 he gives there on "Epic's interaction with OEMs and carriers regarding the distribution  
16 of EGS on Android". So there is detailed evidence in the contact that Mr Allison's team  
17 has had with these OEMs and carriers regarding the distribution of EGS on Android  
18 and the reaction, importantly, of these other third party entities. Again, all of this is  
19 material that goes squarely to the essential facilities case, and which we will need to  
20 be able to cross-examine Epic's witnesses on these agreements and discussions.  
21 Mr Allison gives evidence that these discussions have taken place. He gives evidence  
22 of his views as to how successful or otherwise they have been. We need to be able  
23 to test that by reference to disclosure. We need to be able to cross-examine, and we  
24 can only cross-examine if there is adequate disclosure, which there must be.

25 I would note, again, there are no documents cited in Mr Allison's witness statement,  
26 and we are told by his solicitors he did not refer to documents in producing this

1 evidence. So we need to have access to the relevant documents in order to properly  
2 cross-examine him on that evidence. His evidence, we say, also makes it clear that  
3 there must at least be some documentary material as regards these communications  
4 between Epic and these third parties as regards EGS on Android.

5 That then leads to my second point that we have, in line with the Tribunal's indication,  
6 reviewed Epic's disclosure that was given in response to requests 5 to 7, to see  
7 whether we could find a material as regards communications with third parties. It is  
8 clear, upon our review, that records do exist, but they are missing and have not been  
9 disclosed. If I can, in that regard, ask you to turn to the detailed Redfern  
10 Schedule -- our detailed Redfern Schedule -- which is found in Bundle A, tab 4.

11 THE CHAIR: Yes.

12 MS SMITH: I'm trying to juggle these documents. Request G3 starts on page 60 ...  
13 Apologies, request G3, yes, starts on page --

14 THE CHAIR: 77.

15 MS SMITH: -- 60 ... Oh, no, sorry. Request G3 is, yes, on a later page, but the  
16 analysis and the submissions are tied up and under request G1. What I want to take  
17 you to, my Lady, is on page 66, in our Redfern Schedule, where we set out what we  
18 have found upon our review of the disclosure given in response to requests 5 and 7.  
19 So starting on page 66, Madam. (Pause)

20 Sorry, I should have started on page 65(b), the second bullet point on that page, that  
21 refers to:

22 "Epic's Request 5 and 7 disclosure recording Epic's interactions and negotiations with  
23 third parties is insufficient and inadequate, as it does not adequately disclose Epic's  
24 strategy concerning the involvement of, and terms of discussions, negotiations and  
25 agreements with those third parties in relation to EGS on mobile."

26 Various illustrative examples are given. The first in the bullet point is about the

1 Telefónica arrangement. As I've said, that's been now agreed -- Epic has now agreed  
2 to disclose that material. The second bullet point, right at the bottom of page 65, is  
3 the agreement with the other entity, and Epic has agreed to disclose that material as  
4 well.

5 MR SCANNELL: (Inaudible)

6 MS SMITH: Oh, am I?

7 MR SCANNELL: Yes.

8 MS SMITH: Sorry.

9 THE CHAIR: I'm following anyway.

10 MS SMITH: Okay, and then the -- this is the danger of having so many different  
11 documents, but do you then have the bullet point:

12 "There are clear examples of missing records of Epic's engagement --

13 THE CHAIR: Yes.

14 MS SMITH: -- with OEMs and Carriers ..." and an example is given. Then:

15 " ... clear examples of missing records of Epic's engagement with developers in  
16 connection with EGS [on mobile] ..."

17 So you've seen that each of these, Epic's engagement with OEMs and carriers, and  
18 Epic's engagement with developers in connection with EGS on mobile, are matters on  
19 which Mr Allison specifically gives evidence. We know that there are documents or it  
20 appears that there are documents that relate to those issues, that have not been  
21 disclosed, and which we --

22 THE CHAIR: The issue is that when we had the last hearing, there's a concern about  
23 the proportionality of some of these requests, and it wasn't simply -- you may find,  
24 I mean, there are missing documents, but is there sufficient, in the other disclosure,  
25 that means that it would be disproportionate now to conduct a wholesale review for  
26 communications with all third parties, for example? Do you see what I mean? I mean,

1 the idea was that you would go away and you would review the disclosure provided in  
2 response to request 5 and 7, see if you have enough, rather than everything.

3 MS SMITH: Yes, my Lady. Well, I think the point is, my Lady, that we have gone  
4 through that disclosure. We've done this step by step. We have gone through that  
5 disclosure, we have identified gaps, we have put together in G3 -- which is on page,  
6 I hope, 76 of Bundle A -- a focused request for custodial disclosure of "documents  
7 evidencing communications, negotiations with third parties", for a limited date range,  
8 as set out in G1; specific search terms set out in Annex 1 -- a limited number of specific  
9 search terms; and for the custodians, set out in request G1. "Documents which  
10 evidence communications and negotiations with [those] third parties", so it is a focused  
11 request for disclosure, and a focused request for disclosure under (b):

12 "Agendas, minutes, records of any communications, heads of terms, agreements and  
13 strategy documents ..."

14 So specific documents, again, for that particular date range. Those are clear and  
15 targeted requests aimed at specific categories of documents, which we anticipate  
16 should be readily available and identifiable to Epic (overspeaking) --

17 THE CHAIR: G3 (overspeaking) --

18 MS SMITH: -- Mr Allison has given evidence on those matters.

19 THE CHAIR: So, G3(b) is quite a good example, actually, because you were getting  
20 agendas, minutes, records of communication -- now what were you getting -- in  
21 relation to requests 5 and 7. So you were getting various slide decks and things, if  
22 I remember rightly. Or have I got that wrong?

23 MS SMITH: I'm trying to remember what we were getting at. Go back to 2024 Redfern  
24 Schedule.

25 THE CHAIR: You were getting certain documents anyway, and the thought was that  
26 within those there would be documents that showed dealings with OEMs, developers,

1 and there may be things that recorded what the reaction was when there was  
2 a deal -- whether they said, "Oh, we're terrified of Google. We're not going to go  
3 there". The thought was there might be some of that evidence in the request 5 and 7  
4 responsive documents, and that you were to look at that and see what else, over and  
5 above what came out of requests 5 and 7, you might need. So I think we slightly cross  
6 purposes. It's really whether there are obvious gaps.

7 MS SMITH: Yes, my Lady. If I could take you back to requests --

8 THE CHAIR: Yes.

9 MS SMITH: -- the 2024 Redfern Schedule, which is in Bundle A, tab 3.

10 THE CHAIR: Yes.

11 MS SMITH: We can look back at what was actually ordered. Request 5 is set out on  
12 page 52 of Bundle A -- that's request 5 which is agendas, et cetera, relevant to Epic's  
13 strategy for the release of EGS on mobile.

14 THE CHAIR: Yes.

15 MS SMITH: So it's internal strategy documents.

16 Request 6 -- which is what we are now effectively seeking by our G3 -- is on page 53  
17 and that's agendas, et cetera, related to Epic's engagement and potential engagement  
18 with third parties in connection with EGS on mobile.

19 THE CHAIR: Yes, and I think --

20 MS SMITH: Request 6 was not ordered because we had hoped that some of that  
21 might come up in request 5.

22 THE CHAIR: Yes.

23 MS SMITH: As it hasn't --

24 THE CHAIR: So that's my point, really. That is it that you've looked at all the agendas,  
25 minutes, slide decks, presentations and there isn't anything reporting back on? We  
26 had discussions with so-and-so and the overwhelming view is that they're not

1 interested because?

2 MS SMITH: Well, our request at G3(b), my first point, my Lady, is that it is not the  
3 same as request 5.

4 THE CHAIR: Right.

5 MS SMITH: Previous request 5. It is what was in request 6.

6 THE CHAIR: Yes.

7 MS SMITH: And it proceeds on the basis that we have looked at the agendas,  
8 et cetera, and we have identified that, for example, page 66, the material that suggests  
9 there is further evidence or further documents, further disclosure, that records  
10 communications with or discussion of communications with OEMs and  
11 carriers -- Epic's engagement with OEMs and carriers -- as to EGS on mobile.

12 So for example, page 67, the first bullet point in Google's reasons for requests. Yes,  
13 it's page 67, the second paragraph, the first full paragraph with a bullet. There's  
14 a reference to a spreadsheet, I hope that in itself is not confidential, but it suggests  
15 that --

16 THE CHAIR: Yes, I see.

17 MS SMITH: -- there have been these communications with third parties and we have  
18 not, as a result of the request 5 disclosure, received the documents that evidence the  
19 communications with third parties, despite the hope expressed at the time by the  
20 Tribunal and the hope shared by us that the request 5 disclosure, which was about the  
21 strategy internally, would perhaps also provide us with material as regards the  
22 communications with third parties, and we have identified as best we can specific  
23 missing material.

24 And again, yes, I've given you the other two bullet points that precede the one about  
25 the spreadsheet on page 67. There are other examples, specific examples, given on  
26 page 66 where we have identified that there must be further material as to contacts

1 with third parties, which unfortunately the request 5 disclosure has not given us.

2 THE CHAIR: I see what you say in relation to those two bullet points on page 67.

3 MS SMITH: Sorry --

4 THE CHAIR: There's a statement there --

5 MS SMITH: Two more on the preceding page 66.

6 THE CHAIR: There's no evidence in relation to those as to what the ultimate outcome

7 was.

8 MS SMITH: There's no material that's been disclosed but --

9 THE CHAIR: Yes.

10 MS SMITH: -- there must be other material there.

11 THE CHAIR: I think my concern is, I sort of anticipate that there would be missing

12 material because the whole point about this is it's disproportionate. Well, it's potentially

13 disproportionate. It's quite a substantial exercise to go into all communications with

14 all third parties. So the theory behind it, just to revisit it and to be clear about it, was

15 that if the disclosure in response to requests 5 and 7 was sufficient to allow you to see

16 what had happened and why, then any other disclosure in relation to that third party

17 would be, in effect, potentially unnecessary and disproportionate, and would simply go

18 to underpin the conclusion that you could already see in the document you had.

19 As I see those two bullet points, you're saying, "Well, that's fine in principle, but it hasn't

20 worked here because we know of these two and we have no idea what the outcome

21 was".

22 MS SMITH: Yes and my Lady, how we have sought to address that is that we have

23 identified specific search terms. If I can just remind your Ladyship of the ones that we

24 have identified in this regard, that -- it's at annex 1 again, perhaps as we're in the

25 document, page 90 of Bundle A --

26 THE CHAIR: Yes.

1 MS SMITH: -- the search terms that we have identified as relevant to this request are  
2 1, 3, 4, 10 and 11. So we have sought to meet this point, which we are very much  
3 aware of, of trying to focus the disclosure sought by limiting date range, limiting  
4 custodians and limiting search terms. 1, 3, 4, 10 and 11, we say, are relevant to this  
5 point.

6 Also, my Lady, before I get to the point of Epic's response to this request, we have  
7 done our best to target our requests for disclosure. Epic's response has been to  
8 essentially refuse to engage at all with that request for disclosure. They simply have  
9 said, "No, we don't need to give you disclosure", and I'll come to that but I also need  
10 to point, before I do come to that, that what was this request 6 disclosure and is now  
11 request G3 disclosure has become even more important, in my submission, Madam,  
12 because of the evidence given by Mr Allison which has been given subsequent to last  
13 January's hearing. And that makes it absolutely clear that Mr Allison's team has been  
14 in discussions with a large number of third parties, OEMs, carriers and developers,  
15 and there must be material out there which we need to see in able to properly -- in  
16 order to be able to properly cross-examine him on the evidence that he gives.

17 So what was request 6, now request G3, has become, we say, even more important  
18 in light of that subsequent evidence that's been given by Epic's witness, Mr Allison.

19 As I said, we've sought to do our very best to focus the disclosure that we are  
20 requesting under G3 in light of the material that we have found. We have found  
21 material that we think must be there. There may be more material, given what  
22 Mr Allison says, that we have not been able to identify by way of example, and we  
23 need that material.

24 Epic says, effectively, "Well, it's our communication with third parties was primarily in  
25 person or in calls so you don't need disclosure of communication with third parties."

26 We say that's just not good enough. There must be some in writing and there must

1 be records of those communications on which Mr Allison gives evidence.  
2 So we maintain our request 3. We've put, in our submission, a reasonable and  
3 focused request by reference to dates, search terms and custodians. And so we  
4 maintain that request.  
5 G1 and G3 are the documents that relate to EGS on mobile. My Lady, it might be  
6 useful if I also, before Mr Scannell responds, highlight our request G4, which is related  
7 but not exactly the same. Request G4 relates to disclosure of documents about Epic's  
8 app distribution strategy other than EGS on mobile; so that is the distribution of the  
9 Epic Games Store via PC, on the web, et cetera, not on mobiles. But again, we say  
10 these are alternative distribution channels which are viable and that -- so they go  
11 centrally to the issue of Epic's essential facilities case.  
12 And request G4, while we're in the full Redfern Schedule, starts on page 76, I hope.  
13 Yes.  
14 THE CHAIR: Yes.  
15 MS SMITH: And it might be useful and we think it is -- we think it probably is useful to  
16 have open as well the Summary Redfern Schedule next to it because we have  
17 amended and refined our request under G4. It's on page 19 of the Summary Redfern  
18 Schedule. Shows the request as amended by Google, page 19 of the Supplementary  
19 Bundle 1.  
20 THE CHAIR: Yes.  
21 MS SMITH: This is documents related to Epic's app distribution strategy other than  
22 EGS on mobile. Again, it's custodial or it's disclosure for slide decks, et cetera, in  
23 a certain date range.  
24 On a different issue, the app distribution strategy other than EGS on mobile and  
25 then -- that's (a) -- so that's a limited request simply for slide decks or notes  
26 and minutes of meetings and groups that address that issue.

1 THE CHAIR: Yes.

2 MS SMITH: And then (b) and (c) are similarly very limited. They're limited in subject  
3 matter as well because they are just documents related -- custodial disclosure  
4 regarding documents related to two particular issues: the release and distribution of  
5 Fortnite through GeForce NOW, which is (b), and (c), Epic's consideration of the  
6 decision to remove Fortnite from the Samsung Galaxy Store.

7 You may recall, Madam, or may not, that both of those two issues, Fortnite through  
8 GeForce NOW, which is effectively a web streaming service and we say is an  
9 alternative viable distribution channel for Epic's app Fortnite, and the blocking of  
10 Fortnite from the Samsung Galaxy Store are both issues that were previously  
11 considered by the Tribunal back in December 2024.

12 Now, these are requests that were previously made under request 9 of the 2024  
13 Redfern Schedule and that order in that regard, if I could take you back to it, Madam,  
14 paragraphs 20 to 22 of the 10 January order, which is in Bundle F, tab 7.

15 THE CHAIR: Yes.

16 MS SMITH: Page 74, paragraphs 20 to 22. Under request 9, paragraph 20, Epic is  
17 to identify documents that have already been disclosed as regards these two  
18 issues -- the release of Fortnite on Nvidia GeForce NOW, and the removal of Fortnite  
19 from the Samsung Galaxy Store.

20 And then paragraph 21:

21 "Google is to identify to Epic in writing the basis on which it's alleged Epic's disclosure  
22 is deficient."

23 And then 22:

24 "The parties shall seek to agree further targeted searches for Epic to provide  
25 disclosure and response to request 9, failing which Google may renew its application  
26 for disclosure."

1 That is the basis upon which we now make application under request G4.

2 THE CHAIR: Yes.

3 MS SMITH: Epic's suggested, in paragraphs 42 to 43 and 48 of its skeleton, that the  
4 Tribunal had already considered and dismissed Google's request 9. Again, that's  
5 clearly incorrect. The Tribunal made specific provision for Google to come back if  
6 Epic's disclosure, pre-existing disclosure, disclosure that was given prior to the  
7 December 2024 hearing was inadequate. We have done that and we now come back  
8 to the Tribunal.

9 THE CHAIR: Yes.

10 MS SMITH: And the basis on which we seek that further disclosure is set out in our  
11 Redfern Schedule, Bundle A, page 76 onwards. And we have identified -- I hope I'll  
12 get some assistance on the right paragraph page numbers. Page 79, we make the  
13 point, in the second bullet point on that page, Mr Allison's substantial proposed  
14 corrections to his evidence in Allison 2 -- you'll recall I referred you to that,  
15 my Lady -- saying that he had to correct his witness evidence because it turned out to  
16 be incorrect, but has not looked at any documents when preparing his witness  
17 evidence. That, in our submission, makes the need to test his evidence against  
18 contemporaneous documents even more acute.

19 We make the point then that Epic has given no targeted disclosure in connection with  
20 its app distribution strategy generally. Its pre-existing disclosure was aimed at the  
21 release of EGS on mobile rather than its distribution of its apps and app store on  
22 distribution channels other than mobile. And it was only up to 12 August 2020, that's  
23 the disclosure from previous US proceedings, so it's now five years out of date, and it  
24 doesn't cover the recent developments, including those on which Mr Allison has  
25 provided evidence so we say it must be updated.

26 And that's our G4(a), that we need updated disclosure from August 2020, so not the

1 disclosure that's already been given, but subsequent disclosure, from August 2020 to  
2 May 2025, and it's limited to agendas, slide decks and notes presented and minutes  
3 of meetings and groups that address Epic's app distribution strategy other than in  
4 respect of EGS on mobile. Given the fact that disclosure has only been given so far  
5 on this point up to 2020, clearly things have moved on since 2020, given Mr Allison's  
6 evidence, we ask, quite reasonably, in my submission, and quite proportionately, for  
7 a limited category of documents and a limited date range under G4(a).

8 And in fact, in the Summary Redfern Schedule, we've refined that request even more  
9 and you'll see from the Summary Redfern Schedule that we don't ask for agendas,  
10 just for the documents, the slide decks and notes presented at the minutes of the  
11 groups and meetings that discuss Epic strategy for distribution of apps other than on  
12 Android.

13 So that's our (a) -- it's a very limited request for disclosure of particular documents:  
14 only those documents recording meetings at which these issues were discussed and  
15 only for the period postdating the US disclosure period from 2020 to May 2025. That's  
16 (a). Clearly relevant, we say, given Mr Allison's evidence as to what has been going  
17 on since then as regards the distribution of EGS on other distribution channels and  
18 EGS and Epic's apps.

19 (b) and (c) are requests for effectively updating disclosure to particular issues which  
20 disclosure was ordered back in 2024. But what the Tribunal did in 2024, the  
21 10 January 2025 order, is that it required Epic to identify documents that have already  
22 been disclosed -- that date, as regards these two issues, which effectively would have  
23 been the documents disclosed as part of the US disclosure, which only goes up to  
24 2020.

25 It's now clear that there have been developments as regards both of those matters so  
26 we ask for updating disclosure as regards those two limited issues by reference to

1 specific date ranges, 2022 to 2025, as regards GeForce NOW, the release of Fortnite  
2 through GeForce NOW, because those dates relate to the Fortnite beta being  
3 launched on GeForce NOW in January 2022. So that's the start date for that request  
4 up to, effectively, the present day and then Samsung's decision to remove Fortnite  
5 from the Galaxy Store was -- the first release of Samsung's Auto Blocker was in  
6 October 2023 so we have asked for disclosure from that date, effectively, to the  
7 present day, and we have asked for disclosure from a limited number of custodians  
8 and as regards specific limited search terms.

9 So, my Lady, we say that this request is essentially in line with exactly what was  
10 anticipated by the Tribunal under its previous order. We have sought to make the  
11 request as focused as possible.

12 Epic opposes request G4(a) in its entirety. It partially agrees G4(b), but only for  
13 disclosure for a period of three months and for one custodian. It partially agrees 4(c),  
14 but only for a period of two months and for two custodians, but only as regards certain  
15 documents, his Gmail and Slack documents. We say that's just too limited, given the  
16 facts that we set out as to the dates that are relevant to both of these issues.

17 We also make the following points in response to Epic's skeleton, in this regard. Epic  
18 makes the general point, in paragraph 48 of its skeleton, that this request, G4(a), or  
19 G4 generally, I think, is an example of Google being inconsistent in requesting external  
20 communications from Epic but rejecting Epic's requests for such communications for  
21 disclosure of such communications from Google on the basis they're unjustified and  
22 unnecessary.

23 But that point fundamentally misunderstands the difference between the nature of the  
24 disclosure sought by Google and that sought by Epic, and the issues in the case to  
25 which that disclosure relates.

26 As I will explain when I address Epic's request for disclosure, we object to producing

1 communications surrounding agreements between Google and third parties, as well  
2 as the agreements themselves, which we have agreed to disclose, because such  
3 communications are not relevant to Epic's pleaded case, that it is the agreements that  
4 have anti-competitive effects.

5 By contrast, however, we seek disclosure as to internal and external communications  
6 as regards Epic's app distribution strategy because it is of central relevance to Epic's  
7 pleaded case that the Play Store is an essential facility and that other distribution  
8 channels are not viable. Whether or not they are viable needs to be tested by  
9 reference to Epic's communications with third parties who are able to provide Epic with  
10 services or use those alternative distribution channels.

11 Further, the issues have clearly been put into issue by Mr Allison's evidence, which  
12 you've seen, which relates squarely to Epic's communications with third parties, not  
13 just as regards the distribution of EGS on mobile -- and I've shown you the relevant  
14 paragraphs in that regard -- but also the distribution of EGS via other channels.

15 If we can just finally, in this regard, then go back to Mr Allison's second witness  
16 statement, which is in Bundle C, tab 16. If I can take you to page 416,  
17 paragraph 10(c), where he gives updating evidence on EGS as a PC store -- this is  
18 the alternative distribution channel that we are talking about -- and various new and  
19 recent initiatives launched by Epic in this regard, where effectively they offer various  
20 exclusivity programmes to third-party developers. You'll see the Epic first run in (i); (ii)  
21 launch everywhere with Epic, a programme for all apps created using Epic's game  
22 engine, Unreal Engine, and now on Epic, a programme which offers third-party  
23 developers a 100 per cent revenue share.

24 All of these recent developments squarely and obviously are relevant to the question  
25 of whether the distribution of apps and EGS as a PC store -- so other than on Google  
26 Play store -- is a viable distribution channel. Mr Allison gives evidence that he has

1 | been discussing exactly -- or they've been developing -- Epic has been developing  
2 | initiatives to encourage third-party developers to use that alternative distribution  
3 | channel, the distribution of EGS as a PC store.

4 | Again, that's of central relevance to the question of whether Google Play Store is an  
5 | essential facility. Effectively, the only way that Epic can get its apps and app store to  
6 | market. So we need to have disclosure -- which we seek in G4(a) -- limited disclosure  
7 | for records of meetings that address that strategy, updated records of meetings that  
8 | address that strategy. Clearly, these programmes and these initiatives must have  
9 | been discussed internally at Epic. Mr Allison gives evidence on them. There must be  
10 | material which we need to be able to cross-examine him on these initiatives.

11 | I've made the points about the updating disclosure as regards the specific issues in  
12 | 4(b) and 4(c). 4(b) and 4(c) are partially agreed by Epic and the state of agreement  
13 | on those, as I've said, is in page 19 and 20 of Supplemental Bundle 1 but I've said  
14 | their date ranges and their custodians are too limited given the issues involved. So  
15 | my Lady, I see it's 12.55 pm.

16 | THE CHAIR: Yes.

17 | MS SMITH: That's all I have to say. That actually is all of the Google --

18 | THE CHAIR: Yes.

19 | MS SMITH: -- requests.

20 | THE CHAIR: Yes.

21 | MS SMITH: And I have dealt with them in a lot of detail, but I hope that's helpful.

22 | THE CHAIR: Yes. Thank you, Ms Smith.

23 | Mr Scannell, I'm not going to ask you to stand up and have only five minutes or start  
24 | now and finish later, unless you have some introductory remarks that would occupy  
25 | us for five minutes.

26 |

1 | Reply submissions by MR SCANNELL

2 | MR SCANNELL: I'm grateful, madam Chair. I will make one or two introductory  
3 | remarks by way of a route map to what I'm going to say in detail to disabuse you of  
4 | the various heresies that you've just heard, in relation to those requests. Timing will  
5 | be an issue, though, before we get to my substantive remarks in response to my  
6 | learned friend. And so, if it were possible, I'd be very grateful if we could perhaps have  
7 | a shorter than normal lunch so that the risk that we won't get to the end of the Epic  
8 | disclosure requests can be controlled.

9 | THE CHAIR: Yes.

10 | MR SCANNELL: I'm grateful. So just by way of a route map to where I'm going to  
11 | come from with requests G1 to G4. We have very serious concerns relating to these  
12 | disclosure requests, some of which you have already anticipated, madam Chair.

13 | It is true that requests 5, 7 and 6 have been considered by the Tribunal already. We  
14 | never made the submission that those disclosure requests had been dismissed, which  
15 | is a submission repeatedly made by my learned friend. The submission that we've  
16 | made is that the order that was made by the Tribunal when it considered these  
17 | requests before that was that we, Epic, had to provide disclosure. That had to be  
18 | considered in good faith by Google. Google then had to revert to say that what they  
19 | have received is not enough and to explain why it was not enough by reference to the  
20 | pleaded case.

21 | Now, that has not been done. In the submissions that the Tribunal has just heard, you  
22 | have not been taken to the pleaded case to show in what respect the very substantial  
23 | disclosure, which has already been provided by Epic, is deficient. What the Tribunal  
24 | is now asked to provide, contrary to the submission you've just heard, is not targeted,  
25 | it is not limited and it is not proportionate. It is the very opposite of that. These are  
26 | wholesale extensions to what was asked for before.

1 Just to take one example of how that is the case, although this was glided over by my  
2 learned friend, Google is asking Epic, which has already nominated a pool of  
3 custodians to add ten new custodians to that list for the purposes of these searches.  
4 Just pausing there, that is going to result in a gargantuan exercise by Epic and  
5 a hugely expensive one to go along with that. They're asking us to agree an extensive  
6 list of additional search terms. Now, Epic has already tried its very best to  
7 accommodate Google by agreeing to the majority of them, but drawing a line when it  
8 comes to others, and they're asking out of the blue with no basis whatever to change  
9 the date ranges of requests 5, 6 and 7 as well. There's simply no basis for that. There  
10 is no provision in the orders made by the Tribunal already to change the date ranges.  
11 All they say to justify that is, "Oh, well, there have been some developments on the  
12 market". Well, of course there have been some developments on the market. There  
13 will always be developments on the market. It's common ground, in these  
14 proceedings, that this is a fast moving industry but a line has to be drawn somewhere  
15 and a line already has been drawn by the Tribunal. It was drawn in the 10 December  
16 order and in the 19 December ruling.

17 It is not good enough to say, as you have heard, madam Chair, that we have identified  
18 gaps in the disclosure. That's not a basis for seeking further disclosure, to say that  
19 there are gaps. That is a fundamentally flawed submission, at any time, when seeking  
20 disclosure, when what matters is what is relevant on the pleaded case, but it's doubly  
21 inappropriate in this instance because these matters have already been considered  
22 by the Tribunal, and the Tribunal has already made an order which is inconsistent with  
23 the making of that submission.

24 I'm grateful.

25 THE CHAIR: Right. That's fine.

26 So how quickly do people want to gobble their lunch? I'm happy to come back for

1 1.30. If that's a bit too precipitate, we could say 1.45 or 1.40.

2 MR SCANNELL: I'm in your hands. This is an indulgence that I ask of the Tribunal.

3 1.30 would be preferable, but I'm in your hands (inaudible).

4 THE CHAIR: We'll come back at 1.30.

5 (1.01~pm)

6 (The short adjournment)

7 (1.32~pm)

8 THE CHAIR: Yes, Mr Scannell.

9 MR SCANNELL: Request G1, to begin with.

10 THE CHAIR: Yes.

11 MR SCANNELL: We oppose that request, but where we have come out between us

12 is that Google proposes additional search terms 1, 3 to 4 and 10 to 11. If one looks at

13 annex 1 to the Redfern, on page 92 --

14 THE CHAIR: Yes.

15 MR SCANNELL: I'll just repeat those numbers for your notes. Google is proposing

16 search terms 1, 3 to 4 and 10 to 11.

17 THE CHAIR: Yes.

18 MR SCANNELL: Epic is proposing search terms 2 -- I'll pick up another colour -- 2

19 and 5 to 9.

20 THE CHAIR: Right. Yes.

21 MR SCANNELL: What you must now do, madam Chair, so far as the search terms

22 are concerned, is to decide whose position to adopt. I'd suggest that the starting point

23 in deciding that is to understand the context in which request G1 is made. Once that's

24 understood, it becomes clear, in my submission, that Google has already received

25 sufficient disclosure under requests 5 to 7, as they were, and that Epic's additional

26 search terms must therefore be preferred, because it's more than Google has any right

1 to, but it's nevertheless offered.

2 At the starting point in understanding the context of request G1 is, as has been  
3 explained already, that G1, together with G2 -- which is now agreed -- tracks onto  
4 requests 5 to 7 which Google made at the CMC on the 5 December last year.

5 THE CHAIR: Yes.

6 MR SCANNELL: You considered those requests in detail in the ruling you made on  
7 19 December.

8 THE CHAIR: Yes.

9 MR SCANNELL: That ruling was then reflected in your January order. 10 January, to  
10 be precise.

11 Epic has already given Google very substantial disclosure under that order, under  
12 requests 5 and 7. The original search terms and custodians have generated a review  
13 pool comprising more than 31,000 documents. 14,703 of those documents have been  
14 disclosed to Google.

15 If I can just pause there, those documents include overview-type documents, which  
16 are produced within Epic, which provide an overview of all of the OEMs and developers  
17 and MNOs and others with whom the business is speaking, clubbed together in tabular  
18 form over periods of time.

19 The search terms that were used to generate those documents -- there were 27 of  
20 them in total -- were the subject of extensive correspondence between the parties in  
21 December last year and in January of this year. Epic proposed those search terms  
22 initially. Google proposed changes to those search terms. Epic agreed those  
23 changes, despite the fact that agreeing to the changes increased the pool by  
24 25 per cent.

25 What Google was then expected to do -- under the 19 December ruling and the order  
26 of 10 January -- was to write to Epic to explain in what way that was not enough, and

1 has had to do that by reference to the pleaded issues. Google did write to Norton Rose  
2 Fulbright on 16 May this year, but it did not engage in any meaningful way with the  
3 pleaded case. Instead, what it said was, "We've identified a few meetings, evidenced  
4 by the disclosure you have given, but we don't have full disclosure in respect of those  
5 meetings". So there are what Google called gaps in the documentary record, and they  
6 should be filled by further disclosure from Epic. For your note -- but I'm not proposing  
7 to turn it up -- that's RPC's letter to Norton Rose on 16 May at paragraphs 5 and 6. It's  
8 in the Bundles at D40, page 135.

9 That was, as I said before the short adjournment, not what Google was supposed to  
10 do under the December ruling and the consequent orders. It's the wrong approach to  
11 take in principle to disclosure. Just because a party to proceedings receives on  
12 a pleaded issue disclosure, which might mention a particular meeting or a particular  
13 word or a particular event, does not mean that that issue or word or meeting, or  
14 whatever it might be, becomes the launch point for further disclosure. If that were the  
15 approach, then the result would be an ever-widening net of disclosure, which never  
16 closes.

17 To make matters more difficult at around the time of 16 May, even though Epic had  
18 provided all of this R5 and R7 disclosure months earlier, Google reserved the further  
19 points that it wanted to make to the Redferns for this hearing.

20 Be that as it may, what we now see in the Redfern Schedule is more of the same.  
21 There's no real attempt to engage with the question that Google was supposed to be  
22 asking, which is how this disclosure is insufficient to enable the pleaded issues to  
23 proceed. Instead, it continues to say to the Tribunal, "Well, there are gaps in the  
24 record". As you, madam Chair, I think quite rightly and sensibly observed, there will  
25 always be gaps in the record, but that simply begs the question. It's on that basis that  
26 Google makes this blanket proposal under G1 to add 11 different additional search

1 terms and a swathe of further custodians.

2 In point of fact, if I could just pause there, none of the documents that Google says are  
3 absent, are absent because of search terms. They're absent because they either fell  
4 outside the date range for R5 to R7 disclosure that the parties agreed in January this  
5 year -- and Epic has voluntarily disclosed those documents anyway -- or they're  
6 absent because the relevant event didn't bring any documents into being.

7 So we say that Google has not made out any case that the documents it's already  
8 received are insufficient to deal with the pleaded issues. As I've already said, if that is  
9 correct -- and I'll unpack it further -- but if that is correct, then Google isn't entitled to  
10 anything more under R5 and R7, or G1, as it's now called. That means that the only  
11 possible answer to the question "Well, whose additional search term should I prefer?"  
12 is Epic's, because Epic is offering something more than Google is entitled to.

13 Even if you were to find that Google is entitled to something more under R5 and R7  
14 disclosure, beyond the thousands of documents it's already receiving, we do maintain  
15 that the search terms Google is proposing are disproportionate, beyond the fact that  
16 none of those additional search terms are actually linked back into the pleadings.

17 At page 65 of the Redfern Schedule, Norton Rose Fulbright provides one illustration  
18 of how disproportionate Google's proposed additional search terms actually are. In  
19 the Epic response column, second substantive paragraph --

20 THE CHAIR: Yes.

21 MR SCANNELL: -- Epic says that:

22 "When Google's proposed additional search terms are applied to the disclosure  
23 Google has already received under R5 and R7, more than half of the disclosed  
24 documents respond to the search". [as read]

25 What that suggests is that Epic has already substantially disclosed the documents that  
26 Google professes to want Epic to search for now. Or, to put it another way, if the

1 additional areas of interest to Google were rationalised as a question, posed in the  
2 language of the additional search terms that Google commends, then the disclosure  
3 that it has already received is substantially the answer to that question.

4 We do make the point that Google's additional search terms are likely to give rise to  
5 a huge swathe of irrelevant material. I'm limited to what I can say by confidentiality in  
6 relation to that, but we've highlighted the problem in our skeleton at paragraph 43(a)  
7 and in correspondence with Google.

8 One point I can make openly is that Google wants every document that responds to  
9 Epic Games Store and to a long list of MNOs, or carriers, as they're called in the  
10 context of these proceedings. But it's important to bear in mind in that respect, and  
11 this is a point I'll return to, that Epic is the Claimant here. It's not the Defendant.  
12 Google already knows that Epic has concluded a deal with one MNO and that it hasn't  
13 concluded deals with anybody else. It can probably surmise that Epic, being a well-run  
14 business, is trying its best to distribute wherever it's able in the circumstances. But  
15 what does that actually get you in the context of these proceedings, where the  
16 allegations are all made against Google, that it has breached competition law in  
17 a number of important respects?

18 Finally, at page 69 of the Redfern Schedule, in the reasons column, first bullet, if  
19 I could ask you to look at that, Google points to Mr Allison's evidence in his second  
20 witness statement at paragraph 26. We can see what Mr Allison says there.

21 It's important to remember the process that we're engaged in. The only question that  
22 arises under G1 is, "What are the additional search terms to be, and who are the  
23 custodians to be?" That's the balance of the issues. Mr Allison is already a custodian.  
24 Moreover, Google's additional search terms do not address the narrow issue that  
25 arises on what Mr Allison has attested to. So it's really unclear how that takes anything  
26 further forward.

1 As to ASTs -- that's additional search terms 10 and 11, which Google also  
2 propose -- they're also unacceptable. They're apparently advanced in an attempt to  
3 revive request 6 of the 2024 Redfern. The existing disclosure between Epic and third  
4 parties relating to Epic Games Store on mobile, and internal Epic correspondence  
5 relating to those exchanges, and the progress made in those discussions and next  
6 steps, are already covered by the disclosure that has been provided under R5 and R7.  
7 As I've already mentioned, it also includes internal overview documents summarising  
8 those third-party engagements and discussions. Running additional search terms 10  
9 and 11 would clearly duplicate that disclosure, because they also relate to Epic's  
10 engagement with third parties in relation to the launch of Epic Games Stores on mobile  
11 and Android.

12 So we do say that they're unnecessary and disproportionate, and that's not simply  
13 a matter of conjecture, either. Norton Rose has run test searches on the disclosure  
14 that Epic has already given under R5 and R7, using additional search terms 10 and  
15 11, and that establishes the overlap between what Google has already been given  
16 and what it now requests. The reference for that is page 66 of the Redfern in the Epic  
17 response column, first paragraph. You quite rightly anticipated that overlap, madam  
18 Chair, in your 19 December ruling, when you said that additional search terms 10 and  
19 11 were at that time disproportionate and unnecessary.

20 Now that brings me to the important question of additional custodians, because, as  
21 I said before the short adjournment, this is a really quite extraordinary request from  
22 Google, to add ten new custodians to the pool of custodians. 13 originally, but now  
23 cut down to 10, presumably to make 10 look, in some sense, respectable.

24 The existing pool of custodians is ample, and that is the first and most important point.  
25 That pool has been identified in the fourth witness statement of Ms Rogers of  
26 Norton Rose Fulbright, which was filed on 15 January this year under paragraph 8 of

1 the 10 January order. Could we turn up that witness statement? It's in Bundle C at  
2 tab 15, please. Within that, if we could turn to page 410, please, at paragraphs 8 to  
3 11.

4 One sees there the existing pool for these requests nominated by Epic.  
5 Mr Steve Allison, VP and GM of Epic Games Store since 2018. Mr Billings, Mr Somol  
6 and Mr Stolfus.

7 Paragraph 7 of this witness statement is very important. If I could ask you, please,  
8 madam Chair, to read that. (Pause)

9 THE CHAIR: Yes.

10 MR SCANNELL: So these are the people who attended the meetings. These are the  
11 people who were working on the issues covered by R5 and R7. They are the  
12 appropriate custodians. As I say, Google now wants to add ten further custodians to  
13 that list. In answer to that, we have reluctantly indicated that we are willing to add  
14 Mr Tim Sweeney as a custodian on the R5, R7 requests and G4. Mr Eric Gass would  
15 be added for the R5, R7 requests, and for request G4(b). Mr Ryan Dixon would be  
16 added for request G4(c).

17 Now I say reluctantly, because Epic has done everything in its power to be cooperative  
18 in this respect, but it's highly likely that there will be duplication across the disclosure  
19 that we've already given and across these custodians into say. We don't think that  
20 any of those are actually necessary, and we don't see a credible basis on which to add  
21 them. Nevertheless, we're prepared to agree to add them. We do say that anything  
22 beyond those three would clearly be disproportionate.

23 Now, as to the custodians proposed by Google, that's 63 to 64 of the Redfern  
24 Schedule, on the left-hand side, subparagraphs (a) to (h), initially --

25 THE CHAIR: Yes.

26 MR SCANNELL: As I say, we are willing to add Mr Sweeney as a custodian, but we

1 don't agree to the others. As to them, Mr Grant, he is the vice president of the creator  
2 platform in Epic. He's addressed in Fourth Rogers at paragraph 13(a). Ms Rogers  
3 explains, in that respect, that he has not participated in strategy, and is not therefore  
4 relevant to R5 and R7.

5 Then we have Mr Vogel.

6 THE CHAIR: Can I just pause you there? What do you say about the fact that he's  
7 a witness? Do you say that makes a difference or ...?

8 MR SCANNELL: No, it's very common in commercial litigation -- very common in  
9 competition litigation also -- to have witnesses who aren't custodians. That's perfectly  
10 fine. There's nothing exceptional about that at all. And --

11 THE CHAIR: It depends on what they're giving evidence about.

12 MR SCANNELL: It depends on what they're giving evidence about, quite right. But  
13 the important point is that just because they're a witness does not mean that they  
14 should be a custodian. That's absolutely the antithesis of the sort of streamlined,  
15 proportionate disclosure, which is called for in the Competition Appeal Tribunal and  
16 beyond.

17 We then have Mr Vogel. He is addressed in Fourth Rogers, at paragraph 14(a), on  
18 page 412 of the C Bundle. The important point in relation to Mr Vogel is that Mr Allison  
19 reports to him on strategic matters, and Mr Allison is a custodian already, so there is  
20 therefore duplication across those two.

21 Mr Sussman is addressed in fourth Rogers at paragraph 14(e). He's the president of  
22 Epic, not involved in the day-to-day strategic decision-making or commercial decisions  
23 around Epic Games Store on mobile. To the extent that that's not the case, his  
24 documents would duplicate Mr Allison's material. All of that is set out in Fourth Rogers,  
25 at page 412.

26 Mr Tascan -- he was the executive vice president of games development in Epic. He

1 left the business in July 2024. He's addressed in Fourth Rogers at paragraph 14(c).  
2 According to Ms Rogers, he was not involved in strategic decision-making or  
3 commercial discussions regarding Epic Games Store on mobile, and he's no longer at  
4 Epic, as I've mentioned.

5 Mr Wassmer, he is the executive vice president of development. He's addressed at  
6 paragraph 14(d) of fourth Rogers. He is a games developer, and to the extent he was  
7 involved in any discussions about strategy, his material would duplicate Mr Allison's  
8 emails and Slack documents.

9 Mr Winterbottom is addressed in fourth Rogers, paragraph 15(a). As to who he is,  
10 he's the current executive vice president of games development, having taken over  
11 from Mr Tascan. We're told by Ms Rogers that his focus was on product development,  
12 especially the development of -- I'm hesitating as that may be confidential.

13 THE CHAIR: Yes, I can read it. Yes.

14 MR SCANNELL: We are told that he ... That too is confidential. Could I ask you,  
15 madam Chair, please, to read the final three lines of paragraph 15(a)?

16 THE CHAIR: Yes.

17 MR SCANNELL: Right. There is then, Mr Modon. He is not covered in Fourth Rogers,  
18 but his position is explained in a letter from NRF to RPC, dated 24 January this year.  
19 It's in the D Bundle, at tab 13, page 45. (Pause)

20 He seems to have excited interest because he was quoted in a press release that  
21 related to Telefónica, on 12 December 2024, but it's quite inappropriate to add him,  
22 also. The whole purpose of adding Mr Stolfus as a custodian, as is explained in this  
23 letter, was that he is responsible for developing partnerships with OEMs and carriers,  
24 including Telefónica. He reports directly to Mr Modon, so adding Mr Modon would  
25 simply create duplication of the sort you referred to, madam Chair, before the break.

26 Returning then to Google's list of additional custodians on pages 63 to 64 of the

1 Redfern Schedule, that leaves Mr Dixon and Mr Gass, because Google is -- as my  
2 learned friend pointed out -- no longer requesting Ms Gong, Mr Nanzer or Mr Sparks.  
3 As I've said, we are willing to add Mr Gass for R5, R7 and for request G4(b), and we're  
4 willing to add Mr Dixon for Google's request G4(c). As to who those two individuals  
5 are, you can see that, madam Chair, from page 70 of the Redfern Schedule, in the  
6 "Epic's position in response" column, first and second bullets.

7 THE CHAIR: Sorry, can I have the page reference again?

8 MR SCANNELL: Page 70.

9 THE CHAIR: 17?

10 MR SCANNELL: Seven, zero. (Pause)

11 So you can see who those two individuals are --

12 THE CHAIR: Oh, yes.

13 MR SCANNELL: Mr Dixon, Mr Gass.

14 THE CHAIR: Yes.

15 MR SCANNELL: So that's the position relating to custodians. We don't think it's  
16 appropriate for any additional custodians to be nominated. We have nevertheless  
17 agreed to nominate three for particular requests made by Google.

