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16 *Attorneys for Plaintiff Epic Games, Inc.*

17
18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 **IN RE GOOGLE PLAY STORE**
22 **ANTITRUST LITIGATION**

23 THIS DOCUMENT RELATES TO:

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

Case No. 3:20-cv-05671-JD
Case No. 3:21-md-02981-JD

25 **DECLARATION OF ETHAN**
26 **DIAMOND IN SUPPORT OF**
27 **PLAINTIFF EPIC GAMES, INC.'S**
28 **MOTION FOR A PRELIMINARY**
INJUNCTION

Date: June 2, 2022 at 10:00 a.m
Courtroom: 11, 19th Floor
Judge: Hon. James Donato

1 I, Ethan Diamond, declare as follows:

2 1. I am the co-founder and former CEO of Bandcamp. In March 2022, I became an
3 employee of Epic Games Inc. (“Epic”) after Bandcamp was acquired by Epic, and I currently
4 serve as Senior Director of Bandcamp. I submit this declaration in support of Epic’s Motion for
5 a Preliminary Injunction. The contents of this declaration are based on my personal knowledge.
6 If called as a witness, I could and would competently testify thereto.

7 2. I served as the Chief Executive Officer of Bandcamp for fourteen years. In that
8 role, I grew Bandcamp into a profitable business with over 100 employees. I have managed and
9 directed the company toward its primary mission to fairly compensate artists in order to allow
10 them to keep making music. My responsibilities as Senior Director of Bandcamp remain the
11 same.

12 **Bandcamp’s “Artists-First” Philosophy**

13 3. In 2008, I, along with Shawn Grunberger, Joe Holt and Neal Tucker, co-founded
14 Bandcamp, an online record store and music community that directly connects artists and their
15 fans and makes it easy for fans to support artists equitably so that they can keep making music.

16 4. Our business is based on an “artists-first” philosophy, meaning that unlike other
17 music distribution platforms, we have a transparent business model, with Bandcamp receiving a
18 low revenue share so that artists make as much money as possible from their music.

19 5. Specifically, with respect to purchases of digital goods (*i.e.*, digital songs and
20 albums), we receive only a 10% revenue share (after \$5,000 in sales by an artist, and 15% before
21 that threshold). We have deliberately limited our revenue share to the minimum necessary to
22 operate the business, because fair compensation for artists helps them to keep making music,
23 which in turn creates the best experience for music fans.

24 6. As a result, when a fan buys a product through Bandcamp, an average of 82% of
25 the revenue goes directly to the artist or their label.¹ This is a critical part of our business, and
26 one that sets us apart.

27 _____
28 ¹ The remainder is used for Bandcamp’s revenue share and payment processing fees.

1 7. That is something we have heard time and again from artists. For example, one
2 band named 75 Dollar Bill released a digital-only album exclusively on Bandcamp, and it
3 reportedly made \$4,200 from nearly 700 buyers in just two days, more than it made from
4 services like Spotify, Apple Music and YouTube over the last *six years*. A true and correct copy
5 of an article titled “This Is How Much More Money Artists Earn From Bandcamp Compared to
6 Streaming Services,” by Marc Hogan, dated June 4, 2020, is attached as Exhibit A.²

7 8. I understand that many of the artists that sell music on Bandcamp rely on the
8 service to make a living based on what they have shared on Twitter. For example, one artist
9 shared that Bandcamp is “the princip[al] reason for [his] financial survival in the last year and a
10 half,”³ while another stated, “[I] regularly use my @bandcamp money to buy groceries.”⁴



26 ² <https://pitchfork.com/thepitch/how-much-more-money-artists-earn-from-bandcamp-compared-to-spotify-apple-music-youtube/>

27 ³ https://twitter.com/shit_rock/status/1468579627689918465

28 ⁴ <https://twitter.com/jeremybastard/status/1364260110944641031>

1 9. In fact, I understand that for some independent artists, Bandcamp is the only
2 platform available on which they are able to make money off of their music *at all*. For example,
3 artist Emma Swift has stated that it “wasn’t actually going to be financially sensible or
4 sustainable for [her] to release [her music] on mainstream streaming platforms such as Spotify or
5 Apple,” and that she was only going to be “able to survive as an artist if [she] used a platform
6 that would allow [her] to make money from the record.” She said that she opted to release her
7 music on Bandcamp for this reason. A true and correct copy of an article titled “The anti-
8 Spotify: How online music company Bandcamp became the toast of the COVID age” by Randall
9 Roberts, dated September 24, 2020, is attached as Exhibit B.⁵

10 **Overview of Bandcamp Business Today**

11 10. Today, more than 500,000 independent artists and over 11,000 independent labels
12 rely on Bandcamp, collectively earning close to \$1 billion in revenues to date.

13 11. We have built a robust online community, with over 15 million monthly active
14 users (“MAUs”).

15 12. From the period from January 1, 2020 through March 16, 2022, Bandcamp’s
16 overall take rate on gross sales and the gross profit margin on our digital marketplace was
17 approximately 13% and 7.5% respectively.

18 13. We are predominantly located in the United States and the United Kingdom,
19 though our service is also available throughout Canada and parts of Europe.

20 14. We have over 100 employees, who are now Epic employees; they will continue to
21 work on Bandcamp’s services as part of the Epic Games Store organization.

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26 ⁵ <https://www.latimes.com/entertainment-arts/music/story/2020-09-22/bandcamp-anti-spotify-streaming#:~:text=The%20anti%2DSpotify%3A%20How%20online,their%20annual%20meetup%20in%20Arizona.&text=Like%20thousands%20of%20artists%2C%20Nashville,of%20her%20gigs%20were%20scrapped.>

1 **Bandcamp Android Application**

2 15. We launched the Bandcamp mobile app for Android in 2013. We chose to launch
3 our Android app on the Google Play Store, as it is the largest distribution channel for mobile
4 apps on Android and has the widest audience.

5 16. From a business perspective, mobile apps are an important part of the Bandcamp
6 business, even more so as users increasingly interact with the internet solely through apps, rather
7 than web browsers.

8 17. Users can download the Bandcamp Android app free of charge. In addition, since
9 2015, Android users have been able to make in-app purchases of digital content on the
10 Bandcamp app, including purchases of songs and albums.

11 18. Since we launched in app-purchases in our Android app in 2015, we have used
12 our own payment system, which is fully integrated with PayPal and customized to our business.
13 This was consistent with Google's guidelines, which have historically exempted digital content
14 consumable outside of the app (*i.e.*, digital music distribution) from both the required use of
15 Google Play Billing for purchasing digital goods and services, and from paying Google a
16 revenue share. A true and correct copy of Google's prior payments policy, as downloaded via
17 The Wayback Machine, is attached as Exhibit E.⁶

18 **Bandcamp iOS Application**

19 19. We also launched the Bandcamp mobile app for Apple's mobile operating system
20 ("iOS") in 2013. While the iOS app is also free of charge, users have never been able to make
21 in-app purchases of digital content within the app.

22 20. This is because Apple has always mandated the use of its own payment processor
23 ("IAP") for purchases of in-app digital content, which has historically imposed a 30% revenue
24 share on such transactions. We cannot sustain paying Apple its revenue share and therefore, we
25 are unable to offer digital content for sale within the Bandcamp app on iOS.

26
27 ⁶ <https://web.archive.org/web/20200929075133/https://support.google.com/googleplay/android-developer/answer/9858738>

1 21. If a user attempts to purchase a digital album or song within the iOS Bandcamp
2 app, they see a message that the content is “[n]ot available for purchase on this device.” Instead,
3 the user can add the digital content to their “wishlist,” which prompts an email from Bandcamp
4 to the user with information on how to purchase the digital content on Bandcamp’s website.
5 This process forces users and prospective users to exit the app to purchase music—or to give up
6 the purchase if they are not so inclined.

7 **Impact of Google’s New Payments Policy**

8 22. On September 28, 2020, Google announced that it was “clarifying” its billing
9 policy to say that “all developers selling digital goods in their apps are required to use Google
10 Play’s billing system.” The announcement initially indicated that Google would require
11 developers to comply by September 30, 2021.

12 23. Because Google framed this as a policy “clarification,” we were unsure whether
13 we would be permitted to continue using our existing payment solution for in-app purchases of
14 digital goods, as we had operated on the Google Play Store for the preceding six years.
15 Therefore, we contacted Google for guidance to understand the impact of the clarification on our
16 business. I understand that Joshua Kim, Bandcamp’s Director of Business Operations, is
17 submitting a declaration that provides more detail on our communications with Google.

18 24. In August 2021, Google informed us that its policy change would apply to
19 Bandcamp, and we would no longer be permitted to use our own payment solution for in-app
20 purchases of digital content.

21 25. Google subsequently set a March 31, 2022 deadline for all developers that sell
22 digital goods and services, including the Bandcamp app, to cease using other billing systems,
23 switch to Google Play Billing, and pay a revenue share to Google. Google has stated that any
24 apps that have not done so by June 1, 2022 will be removed from the Google Play Store.

25 26. In December 2021, after outreach to Google about how its policy change would
26 threaten our business, Google offered us a 10% revenue share in exchange for Bandcamp’s
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1 agreement to integrate with Google Play Billing and develop features across Google surfaces
2 such as WearOS, Auto and TV.

3 **Integrating Google Play Billing and Paying Google Revenue Share Is Unworkable for the**
4 **Bandcamp App on Android**

5 27. Google’s policy change does not work for our community or our business. Even
6 at a revenue share rate of 10%, we would have to either pass those fees on to consumers (making
7 Android a less attractive platform for music fans), pass those fees on to artists, or run our
8 Android business at a long-term loss.

9 28. Beyond the impact of the additional revenue share, Google Play Billing would
10 pose a number of challenges to the way we have designed and operated our Android business for
11 several reasons. I explain those reasons at a high level below. I understand that
12 Shawn Grunberger, Bandcamp’s Director of Technology, is submitting a declaration that
13 provides more detail on these issues.

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1 29. First, integrating Google Play Billing would impact our ability to pay out artists
2 and labels within 24 to 48 hours of a sale. We have intentionally designed our billing system in a
3 way that enables us to send payouts to artists and labels in this timeframe. I understand that
4 artists have said this is a critical feature of our offering, distinguishing us from our competitors
5 who take much longer to pay artists. For example, one artist who sells music on the Bandcamp
6 app recently tweeted: “@BandCamp > Spotify/AppleMusic [because] 1. Higher % payout for
7 artist. 2. Same week payout for artist. (Versus a 3 month wait period)[.] 3. Direct artist to
8 supporter communication. 4. New music notifications direct to fans. 5. Read #2 again.”⁷



7 <https://twitter.com/IAmBrinson/status/1427663957662343171>

1 30. If we were forced to use Google Play Billing, it would affect our payout process,
2 as it takes Google up to 45 days to pay out developers for any given purchase. Waiting to
3 receive funds from Google would significantly delay payouts to artists and labels. In order to
4 continue to send payouts to artists and labels within 24 to 48 hours of a sale, we would need to
5 use our own funds to advance the payouts to artists.

6 31. Second, Google Play Billing cannot be used for the purchase of physical goods.
7 If we were forced to use Google Play Billing for digital goods only, artists would have to deal
8 with two different payment systems for purchases of digital goods versus physical goods. I
9 expect that this will confuse artists, who would continue to be paid out within 24-48 hours for
10 sales of physical goods, but would need to wait 15-45 days for sales of digital goods (absent
11 Bandcamp fronting the money to pay out artists for digital goods on the same schedule as
12 physical goods).

13 32. Third, it has taken significant engineering work to integrate our customer support
14 tools with PayPal in a way that allows our support team to provide quality support without
15 leaving our own payment system; it would require significant resources and expense to build a
16 new infrastructure in order to provide the same quality of support through Google Play Billing.

17 33. Fourth, Google requires developers using Google Play Billing for digital
18 purchases to create a pricing schedule for each digital item available for purchase in their app.
19 This would present a significant challenge for our app, a large marketplace that offers 13,000
20 new in-app digital items daily, and that allows artists full control over pricing, including a Name-
21 Your-Price feature which artists can enable to allow users to pay extra for items.

22 **The iOS Approach Is Not a Good Solution for the Bandcamp App on Android**

23 34. While we could turn off digital sales in the Android version of the Bandcamp app
24 to avoid integrating Google Play Billing and paying Google a revenue share—the same approach
25 we are forced to take in the iOS version of the Bandcamp app—this is not a good solution for us
26 for the reasons explained below.

1 35. First, users would no longer have the choice to directly purchase music in the app
2 but would instead be met with a message that digital music is not available for purchase on their
3 device. They would have no choice but to leave the app to complete their purchase.

4 36. Second, it would eliminate our only existing access point to consumers—
5 particularly young consumers—who purchase and consume digital content solely through mobile
6 applications, which I understand is a rapidly growing population. If there is no way for these
7 consumers to purchase digital music directly in the Bandcamp app, I expect that some of them
8 will not purchase digital music from Bandcamp at all.

9 37. Moreover, if there is no way to purchase digital music in any version of the
10 Bandcamp app, I expect that some artists will become less engaged with Bandcamp or leave the
11 service altogether, making Bandcamp less attractive for fans and artists alike. Thus, removing
12 digital sales in the Android version of the Bandcamp app may hinder our ability to keep fans and
13 artists engaged and to continue to grow Bandcamp.

14 **Request to Google**

15 38. In light of this, on April 15, 2022, I wrote to Purnima Kochikar, Vice President of
16 Google Play Apps and Games at Google, urging Google to withdraw its proposed policy
17 “clarification” and revert to the long-standing policy that allowed apps like Bandcamp to offer
18 their own payment solution for digital goods. I asked Google to confirm by April 25, 2022
19 whether it would agree to these terms. Attached hereto as Exhibit C is a true and correct copy of
20 my April 15, 2022 email.

21 39. Ms. Kochikar responded to my email on April 21, 2022 and reiterated that
22 Google’s policy “clarification” was “not a new policy and only a clarification of the existing
23 policy[,]” and that her team would “support [Bandcamp] should [we] choose to integrate Google
24 Play Billing.” Ignoring my urging to withdraw its policy “clarification/” Ms. Kochikar explained
25 that Bandcamp’s options are to integrate Google Play Billing, turn off digital sales in
26 Bandcamp’s Android app, or distribute Bandcamp’s Android app through a channel other than
27 Google Play, the largest distribution channel for apps on Android with the widest audience. (*See*
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1 Ex. C at 1-2.) For the reasons explained above, Ms. Kochikar's proposed options are not
2 workable solutions for Bandcamp.

3 **Epic Acquisition**

4 40. On March 2, 2022, I announced that Bandcamp was joining Epic because of
5 Epic's proven track record of success in growing its company. A true and correct copy of my
6 announcement, available at <https://blog.bandcamp.com/2022/03/02/bandcamp-is-joining-epic/>, is
7 attached as Exhibit D.

8 41. I believe that by joining Epic, Bandcamp will be able to significantly push
9 development forward across the business. For example, we will be able to expand
10 internationally and into more languages. While we currently only support three languages, we
11 intend to expand to support ten languages under Epic. We expect that by joining Epic and
12 expanding, we will be able to substantially grow our business in the next year.

13 42. Google's revised payments policy threatens to compromise our ability to continue
14 to build around our artists-first revenue model, substantially grow our business, and allow artists
15 full control over their music.

16 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
17 and correct and that I executed this declaration on April 28, 2022, in Santa Cruz, California.

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20 _____
Ethan Diamond