

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EPIC GAMES, INC.,

Plaintiff,

vs.

APPLE INC.,

Defendant.

AND RELATED COUNTERCLAIM

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

**PRETRIAL ORDER NO. 9 RE: ADDITIONAL
THIRD PARTY ADMINISTRATIVE MOTIONS
TO SEAL**

Dkt. Nos. 551, 561

TO ALL PARTIES AND COUNSEL OF RECORD:

The Court previously issued Pretrial Order Number 7 on Friday, April 30, 2020, which dealt with several administrative motions to seal received from third parties. (*See* Dkt. No. 547.) Since issuing Pretrial Order Number 7, additional administrative motions to seal from third parties were filed and received on Friday evening. (*See* Dkt. Nos. 546 (Facebook Inc.), 550 (Lyft Inc.), 551 (Microsoft Corporation), 554 (Nintendo of America, Inc.), 555 (Kabam, Inc.), 560 (Spotify USA Inc.), 561 (Samsung Electronics Co., Ltd.)) Given that time is of the essence, the Court has conferred with the parties to determine which of these additional administrative motions must be addressed prior to trial commencing on Monday, May 3, 2021. Based on the parties' representations, the Court addresses only Microsoft's and Samsung's administrative motions.¹

As the Court explained in Pretrial Order Number 7:

Local Rule 79-5 provides that documents, or portions thereof, may be sealed if a party "establishes that the documents, or portions thereof, are privileged, protectable as a trade secret, or otherwise entitled to

¹ The remainder of the above motions will be addressed in a subsequent trial order.

1 protection under the law.” Civ. L. R. 79-5(b). In general, a “strong
 2 presumption in favor of access” to court records exists, especially
 3 during trial. At times, compelling reasons which are “sufficient to
 4 outweigh the public’s interest in disclosure and justify sealing court
 5 records exist when such ‘court files might have become a vehicle for
 6 improper purposes,’ such as the use of records to . . . release trade
 7 secrets.” *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172,
 8 1178 (9th Cir. 2006) (quoting *Nixon v. WarnerCommc’ns, Inc.*, 435
 9 U.S. 589, 598 (1978) (“[C]ourts have refused to permit their files to
 10 serve as . . . sources of business information that might harm a
 11 litigant’s competitive standing”).

12 Here, and importantly, the gravamen of this case *is* business
 13 competition, including whether competition exists; if so, among
 14 which players; and how such competition influences the market. The
 15 Court understands that the standard is more lenient when the
 16 information concerns third parties, but this is not dispositive. The
 17 third-party information must be balanced with the Court’s ultimate
 18 resolution of the instant dispute which should be transparent in its
 19 analysis. Accordingly, the Court makes the following findings based
 20 upon the current state of the record:²

21 (Dkt. No. 547 at 1-2.) With this prior framework in mind, the Court addresses Microsoft’s and
 22 Samsung’s administrative motions.

23 **1. Microsoft Corporation (Dkt. No. 551)**

24 The motion is **GRANTED** as to all documents except for:

- 25 • PX2477/DX-5523 (Dkt. No. 551-5)
 - 26 ○ Page 13 of the presentation: the sub-heading shall be unredacted.
 - 27 ○ Pages 13-14, and 16-17 of the presentation: the information in the right-hand
 28 column of these pages shall be unredacted except for Microsoft’s own amounts,
 which incorporates internal confidential financial data. The remainder of the
 proposed redactions on these pages are otherwise appropriately sealed.
 - Page 23 of the presentation: sub-heading shall be unredacted except the percentage
 amount, which is appropriately sealed.
 - Page 55 of the presentation: the sub-heading shall be unredacted. The smaller sub-
 heading below that is appropriately sealed.

² Litigants are advised that if the Court ultimately decides that certain information is important to disclose which has been sealed, it will provide an opportunity for the moving party to respond.