18 That takes me to the question of whether to extend the date range for R5, R7  
19 disclosure in request G1. The date range for the R5, R7 disclosure was the  
20 13 August 2020 to 31 October 2024. Google is now proposing and, as I said before  
21 the short adjournment, without any real reason, to change that date range from  
22 1 December 2023 to 31 March 2025. There's no provision of any kind for a change of  
23 the date range in the disclosure that Epic has already been ordered to provide, and no  
24 reason has been advanced, as I say, beyond saying that there are developments in  
25 the market. It's not simply a small point to say that the date ranges are changing.  
26 Extending this date range in the way that Google is suggesting just assumes that we

1 should add five months to the disclosure range, and that's likely to be extremely  
2 onerous and expensive.

3 Could I then move on to request G3 and I can take this more shortly?

4 THE CHAIR: I mean, speaking more generally, at some point there may be a need to  
5 update some of the disclosure, do you think, before trial?

6 MR SCANNELL: There may be. I couldn't exclude that possibility. The appropriate  
7 approach to take in relation to that is to make an application which is clearly explained  
8 by reference to the pleadings, by reference, for example, to the expert reports that are  
9 in -- that sort of thing -- and to limit that further disclosure so that it becomes  
10 manageable for all of the parties who will have to prepare for what is going to be a very  
11 heavy trial.

12 THE CHAIR: So, for example, you could see that there might be a need to update  
13 financial ledger information, perhaps. I mean, I'm not making any finding about that,  
14 but you could see that financial information could change and you might want to have  
15 an update.

16 MR SCANNELL: Yes, I concede that. And of course, that cuts both ways. We couldn't  
17 exclude the possibility that Google.

18 THE CHAIR: Yes.

19 MR SCANNELL: Which, of course, to date, we haven't heard from. We haven't  
20 actually got any disclosure from them yet. But applications could be made to update  
21 the disclosure that they're providing as well. I couldn't exclude any of.

22 THE CHAIR: Yes. I suspect, your concern is that it would be somewhat piecemeal,  
23 perhaps, to update now to March and then perhaps need to do another update if it's  
24 that important at another stage?

25 MR SCANNELL: That really is the point: that a line has to be drawn somewhere, and  
26 a line has been drawn. A line was drawn in January. It's all very well and good to say,

1 "Well, we would quite like there to be an update in the disclosure because we can  
2 point to particular developments in the market", but as I say, there will always be  
3 developments in this market. Always. For all we know right now, developments are  
4 happening, and we could all come back next week and say, "Well, all of the disclosure  
5 will have to change to accommodate those". So the short point is the point that you  
6 have just made, madam Chair, that one does have to draw a line, and that line has  
7 been drawn.

8 Now, G3 is also resisted. G2 is agreed. As has been pointed out already, G3 is  
9 substantially the same request as R6, back in 2024 and under the 2024 Redfern.  
10 Again, that was considered by the Tribunal. At that time, it was judged to be neither  
11 proportionate nor necessary. That was because R5 and R7 would provide all of the  
12 necessary information relating to Epic's engagement with third parties in relation to its  
13 strategy relating to the distribution of Epic Games Store on mobile.

14 The only conceivable basis on which R6 could now be revived -- we did not say that it  
15 was dismissed -- but the only basis on which it could be revived is if Google can  
16 establish that the R5, R7 disclosure it has received is deficient in the proper sense,  
17 and has not come close to that, I would suggest. All it has done under G3 is point to  
18 four documents it says are missing. Now, the first point is that even if four documents  
19 were missing, among the thousands that they've already received, that would not  
20 establish deficiency. But as it is, Google is wrong to say that they're missing anyway,  
21 two of the four documents were not included in the disclosed documents because of  
22 the date range. They fell outside the date range that the parties expressly agreed in  
23 January of this year, so adding more search terms and custodians wouldn't solve that,  
24 and wouldn't have changed the position. In any event, Epic has now disclosed those  
25 documents. The other two are not documents at all. Google has simply seen  
26 a reference to a third-party interaction, and not appreciated that that interaction didn't

1 generate documents.

2 Google also relies on Mr Allison's overview account in his second witness statement --

3 THE CHAIR: They might say that they don't know whether the interaction generated  
4 documents. They might argue that that's the position. They just don't know. So you  
5 say that it was probably all conversations, and we've seen Mr Allison's statement that  
6 refers to oral conversations and discussions, but I think Google's point is that they  
7 don't know whether that's right or wrong, in relation to those two particular entities  
8 they've identified in the Redfern Schedule.

9 MR SCANNELL: Yes. Well, let's take that at its very highest and assume that all of  
10 those points are fair. The right answer to that is not to come along to the Tribunal and  
11 to try to expand the whole reach of R5, R7 disclosure. That's almost a textbook  
12 definition of a disproportionate approach. The right approach is to write in relation to  
13 those two documents, to ask for a clarification first as to whether something has gone  
14 awry with the disclosure process and if, to the extent that RPC is dissatisfied with the  
15 response, to make a targeted specific disclosure application in respect of those two  
16 documents.

17 THE CHAIR: Yes.

18 MR SCANNELL: I'll take Mr Allison shortly, because it really is a short point. There is  
19 a real danger in looking at Mr Allison's witness statement and observing that he is  
20 making observations about the fact that he has had conversations with particular  
21 developers, particular OEMs, to take a sort of "Epic is the Defendant" approach and  
22 say, "Aha, these are smoking guns. These are all gaps in the record. It's all very  
23 suspicious that you're talking to these people. We need disclosure. We need to find  
24 out what exactly is going on".

25 But that really does miss the wood for the trees in relation to this case. The fact that  
26 Epic is talking to these people is entirely unremarkable and unsurprising. All it actually

1 shows is that Epic is a conscientious, ambitious, commercially-minded developer. And  
2 of course, it's trying to distribute its apps. But where is all of this going to go at trial?  
3 We've heard absolutely nothing about that. Is Google seriously going to put Mr Allison  
4 in the stand and cross-examine him about meetings that he's had with OEMs,  
5 suggesting that the meeting didn't take place, suggesting that the content of the  
6 meeting was somehow different? That would be absurd and preposterous. And it's  
7 an indication that these are not actually the pleaded issues between the parties. So  
8 I do say that this point that's made about Mr Allison's second witness statement is,  
9 with respect, a red herring.

10 THE CHAIR: But am I right in thinking Mr Allison does refer to certain conversations  
11 and say they were unwilling to engage, he inferred, because of a certain factor? How  
12 would you test that if you didn't have documents to show what was said in those  
13 conversations, if they exist? I mean, there's no disclosure, if they don't.

14 MR SCANNELL: In respect of that, madam Chair, may I have a moment? (Pause)  
15 I'm very grateful. In relation to that particular point, the particular point that you have  
16 pinpointed, that I think is one of those points which falls into the application directly  
17 aimed at that particular issue and seeking disclosure in respect of that very narrow  
18 point. Documents, for example, which indicate that that actually happened because  
19 I can see, I think one can fairly see, that within that allegation or within that evidence,  
20 rather, is an allegation about Google and it is a point which quite frankly, irrespective  
21 of the pleaded issues, Google might want to clear its name on.

22 THE CHAIR: Yes.

23 MR SCANNELL: I do want to be fair in relation to that and that's why I asked you for  
24 a moment so that I could take instruction specifically in relation to that particular point.  
25 The point that I believe you have in mind is the paragraph 26 point in second Allison.

26 THE CHAIR: Yes.

1 MR SCANNELL: That takes me then to G4. And again, we do not agree to that  
2 request. Again, we are concerned with the nature of the request because it is, for all  
3 intents and purposes, a reanimation of request 9, which was unsuccessfully pursued  
4 in December. And again, the outcome of that was that Google should identify, by  
5 reference to the claim form, the documents that Epic had already disclosed that relate  
6 to the release of Fortnite on Nvidia GeForce NOW, and the removal of Fortnite from  
7 the Samsung Galaxy Store, in what way, they said, that the disclosure was deficient.  
8 And thereafter, if they said that there wasn't enough to make targeted searches -- that  
9 was the ruling that you made on 19 December -- targeted searches were to be sold,  
10 failing which further request could be made.

11 And fundamentally, we don't see that Google has complied with that direction from the  
12 Tribunal. Instead, it's proceeding as if that order wasn't there and it simply revives  
13 request 9. But in any event, request 9, in my submission, was a misconceived request  
14 in December, and it's equally misconceived today.

15 To get a sense of the exorbitance and disproportionality of it, could we take a look at  
16 the request. It's at page 77 of the Redfern Schedule, at the very bottom of the page,  
17 on the left-hand side.

18 Just looking at that language, Google is apparently seeking all documents relating to  
19 Epic's distribution strategy for all apps, anywhere, with the only exception being Epic  
20 Games Store on mobile and the distribution of Epic Games Store otherwise than on  
21 mobile would apparently also be included in that request.

22 Now, Epic's distribution strategy for every one of its apps across every conceivable  
23 platform is far broader than any party's pleaded case, and there's no basis for  
24 a request of that breadth. Of course, as I've said before, it is Epic's strategy to  
25 distribute its apps. But just because that is its commercial aim, or may be, it doesn't  
26 mean that Google is entitled to disclosure in respect of it. That's essentially a large

1 proportion of Epic's entire business that they're asking for in disclosure in respect of  
2 their G4(a).

3 Google's indication in that regard that it would be content not to have agendas is, with  
4 respect, simply an indication that this is absurdly broad. In her skeleton argument, my  
5 learned friend makes the point that if one considers the essential facility a plea, maybe  
6 that justifies it. So, the point that she makes is that the Tribunal will have to  
7 decide -- this is paragraph 38 of Google's skeleton -- whether Google Play is  
8 indispensable as a means of distributing rival app stores, or whether there are other  
9 app and app store distribution channels available as alternatives to Google Play. So  
10 that's the point that's made.

11 That is misconceived. Epic's case arises from anti-competitive conduct by Google on  
12 the markets for the licensing of the Android operating system on mobile devices, the  
13 distribution of apps for mobile devices using the Android operating system, and the  
14 market for the provision of payment services for purchases of digital content within  
15 such apps. Its essential facilities case quite clearly alleges that Google's conduct on  
16 those markets I've just referred to, in particular, the pre-installed requirement, the  
17 pre-installation restrictions and the technical restrictions, make it unreasonably difficult  
18 for distributors like Epic to distribute their rival apps and app stores on Android devices.

19 My learned friend simply ignores those words "Android devices" but they appear  
20 perfectly clearly in paragraph 144(c) of the fifth amended claim form. Google,  
21 incidentally, pleads back to paragraph 144(c) at paragraph 124(d)(v) of the third  
22 amended defence by denying that Google Play Store is the only practical means to  
23 distribute on Android devices and that, "Google Play Store is indispensable to gain  
24 access to Android devices". That's a direct quote from paragraph 124(d)(v). So  
25 disclosure in respect of Epic's strategy, generally, beyond Android is clearly not  
26 necessary to resolve the pleaded essential facility case.

1 Now, again, I want to be absolutely fair. Google does plead that developers shouldn't  
2 complain about Google's anti-competitive conduct on Android markets because they  
3 can always just distribute via non-Android devices like PCs and laptops and games  
4 consoles.

5 They make that plea at paragraph 58(b)(ii) of the third amended defence, but that  
6 rather contemptuous plea speaks only to the fact that there are other distribution  
7 channels that are available. It doesn't put in issue Epic's distribution strategy across  
8 each of those alternative channels. So the essential facility argument doesn't justify  
9 G4(a).

10 Very quickly, the date range on G4(a). We don't accept that the date range Google  
11 seeks to apply makes any sense. Requesting a five-year period from 2020 to 2025,  
12 particularly given the open-ended nature of what Google is asking for, is exorbitant.  
13 As we say in the Redfern Schedule, the start date for that is, it would seem, completely  
14 arbitrary. It's the date from which the US discovery ran, but that's irrelevant. It has  
15 nothing to do either with the distribution of apps on Android devices, which is what the  
16 present proceedings concern, and that disproportionality or exorbitance isn't removed  
17 by simply observing that there have been a number of developments, and I've dealt  
18 with that so I'm not going to go over that again.

19 As for G4(b), where the date range is 2022 to 2025, and the custodians that are asked  
20 for are all of the custodians I've mentioned, but at least Ryan Dixon, all the factual  
21 witnesses and Mr Grant, the context of G4(b) is again that we, Epic, were asked to  
22 give disclosure in respect of Nvidia's GeForce NOW, including from Mr Dixon, and that  
23 has happened.

24 The subsequent events that the Tribunal had in mind was that Epic would write to  
25 Google to inform it of the documents it had disclosed on that point and Epic did so on  
26 31 January this year. It explained that thousands of documents relating to Fortnite's

1 availability on GeForce NOW had been disclosed in the US proceedings, including  
2 emails from Mr Dixon and Mr Grant. Google was then supposed to identify  
3 deficiencies.

4 We've a number of concerns on G4(b) that arise from issues relating to that. First of  
5 course, Google hasn't articulated a reason why there is a deficiency to date, apart from  
6 the need to accommodate recent developments.

7 It is when one actually does the mathematics on it, a blanket request for full and  
8 complete disclosure in respect of the entirety of Epic's commercial relationship with  
9 Nvidia GeForce NOW.

10 One can see that from the fact that the US discovery provided to Google covered the  
11 period from August 2020 to 19 January 2022, and Google is now asking for complete  
12 disclosure from 20 January 2022 all the way up. So there's no basis for that, we say.

13 And the final point in relation to GeForce NOW is that it's all a rather odd request  
14 anyway, because it claims to be interested in Epic's strategy for the distribution of  
15 apps. That's why it's in G4, overall. But Epic does not actually distribute native apps  
16 via GeForce NOW, and it doesn't distribute web-based apps through that channel  
17 either. GeForce NOW is a cloud-based streaming service. It hosts content, not apps.  
18 Consumers who want access to content using GeForce NOW access Epic's servers  
19 remotely, so it's not actually a point anyway, which goes to the pleaded issues in the  
20 case.

21 You may have seen from paragraph 51 of our skeleton argument, which is in the  
22 A Bundle at page 43, and that we are nevertheless willing to undertake targeted  
23 searches using Google's proposed search terms under G4(b), subject to what we say  
24 about custodians and date ranges.

25 As for what we say about custodians, we're willing to offer Mr Eric Gass as the  
26 custodian for those searches. Why? Because he is obviously the appropriate

1 | custodian. He's Epic's senior mobile partnerships lead and he reports to  
2 | Mr Hans Stolfus, Epic's director of growth partnerships. Epic's relationship with  
3 | GeForce NOW comes within Mr Gass's remit but Google suggests that Messrs Dixon  
4 | and Grant should also be custodians because they were custodians from whom Epic's  
5 | earlier disclosure relating to Fortnite on GeForce NOW was drawn.  
6 | But neither of those individuals would actually be appropriate custodians. Mr Dixon  
7 | no longer has any involvement with GeForce NOW, and that's important because he  
8 | has already provided disclosure up to January 2022 and also because the date range  
9 | proposed by Epic in respect of GeForce NOW is 1 January 2025 to 31 March 2025.  
10 | And as to Mr Grant, he would obviously not be an appropriate custodian. I've dealt  
11 | with him already in the context of the pool of custodians by reference to Ms Roger's  
12 | fourth witness statement and the relevant paragraph there is 13(a) of Ms Roger's  
13 | fourth witness statement.  
14 | And then finally the date range on G4(b). We don't accept that there is a justification  
15 | for the start date of the date range. As I've already said, Google has already, or has  
16 | apparently, chosen that date range because it wants complete disclosure in respect  
17 | of the commercial relationship from beginning to end and the recent developments  
18 | argument takes it no further.  
19 | G4(c) then. The context of G4(c) is the same as the context of G4(b). You ruled in  
20 | December that Epic was to write to Google in relation to disclosure relating to the  
21 | removal of Fortnite from the Samsung Galaxy Store. And Epic did that on 31 January.  
22 | It's actually quite helpful to turn up that letter. It's in tab 80 of the D Bundle.  
23 | If I could ask you, please, to read paragraphs 11 to 12 of that letter at page 255.  
24 | THE CHAIR: Sorry, which paragraph?  
25 | MR SCANNELL: Paragraphs 11 to 12, which I hope you will find on page 255.  
26 | THE CHAIR: Yes. Yes.

1 MR SCANNELL: The point here is really the same as the point we've seen elsewhere:  
2 that we have not seen any attempt by Google to engage with the important points that  
3 NRF are making at paragraphs 11 to 12. No engagement with the pleaded issue in  
4 respect of removal. No attempt to explain why the exceptional decision Epic took, in  
5 response to what it perceived to be serious anti-competitive conduct by Samsung and  
6 Google, has anything to do with its app distribution strategy generally, and no attempt  
7 to narrow the request to specific documents in light of what is already publicly available  
8 and filed with the US court. So fundamentally, we say that no disclosure order should  
9 be made under G4(b).

10 That's the primary position. Beyond the primary position, we have indicated that we  
11 are willing to undertake targeted searches again and make further limited disclosure  
12 in respect of these events. Given that that's more than Google has any entitlement to,  
13 as I've just explained, we suggest that that proposal should be accepted. Under the  
14 proposal, we would accept the search terms proposed by Google and we would apply  
15 those search terms to the appropriate custodians' documents. The appropriate  
16 custodians for G4(c) are Mr Tim Sweeney, Epic's CEO, and Mr Ryan Dixon, Epic's  
17 senior director for online services and kids' web services. Mr Sweeney and Mr Dixon  
18 were the individuals on the front line when Samsung's extraordinary conduct came to  
19 light, so they're likely to possess any relevant documents to the extent there are  
20 documents. There's no basis whatsoever to add all of Epic's witnesses and the  
21 entirety of its executive team. That's obviously disproportionate.

22 Finally, as to the date range, we don't accept that 1 October 2023 to 31 March 2025  
23 is appropriate. 1 October 2023 is nine months before the discovery that Samsung was  
24 setting its Auto Blocker function to "on". The 31 March 2025 is nine months after Epic  
25 decided to remove its games from the Samsung Galaxy Store. It's for that reason that  
26 we have proposed 1 June 2024 to 31 July 2024, and suggest that that is enough. It

1 allows for additional time both before and after the relevant events became known.

2 Those are my response submissions on G1 to G4, Chair.

3 THE CHAIR: Thank you. Thank you. Ms Smith.

4

5 Reply submissions by MS SMITH

6 MS SMITH: Thank you, Madam.

7 Can I just make one general point and four particular points in reply, as regards G1,  
8 G3, and G4.

9 Generally, the point was made on a number of occasions, by counsel for Epic, that  
10 you have not been taken to the pleaded case to show that the disclosure requirements  
11 are justified. Quite a surprising submission, given that these disclosure requests are  
12 clearly relevant to Epic's pleaded case as to essential facilities, and that issue has  
13 already been considered and decided by the Tribunal back in December. Insofar as  
14 your Ladyship needs specific references to the pleadings in that regard, they are set  
15 out in my skeleton at paragraphs 35 and 37. If your Ladyship really needs me to do  
16 so, I am prepared to do that, to take you to those specific parts of Epic's pleaded case  
17 that puts squarely in issue the question of essential facilities and the question of  
18 alternative distribution channels. But I think it's -- unless you're --

19 THE CHAIR: I noted the references in your skeleton.

20 MS SMITH: Thank you.

21 Then on G1 and G3, if I could ask you to look at the Summary Redfern Schedule,  
22 which sets out the up-to-date position taken from the Redfern schedules.

23 THE CHAIR: Yes.

24 MS SMITH: G1, on page 17 of the Supplemental Bundle, 1. I'm not going to repeat all  
25 the points I made in that regard, but it is necessary to respond to what my learned  
26 friend has said about date ranges. You'll see in the latest position column:

1 "Epic does not agree to the extension of the date range beyond that applied to the  
2 disclosure Epic provided in response to requests 5 and 7 from 1 December to  
3 30 November 2024". [as read]

4 Mr Scannell made the submission on a number of occasions that you cannot go  
5 beyond, or should not go beyond, the date range previously set in the January 2025  
6 order. Well, that position makes -- in my submission -- absolutely no sense, when it  
7 is in everyone's interests, including the Tribunal, that we have disclosure updated to  
8 May 2025, as set out in our revised request, and also makes absolutely no sense  
9 because it is wholly inconsistent with Epic's requests for disclosure, all of which are  
10 made for date ranges up to the end of May 2025. And, I stress, insofar as Google has  
11 partially agreed to those requests for disclosure from Epic, we have agreed to a date  
12 range that takes you to the end of May 2025. That is sensible, and we submit that that  
13 is the position that should be taken as regards Google's requests for further disclosure  
14 as well.

15 THE CHAIR: I mean, is there a difference in this sense, that a firm -- if in effect, what  
16 was beginning to get boiled down was basically just updating disclosure? There is  
17 a risk, isn't there, that that could be asked for several occasions between now and  
18 trial, and it ought to be capable of being dealt with in correspondence, if nothing else.  
19 But if there's a new request, then it's sensible that it goes to a realistic date. I mean --

20 MS SMITH: Well, my Lady, the submission I make in that regard is that this hearing  
21 was provided for by the Tribunal and was anticipated by the Tribunal when it made its  
22 January order. It was provided for by the Tribunal in its, I think, 23 May order, that this  
23 should be essentially the end date for all outstanding requests in the Epic/Google  
24 proceedings, including the request for further disclosure that we made on the back of  
25 the Tribunal's previous order, and have been given permission to do so by the  
26 Tribunal, and any requests made by Epic for disclosure. We say taking disclosure as

1 regards all of those requests up to the end of May is sensible, because that is  
2 envisaged in the timetable set by the Tribunal, and it's also sensible to stop here and  
3 not carry on forever, given the timetable going forward, because we have now  
4 Rodger's requests for disclosure. Witness statements will be served in these  
5 proceedings in September, so disclosure up to the end of May -- sorry, September  
6 disclosure in (inaudible) for Rodger, and October will be witness statements.

7 So the end date of the end of May that we propose, for the purposes of today's hearing,  
8 we say is sensible to draw a line in the disclosure sought by Epic and Google, given  
9 the timetable going forwards, and also the fact that this hearing was effectively  
10 envisaged by the Tribunal and provided for by the Tribunal in its orders on previous  
11 disclosure.

12 As regards -- that's my second -- the point on custodians. If I could ask you to look  
13 at -- this is the custodians for G1 and G3 -- Supplemental Bundle 1, page 17. Epic  
14 have offered Tim Sweeney and Eric Gass as custodians for requests 5 and 7 --

15 THE CHAIR: Yes.

16 MS SMITH: -- and also to some extent for request G4(b) and G4(c), and also  
17 Ryan Dixon for G4(c).

18 We do not see any reason for limiting the custodial disclosure that these custodians  
19 will be giving to previous requests, if your Ladyship -- well, in the light of the fact that  
20 Epic has agreed to further disclosure under G1 and G3. Custodians for all further  
21 disclosure under G1, G3 and G4 should be extended to Tim Sweeney, Eric Gass and  
22 Ryan Dixon. They should be custodians for the G1, G3, and G4 generally. There is  
23 no reason to try to cut and salami slice in this way.

24 As regards the following custodians, I've made my submissions about the following  
25 custodians that Google is seeking. I'm not going to repeat those submissions, but I do  
26 note Epic's counsel saying that, in response to your Ladyship's question about "what

1 about disclosure from witnesses in the proceedings; is that not relevant?" he said it  
2 depends what they are giving evidence on.

3 Andrew Grant is the witness who gives evidence on precisely the issues for which  
4 disclosure is sought under G1, G3 and G4. He gives evidence on these alternative  
5 distribution channels for Epic's apps and Epic Games Store. His witness evidence is  
6 in Bundle C -- starting page 217, tab 8 is the witness statement of Andrew Grant, and  
7 you'll see on page 219, in paragraph 9, he addresses the following topics that include:  
8 "(d) Developing Fortnite for mobile devices. Creating the Fortnite app for Android [so,  
9 distribution of apps via Android] and  
10 "(g) Alternative methods of obtaining Fortnite on Android". [as read]

11 Then if you turn over and look at page 232, he gives evidence in section F1 of his  
12 witness statement about web apps. He says, top of page 233, paragraph 48, "Web  
13 apps can be a possible route for developers".  
14 So he's talking about the distribution channel of web apps.

15 Over the page, 234 and 235, he gives evidence on cloud gaming services, specifically  
16 paragraph 451, NVIDIA GeForce NOW.

17 On page 235, under "(g) Alternative methods of obtaining Fortnite on Android" [as  
18 read]. He talks about the alternative means of obtaining Epic's apps on Android by  
19 direct download, by Play Store, and by alternative app stores, so alternative routes to  
20 market. He gives witness evidence on exactly the issues on which we are seeking  
21 disclosure under G1, G3 and G4.

22 The fourth point I want to reply on was the point that Mr Scannell made about  
23 Mr Allison's witness statement. He made the surprising submission that Mr Allison's  
24 witness statement was not relevant to our applications for disclosure, and even went  
25 as far as to say he cannot see what we might be cross-examining Mr Allison about in  
26 due course.

1 | If I need to repeat myself, I'll repeat myself. Epic's case -- this is Epic's case -- is that  
2 | other distribution channels are not viable channels for the distribution of its apps and  
3 | its app store. Google Play is the only viable channel, and it is an essential facility.  
4 | Mr Allison, however, gives evidence on numerous discussions that he has had with  
5 | third parties about alternative distribution channels. He suggests that the feedback he  
6 | received in response to those discussions was negative as to whether or not those  
7 | channels were viable. We need to be able to test that, which goes to the heart of  
8 | Epic's case. We need to be able to test his evidence in this regard by reference to  
9 | documents recording those discussions, insofar as they exist. The fact that his  
10 | discussions were mostly on the phone, or mostly by way of face-to-face meetings,  
11 | does not mean that documents will not exist in that regard, and we need to be able to  
12 | see those documents to test his evidence.

13 | THE CHAIR: Have you got the pleading references for Epic's case being that other  
14 | distribution channels are not viable? Don't worry if you haven't. You can tell me at the  
15 | end.

16 | MS SMITH: I'm sure I have. (Pause)

17 | Yes, my Lady. The reference is paragraph 144C of Epic's re-re-re-re-re-amended  
18 | claim form, which is reference B, page 53.

19 | THE CHAIR: That's the same paragraph that Mr Scannell said made clear that  
20 | actually this was only concerned with mobiles. Is that right?

21 | MS SMITH: Well, they say because their -- and again, I'll give you the references if  
22 | I need to in due course. Hopefully my junior will find them. That is not a good point.  
23 | This is because Epic's market definition is limited to the distribution of apps on Android.  
24 | We dispute that market definition, and we say the market is a great deal wider than  
25 | that, that it is not just the distribution of apps on Android devices. The market  
26 | encompasses not only the Apple App Store, which we won't talk about, but other

1 routes to market, including web apps and essentially streaming and sideloading of  
2 apps, that is, direct download of apps onto the phone.

3 So it is a dispute as to the market definition. Their pleading is "yes, restricted to the  
4 distribution of apps on Android". Our pleading is "no, your market definition is wrong".

5 Therefore, when you say "this Google Play Store is an essential facility for the  
6 purposes of distributing apps on Android", we say it is not an essential facility, because  
7 not only are there other routes to market via Android, such as EGS on Android, but  
8 other routes of market outside your definition of the relevant market -- which we don't  
9 agree in any event -- sideloading web apps and downloading via web streaming  
10 services.

11 The fact that they seek to limit their case to their defined market help doesn't help  
12 them, when our response to that -- and I'll give you the references in due course -- is  
13 that it's not an essential facility and you can't just look at what at your narrowly defined  
14 market, which is wrong in any event.

15 THE CHAIR: But do you need disclosure relating to their web app? Oh my, I'm going  
16 to get all the terminology wrong. Do you need to disclosure relating to web apps --

17 MS SMITH: Well, my --

18 THE CHAIR: -- to answer your -- to inform your response?

19 MS SMITH: That is exactly the sort of disclosure we are -- and again, my gaming and  
20 technical knowledge might fall down here. I don't have my children to ask questions  
21 for in court with me, but the distribution of Fortnite -- and I'll be told whether I'm  
22 wrong -- the distribution of Fortnite via NVIDIA GeForce NOW is the distribution of  
23 Fortnite via a web app. GeForce NOW is a web streaming service. Again, I'm going  
24 to get this wrong, but I understand the technology of this is: a gamer goes on to their  
25 PC, they go on to NVIDIA GeForce NOW, and they are live streamed to the Epic  
26 Games Store web app at the other end of the connection. Sorry, this is awful, not a

1 very technical way of describing it, but -- so it is effectively playing Epic's games,  
2 including Fortnite, via a web app, live streaming it on your PC. So those are the sort  
3 of alternative distribution channels that we say exist for Epic's apps, including Fortnite,  
4 apart from playing it via the Fortnite native app, which you obtain via the Epic Games  
5 Store or the Google Play Store.

6 THE CHAIR: So, I'm trying to grapple with this, but I think -- do you need disclosure  
7 again about the strategy in relation to web apps? I don't know if there'd be a dispute  
8 about it being an alternative way of accessing?

9 MS SMITH: Yes, that is our category G4(b). Yes, via NVIDIA GeForce NOW, except  
10 it's focused just on that particular streaming service.

11 THE CHAIR: So I'm just wondering why you need the disclosure, because I'm not  
12 sure there'd be a particular dispute you could access Fortnite on through web apps.  
13 So I think you're going to have to explain to me what the issue is, that this disclosure  
14 helps you in your defence.

15 MS SMITH: Okay. So, there is a dispute, and if I could take you to Epic's reply, which  
16 is in Bundle B, tab 3, page 146, paragraph 4(c). This is Epic's reply in response to our  
17 defence that:

18 "... not only can you distribute Fortnite via an Android app, you can distribute it via web  
19 apps and streaming services". [as read]

20 Epic's case at paragraph 4(c) of its reply, on page B1046 of the bundle, is that:

21 "It is denied that the distribution of Fortnite via web apps or streaming services are  
22 substitutes for the native Fortnite Android app." [as read]

23 So that question of substitutability and alternative distribution channels not just via  
24 Android, but also via web apps and streaming services, is squarely an issue on the  
25 pleadings in that case, in my submission.

26 THE CHAIR: I think I'd need to understand a bit more about what's meant by that

1 | reply, and it's just so that I can get an understanding. Mr Scannell, can you assist me  
2 | as to what the thrust of that paragraph is? Because I'm not sure -- I mean, okay, if  
3 | you're talking to a complete techno dinosaur, you can access Fortnite through a web  
4 | app, can't you? And you can access it on your phone; is that right? No.

5 | MR SCANNELL: Well, just to preface my remarks, I think you may be underestimating  
6 | my own age.

7 | THE CHAIR: Okay.

8 | MR SCANNELL: The purpose of 4(c) is not to say, "Well, we've had all sorts of  
9 | difficulties trying to distribute our apps one way or another way, which is an alternative  
10 | channel that you've identified in your defence." We're just -- the point that's being  
11 | made in 4(c) is that the distribution of Fortnite via web apps and streaming services  
12 | isn't the same thing --

13 | THE CHAIR: It's not a -- it's, in that sense, not the same thing as doing it on your  
14 | phone.

15 | MR SCANNELL: Yes.

16 | THE CHAIR: That's -- yes.

17 | MR SCANNELL: That's and that's plainly what I would suggest is at the heart of the  
18 | question that you were asking. The essential facilities case is set out in the claim. It's  
19 | clearly confined to Android. The third line from the bottom of the paragraph that you  
20 | were looking at, 144(c), says that it is confined to Android. The defence comes along  
21 | and says, "We don't accept that it is indispensable on Android. Oh, and by the way,  
22 | there are lots of other ways that you can distribute apps". That further submission,  
23 | beyond the denial, is simply observing that these other channels of distribution actually  
24 | exist.

25 | But what's now being said is, "Oh, well, that means that whatever you have done to  
26 | try to distribute in those other ways, we can get cross-examination of all of your

1 negotiations. All of your internal documents and so on, relating to distribution." But  
2 that's not an issue. The only point that's being made in the defence, further to the  
3 denial in respect of essential facilities on Android, was that there are other channels  
4 for distributing apps. In the reply at paragraph 4(c), the point that's being made is that  
5 distribution of Fortnite via web apps and streaming services are not the same thing as  
6 distributing on Android, which is the significance of the word "native".

7 THE CHAIR: Thank you.

8 MS SMITH: My Lady, there's no dispute that, as a matter of fact, various distribution  
9 channels exist. What is relevant for the purposes of Epic's essential facilities case -- if  
10 Epic seeks to make an essential facilities case, their case is that, as a matter of  
11 commercial reality -- because of course they accept there are other technical ways in  
12 which they can distribute their apps. But their essential facilities case, and that's what  
13 essential facilities is about, is that as a matter of commercial reality, they have to  
14 distribute their apps via Google Play Store. We say, no, you do not have to distribute  
15 your apps via Google Play Store, as a matter of commercial reality. These other routes  
16 to market exist, technically, but that's not really the important point. The important  
17 point is they are also a commercial, legally viable route to market. Whether or not they  
18 are a commercially viable route to market, turns on, fundamentally, the response that  
19 Epic gets when it goes out to developers, OEMs and carriers and says, "We want to  
20 distribute Fortnite, our most well-known app, and our Epic Games Store via these  
21 other alternative distribution channels". As Mr Allison said, we give various incentives  
22 to developers to distribute our apps -- or the apps they're going to produce for us -- via  
23 these other distribution channels. It's the question of the commercial viability of those  
24 other distribution channels that goes to the issue of an essential facility.

25 We do need to be able to (audio distortion). Subject to Mr Allison's evidence, which is  
26 in effect put at its highest level without breaching confidentiality, these are not

1 commercially viable, because we when we go out and talk to people, these are the  
2 responses we get. We need to be able to test that evidence by reference to the  
3 documents that actually record what was said. So, this is the nature of an essential  
4 facilities argument. Presumably, that was the purpose of Mr Allison's evidence that  
5 was put in by Epic, to try to say, "These are not commercially viable. Look at these  
6 discussions I've had". We need to be able to test that evidence by reference to the  
7 documents that must exist out there, because he's given evidence that these meetings  
8 have taken place, these discussions have been had. There must be some documents.  
9 Even if the discussions were oral, there must be some documents -- or mostly oral,  
10 not all of them -- and we need to be able to test what he says as to the commercial  
11 viability of these other distribution channels, by reference to any documents recording  
12 the discussions insofar as they exist. That's the basis for our requests G1, G3, and  
13 G4 and our further requests, because Mr Allison's evidence was put in after we were  
14 last in front of you, Madam, as regards requests 5 and 7.

15 Can I then just make a final point, or two, specifically about request G4, which reflects  
16 what was request 9? I'm not going to repeat my points about the Tribunal specifically  
17 allowing us to reopen that request, but it did. What I would like to take you to, my Lady,  
18 is the Supplemental Bundle 1, page 19, which sets out the revised request by Google  
19 under G4, because it appeared to me that Mr Scannell was making various  
20 submissions by reference to the initial position that we took under G4, rather than the  
21 revised requests, which are set out in the Supplemental Bundle on page 19.

22 As regards the scope of G4(a), for "slide decks or notes presented at, and minutes of,  
23 relevant meetings and groups that address Epic's app distribution strategy (other than  
24 in respect of EGS on mobile)", we take on board what has been said by Mr Scannell,  
25 I think, by your Ladyship, that that is broad, and we are willing to limit the scope of that  
26 request to:

1 "... relevant meetings and groups that address Epic's app distribution strategy for  
2 Fortnite and the Epic Games Store (other than in respect of EGS on mobile)." [as read]  
3 We do, however, maintain the request for a date range from 13 August 2020 to  
4 31 May 2025. The start date can be explained on the basis that what was previously  
5 ordered by the Tribunal under the December 2021 order was simply that Epic provide  
6 us with disclosure previously given by it in the context of the US proceedings, and that  
7 disclosure finished in August 2020. So there have been, as you see -- and I've shown  
8 you in the Allison witness statement -- significant developments in the five years since  
9 then. So we ask for updated disclosure for the period after the US disclosure period  
10 ended -- that's 13 August 2020 to 31 May 2025 -- and you've had my submissions on  
11 why that end date is justified.

12 As regards the periods -- date ranges for (b) and (c), please can I ask you to turn to  
13 the detailed Redfern Schedule? At A79, I hope. This is the detailed  
14 Redfern Schedule, which describes quite succinctly the justification for -- yes, the (b)  
15 and (c). At the bottom of page A79, you will see a paragraph starting:

16 "As regards developments in connection with the distribution of Fortnite on GeForce  
17 Now ..."

18 So that's request for b, G4(b), and you'll see that:

19 "... [that's] central to Epic's allegations that Google Play is 'indispensable' and an  
20 'essential facility'. [And the references given to the pleading, I'm not going to go back  
21 to that]. Epic accepts in its [solicitor's] second letter dated 31 January 2025 that its  
22 latest disclosure of material targeted at the distribution of Fortnite on GeForce NOW  
23 [only] 'captured documents ... until the 19 January 2022 when the Fortnite beta  
24 launched on GeForce NOW'."

25 We have asked for disclosure after that date. In fact, we've asked for disclosure  
26 starting on the 20 January 2022 because, of course, it is relevant, in our submission,

1 that you don't just get documents up until the date on which Fortnite actually launched  
2 via this alternative distribution channel, but we need to be given disclosure that  
3 addresses the outcome of the release of Fortnite on that alternative distribution  
4 channel, GeForce NOW. As we say in on page A79, we need disclosure:  
5 "... for the period post-dating 19 January 2022, including material that addresses the  
6 outcome of the release of 'Fortnite beta' on GeForce NOW and subsequent distribution  
7 of Fortnite on GeForce NOW ... Epic's disclosure is over 3 years out of date, does not  
8 cover recent developments and must be updated".  
9 Epic's proposal is that they only give disclosure for the period from 1 January 2025 to  
10 31 March 2025. Well, given that that will miss out the crucial period, we say, as to the  
11 period after Fortnite was launched on GeForce NOW, that disclosure period of only  
12 three months is not sensible or adequate.  
13 As to the date ranges for the removal of Fortnite from the Samsung Galaxy Store,  
14 you'll see in the following bullet point, on page A80. That addresses the removal of  
15 Fortnite from the Samsung Galaxy Store. The important point here is that Epic has  
16 not, up to now, disclosed any material in response to this disclosure request, at all.  
17 On the contrary, it has simply said, "We will give you our pleadings in separate legal  
18 proceedings in the US, that set out our position as to Samsung's removal of Fortnite  
19 from the Samsung Galaxy Store", and you can see that from that second bullet point:  
20 "It is not appropriate for Epic to seek to substitute giving proper disclosure by referring  
21 to pleadings in separate legal proceedings in the US - that is not disclosure, it is merely  
22 Epic's asserted position. The Tribunal and Google must be able to test Epic's case by  
23 reference to disclosure relevant to distribution channels used (and not used) by Epic,  
24 [so when they stop using Samsung Galaxy Store]. As Epic has not given any  
25 disclosure on this issue, it necessarily follows that supplemental disclosure is  
26 required."

1 Then a justification is given for the period for which we seek disclosure, which is the  
2 period of 1 October 2023 to 31 May, now updated to 31 May 2025. The start date is  
3 the date on which Samsung's Auto Blocker feature was first released. That's the  
4 justification for the 1 October 2023 date.

5 Epic proposes a date range of just two months from 1 June 2024 to 31 July 2024.  
6 I understand that's on the basis that on 1 June 2024, the Samsung Auto Blocker  
7 became a default feature on the Samsung Galaxy Store, whereas before it was an  
8 optional feature on the Samsung Galaxy Store from 1 October 2023.

9 We say that disclosure is necessary from the period it became an optional feature, the  
10 first release of Samsung's auto blocking feature, on 1 October 2023 because it is  
11 inconceivable that Epic would not have been considering the impact of Samsung's  
12 Auto Blocker feature as soon as it was introduced. Samsung Galaxy Store is  
13 a significant route to market for Fortnite and it's inconceivable that Epic was not  
14 discussing internally the fact that Samsung had just put a feature on its Galaxy Store  
15 that could block the distribution of its most important app. So we seek disclosure from  
16 the period of 1 October 2023 on that basis. Those are the date ranges that we seek  
17 under G4.

18 I have already made my submissions on custodians, but just to draw your Ladyship's  
19 attention to the fact that I am not sure that Mr Scannell -- that Google has, as you will  
20 see from Supplemental Bundle 1, page 19, we have reduced our request for  
21 custodians. We've focused our request for custodians under G4(b) and G4(c). You'll  
22 see on G4(b), we only seek now the custodians to be Ryan Dixon and the witnesses  
23 in the proceedings for the reasons I've already discussed. We don't seek for the other  
24 members of Epic's executive team to be custodians under G4(b).

25 Similarly, the custodians I've already made submissions on, paragraph 4(c). I've made  
26 the submission about how important it must have been to Epic when Samsung decided

1 to block the download of Fortnite from its Galaxy Store and so we seek the custodians  
2 from Epic's witnesses and Epic's executive team.

3 As regards Epic's proposal for Tim Sweeney as a custodian, in addition to Ryan Dixon,  
4 we note that that proposal is limited to Tim Sweeney's Gmail and Slack documents  
5 and we don't understand why the custodial documents should be limited to just those  
6 particular types of messaging for Mr Sweeney but all relevant document types should  
7 be searched for the individuals in question.

8 Thank you, my Lady.

9 THE CHAIR: I see the time, Mr Scannell, and I'm very conscious that you won't have  
10 very much time left today but we should rise now for the transcriber but given we've  
11 been going for an hour and a half, it will be ten minutes and then we can come back  
12 and see where we go.

13 (3.00~pm)

14 (A short break)

15 (3.12 pm)

16

17 Reply submissions by MR SCANNELL

18 THE CHAIR: Right, Mr Scannell, where we are is it's now 3.10. I am hoping, but we  
19 are awaiting confirmation from the transcriber, that we may be able to sit till five. I'm  
20 not suggesting that that will be sufficient time for you to get all of your requests done,  
21 but you may tell me otherwise, but it seemed appropriate that we might try and get  
22 through E1 to E4. I think that's a category that's -- is that what you were planning on  
23 doing?

24 MR SCANNELL: I would hope that we will be able to get through E1 to E12.

25 THE CHAIR: Excellent.

26 MR SCANNELL: On the basis --

1 THE CHAIR: Because they're similar, aren't they? There's a pattern. Yes.

2 MR SCANNELL: That would leave user choice billing, broadly, and Spotify.

3 THE CHAIR: Yes.

4 MR SCANNELL: It is very important for us for all sorts of reasons relating to the factual  
5 evidence and preparation of expert reports or at least expert work, that we do resolve  
6 these, certainly before the summer, and so it seems that there are two options  
7 available. Our preference would be to find a half day, even if it were a remote  
8 hearing --

9 THE CHAIR: Yes.

10 MR SCANNELL: -- to resolve it. And that would put it to bed.

11 THE CHAIR: Yes.

12 MR SCANNELL: The alternative is far less attractive and that would be to resolve  
13 those two on the papers.

14 THE CHAIR: Yes. I thought you might come up with those two options. From my  
15 perspective, I think if we can get availability for a half day just to sweep up everything  
16 that resolves things, or at least gets the advocacy out of the way before the summer,  
17 and hopefully I will be able to reach a decision before the summer and allow the parties  
18 to progress. But it also relieves the time pressure on you a little bit because  
19 I appreciate you're under one.

20 MR SCANNELL: Immensely grateful for that.

21 Madam Chair, there is one preliminary point before I launch into E1 to E12, and I hope  
22 that it will immediately become apparent to you that I'm not simply wasting your time.  
23 That it is actually important consideration for you to bear in mind when you're  
24 considering Epic's disclosure requests.

25 This comes under the category of points that are presented by Google in opposition  
26 to our disclosure requests that there is no need for that disclosure because they have

1 | already disclosed the relevant documents. So this is not an argument that they have  
2 | disclosed enough; it's that they have actually disclosed what we're looking for.

3 | And it arises from disclosure which has been going under the name "harmonisation  
4 | disclosure". I'm looking at your face, madam Chair, to see if there's a flash of  
5 | recognition as to what that is.

6 | I'm going to explain it very quickly. You may recall that following the order that these  
7 | proceedings, the Epic proceedings, be jointly case managed with Coll and Rodger --

8 | THE CHAIR: Yes.

9 | MR SCANNELL: -- Google undertook to the Tribunal at the 1 May CMC to give Epic  
10 | the disclosure it had already given to the Coll class representative. That's what I'm  
11 | referring to by the "harmonisation disclosure".

12 | Google, when it gave that commitment assured the Tribunal that it would endeavour  
13 | to do that on a rolling basis over a 28-day period, to run from the date when a joint  
14 | CRO was put in place for the newly consolidated proceedings. Google confirmed to  
15 | the Tribunal that that would be reflected in the consequent order that was made after  
16 | 1 May.

17 | Now, to cut a long story short, Google did not provide the disclosure on a rolling basis.  
18 | Instead, a day before the expiry of the 28-day period, it dumped 88,000 documents on  
19 | Norton Rose Fulbright in one go, along with 18 separate disclosure statements. All of  
20 | this happened on 11 June, so it's very, very recent. It's a week and a half ago. Now,  
21 | that was after the parties had produced both their Redfern schedules and given their  
22 | responses to each other's Redfern schedules.

23 | In Google's response Redfern Schedule, incidentally, it's actually relied upon this, on  
24 | the fact of this harmonisation disclosure which hadn't yet even been given, to justify  
25 | a refusal to give the disclosure that we are now requesting. That was obviously  
26 | absurd, but things have moved on since then.

1 It's common ground that Norton Rose Fulbright and Epic couldn't possibly have  
2 interrogated or reviewed these 88,000 documents in a week and a half. But Google  
3 continues to rely on the harmonisation disclosure as a reason of why you shouldn't  
4 give Epic the disclosure that it's asking for. And then on Friday night, Google's  
5 solicitors wrote to Norton Rose Fulbright to say that Epic should take Google,  
6 essentially, at its word, that the harmonisation disclosure contained the material  
7 requested by Epic and that on that basis, Epic should simply withdraw all of its  
8 disclosure requests.

9 Now, that is obviously something that we cannot do and I say that for three reasons.

10 The first is that you may have seen from my skeleton argument, that's at paragraph 1  
11 of my skeleton argument in A, tab 2, page 21 --

12 THE CHAIR: Yes.

13 MR SCANNELL: -- that the Coll class representative has written to the parties in  
14 advance of this hearing, expressly supporting Epic's current disclosure requests.

15 Now, she did that on the express basis, in her letter, that the Epic disclosure requests,  
16 if granted, would be helpful and useful in the consolidated proceedings. Now, that is  
17 manifestly something she could not have done, or she could not have said if the Epic  
18 disclosure requests were incapable of adding to the documents already produced in  
19 the Coll proceedings and that is what the harmonisation disclosure is.

20 The second reason is that the indication that the Coll class representative gave is  
21 inherently likely to be correct, in any event. A significant number of the categories of  
22 disclosure we're seeking have not been sought in the Coll proceedings and the  
23 searches that we are asking to be undertaken now, cover different and more recent  
24 time periods than the Coll disclosure to date. So we cannot assume that the disclosure  
25 requests are unnecessary.

26 And third, in the very short time period available to it since Friday night,

1 Norton Rose Fulbright have, to their credit, burnt the midnight oil to ascertain on  
2 a quick sampling basis whether it's likely to be true that the harmonisation disclosure  
3 is likely to satisfy Epic's disclosure requests, in whole or in part, and they have found  
4 that it is not true.

5 So just to take two examples RPC has urged Norton Rose to consider. The first is in  
6 the context of Epic's requests for disclosure of RSA agreements with mobile network  
7 operators. That's request E9 that I will be addressing in a moment.

8 The documents that RPC says are included in the harmonisation disclosure, in that  
9 respect, are expired RSA agreements with certain mobile network operators. I'm not  
10 sure if I'm allowed to mention their names. They all expired in 2023 but the whole  
11 point of request E9, as we'll come to, is to enable Epic to ascertain the current position  
12 up to 31 May 2025 with respect to MNOs.

13 The second example is in the context of Epic's request for external communications  
14 between 8 June 2022 and 31 May 2025 between Google and Spotify in relation to  
15 the 2022 Spotify addendum. That's request E20, of which we may not have time to  
16 get to today. The only responsive document Reynolds Porter Chamberlain says is in  
17 the harmonisation disclosure is a document dating from July 2022. But if that is right,  
18 and let's assume for the moment that it is, that leaves a three-year gap with no  
19 disclosure relating to this highly relevant and important set of negotiations.

20 So in my submission, we cannot today proceed on the assumption that the  
21 harmonisation disclosure is the answer to anything. We can't allow it to sabotage our  
22 disclosure requests. It can't safely be assumed that the contrary is true.

23 I have a duty to you to present things in the fairest possible way and I think the fairest  
24 possible way for me to address you in relation to this is to say that you have, strictly  
25 speaking, two options available to you.

26 You could send us away and say, "Review the harmonisation disclosure and come

1 back to us with new requests that are tailored to what you have not been able to find  
2 in the harmonisation disclosure". That would be very, very prejudicial and unfair,  
3 I would suggest, particularly given what I've just addressed you on in terms of the  
4 unlikelihood that the harmonisation disclosure actually contains what we are looking  
5 for.

6 But also, if that were to be the result, that there would be a real problem with the  
7 production of updated factual evidence and the expert reports in the proceedings  
8 because realistically, this couldn't happen before deep into the Michaelmas term,  
9 around the time of the service of the expert reports.

10 That leaves only one other option and that is to proceed on the assumption that the  
11 11 June disclosure does not correspond or respond to Epic's disclosure requests. And  
12 as I've said, there are compelling reasons to conclude that that is actually the case, in  
13 any event and what that would mean is that if, as we hope is the case, you grant the  
14 disclosure orders that we're seeking, while Google is executing those orders that you  
15 make, Norton Rose Fulbright will, of course, be doing its best to get on top of the  
16 88,000 documents. And if it emerges that there is some overlap, they can write to  
17 RPC and let them know that that is the case.

18 THE CHAIR: Yes. I think we should probably proceed and start hearing the points.

19 MR SCANNELL: I'm very grateful.

20 Okay, so E1 to E12. These pertain to incentive agreements that Google concludes  
21 from time to time with original equipment manufacturers. E1 to E4 relate to incentive  
22 agreements that are concluded with OEMs. Requests E5 to E8 relate to Samsung  
23 specifically, so Samsung is just one OEM. Then E9 to E12 -- they relate to incentive  
24 agreements that are entered into with mobile network operators or carriers. They're  
25 called both.

26 Under the terms of those agreements, Google shares the revenue it earns from the

1 use of their devices, if they're OEMs, or networks, if they are mobile network operators.  
2 Sometimes those incentive agreements are called revenue sharing agreements.  
3 Sometimes they're called mobile incentive agreements, MIAs. But there's no magic in  
4 the names.  
5 I'm going to deal with E1 to E12, but with brackets around E5 to E8, which is Samsung.  
6 Then I'll double back to Samsung.  
7 First: how are they relevant to the case? We say that they're relevant in multiple  
8 respects and I can take that from the pleadings if it's helpful. But in the interests of  
9 time, I propose simply to provide you with a summary outline of how this arises on the  
10 pleadings.  
11 In short, there is at the heart of the Epic case against Google an allegation of a kind  
12 of anti-competitive cycle or spiral. The way that works is that Google leverages  
13 dominance on the licensing operating system -- licensable operating systems  
14 market -- to restrict competition on downstream markets, in particular, the Android app  
15 distribution market. It does that, we allege, in a number of different ways.  
16 One of them is that it pays OEMs and carriers very substantial sums of money,  
17 essentially to make it harder for app developers other than Google to access their  
18 devices and networks. That's where the incentive agreements come in, because they  
19 are the vehicles for the payment of that money.  
20 We then allege that Google leverages the dominance it consequently enjoys on the  
21 Android app distribution market to restrict competition for the provision of mobile  
22 payment services on the Play Store app payment services market. That maximises  
23 the number of transactions that go through Google's in-app billing system, compared  
24 to the number that go through other payment systems. Of course, we allege that the  
25 commission that Google charges on each of those transactions is excessive and  
26 unfair. Then to complete the cycle, Google can then use the maximised revenue it

1 makes from the use of its in-app billing system to feed back into the anti-competitive  
2 cycle via the payments it makes to the OEMs and the carriers under the incentive  
3 agreements. So the process begins all over again.

4 Now, the incentive agreements are obviously a key component in that anti-competitive  
5 cycle, and that's the background to the requests E1 to E12. It's obviously important in  
6 that context that Epic can determine how prevalent these revenue sharing agreements  
7 are and what proportion of the relevant markets they affect. It's important that they  
8 can identify the original equipment manufacturers with whom Google has concluded  
9 them, to see what the terms of the RSAs actually are and how they operate.

10 We need to be able to determine the objective purpose and effect of those  
11 agreements, and we need to analyse through our experts the value that Google  
12 ascribes to the incentives established by the agreements, by being able to quantify the  
13 profits that Google is willing to share to establish those incentives.

14 I turn next to the scope of the requests we make. So E1 is at page 99 of the Redfern.

15 THE CHAIR: Yes.

16 MR SCANNELL: It seeks the incentive agreements themselves. Looking at E1, we  
17 seek:

18 "All RSAs, MIAs, and other documents of a similar nature (including non-binding  
19 preliminary documents, such as letters of intent and heads of terms) ... current as of  
20 [the end of] May 2025, and ... any other agreements that replaced or supplemented  
21 prior RSAs [were] disclosed by Google [to] 2024".

22 We don't anticipate that Google should encounter any significant difficulty in disclosing  
23 those documents. In all likelihood, we say, they're stored on a single database and  
24 they can be sent to Google's lawyers and from them to Epic's lawyers with a minimum  
25 of inconvenience and expense.

26 Google resists this request, subject to a proposal that it makes. So it commends

1 a proposal and it says, "If you don't like that, we're resisting it".

2 We do not accept that Google's proposal is sensible. Google's proposal can be found  
3 at page 99 of the Redfern in column D.

4 THE CHAIR: Yes.

5 MR SCANNELL: The bold text there. So it's proposing:

6 "Copies of RSAs and MIAs related to the UK entered into between Google and OEMs  
7 which are current as of 31 May 2025 (inclusive of any amendments to and/or waivers  
8 of the same)."

9 If you could keep your finger there, madam Chair, and flip forward to page 108, you  
10 will see the same Google proposal in column D --

11 THE CHAIR: Yes.

12 MR SCANNELL: -- alongside Epic's request for Google's incentive agreements with  
13 the mobile network operators.

14 Returning to page 99, and why that proposal isn't satisfactory, the first reason is that  
15 there's no reason to restrict this request to agreements related to the UK. It's true that  
16 Epic seeks an injunction in the UK. That's tried and true. But Epic's pleaded case is  
17 that the collective effect of Google's incentive agreements is to reinforce its dominance  
18 on app distribution. That's paragraph 94I of the fifth amended claim form Bundle A,  
19 tab 1, page 31. We can go there if you wish, but I'm not proposing to.

20 The app distribution market that Epic avers to be the market that is affected is  
21 a worldwide market, minus China. If I could just make that good, could we look at  
22 Bundle B, tab 1, page 42, please. The relevant paragraph there is paragraph 121.  
23 "Geographic scope of the Android app distribution market is worldwide, excluding  
24 China". [as read]

25 So Epic's primary case is that Google has abused a dominant position on a worldwide  
26 market, not simply the UK, and the incentive agreements it has concluded outside the

1 UK are just as relevant as those it has concluded here.

2 The international incentive agreements are also relevant on the evidence and the  
3 relevant reference there is Mr Gennai's second witness statement. Now I'll be going  
4 there in just a moment, so I'm not proposing to go there for, for the purposes of this  
5 point, but at paragraph 62 of his second witness statement he makes it clear that he  
6 too is not considering these RSAs and incentive agreements in the UK context only.

7 That's the first reason we can't accept Google's proposal.

8 The further reason is that we don't accept that there's any basis for Google to exclude  
9 documents of a similar nature, which we saw in the request E1, or preliminary  
10 documents such as letters of intent and heads of terms. So as to documents of  
11 a similar nature, the only argument that is put forward against that by Google is that  
12 they profess not to know what that means. But that has been explained to Google,  
13 and it's explained again in the Redfern. The reference there is page 100, at column  
14 C. Under the heading "Scope of requests 1 to 4", you see there the explanation of  
15 "documents of a similar nature".

16 THE CHAIR: Yes.

17 MR SCANNELL: That is instinctively just a matter of common sense, really. There  
18 are documents that are neither RSAs nor MIAs formally or in name, but they are  
19 nevertheless designed to reward OEMs or carriers in return for modifying their  
20 commercial intercourse with developers. They might be agreements or they might be  
21 something else.

22 THE CHAIR: There is always a drafting issue, isn't there, when you start using  
23 phrases like "but not limited to". I'm just reading that and there is a slight concern it  
24 goes beyond documents that have the same effect as the RSA or MIAs, which I'm sure  
25 isn't in fact what is intended. But there is always that interpretation when you've got  
26 to have something that's inclusive.

1 MR SCANNELL: I accept that. I'm sure, madam Chair, you'll appreciate that the  
2 mischief of seeking something beyond something that's called an RSA, or something  
3 that's called a MIA, is to make sure that a situation doesn't arise where all sorts of  
4 other agreements are being concluded, or arrangements by Google involving Google  
5 paying vast sums of money to OEMs or mobile network operators. But there's no  
6 disclosure in relation to all that, because, strictly speaking, they're not RSAs or MIAs.  
7 The mischief is to ensure that all of the incentive-type agreements are disclosed.

8 THE CHAIR: Yes.

9 MR SCANNELL: Then as to pre-final agreements, they should be concluded. This is,  
10 as we've heard already today, a fast-moving industry. That's common ground. If  
11 Google is negotiating with OEMs to conclude new or replacement incentive  
12 agreements, for example, and if they've reached the point of heads of terms, for  
13 example, those heads of terms are obviously going to be relevant. If one only relies  
14 on the old agreements, which may have been in place for a few years, that could,  
15 come trial, give rise to a very misleading picture as to Google's current incentive  
16 agreements with OEMs and MNOs. In fact, thinking about it, the updated agreements  
17 in their pre-final form may well be more relevant, come trial, than the old agreements  
18 to Epic's injunction claim.

19 The second reason why pre-final agreements and agreements covered by request  
20 E1(b) are relevant is that they may contain indications as to why it is that Google is  
21 concluding them. Now, the reasons for Google concluding them seems to have  
22 excited some controversy within Google. I'm not going to deal with it under E1, where  
23 we're just asking for the agreements. I'm going to deal with that particular objection  
24 when I come to E2, because that's asking for the internal communications and  
25 negotiations. For all of those reasons, we don't accept Google's proposal on E1 or  
26 E9.

1 Beyond the proposal, they then say, "Well, we object more generally". As to the  
2 objections that they raise, the points that I haven't already addressed are: first, that  
3 they should not have to disclose all of their incentive agreements with OEMs and  
4 carriers; second, that they've already provided some disclosure relating to those  
5 agreements; and third, that Epic has somehow barred itself from any further disclosure  
6 in relation to RSAs.

7 The first of those objections, that Google shouldn't have to disclose all of its incentive  
8 agreements, breaks down into two points. The first is that they shouldn't have to  
9 disclose anything outside the UK, and I've dealt with that already. The second seems  
10 to be an argument that one RSA is much like another, and so a sample of RSAs should  
11 be sufficient for Epic's purposes. If that is what Google means to say, then it's not  
12 tenable. To make that point good, could I ask you, please, madam Chair, to turn to  
13 Google's third amended defence. That's in the B Bundle again.

14 THE CHAIR: Is this the reference to them being bespoke?

15 MR SCANNELL: Yes.

16 THE CHAIR: Yes. Okay.

17 MR SCANNELL: I'm grateful. The relevant paragraph, for your note, is  
18 paragraph 76L(b).

19 Also in Google's evidence, we have Mr Gennai's second witness statement. If I could  
20 ask you please to turn that up, that's in the C Bundle at tab 3, page 98.

21 THE CHAIR: Yes.

22 MR SCANNELL: It's paragraph 56. If I could ask you to read paragraph 56, please.

23 THE CHAIR: Yes.

24 MR SCANNELL: I would emphasise the words on the second line:

25 "Depending on the commercial terms negotiated with each OEM". [as read]

26 THE CHAIR: Yes.

1 MR SCANNELL: Over the page, if I could ask you, please, to read paragraph 63.

2 THE CHAIR: Yes.

3 MR SCANNELL: It's the same point so we say it's tolerably clear that one RSA is not  
4 the same as another. Each is different, and it's therefore not good enough to disclose  
5 some but not all of them.

6 Before we leave Mr Gennai's witness statement, could I refer you also to the first  
7 sentence of paragraph 62. (Pause)

8 THE CHAIR: Yes.

9 MR SCANNELL: And that adumbrates a point that Google has reportedly made in the  
10 US proceedings also, that there's nothing to be concerned about with its incentive  
11 agreements because they only affect a small portion of the market. Now, that may or  
12 may not be true, but it makes it all the more important, I would suggest, for Google to  
13 produce all of the RSAs and not merely a small fraction of them.

14 The disclosure Google relies on to object to request E1 and E9. I've dealt with the  
15 harmonisation disclosure already; that's part of what they're relying on in this regard.  
16 They also say that they've disclosed documents of another category. Those  
17 documents are simply a small clip of documents which they were ordered by the  
18 Tribunal to disclose from the Australian proceedings. It's amounted to 39 documents  
19 and it's clearly not enough.

20 So that therefore leaves only the point that Epic has somehow barred itself from asking  
21 for these RSAs. The background to that point is that when Epic applied to amend the  
22 third amended claim form, back in August last year, a partner at Norton Rose Fulbright  
23 said in the supporting witness statement that Epic didn't consider that additional  
24 categories of disclosure would need to be identified at that time as a result of the  
25 amendments. Some of the proposed amendments related to RSAs and according to  
26 Google, that means that Epic can't ask for any further disclosure relating to RSAs or

1 similar incentive agreements.

2 But that argument, ingenious though it may be, is hopeless and there are three  
3 answers to it, any one of which is enough. The first is that even before Epic proposed  
4 to amend it, the third amended claim form already alleged that Google interferes with  
5 the pre-installation of alternative channels for the distribution of apps by interfering  
6 with OEM's ability to disapply technical restrictions. That was paragraph 68 and  
7 a quotation from it. And that was the claim as it stood before the application to amend.  
8 That paragraph expressly stated that Epic would rely on RSA-type agreements to  
9 establish the pleaded allegation and that, pending disclosure, the relevant paragraph,  
10 it would rely on two in particular: an agreement with OnePlus and an agreement with  
11 LG. So plainly disclosure was already required in respect of the RSA agreements.  
12 The solicitors' witness statement didn't change any of that of course.

13 The second point is that Epic had already asked Google for disclosure of Google's  
14 RSAs in materially identical form to the form that we're still asking for a year later. It  
15 did that on 11 June 2024, two months before the application to amend. So even if the  
16 supporting witness statement did say that nothing additional would need to be  
17 requested, which it didn't, Google's point wouldn't go anywhere.

18 And the third point is that the amendments that Epic made in the event to its pleaded  
19 case, having obtained permission, expressly averred that Epic's case in respect of  
20 both OEM RSAs and carrier RSAs are subject to further disclosure and the right to  
21 plead further in due course. So the reliance on the witness statement point goes  
22 nowhere.

23 For those reasons, we say that request E1, which we saw, and E9 asking for these  
24 agreements should be granted.

25 Requests E2 to E4, which go along with requests E10 to E12. Requests E2 and  
26 E4 -- there on page 102, 104 and 105 of the Redfern and requests E10 to E12. E10

1 is on page 109 and E12 is on page 110.

2 THE CHAIR: Yes.

3 MR SCANNELL: These cover internal Google communications to 31 May 2025,  
4 relating to Google's transition from version three of its RSAs to version four of its RSAs,  
5 or the introduction of new incentive agreements in place of old ones. That's E2 on  
6 page 102.

7 THE CHAIR: Yes.

8 MR SCANNELL: Then E3 is external communications to 31 May 2025, discussing the  
9 changeover from version three to version four of the RSAs or equivalent replacements  
10 of MIAs, including as to purposes.

11 And request E4 is for communications between Google and OEMs, reflecting how  
12 much of these RSAs and MIAs -- sorry, how much the RSAs and the MIAs actually  
13 cost Google.

14 THE CHAIR: Yes.

15 MR SCANNELL: Requests E10 to E12 are materially the same request in relation to  
16 incentive agreements with MNOs. The purpose of requests E2 and E3 and, for that  
17 matter, E10 and E11, they arise from the need to ascertain the basis of Google's  
18 decision to replace one version of its RSAs, version three, with another RSA, version  
19 four.

20 We understand that some of the restrictions contained in version three might have  
21 been removed from version four and we also need to understand whether similar  
22 changes affect MIAs.

23 Requests E4 and E12, they're aimed at ascertaining how much Play Store revenue  
24 Google is prepared to forgo in return for incentivising OEMs and carriers to impede  
25 potential competitors of Google from accessing the Android ecosystem and competing  
26 on the Android app distribution market.

1 Now, I'm not going to spend too long on those particular requests because they have  
2 been overtaken by a proposal that has been made to Google, and I'll get to that in just  
3 a moment. But I do need to deal with one objection that remains live.

4 THE CHAIR: Right.

5 MR SCANNELL: Whether or not one is dealing with the proposal that I'm going to turn  
6 to or the position in the Redferns, and that is that, as I've said before, Google objects  
7 to any disclosure that goes to the reasons why they're concluding these agreements.  
8 Now, as to that objection, we of course accept that, strictly speaking, we don't have to  
9 establish the Google state of mind when it comes to the breaches that we're alleging  
10 or the incentive agreement.

11 What ultimately matters are the effects that are brought about by those incentive  
12 agreements. But those effects are in issue. That's the first point. And insofar as Epic  
13 alleges that the effect of the incentive agreements is to restrict access by rival  
14 developers to the Android app distribution market, if there are documents which show  
15 that Google wanted to bring about precisely that effect and was trying to achieve it by  
16 entering into the agreements or by updating or replacing them, then that's obviously  
17 highly material.

18 But in any event, the reasons for Google handing over large sums of money to OEMs  
19 and carriers is put in issue by the factual evidence. Mr Gennai, some of whose  
20 evidence we've already seen, attests that it's no part of the reason why Google  
21 concludes these deals, that Google wants to incentivise OEMs to discriminate against  
22 mobile app developers. If Mr Gennai is to be believed, Google's motives are far more  
23 philanthropic than that. He says, at paragraph 57.3 of his second witness statement,  
24 for instance, that Google simply wants to support OEMs with additional revenue.

25 Then, in his third witness statement, at paragraph 56, he says that what he means by  
26 that is that Google wants to help OEMs to reduce their prices and to improve user

1 satisfaction by investing and innovating.

2 Now, I'll say nothing about the likelihood of that being the case and leave it at this. It

3 may or may not be true, but either way, Epic is entitled to test Mr Gennai's account.

4 So Google's internal communications relating to the reasons for entering into these

5 RSAs and MIAs, or for extending or varying them, is highly important and so are

6 Google's external communications with the relevant OEMs relating to those

7 agreements and amendments.

8 I come now to the proposal that we are making on requests E2 to E4 and E10 to E12,

9 and that is set out in two letters from NRF to Reynolds Porter Chamberlain. I won't

10 ask you to turn them up now, but we may dip into one of them. For your note, the first

11 is on 4 June 2024, and the bundle reference is D55/199. And the second is 17 June,

12 also from NRF to RPC, D69/235.

13 THE CHAIR: Yes.

14 MR SCANNELL: So in short, Epic has proposed that instead of applying E2 to E4 and

15 E10 to E12 to all OEMs with whom Google has concluded incentive agreements, those

16 requests would apply to a small sample of OEMs, so long as Google does two things.

17 The first is that it discloses internal communications relating to the overall justification

18 for replacing RSA version three with RSA version four. And the second is that it

19 provides a schedule or a witness statement listing the incentive agreements it has

20 concluded between 2020 and June this year, and provides certain information relating

21 to those agreements, supported by a statement of truth.

22 Just so that you can see that, could we turn to Bundle D, tab 55, please.

23 THE CHAIR: Yes.

24 MR SCANNELL: It's at pages 199 to 200. And within this letter the relevant paragraph

25 is paragraph 7. That describes the witness statement. Then the later letter describes

26 the other elements of the proposal that I described.

1 THE CHAIR: Yes.

2 MR SCANNELL: I would suggest that the witness statement that's being requested is  
3 a straightforward one. And it should be feasible, eminently feasible, for Google.  
4 Almost certainly all of these agreements are available on a database in its business.  
5 Google objects to it, and it's striking that it does that without denying that it would be  
6 feasible and straightforward to provide the witness statement. The objection that my  
7 learned friend makes at paragraph 64 of her skeleton argument is that a witness  
8 statement along the lines Epic requests wouldn't be compliant with the Tribunal's  
9 Practice Direction on trial or appeal witness statements.

10 With respect, that's not a good argument at all. The Tribunal's Practice Direction on  
11 witness statements, which is in the Authorities Bundle, requires that a witness has  
12 a personal knowledge that's relevant to the case and identified by list what documents  
13 the witness refers to for the purpose of giving their evidence. There's no reason at all  
14 why the requested witness statement should fall foul of that. In any event, the Tribunal  
15 has in the past ordered witness statements in lieu of disclosure when it saves costs  
16 and time and gets to the gist of what the parties need to resolve the issues between  
17 them. That was done at least twice in the trucks case and the Suez Group litigation in  
18 2021, and in *Ryder v MAN* in 2019. And of course, if this --

19 THE CHAIR: It's also being done in this case. It's been done in *Coll*, I seem to recall.

20 MR SCANNELL: Quite right. Yes. And in any event, if there's an objection to the  
21 witness statement, the short answer is well, comply with request E1, give us all of the  
22 agreements and we will do the further work but the other elements of the proposal  
23 would nevertheless remain.

24 So I commend the proposal to you as a proportionate and sensible alternative to  
25 requests E2 to E4 and E10 to E12.

26 On E1 to E12, the only remaining point to deal with is E5 to E8 on Samsung, and I can

1 take that more briefly. These relate to Google's incentive agreements with one  
2 particular OEM, Samsung, and it seeks revenue sharing agreements, mobile incentive  
3 agreements or similar, which have been entered into by Google with that OEM. The  
4 request itself is at page 106 of the Redfern Schedule, E5, on the left-hand side.

5 For the avoidance of doubt, madam Chair, the proposal that I just made covering E2  
6 to E4 and E10 to E12, that does not apply to Samsung and that is because Samsung  
7 is, we say, a special case. It's by far the biggest OEM with whom Google has  
8 concluded these incentive type agreements. And there is evidence that it has  
9 positively acted upon those incentives in a way that has caused real harm to Epic,  
10 which is also relevant to one of the Google requests that we saw, G4(c).

11 Samsung is the subject of specific pleas in the claim relating to the extraordinary sums  
12 of money Google has apparently paid it since 2020, but we say to soft pedal on the  
13 Samsung Galaxy Store, which has facilitated the hegemony of the Google Play Store.  
14 The relevant paragraphs of the fifth amended claim form are 94(k) to 94(n) for  
15 November at B1, page 31.

16 Google denies those allegations in its defence. The reference there to the third  
17 amended defence is paragraphs 76(j) to 76(m).

18 THE CHAIR: Yes.

19 MR SCANNELL: B2, page 93. The scope of requests E5 to E8 is the same as the  
20 scope of E1 to E4 for OEMs, and E9 to E12 for MNOs, except that draft agreements  
21 are not requested for other OEMs and carriers, but they are requested for Samsung,  
22 under request E5. The time frame is narrow, at 1 January 2024 to 31 May 2025, and  
23 that's designed to be proportionate and ensure that the up-to-date position is  
24 understood. It's highly relevant, we say, that Epic can see Google's internal  
25 discussions relating to the extension or variation of Samsung's existing incentive  
26 agreements, or their replacement with new versions or types of incentive agreements.

1 That's what request E6 aims to bring to light. It's also necessary for us to see the  
2 external communications between Google and Samsung on the same matters, and  
3 that's request E7, page 107. It's important, and relevant, to know how much Google  
4 is prepared to pay Samsung under those arrangements, not least because that  
5 provides an insight -- a key insight, we would say -- into the value that Google attaches  
6 to maintaining its dominance in the Android app distribution market. That's request  
7 E8, on page 107.

8 As to what Google has to say about requests E5 to E8 --

9 THE CHAIR: Can I just ask you one thing about the draft agreements? Why is it that  
10 that's included for Samsung but not the others?

11 MR SCANNELL: The right way to think about why it's included for Samsung and not  
12 the others, is that we're trying to be as narrow as we can with the others. It's not that  
13 we think that the draft agreement shouldn't be requested. A lot of thought went into  
14 the question of whether the draft agreement should also be requested for all OEMs.  
15 It was decided to narrow that and not include them for them, but not to do that for  
16 Samsung, because Samsung is a special case. It's all designed to get to the heart of  
17 what exactly is going on with these revenue sharing agreements. We're prepared to  
18 forego it for the less enormous OEMs, but not for Samsung. The amounts of money  
19 which have changed hands from Google to Samsung are enormous, and Samsung  
20 has apparently acted on the incentives generated by those sums of money, in a way  
21 which has caused harm to Epic, and that's being thrashed out in the US courts,  
22 separately, as we speak.

23 We've traversed this ground already today, with Samsung essentially restricting Epic  
24 on the Samsung Galaxy Store by enabling that auto blocker that we heard about. It  
25 was that that caused Epic to leave Samsung Galaxy Store, and that has resulted in  
26 separate litigation.

1 I was just about to finish by mentioning the objections to E5 to E8, which are very  
2 short. But because Google doesn't actually say anything material, beyond the point  
3 of disclosure of incentive agreements generally, under E1 to E4 and E9 to E12, it does  
4 add one curious point that it has already disclosed documents relating to a particular  
5 project called "Project Banyan", and that that should be added to its account, labelled,  
6 "We've already given you enough".

7 Now, as to where Project Banyan appears in the pleadings, we can see that from  
8 paragraph 94(l) of the fifth amended claim form. No need to turn that up. It's in B,  
9 tab 1, page 31. In short, Project Banyan was another of these Samsung incentivising  
10 schemes. It was devised in 2019 by Google. It was never actually reified. It never  
11 actually came into being, but we say that it's tolerably clear that the purpose of that  
12 scheme was, again, to incentivise Samsung to deprioritise the Samsung Galaxy Store  
13 so that Google Play Store faced less competition. Google denies that at the third  
14 amended defence of paragraph 76(k). There's nothing to the opposition point based  
15 on Project Banyan. Epic isn't seeking Project Banyan disclosure under requests E5  
16 to E8, and that's clear from the date range of the requests, which again, is  
17 1 January 2024 to 31 May 2025.

18 But we do say that the disclosure that Google has given in relation to Project Banyan  
19 does help to explain why it's important for Google to disclose draft agreements, and  
20 this goes back to your question, madam Chair. The reason is that, as I've said, Project  
21 Banyan was never actually implemented, so all of the disclosure that we have relates  
22 to draft agreements with Samsung. That disclosure strongly suggests that Google  
23 was aware that it would be unlawful to pay Samsung to deprioritise the Samsung  
24 Galaxy Store, and that is relevant to the question as to why Google chooses to share  
25 monopoly profits at all, which is a live issue on Mr Gennai's evidence.

26 So the reliance on Project Banyan disclosure is not a reason not to order the

1 Defendants to give disclosure under E5 to E8. We'd suggest, in fact, that the contrary  
2 is the case. For those reasons, we commend requests E5 to E8 to the Tribunal. That  
3 concludes the reasons for E1 to E12.

4 THE CHAIR: Thank you. Thank you. I'm quite conscious of the transcriber who may  
5 need to flex his or her fingers a little bit. Shall we -- I'm afraid it's probably only  
6 a five-minute break, but I'll come back just after ten past.

7 (4.06~pm)

8 (A short break)

9 (4.10~pm)

10

11 Reply submissions by MS SMITH

12 THE CHAIR: Yes, Ms Smith.

13 MS SMITH: Thank you, Madam. I will address very briefly the points made by  
14 Mr Scannell in introduction, before I move on to the specific requests E1 to E12.

15 First, I need to respond to Mr Scannell's complaint that the harmonisation disclosure  
16 was not supplied in tranches, but supplied the day before the deadline, on 11 June.

17 It's important for the Tribunal to look in that regard at the order that Google was subject  
18 to as regard this harmonisation disclosure. If I could ask you to turn to that -- its just  
19 been agreed between the parties in a Supplemental Bundle 1, page 7, paragraph 6.1.

20 If your Ladyship -- if you have that.

21 THE CHAIR: Yes.

22 MS SMITH: "By 4.00 pm, within 28 days [that was 12 June] Defendants, Google,  
23 should disclose to Epic all documents disclosed in the Coll proceedings not previously  
24 disclosed to Epic, save for the documents which Defendants are required, pursuant to  
25 paragraph 21 to 24 of the Joint Confidentiality Ring Order, to provide notice of third  
26 parties before motion can be made, which may be served once the third-party

1 application process has been completed. The Defendants should endeavour to  
2 produce material in tranches as they are available for production within the 28-day  
3 period." [as read]

4 So it was just an 'endeavours' requirement on Google. It was explained to Epic's  
5 solicitors in correspondence that Google could not make the disclosure of the  
6 harmonisation disclosure on the rolling basis before 11 June, because of the necessity  
7 of checking confidentiality with third parties, which as your madam will be aware, is  
8 a substantial undertaking. Epic was aware of that danger as a result of Google's  
9 skeleton for the 1 May case management conference, which is at F16. If I could take  
10 your Ladyship to it. Tab 16, page 430.

11 THE CHAIR: Yes.

12 MS SMITH: Paragraphs 7 to 8, pages 430 to 431. Google's skeleton made clear to  
13 Epic that there were 80,000 documents previously disclosed to Coll, but not to Epic or  
14 Rodger. Google would need to re-designate these documents under their draft joint  
15 CRO, which is different from the confidentiality arrangements applicable in the Coll,  
16 because of different tiers of confidentiality. So paragraph 8:

17 "Google will require more time to complete the envisaged disclosure to Rodger, Epic  
18 and Coll." [as read]

19 THE CHAIR: Yes.

20 MS SMITH: So Epic were well aware of the issues regarding this harmonisation  
21 disclosure. It came as no surprise. Nor the volume of disclosure come as any  
22 surprise. 80,000 documents were quite clearly set out on the face of our skeleton for  
23 the 1 May CMC. We're told by Mr Scannell, that having received these 80,000-odd  
24 documents, Epic's solicitors have been unable to review them in the week and a half  
25 since they were provided. Now, Google has sought to assist Epic in that regard by  
26 applying search terms -- relevant search terms -- to that disclosure, and to identify

1 relevant documents that may be -- or documents that are relevant to requests E1 to  
2 E12. We managed to do that within a couple of days, and we set out the results of  
3 that in our letter to Epic's solicitors of Friday, 20 June. I will be taking your Ladyship  
4 to that, because it shows what we have said. We have said that there is already  
5 substantial disclosure available to Epic, which is explicitly relevant to their requests E1  
6 to E12, and that is disproportionate to order any further disclosure in that regard.

7 Mr Scannell made a further submission that insofar as they have been able to carry  
8 out searches of the harmonisation disclosure, Epic's solicitors have carried out some  
9 searches which has shown that harmonisation disclosure is not adequate, and he gave  
10 the example that that was not adequate because a search they carried out as regards  
11 carrier agreements with mobile network operators, with MNOs, turned up some  
12 expired agreements. But that is precisely what Epic is seeking under their request E9.  
13 If you look at their request, E9, which is in our Supplemental Redfern Schedule, at  
14 SB 1, page 24. Under E9 -- and this is a point that I will come back to -- Epic seek all  
15 carrier agreements, regardless of whether or not they are still in force, up to  
16 31 May 2025. That's made explicit in their skeleton argument and explicit in their  
17 rejection of our proposal to give them current agreements. They want past  
18 agreements as well. So that's exactly what they were seeking.

19 So, in my submission, there's nothing in Mr Scannell's argument that the Tribunal  
20 should not have regard to the harmonisation disclosure, and I will be referring you to  
21 it, my Lady, in support of my submission that any further disclosure under E1 to E12,  
22 over and above that proposed by Google, is disproportionate. So if I can take you  
23 then --

24 THE CHAIR: I thought the point on the agreements that turned up, that were past  
25 agreements, was that there wasn't then also a current one. I think that was the point.

26 MS SMITH: My Lady, that leads me to my next point --

1 THE CHAIR: Okay.

2 MS SMITH: -- which if I can take you to our proposal for further disclosure. We do  
3 not say, "Just be happy with what you've already had", we are also making a proposal  
4 for further disclosure, and that's most easily seen on the face of the supplemental  
5 Summary Redfern Schedule, which is at Supplemental Bundle 1, starting on page 23.  
6 Requests E1 to E12 are set out in pages 23 to 27 of the Supplemental Bundle, but  
7 you'll see from that table on the right-hand side the proposals that Google has made  
8 for further disclosure in response to E1 and E9:

9 "... Google has offered to provide copies of RSAs and MIAs related to the UK which  
10 are [and have been entered into] between Google and OEMs [original equipment  
11 manufacturers] including Samsung, and between Google and carriers [or MNOs], [all  
12 of them that] are current as at 31 May 2025 (inclusive of any amendments to and/or  
13 waivers of the same)." [as read]

14 Now that I think is a pretty clear offer. There seems to have been some  
15 misunderstanding on the part of Epic's counsel. We propose to disclose all the current  
16 agreements that are in force as of 31 May 2025. We are not proposing to disclose  
17 a sample of them. We're proposing to disclose copies of RSAs and MIAs related to  
18 the UK, entered into between Google and OEMs, which are current as at 31 May,  
19 inclusive of amendments and/or waivers. That covers, Samsung, who is an OEM and  
20 also under E 9, current RSAs and MIAs, current as at 31 May 2025, between Google  
21 and carriers.

22 Now, our proposed case is that any further disclosure over and above the actual RSAs  
23 and MIAs that are current as at 31 May 2025, particularly any further disclosure of  
24 agreements that relate to jurisdictions other than the UK, or disclosure of internal and  
25 external communications, which is E2, E3, or data and analysis, E4, relating to those  
26 documents, we say that such further disclosure is neither necessary, reasonable or

1 proportionate, and I make that submission on the basis of three main points. First --

2 THE CHAIR: Can I just ask you one question first of all about the definition? So,

3 RSAs MIAs and other documents of a similar nature. We had Mr Scannell saying,

4 "Well, it doesn't really matter what they're called. It's what they're doing". It may be

5 called something different, but it may be very similar in effect. So how would that be

6 captured if you only have RSAs and MIAs?

7 MS SMITH: Perhaps I can take that point away, because obviously what we don't

8 want to do is capture any documents that don't have any sort of binding force, and I'll

9 explain why that's the case shortly, but we'll take that away perhaps as regards the

10 language.

11 Why I say that it would not be either necessary or proportionate to include documents

12 that don't have any sort of binding force -- well, I'll make three points in regard to that.

13 First, Epic's pleaded case is that the agreements at issue, what they have described

14 as the RSAs or the MIAs, are objectionable because they had anti-competitive effects.

15 That is, they had the effect -- and I underline the word "effect" -- of reinforcing Google's

16 alleged dominance.

17 In this regard, it is worthwhile going back to see what Epic's pleaded case actually is

18 in this regard. If I can take you first to Bundle B, tab 1, this is Epic's 5R amended claim

19 form, most recently amended claim form. If we could start, please, at paragraph 68,

20 which is on page 22.

21 THE CHAIR: Could I just have the page reference again?

22 MS SMITH: The page reference is Bundle B, tab 1, page 22.

23 THE CHAIR: Thank you. Yes.

24 MS SMITH: It's page 22, paragraph 68. This is where Epic introduces these

25 agreements in its pleadings. Paragraph 68:

26 "In addition to making it mandatory to pre-install the Google Play store in a prominent

1 position pursuant to the MADA [that's the mobile agreements distribution  
2 agreements -- mobile something agreements, distribution agreements], Google further  
3 interferes with the pre-installation of alternative channels for distribution of apps.  
4 Specifically, although it is in principle open to OEMs to grant approvals and pre-install  
5 apps, meaning that the technical restrictions do not apply, in practice, Google, through  
6 agreements entered into with the OEMs (see paragraph 94(i) below), interferes with  
7 the OEM's ability to do so, in particular by preventing or otherwise interfering with the  
8 pre-installation of app stores." [as read]

9 So these agreements entered into with the OEMs, to which reference is made in  
10 paragraph 94(i) below, are the RSAs and MIAs. If you turn to  
11 paragraph 94(i) -- perhaps we start with 94(g) -- on page 30, you will see Epic's  
12 pleading specifically on revenue sharing agreements, under the heading, page 30,  
13 "Revenue sharing agreements":

14 "OEMs that have entered into an MADA can also enter into a revenue sharing  
15 agreement (RSA) or a mobile incentive agreement (MIA), under which Google pays  
16 the OEM a proportion of revenues it derives from the use of the OEM's devices, if  
17 certain conditions are satisfied". [as read]

18 Then in paragraph 94(h), there's a reference to Google entering into a version of the  
19 RSA known as RSA 3.0 or MIA, and at the end of that paragraph:

20 "Epic understands that Google has recently entered, or is in the process of entering  
21 into, a new version of the RSA with OEMs (RSA 4.0)". [as read]

22 Can I just pause there to make the point that Epic's pleaded case refers solely to RSAs  
23 and MIAs. It does not refer to any other similar agreements or documents of a similar  
24 nature.

25 But if you then look at what they say about why these agreements are objectionable,  
26 in paragraph 94(i), Epic explains that there are three tiers of revenue sharing under

1 RSA 3.0, so the anti-competitive effects are only pleaded as regards the RSA 3s.  
2 I would ask your Ladyship to note that. They're only pleaded as regards the RSA 3s,  
3 not as regards the RSA 4s. So there's revenue sharing under RSA 3 and they explain  
4 what this revenue sharing is and the premier device tier, which gives the highest share  
5 of Google's revenues.  
6 Then towards the end of that paragraph, on the top of page 31, is what Epic identifies  
7 as the problem with these agreements:  
8 "Accordingly, OEMs are incentivised to not pre-install or promote alternative app  
9 distribution methods. The collective effect of these agreements is to reinforce  
10 Google's dominance in app distribution". [as read]  
11 Two points to note from that, Madam. First of all, Epic's pleaded case relates only to  
12 RSAs and MIAs. In particular, the anti-competitive effect of the agreements is only  
13 said to arise from the RSA 3s, which have the revenue sharing premier tier provisions  
14 in them, not RSA 4s.  
15 Importantly, my second point is that Epic's case is that the effect of these agreements  
16 is to reinforce Google's dominance. It is the nature of the agreements themselves, the  
17 fact that they contain revenue sharing arrangements, that have the effect of reinforcing  
18 Google's dominance and restriction of competition. So it is the effect of the  
19 agreements which is relevant, not the history of how they were arrived at or why the  
20 parties agreed to them, but it is the agreements themselves, the terms they include,  
21 and the effect of those agreements. Of course, the effect of agreements for the  
22 purposes of competition law is an objective issue.  
23 Therefore, in our submission, there is no basis in Epic's pleaded case for its  
24 wide-ranging requests for all communications, both internal and external, regarding  
25 the negotiations of, the purposes of and the reasons for these agreements, and the  
26 extensions or variations to them.

1 THE CHAIR: What do you say about Mr Gennai's evidence?

2 MS SMITH: I'm going to come to that, if I may.

3 First I want to make the point, if I may, Madam, that Epic itself rightly accepts that the  
4 question of anti-competitive effects of these agreements, which is what its pleaded  
5 case is about, is an objective issue. It says in its 2025 Redfern Schedule -- Bundle A,  
6 tab 4, page 102 -- Epic itself accepts, and I quote, that it "does not need to establish  
7 Google's subjective state of mind to establish the [relevant] conduct". So it is the  
8 agreements that are relevant -- the terms of those agreements and their objective  
9 effect in the market -- that is relevant to Epic's pleaded case, not the history of how  
10 they were arrived at or why the parties agreed to them.

11 For similar reasons, historical agreements that are no longer current are also  
12 irrelevant. I make that point as well by reference to Epic's pleaded case. You will  
13 recall, madam, that Epic's case, unlike that pursued by the class action Claimants Coll  
14 and Rodger, is not for damages, doesn't look backwards. Epic's claim is limited to  
15 forward-looking injunctive relief. In that regard, if I could ask you to turn back to page 7  
16 of this pleading.

17 THE CHAIR: I may have misunderstood, but I did not think that Epic were looking for  
18 past agreements. I may have misunderstood. I thought they were looking for --

19 MS SMITH: Yes. E1, paragraph b:

20 "Epic seeks RSAs and "any other agreements that replaced or supplemented prior  
21 RSAs or MIAs disclosed by Google in August 2024, regardless of whether those  
22 agreements are currently active". [as read]

23 THE CHAIR: Oh, I see.

24 MS SMITH: So it is (overspeaking) expired agreements as well.

25 THE CHAIR: But it is aimed at -- it's forward-looking in the sense that whatever was  
26 disclosed back in 2024 is whatever is in effect now, and anything that's updated as

1 something that was disclosed from 2024.

2 MS SMITH: Regardless of whether those agreements are currently active.

3 THE CHAIR: Yes.

4 MS SMITH: So anything that's expired in the meantime.

5 THE CHAIR: Yes. Okay.

6 MS SMITH: We say, again, that's not relevant to their pleaded case. Their claim is  
7 for forward-looking injunctive relief. In that regard, if I could ask you to turn back to  
8 paragraph 6, on page 7 of this Bundle.

9 THE CHAIR: Yes.

10 MS SMITH: "The Claimants seek injunctive relief restraining the Defendants from  
11 engaging in the above breaches. The Claimants do not seek damages". [as read]  
12 Paragraph 22, which is on page 11:  
13 "In the same terms, we seek injunctive relief. We do not seek damages". [as read]  
14 Then paragraph 164, which is on page 61, paragraph 164(a), (b), (c); these are all  
15 forward-looking orders that are sought to prevent Google carrying out certain conduct  
16 in the future.

17 THE CHAIR: Yes.

18 MS SMITH: So historical agreements are, we say, irrelevant to Epic's pleaded case.  
19 It is the current agreements and the ongoing effect, which we have offered to provide,  
20 which are relevant.

21 Also, draft agreements which have not been entered into, we say, are irrelevant. Epic  
22 is seeking drafts and it makes that clear in its skeleton, paragraphs 13(b) and 20. But  
23 the justification that they give, that's explicitly set out in E5, as regards Samsung. The  
24 explanation given in paragraph 13(b) of Epic's skeleton, which is found on page 28 of  
25 Bundle A, is that it is necessary to receive non-final agreements. Epic says at  
26 paragraph 13(b):

1 "If, as Epic believes, some agreements are in the process of negotiation or  
2 renegotiation then drafts and communications regarding those drafts will be the most  
3 helpful documents currently available to demonstrate the position. Further, there is no  
4 reason for Google to withhold these documents, as they are clearly relevant".

5 But we have offered to give them the most up-to-date agreements that are current as  
6 of 31 May. Drafts of agreements which have not been entered into, and which may or  
7 may not reflect the final terms of the agreements ultimately entered into, are irrelevant,  
8 we say again, to Epic's pleaded case on the anti-competitive effects of the  
9 agreements. That's my first point about the scope of the disclosure sought and how it  
10 is not justifiable on Epic's pleaded case to seek disclosure over and above that which  
11 we have already offered, which is agreements that are current as up to 31 May in  
12 2025.

13 That leads me to my second point: that there is no basis for Epic's claim for disclosure  
14 of RSAs and MIAs entered into by Google worldwide. Our offer is for copies of RSAs  
15 and MIAs related to the UK. Now, we say that disclosure of agreements entered into  
16 Google worldwide is not necessary or proportionate on the basis that, in summary,  
17 Epic's claim is limited to the UK, and this Tribunal's jurisdiction is limited to the UK.

18 Before I make each of those points good, it's also important upfront to make the point  
19 that the parties previously agreed to limit disclosure in these proceedings to  
20 UK-specific issues and custodians. If I can take you in that regard to Bundle F, tab 1,  
21 page 4, one of the early orders in this case before I have the privilege of being  
22 involved. It's paragraph 4 of the order, believe it or not, of 21 December 2021.

23 Paragraph 4 of the 2021 order is:

24 "The parties agreed to disclosure of the US documents [that's documents in the US  
25 proceedings], but that any supplemental disclosure shall be limited by the parties to  
26 supplemental disclosure in respect of any UK-specific custodians and/or issues". [as

1 read]

2 So the parties previously agreed to limit the disclosure to UK-specific issues and  
3 custodians. We say that's understandable because, as I've already said, Epic's claim  
4 is limited to the UK and the Tribunal's jurisdiction is limited to the UK.

5 As for Epic's claim, if we could go back to the pleading in Bundle B, Epic's most  
6 recently amended claim form, starting on page 10 of Bundle B, paragraphs 20 to 21.  
7 Epic's pleading -- paragraph 20 starts on the bottom of page 10. But what I want to  
8 refer you to, my Lady, is the pleading after the subparagraphs, which is the crux of this  
9 paragraph 20:

10 "Google has abused its dominant position, contrary to section 18 of the Competition  
11 Act 1998. Google's claim is limited to a breach of UK competition law only". [as read]

12 Paragraph 21:

13 "Google's anti-competitive conduct is causing damage to Epic, but also to developers,  
14 and that damage is including those based in the UK, and it is a reducing choice,  
15 deterring innovation and raising the prices in the UK". [as read]

16 So the harm that is pleaded takes place in the UK. Then if I could ask you to turn to  
17 page 59, where Epic pleads effect on trade. I'm not going to read them all out, but  
18 paragraphs 157 to 161 are all limited to effects on trade in the UK. The references are  
19 to developers in the UK and UK consumers, and they lead to the conclusion in 161.

20 The relevant conduct is likely to have an appreciable effect on trade within the UK,  
21 and it's limited to trade within the UK.

22 Then at 164, which I've taken you to before on the opposite page, page 61, under each  
23 of the subparagraphs, all of the relief sought is only sought in respect of the UK; under  
24 each of those subparagraphs a, b, c, d, e, f and g, your Ladyship will see that the relief  
25 sought is limited to orders in the UK.

26 That's not surprising because, as I've already said, Madam, the Tribunal's jurisdiction

1 is limited to the UK so if I can ask you to put away the pleading, and perhaps I can,  
2 although it hasn't made its way into the Authorities Bundle, and I don't think you have  
3 a purple book in front of you, I could hand up -- and apologies that it didn't make its  
4 way into the Authorities Bundle -- copies of section 18 of the Competition Act, which  
5 will be familiar, I'm sure, to those opposite me as well. (Handed)

6 Section 18 of the Competition Act limits the Tribunal's -- this is the provision upon  
7 which, as you would have seen, Epic relies and which Epic hinges its case. Section 18  
8 Abuse of dominant position and I would emphasise the following. Subparagraph (1),  
9 you'll be familiar with this:

10 "... any conduct on the part of one or more undertakings which amounts to the abuse  
11 of a dominant position in a market is prohibited if it may affect trade within the United  
12 Kingdom."

13 So the effect on trade has to be within the United Kingdom, but also, importantly,  
14 my Lady, the dominant position in a market.

15 If you then turn to subparagraph (3) of section 18, the dominant position to which  
16 reference is made in subparagraph (1):

17 "'Dominant position' means a dominant position within the United Kingdom."

18 That is the dominant position we are concerned with for the purposes of section 18.

19 Now, Epic argues that it's entitled to disclosure relating to RSAs and MIAs worldwide  
20 because the geographic scope of its alleged Android app distribution market is  
21 worldwide, excluding China. For your reference, that's paragraph 121 of its most  
22 recently amended claim form at Bundle B, page 42.

23 But what is relevant under UK law, which we've seen is the only basis for Epic's claim,  
24 is dominance in markets that affect the UK or, as it is put in section 18, "a dominant  
25 position within the United Kingdom". Epic doesn't explain how agreements that do not  
26 relate to the UK could affect markets in the UK, or how their effects could amount to

1 an abuse of a dominant position within the United Kingdom, as required under  
2 section 18(1) and (3).

3 We have offered to disclose all current RSAs and MIAs related to the UK, which we  
4 say is all that is necessary or in fact relevant.

5 THE CHAIR: Yes.

6 MS SMITH: But that then leads me to my third and final point on the requests,  
7 generally, before I turn to the RSA proposal most recently made by Epic, which is that  
8 Epic's wide ranging requests under its requests E1 to E12 failed to take into account  
9 the significant disclosure that has already been provided to Epic in this regard,  
10 including existing disclosure in Epic proceedings in the US and in Australia, and further  
11 supplemental disclosure in response to Epic's previous disclosure requests in these  
12 proceedings, as well as the harmonisation disclosure that I mentioned at the start of  
13 my submissions, which was provided to Epic as a result, on 11 June.

14 As regards disclosure from proceedings in other jurisdictions, can I take you to Epic's  
15 evidence contained in the first witness statement of Mr Tricker, one of Epic's solicitors.  
16 Bundle C, tab 11, page 364. This is a witness statement from Mark Tricker of Norton  
17 Rose Fulbright, which was put into the Tribunal in support of Epic's application to  
18 amend its claim form back in December 2024. It was heard ultimately in December,  
19 but the witness statement dates to 2 August 2024. And if I could ask you to turn to  
20 page 364.

21 THE CHAIR: Yes.

22 MS SMITH: Paragraph 91, Mr Tricker makes the point:

23 "Epic is engaged in litigation against Google in a number of jurisdictions. These  
24 multiple proceedings have been afoot for a number of years, but have recently  
25 reached their conclusion." [as read]

26 He refers to the US proceedings, Australian proceedings and these have, and

1 I underline:

2 "... publicly brought to light a vast amount of information concerning Google's conduct  
3 relating to app distribution on the Google Play Store." [as read]

4 Then he describes the extent of the proceedings and he makes the point, over the  
5 page on paragraph 92:

6 "The matters of which Epic has gained further knowledge as a result of the foreign  
7 proceedings include, for example, Google's witnesses' testimony on the use of  
8 revenue sharing agreements with OEMs." [as read]

9 Exactly what they are seeking further disclosure of now. And this is the crucial point,  
10 paragraph 93:

11 "For the avoidance of doubt, possibly in light of the [as he described it] vast amount of  
12 information that's come to light in the US and Australian proceedings, my clients do  
13 not consider that any additional categories of documents for disclosure ought now to  
14 be identified or new factual witness testimony provided as a result of the category B  
15 amendments set out below." [as read]

16 The category B amendments are that Google has entered into these RSAs and MIAs.  
17 I've also been asked, yes, that's made clear in paragraphs 97 and 98 of his witness  
18 statement. He then makes explicit reference to the RSAs as being the subject of the  
19 category B amendments.

20 My Lady, that's what Epic has obtained access to as a result of the foreign  
21 proceedings on Epic's own evidence. As regards the further disclosure that Epic has  
22 obtained as a result of the consolidation with the Coll proceedings -- the harmonisation  
23 disclosure -- please, could I ask you to turn to my instructor solicitor's letter to Epic  
24 solicitors of last Friday, 20 June, which is at Supplemental Bundle 1, page 33.

25 THE CHAIR: Yes.

26 MS SMITH: And my Lady, on page 33 towards the bottom of that page, paragraph 4,

1 you'll see that my solicitors made certain points on the requests E1 to E12,  
2 paragraph 4. Google has already explained it's already given substantial responsive  
3 and relevant disclosure to Epic, around 140,000 documents that are responsive to  
4 keywords relevant to requests E1 to E12, and you'll see those set out in  
5 footnote 1 -- the keyword searches that were applied to Google's non-harmonisation  
6 disclosure. So this is the additional disclosure even before the further 88,000  
7 documents.

8 So we have 140,000 documents not just disclosed generally but that are responsive  
9 to these broad keywords relevant to requests E1 to E12. RSA, revenue share,  
10 revenue sharing, MIA, mobile incentive.

11 And then over the page, Google's harmonisation disclosure contains over 3,500  
12 documents that are responsive to these keywords relevant to requests E1 to E12.  
13 You'll see the keywords applied in footnote 2. Very broad keywords. 3,500 documents  
14 come up as a result of that search.

15 While we are here, could I also ask your Ladyship to look at paragraphs 6 and 7. This  
16 goes to Epic's requests E4, E8 and E12 for data sets. And the point we make -- I'm  
17 not going to read it out, I'd ask you to read paragraphs 6 and 7 -- that data sets have  
18 already been disclosed and those data sets are up to date, more up to date, and  
19 they've been disclosed further data sets as part of Google's harmonisation disclosure.

20 Also, if I could ask your Ladyship to look at the specific points related to requests E5  
21 and E8. I'll ask you to read those, if I may, in your own time, my Lady. But we make  
22 the point that in light of the various documents that have been disclosed, those are  
23 confidential, there's no requirement for further requests under E5 to E8, the Samsung  
24 RSAs.

25 As regards carrier RSAs and MIAs, which are addressed from paragraph 12 onwards,  
26 can I particularly ask your Ladyship to look at paragraph 13. Paragraph 13 is the

1 non-harmonisation disclosure and the relevant keyword hits, at footnote 3, that relate  
2 to carriers, MNOs and RSAs or MIAs gave rise to about 40,000 hit results. That's  
3 material that Google has already disclosed over and above the US and Australian  
4 disclosure, which includes, among other things, explanations regarding carrier RSAs  
5 provided by Google to the CMA in the context of the mobile ecosystem market study.  
6 And then over and above those 40,000 hit results, we have further harmonisation  
7 disclosure and a search along those using relevant keywords for carriers, RSAs and  
8 MIAs returns nearly 2,000 hit results, including illustrative examples of responsive  
9 documents.

10 Then the point is made, at paragraph 16, that Google has already offered to give  
11 disclosure of current carrier RSAs and MIAs related to the UK, and in those  
12 circumstances, Google's existing disclosure is adequate to address requests E9 and  
13 E12.

14 So in my submission, it's not reasonable or proportionate to require Google to make  
15 further disclosure in this regard, in particular to it's not reasonable or proportionate in  
16 light of that extensive existing disclosure to require Google to make further disclosure  
17 just to test Mr Gennai's evidence, which is suggested in Epic's skeleton. Epic has  
18 more than adequate disclosure to test Mr Gennai's evidence already in that regard. If  
19 I could ask you to turn back to Mr Gennai's evidence and actually look at what it says.  
20 Gennai 2 is in Bundle C, tab 3. Mr Gennai's second witness statement, page 98,  
21 paragraphs 56 to 57. And I think you've already been taken to this by Mr Scannell  
22 today. You'll see he explains what RSAs are in 56 and then he says in 57 why the  
23 RSAs were introduced. Now, you've seen the extensive disclosure that's already been  
24 given that would enable Epic to cross-examine Mr Gennai were it so advised to do so  
25 as regards that paragraph of his witness statement.

26 Similarly, and importantly, if I could ask your Ladyship to look at what's said in

1 Mr Gennai's third witness statement. Paragraph 54, which is on page 186. And what  
2 he says there, in paragraph 54 on page 186, is he addresses the issue of the RSA 4s.  
3 He says:  
4 "In my second witness statement, I discussed the different iterations of RSAs,  
5 including RSA 2 and RSA 3. There is a further iteration of the RSA, RSA 4, which  
6 I understand Google began entering into with OEMs in around mid 2022. As far as  
7 I'm aware, the RSA 4 was entered into between Google and OEMs do not contain  
8 terms that require the exclusive pre-installation of Google Play as the only app store  
9 on a device. My understanding is that many of the early RSA 3s have now been  
10 terminated or replaced by other agreements, eg RSA 4s." [as read]  
11 Now, as regards the RSA 3s, which started being replaced in mid 2022, Google has  
12 already provided substantial disclosure that goes back to that period. And in that  
13 regard, you've seen the evidence from Mr Tricker and you've seen the searches that  
14 were carried out of the existing disclosure and the harmonisation disclosure.  
15 As regards the RSA 4s that have been replacing the RSA 3s from about mid 2022,  
16 Mr Gennai makes it clear that they do not include terms requiring the exclusive  
17 pre-installation of Google Play. And you will recall that, in any event, although Epic  
18 refers to RSA 4s in its claim form, it explicitly and perhaps notably does not plead that  
19 the RSA 4s have an exclusionary effect. The pleadings as to exclusionary effect, you'll  
20 recall, were limited to the RSA 3s.  
21 So in my submission, further disclosure is neither necessary nor proportionate to test  
22 those points or to test the evidence of Mr Gennai.  
23 And then just briefly, if I could address --  
24 THE CHAIR: Can I just ask you one question? If you were giving your disclosure of  
25 current agreements, they would be -- some of those at least would be RSA 4s?  
26 MS SMITH: Insofar as they've replaced the previous ones.

1 THE CHAIR: Yes.

2 MS SMITH: So moving then to the proposal that Epic has made -- its RSA  
3 proposal -- as regards E2 to E4 and E10 to E12, and we note the confirmation from  
4 Mr Scannell that this does not apply to the Samsung requests at E8 to E9. Now, that  
5 proposal, in summary, is to limit requests for disclosure of internal and external  
6 documents and data to a sample of OEMs and carriers. We note in passing that that  
7 sample -- those OEMs and carriers included in that sample are all UK-based  
8 entities -- in any event -- as this is on the condition that Google also:

9 "(i) discloses its internal communications relating to the overall strategy of replacing  
10 RSA 3.0s with RSA 4.0s and/or introducing RSA 4.0; and (ii) provides a statement to  
11 Epic setting out a list of information ... in relation to the relevant agreements entered  
12 into by Google with OEMs ..."

13 Now, the detailed contents of this proposed RSA statement are set out in paragraph 15  
14 of Epic's skeleton, and they are extensive. If I could just -- perhaps the easiest way is  
15 to just go back to the skeleton in that regard, which sets out the request. Sorry,  
16 my Lady.

17 THE CHAIR: Yes. I've just lost my Redfern schedule on the floor.

18 MS SMITH: I'm surprised it's the first time that's happened. It's Bundle A, tab 2,  
19 page 29, which is Epic's skeleton. It's probably the easiest way of finding out  
20 what -- seeing what Epic wants in its RSA statement. Page 29, paragraph 15 of Epic's  
21 statement. Yes, at the top of page 29 --

22 THE CHAIR: Yes.

23 MS SMITH: -- you'll see their eight subparagraphs, which set out the information that  
24 Epic wants in this RSA statement. I'm going to read them all out.

25 THE CHAIR: Yes.

26 MS SMITH: Now, we welcome the implicit recognition by Epic in making the RSA

1 | proposal, that its original requests were disproportionate, but for the reasons we've set  
2 | out in correspondence, we can't accept it -- or indeed the Redfern Schedule -- nor  
3 | should the Tribunal. There is no need, primarily -- there's no need for a witness  
4 | statement listing all the RSAs and MIAs, let alone those entered into for the previous  
5 | five years. I have already explained why. What is necessary and relevant to Epic's  
6 | case is our proposal, what agreements are current, and we have proposed to disclose  
7 | those agreements themselves to Epic. It's not necessary or relevant for us to provide  
8 | an RSA statement listing every agreement entered into with an OEM between  
9 | 1 January 2020 and the 6 June 2025, regardless of whether they're still in force, and  
10 | including ones that don't relate to the UK. But in any event, it's not appropriate or  
11 | reasonable for the Tribunal to order such a witness statement to be produced by  
12 | Google, and I would like to turn you back to the Tribunal's practice direction on witness  
13 | statements before I address the point that your Ladyship made, that we've already had  
14 | that type of witness statement in the Coll proceedings. If I could start --

15 | THE CHAIR: I'm getting quite nervous now! (Inaudible) tell me I couldn't  
16 | (overspeaking) --

17 | MS SMITH: My point, my Lady, is that that was quite a different witness statement,  
18 | but I will explain why. But, if I can first take you to the Practice Direction. The Practice  
19 | Direction, I think, in fact, the CATs Practice Direction reflects that in the High Court --  
20 | the Practice Direction in the High Court. It's in Authorities Bundle, tab 2. Practice  
21 | Direction 2/2021, which relates to trial and appeal witness statements in the  
22 | Competition Appeal Tribunal. It makes the point that:

23 | "Factual witness statements must be recollections based on a witness's own  
24 | knowledge, rather than a mere description of documents." [as read]

25 | If I can ask you to turn to page 189, paragraph 3.2:

26 | "A trial/appeal witness statement must set out only matters of fact of which the witness

1 has personal knowledge that are relevant to the case, and must identify by list what  
2 documents ... has been referred to for the purpose of providing the evidence ... The  
3 requirement to identify documents ... does not affect ... privilege ..."

4 So it's a witness statement of fact -- and your Ladyship will be aware of this -- from  
5 procedure in the High Court. It's not meant to just be a list of documents. It's meant  
6 to be factual evidence of which the witness has personal knowledge. If the witness  
7 has refreshed their memory by reference to documents in giving that evidence, then  
8 the documents must be listed. But the point is that it is witness evidence of fact that  
9 it's in the witness's own personal knowledge, and that is reflected by what's in the  
10 statement of truth that must be included, which is set out at paragraph 4.1. At the top  
11 of page 190:

12 "The witness statement sets out only my personal knowledge and recollection, in my  
13 own words."

14 Then, last paragraph:

15 "I have not been asked or encouraged by anyone to include in this statement anything  
16 that is not my own account, to the best of my ability and recollection, of events I  
17 witnessed or matters of which I have personal knowledge."

18 So it's not -- that is what witness statements are about, factual witness statements.  
19 They are not meant to be a substitute for Epic carrying out its own inspection of  
20 disclosure, which has already been given by Google, and which we are proposing to  
21 give as regards all current RSAs and MIAs. We have already given disclosure, and  
22 I've drawn your Ladyship's attention to that, and we are going to be proposing to give  
23 disclosure of all current RSAs and MIAs. Epic can inspect those documents and can  
24 discern from those documents disclosed the material it seeks by way of its RSA  
25 statement. That is the proper process for dealing with these types of issues.

26 Importantly, my instructing solicitors have made clear in correspondence, and that's

1 a letter of 11 June, which for your note is in Bundle D, page 220. We have made it  
2 clear in correspondence, there's no individual at Google who would have knowledge  
3 of and be able to provide a witness statement listing every RSA or MIA entered into  
4 with an OEM between 1 January 2020 and 6 June 2025, together with the details set  
5 out in paragraph 15 of Epic's skeleton. It's not possible, it's not appropriate under the  
6 Practice Direction, and it's not necessary.

7 THE CHAIR: I mean, it rather depends whether you call this a trial or appeal witness  
8 statement, isn't it, under the Practice Direction, because the Practice Direction doesn't  
9 apply to trial or appeal witness statements? That's 1.1 ... One second.

10 MS SMITH: This is a trial, my Lady.

11 THE CHAIR: It is -- well --

12 MS SMITH: This will be a trial.

13 THE CHAIR: There will be a trial. Yes, of course, there will be.

14 MS SMITH: And that is the purpose for which the witness statement is produced.

15 THE CHAIR: Well, that's what I'm slightly wondering about, because it's more  
16 a procedural issue, isn't?

17 MS SMITH: Well, if it's simply a procedural issue, my Lady, the appropriate (inaudible)  
18 is that finding out what agreements there are. We have said that we will disclose all  
19 current agreements, which are all that are relevant for the forward-looking claim made  
20 against us by Epic in the UK -- and which is all that is relevant for the purposes I have  
21 outlined -- and Epic should properly inspect that disclosure that we are proposing to  
22 give, and they can discern from that disclosure what the agreements cover. That is  
23 what disclosure is for, and this idea of this RSA statement is both bizarre and not, in  
24 our submission, appropriate.

25 THE CHAIR: Yes, I understand your submissions on that one.

26 MS SMITH: But my Lady, just to make clear, the point -- you brought up the witness

1 statement in the Coll proceedings. I think what you're referring to there is the  
2 "Kourakina statements", which explain the financial data.

3 THE CHAIR: Yes.

4 MS SMITH: Ms Kourakina was an accountant, I think, in Google, who was able to  
5 explain what financial data was produced by Google and in what form. That was within  
6 her knowledge -- her factual knowledge -- as an accountant. I can't remember her  
7 exact job in Google. It did not summarise the data or disclosure, and it was not  
8 a schedule or summary of the agreements or their terms. It was merely saying, "this  
9 is how we do it in Google, as a matter of fact".

10 So, we say that Epic's RSA proposal is neither necessary, reasonable or  
11 proportionate, and we have offered further disclosure, which is both adequate and  
12 more than is required, given the massive amount, the vast amount of pre-existing  
13 disclosure which goes to these issues. No further disclosure is necessary. (Pause)

14

15 Reply submissions by MR SCANNELL

16 MR SCANNELL: Can I deal first with the harmonisation disclosure point?

17 THE CHAIR: Yes.

18 MR SCANNELL: You have my submissions in relation to the general points that arise  
19 from the harmonisation disclosure. I do say that it is not only the wrong answer, but  
20 actually highly inappropriate to seek to dodge disclosure because of that  
21 harmonisation disclosure. Epic does not know, as of today, what the harmonisation  
22 disclosure actually contains. We're being asked by the Defendants to take them at  
23 their word that it contains the documentation that we're seeking, but it clearly doesn't  
24 contain -- I'm prepared to be that blunt about it -- it does not contain the documents  
25 that we are seeking, and the reason I can be so forthright and so confident about that  
26 is because everything that we're asking for is being resisted by the Defendants.

1 They're not giving it, they're not proposing to give it, and this is documentation which  
2 wasn't given in the Coll proceedings. We know that already.

3 The final point relating to that is that, if there were any truth in the submission that the  
4 harmonisation disclosure contains what we are now requesting, then the testing that  
5 has been done, the sampling that has been done, would have at least shown that the  
6 hits are there. But Norton Rose Fulbright, on a sampling basis, has tested the  
7 harmonisation disclosure, and even on a small sampling basis, the harmonisation  
8 disclosure has failed. So that's the first point.

9 My learned friend says that they don't want to disclose anything, any agreements that  
10 have no binding force, and that is why, in their proposal, they are suggesting that all  
11 of the information -- all of the documentation that we request along the lines of  
12 negotiations and internal communications and external communications should be  
13 excluded. That just goes to the reasons why Google is concluding these agreements.  
14 I mentioned the Gennai evidence. I didn't take the Tribunal to that evidence. I'm  
15 happy to do so, but Mr Gennai, in his witness statement, puts the reasons for Google  
16 entering into the OEMs directly in issue. He claims that they have nothing to do with  
17 the sort of effects that we're talking about, and he says that what they're actually all  
18 about is giving money to OEMs because they want OEMs to provide better services  
19 to consumers. That will be hotly contested at trial. This disclosure that we're seeking  
20 as to discussions, internal communications and external communications is directly  
21 relevant to that.

22 It is not true -- the third point -- that we do not plead to agreements of a different sort.  
23 We do we plead to that at paragraph 68 of the fifth amended claim form. The reference  
24 is Bundle B, tab 1, page 22. That was the original pleading, in fact, where we referred  
25 to the fact that Google incentivises OEMs to make it more difficult for developers to  
26 distribute on Android. But in any event, it's an extraordinary submission for

1 competition Defendants to make, that the Claimant has somehow got it wrong because  
2 they mentioned RSA 3.0s and RSA 4.0s, but they didn't quite get the nomenclature  
3 right. Because they didn't quite get the nomenclature right of the vehicles of  
4 wrongdoing, that the Defendants somehow get off the hook from granting disclosure.  
5 We cannot know exactly the forms that Google's incentive agreements take. That's  
6 unknown to us, as the Claimant in the proceedings, and it's wholly unremarkable that,  
7 as a Claimant, we would seek not only disclosure of the agreements we know of -- the  
8 RSAs and the MIAs -- but also agreements of the same sort.

9 Under the proposal that Google commends and advances, they suggest that they  
10 should only have to give present agreements -- so the agreements that are presently  
11 on foot. In fact, to be quite clear about this, what they're proposing is that they would  
12 only disclose present agreements in the UK, and they say that should be enough.  
13 They rely on the fact that the relief that Epic seeks is injunctive relief, which is forward  
14 looking. But can I make a preliminary remark, designed to deflate this extraordinary  
15 floating object, that nothing historic is relevant because we're seeking an injunction.  
16 That's obviously fallacious. That's not true at all. It is perfectly fine in seeking  
17 injunctive relief, to rely not only on what the Defendants are doing today, but also on  
18 what the Defendants have been doing over a period of years. A course of conduct  
19 which establishes the way that the Defendants act and have restricted competition,  
20 which needs to come to an end.

21 It's not true at all that an application for an injunction can only be supported by what is  
22 happening today. That's clearly wrong.

23 THE CHAIR: I think in your RSA statement suggestion, you say five years,  
24 1 January 2020 and 6 June 2025. Just so I can be clear, is that the period you're  
25 looking for?

26 MR SCANNELL: Yes.

1 THE CHAIR: Yes.

2 MR SCANNELL: As to draft agreements next, I think there may be a slight  
3 misunderstanding by my learned friend in relation to that. I thought I had made it clear  
4 that draft agreements are being sought from Samsung -- the draft agreements with  
5 Samsung -- but they're not being sought as between Google and any other OEM. The  
6 position with regard to the other OEMs is that we do want the pre-final versions of  
7 agreements like heads of terms, for example.

8 I've already explained why we say that those draft agreements with Google, in  
9 particular, are highly relevant. They're highly relevant for all OEMs, but we're prepared  
10 to forego them for everyone but Samsung.

11 That brings me to foreign RSAs or RSAs worldwide. Under the submissions that you  
12 heard on that it is, in my submission, quite wrong, in fact, it's absurd to attempt to  
13 evade disclosure on the basis that UK disclosure is enough. I've given you the  
14 references to our pleaded case. Our pleaded case is that Google has abused  
15 dominant positions on worldwide markets and by doing so has caused harm in this  
16 jurisdiction. And that is a completely conventional competition claim in the  
17 Competition Appeal Tribunal. Claims of that sort, here and in the High Court, are very  
18 common indeed.

19 That pleaded case that we allege breaches of a dominant position on worldwide  
20 markets, is just not addressed by the submissions that you heard. What you did hear  
21 is first that section 18 of the Competition Act somehow cannot apply to our case  
22 because it refers to a dominant position in the UK. The problem with that submission  
23 and the reason why it's clearly wrong is that if, as we allege, Google enjoys a dominant  
24 position on a worldwide market, then Google enjoys a dominant position in the UK.  
25 That's the whole essence of holding a dominant position on a worldwide market.  
26 That's a position that you hold here and in France and in Germany and in Brazil and

1 | everywhere else.

2 | The problem that section 18 of the Competition Act is seeking to avoid is a situation  
3 | where the Claimant comes along to the Tribunal and says the Defendant has  
4 | a dominant position on the French market. So it's not a dominant position on any  
5 | market in the United Kingdom. The problem there is one of territoriality and  
6 | jurisdiction. That clearly doesn't apply in this case. And as I say, the basic material  
7 | that is presented to the Tribunal's and High Court's judges, is that international  
8 | behaviour affects Claimants in this jurisdiction and section 18 does not change that at  
9 | all. It would be extraordinary if it did.

10 | Nor is it any answer to what we're asking for to say that in the 2021 disclosure order,  
11 | the parties agreed to narrow their disclosure to the United Kingdom. Indeed, the first  
12 | indication that that must be wrong is that all of the disclosure that Google is seeking is  
13 | disclosure which is going to originate outside the United Kingdom. None of their  
14 | disclosure requests are confined to the United Kingdom.

15 | Paragraph 4 of the 2021 disclosure order, seen in the context of that order, was all  
16 | about the US disclosure. It was all about finishing off the elements of disclosure that  
17 | were given as US disclosure. But of course, it wasn't suggesting that going forward,  
18 | from that point in time, all of the disclosure had to be confined to the United Kingdom,  
19 | however irrelevant that might be or however unuseful that might be. That really  
20 | wouldn't have made any sense, not only for Epic, but also for Google. All of Google's  
21 | disclosure would essentially have to be thrown out of the case if that were true.

22 | I want to address --

23 | THE CHAIR: Can I just ask you something. It's so basic, but I'd just like to get some  
24 | clarity on it. If I were minded to make an order that RSAs worldwide were disclosed,  
25 | so you've got UK ones and you've got worldwide ones, what do you see those  
26 | worldwide RSAs going to? How would they be deployed?

1 MR SCANNELL: Well, they will be deployed to show --

2 THE CHAIR: I mean, you don't have to say if it's privileged, by the way, but how you're  
3 planning on deploying them. Anyway.

4 MR SCANNELL: It's not so much a question of privilege as it is a question of giving  
5 away litigation tactics.

6 THE CHAIR: Yes. I'm not asking you to do that, but I'm just generally trying to get my  
7 head around what it is they bring to the party.

8 MR SCANNELL: It's a perfectly fair question as to relevance, you know, in what way  
9 that we say that the international OEMs are relevant. They all go to the levers which  
10 are pulled by Google to abuse the dominant position that, we say, it enjoys on the  
11 worldwide market for app distribution. And indeed at higher levels than that, because,  
12 of course, the only incentive agreements are incentive agreements which are entered  
13 into by undertakings which already have a MADA or an EMADA with Google. So it  
14 happens only amongst that cohort.

15 It will be critically important to show that there is an abuse that's happening at that  
16 level, because that is the -- we allege -- that is the way that Google creates a situation  
17 where the vast majority of the apps are coming from the Google Play Store and by  
18 extension from that, the vast majority of the in-app transactions are happening in apps  
19 from the Play Store and therefore through the Google in-app billing system, the  
20 commissions on which are excessive and then it all gets fed back.

21 THE CHAIR: I think I'm trying to nail down why it is that the international RSAs inform  
22 that issue over and above what you'll clearly be able to argue by reference to the UK  
23 RSAs.

24 MR SCANNELL: Well, part of the difficulty is that none of these RSAs necessarily  
25 from the evidence that I've shown you, it can't be assumed that they're all the same.  
26 And so in order to understand how exactly Google is going about this, we need all of

1 the RSAs. We need to see how they operate from OEM to OEM. And it's not really  
2 just a question of jurisdiction. And we know also that Google has been shifting its  
3 ground on these RSAs in response to different regulatory interventions from  
4 jurisdiction to jurisdiction. That, too, will tell a story about how they work and what  
5 their effects are, and how levers can be pulled by Google to achieve particular aims.  
6 We know, for example, that the versions of RSAs have changed. You've heard that  
7 from my learned friend. A lot of that is down to the fact that they have had to change  
8 by reason of regulatory intervention. But those regulatory interventions differ from  
9 jurisdiction to jurisdiction. The only way to actually work out the full picture, which we  
10 need on our pleaded case, is to have all of them.

11 THE CHAIR: Then I just have one more question on it. So, what will knowing what  
12 an RSA with an OEM in Hong Kong, for example, what will having knowledge of that  
13 contribute to my ability to determine the case?

14 MR SCANNELL: Well, it has to be remembered that we're dealing with agreements  
15 between Google and OEMs. So we're dealing with not just a small company that's  
16 based in Hong Kong. We're dealing with (overspeaking) --

17 THE CHAIR: And I don't know if there's a separate OEM in Hong Kong. There may  
18 or may not be so --

19 MR SCANNELL: Nor am I. I'm simply taking your example and running with that. But  
20 we're not dealing with small agreements of that sort. These are actually quite big  
21 agreements. They're only agreements that are made with manufacturers of mobile  
22 devices and so yes, that as it happens, the manufacturer of a particular mobile device  
23 might be based in Hong Kong, but that agreement may very well affect that OEMs -- in  
24 fact, our working assumption is that it will. It affects that OEM's behaviour way beyond  
25 Hong Kong. It doesn't really matter who buys the device in Hong Kong. What matters  
26 is how that OEM behaves in response to the incentives that are given to it by Google,

1 and that will have much more wide ranging effects, as far as we understand, than just  
2 Hong Kong.

3 And the same would be true, for example, of an OEM or for that -- well, an OEM that's  
4 based in, you know, a much larger territory, like Germany, for example. Yes, the  
5 device might be made in Germany, but if this OEM is affecting that OEM, if this RSA  
6 is affecting that OEM's conduct in relation to the device, the device may very well be  
7 disseminated far beyond Germany. In fact, we would presume that it would be.

8 THE CHAIR: Thank you. (Pause)

9 MR SCANNELL: Just two final points, if I may. The first is a point which came up  
10 a number of times in my learned friend's submissions. It's a rather beguiling point, but  
11 actually quite a dangerous one which is, "Don't worry about whether or not what we  
12 have given in the past is enough. We've run some search terms and we've got lots of  
13 hits".

14 I say that that's beguiling because it does, on its face, sound like a good point but in  
15 fact, the closer one looks at that sort of point, the less sense it makes. Hits are fairly  
16 easy to produce, as it happens, particularly by a sophisticated litigant, like Google, and  
17 a firm of the reputation of RPC. Search terms can be run across all sorts of disclosure  
18 in heavy litigation and all sorts of hits can arise. It all depends on what exactly one is  
19 looking for and what the search terms are.

20 It may very well be that across the disclosure that there has already been in this case,  
21 if, for example, one searches for RSA or MIA, one gets (a) hit and (b) perhaps even  
22 lots of hits. But that doesn't actually answer the question of whether what we are  
23 asking for that will be in the disclosure, particularly when what we are asking for takes  
24 us up to May 2025.

25 I put it no higher than this, that there is a risk that that argument will cloud the issue.  
26 We can't really know whether the hits that are happening and that are being spotted

1 on the radar screen, show that what has been disclosed contains what we're asking  
2 for. All we can say is that it's highly unlikely that that disclosed documentation does  
3 contain what we're asking for, for all of the reasons that I've described already today  
4 in relation to the harmonisation disclosure, in relation to the 39 documents that were  
5 disclosed in the Australian proceedings, in relation to the US disclosure, because that  
6 ends in June 2022.

7 So that just leaves the Practice Direction point. The point that you made, in response  
8 to that, madam Chair, is a good point. Trial and appeal witness statements actually  
9 mean something or at least it's my submission that they do. A trial witness statement  
10 or an appeal witness statement is a witness statement which is actually deployed  
11 when you're at the substantive hearing of that trial.

12 We all know from practice that witness statements are deployed for all sorts of reasons  
13 on an interlocutory basis before you get to the trial or before you get to the appeal.  
14 And they can be very useful for judges in deciding case management points, for  
15 example. But what really matters is that they've got a statement of truth behind them  
16 so that they can feel confident about points that are presented on an interlocutory or  
17 an interim basis.

18 Reading the wording of the Competition Appeal Tribunal Practice Direction is -- the  
19 wording actually only makes sense if one is thinking about a more substantive witness  
20 statement than the sort of solicitors' witness statement or case management witness  
21 statement. But in any event, even if all of that were wrong, and I don't at all say that it  
22 is, there was actually nothing in the submission that you heard from my learned friend  
23 to suggest that what we are asking for in the witness statement as part of our proposal  
24 would fall foul of the requirements of the Practice Direction, and I see no reason why  
25 it should. There's no reason why the deponent of the witness statement should be  
26 somebody who doesn't know anything about the agreements, for example. And it may

1 be that more than one witness statement is required to get it right. But even if the  
2 deponent doesn't know everything, it would be enough to be told, all of the agreements  
3 having been collated, that that is the understanding of the deponent. That these are  
4 all of the OEMs that have been collated within the business. I've been told and  
5 understand that and here they are and here's the information that's being requested.  
6 The final point is this, that the suggestion was made in respect of the proposal, which  
7 is made to get around the disclosure that we're seeking, which is that bold text that  
8 I brought you to in E1 and E9, that the short way through all of this is to just grant that  
9 which will confine us, of course, to our UK current OEMs with nothing pre-final among  
10 them and then, Epic can review that and can write back to Google.  
11 That is not satisfactory at all, for two reasons. First, because we know already that it  
12 would not be enough. What is the point of waiting, receiving that, and then writing to  
13 them? And that leads to the second point. All that would do is create a huge delay in  
14 the proceedings; a delay which, frankly, we cannot afford. We do need to get this  
15 disclosure soon so that it can be incorporated into our trial preparations.

16 I'm grateful.

17 THE CHAIR: Thank you.

18 Thank you all very much for your helpful submissions. You will no doubt appreciate  
19 I'm not going to be making any decisions today. I want to go away and think about it.  
20 You've done a lot of detailed work and there's an awful lot to get to grips with. I will  
21 get to it as soon as I can, but, I think I said this at the last case management hearing,  
22 unfortunately -- well, fortunately for me, unfortunately for you, I am away as of  
23 tomorrow for ten days or so. So it won't be, I'm afraid, before then.

24 In the meantime, we need to get a date in the diary, don't we, for another hearing.

25 I will leave everyone to liaise over that. Probably half a day? Yes?

26 MR SCANNELL: Yes.

1 THE CHAIR: Half a day would be sufficient. And then if that covers everything,  
2 obviously, thanks to the Tribunal staff for staying late and thank you very much to the  
3 transcribers for staying even beyond the time I requested them to. It is very much  
4 appreciated.

5 (5.33 pm)

6 (The hearing adjourned)

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