- 1 ○ Page 56 of the presentation: the entirety of this page shall be unredacted except that
- 2 the Microsoft specific information may be redacted along with the sub-total and
- 3 total for the console amount and the platform amount.
- 4 ○ Page 60 of the presentation: the sub-heading shall be unredacted except the
- 5 percentage amount, which is appropriately sealed.
- 6 ○ The remainder of the proposed redactions in the document is appropriately sealed.
- 7 ○ That said, the Court does not intend to seal the courtroom if general references
- 8 summarizing the information without reference to specific numbers are discussed
- 9 during trial.
- 10 ● DX-3918 (Dkt. No. 551-16)
- 11 ○ These proposed redactions shall remain sealed. Again, the Court does not intend to
- 12 seal the courtroom if general references summarizing the information without
- 13 reference to specific numbers (*e.g.* that Minecraft has sold more on one platform
- 14 versus another platform) are discussed during trial.
- 15 ● PX-2475/DX-5521 (Dkt. No. 551-19; 551-20)
- 16 ○ Page 15 of the presentation (page 4 of Dkt. No. 551-20): the last item listed shall be
- 17 unredacted except that the video game referenced in the last sentence may be
- 18 redacted and is appropriately sealed.
- 19 ○ The remainder of the proposed redactions in the document is appropriately sealed.
- 20 ○ The Court understands that a witness from Microsoft is testifying in this action.
- 21 Any general questions and discussions on where Microsoft competes with the
- 22 parties will not warrant the sealing of the courtroom. Instead, only specific actions
- 23 or initiatives may warrant the sealing of the courtroom, which the Court will
- 24 consider at the appropriate time.
- 25 ● DX-3437/DX-3587/DX-3764 (Dkt. No. 551-24; 551-26; 551-28)
- 26 ○ The Court is inclined to grant the requests to seal party specific agreements,
- 27 including ones that it has previously addressed in Pretrial Order Number 7 (*e.g.* the
- 28 Valve and Epic Games agreement, and PayPal and Amazon agreements with

1 Apple) given that these documents reflect sensitively negotiated terms and
 2 conditions. However, to obtain a comprehensive understanding of the
 3 considerations of sealing versus the public's right of access, the Court will also
 4 **DEFER** consideration of this request until the document's use at trial.

5 Regarding the unredacted documents above: these documents, or portions thereof, do not
 6 reveal information which is so confidential as to be damaging if revealed as balanced against the
 7 need for public access to the factual issues underlying this case. These documents reflect areas of
 8 competition that are not only highly relevant to the Court's determination in this action, but are
 9 hotly contested.

10 Microsoft shall provide the parties with revised redacted versions of the documents which
 11 may be used in any public portion of the trial, assuming they are otherwise admissible.

12 **2. Samsung Electronics Co., Ltd. (Dkt. Nos. 561)**

13 The Court rules on the administrative motion to seal brought by Samsung as follows:

- 14 • DX-3300, DX-3472, DX-3662, DX-3721, DX-4236, DX- 4335, DX-4370, PX-2447

15 (Exhibits A through H)

- 16 ○ As discussed with Microsoft's similar request above, the Court **DEFERS**
 17 consideration of the sealing of these documents, reflecting specific agreements
 18 between Epic Games and Samsung, until these documents are offered at trial.

- 19 • DX-4428, DX-4524, DX-4457, DX-3048, DX-3620, DX-4322, DX-4800 (Exhibits I
 20 through N)

- 21 ○ **GRANTED IN PART** and **DENIED IN PART** as follows:

- 22 ■ These emails are highly relevant to this action and the public's right to
 23 access these documents significantly outweigh any competitive harm to
 24 Samsung. Indeed, Samsung's requested sealing of these documents is
 25 overbroad, where these emails evidence candid conversations between
 26 two players in a proposed relevant market in this action. The sealing of
 27 the entirety of these documents is not warranted.
- 28 ■ That said, specific terms may be sealed at this time due to perceived

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competitive harm to Samsung, including:

- The specific revenue splits mentioned on EPIC_00011561-62 (Exhibit J) mentioned in the short-term and long-term boxes are appropriately sealed.
- The first bullet point under the Epic Games short-term box shall be sealed on EPIC_00011561 (Exhibit J).
- The copied provision from the parties’ agreement on EPIC_00547871 (Exhibit L) is appropriately sealed at this time, pending decision from the Court on Samsung’s earlier request.
- The specific revenue split mentioned at the top of the page on EPIC_00547872 (Exhibit L) is also appropriately sealed.
- On EPIC_00192148 (Exhibit M), at the paragraph starting with “Having said that,” the remainder of the sentence after “Having said that,” shall be sealed.
- Samsung’s remaining two requests regarding the sealing of written direct testimony of Lorin M. Hitt and the deposition designation of Joe Kreiner will be considered and addressed in a separate order. Thus, the Court **DEFERS** consideration of these requests to be addressed in a subsequent trial order.

With regards to the emails, as set forth above, these documents, or portions thereof, do not reveal information which is so confidential as to be damaging if revealed as balanced against the need for public access. Moreover, these documents reflect areas of competition that are not only highly relevant to the Court’s determination in this action, but are hotly contested.

Samsung shall provide the parties with redacted versions of the documents which may be used in any public portion of the trial, assuming they are admissible.

This Order terminates Docket Numbers 551, and 561.

IT IS SO ORDERED.

Dated: May 2, 2021



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE