ACTION REQUESTED BY DECEMBER 8, 2021

Nos. 21-16506 & 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff/counter-defendant,
Appellant/cross-appellee,

v.

APPLE INC.,

Defendant/counter-claimant,
Appellee/cross-appellant.

On Appeal from the United States District Court
for the Northern District of California (Hon. Yvonne Gonzalez Rogers)
No. 4:20-cv-05640-YGR

MOTION FOR ADMINISTRATIVE STAY AND TO STAY INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that Apple Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: November 16, 2021

s/ *Mark A. Perry*
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Apple Inc. has been ordered to change its business model in a way that will harm customers, developers, and Apple itself. The injunction should be administratively stayed before it becomes effective on December 9, and remain stayed until the appeals are resolved.

INTRODUCTION

In 2008, Apple launched the App Store—a revolutionary commerce engine that has facilitated billions of transactions between app developers and iPhone and iPad users. Apple requires all iOS apps to be distributed through the App Store, and in-app purchases of digital content to be made using the In-App Purchase ("IAP") functionality of the App Store. Among many other benefits, these requirements enhance customer security and privacy while allowing Apple to efficiently collect a commission for use of its intellectual property, products, tools, and services.

Apple has prohibited developers from "steering" users away from IAP—circumventing Apple's commission—through in-app links to or advertisements for alternative payment systems. The Supreme Court has found such anti-steering provisions to be procompetitive in the context of two-sided transaction platforms, like the App Store, because they allow platform operators to reduce transaction friction while recouping their investment. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). Virtually every digital transaction platform uses similar provisions. *See* Ex. C. Since *Amex*, no court has held such provisions unlawful—until this case.

The district court found that Apple is not a monopolist in any relevant market and rejected all claims that its App Store policies violate the antitrust laws. The court explained that the IAP requirement serves several procompetitive purposes, but failed to recognize that Apple's anti-steering provisions, which help enforce the IAP requirement, serve the same purposes. There is *no evidence* that these provisions have anticompetitive effects in any relevant market, or that plaintiff Epic Games, Inc. has been harmed by them. The court's ruling that they are "unfair" under California law, and the accompanying nationwide injunction, will not survive appellate review.

The district court refused to stay its injunction, notwithstanding unequivocal evidence that immediate implementation threatens the integrity of the iOS ecosystem. Absent a stay, apps on the App Store *will* become less secure and less private. Users *will* be exposed to new scams while losing the benefits and services that Apple provides to protect them and differentiate itself from competitors. Developers *will* suffer from reduced user confidence and spending. And Apple *will* be forced to reconfigure the App Store, losing control of a critical component of its efficient and successful business model.

Apple respectfully asks this Court to maintain the status quo by staying the injunction pending resolution of all appeals, and by entering an administrative stay until 30 days after this motion is decided. Epic opposes the requested stay.

BACKGROUND

Apple has invested billions of dollars in the App Store, including a vast array of software and tools that it licenses to app developers, to make it a successful and trusted transactional platform. Apple charges a commission on certain transactions that depend on its proprietary technology. To efficiently collect that commission, and to ensure a seamless and secure purchase experience, Apple requires that in-app purchases of digital content use IAP. At the time of trial, the App Store Review Guidelines prohibited developers from "includ[ing] buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP]" (3.1.1) or from "directly or indirectly target[ing] iOS users to use a purchasing method other than [IAP]" (3.1.3). Ex. D.

Epic is a multi-billion-dollar videogame developer that filed this lawsuit as part of a worldwide media, legislative, regulatory, and litigation campaign dubbed "Project Liberty" through which it "seeks a systematic change which would result in tremendous monetary gain and wealth." Ex. A, at 19. Epic earned more than $700 million through purchases on iOS during the less than two years that its flagship game, *Fortnite*, was on the App Store. But Epic wants to profit even more from Apple's platform by circumventing the commission to which it contractually agreed. *Id.* at 172 ("These are billion and trillion dollar companies with a business dispute").

When *Fortnite* was on the App Store, a player could purchase in-game currency (called "V-Bucks") on Epic's website, on a dedicated gaming console, on an Android device, or in a physical store. Epic paid a commission to Apple only on V-Bucks purchased within the iOS app. To avoid this contractual commitment, in August 2020 Epic activated secret code (called a "hotfix") in its iOS *Fortnite* app to make available an in-app alternative payment mechanism, thereby bypassing Apple's commission and instead taking all revenue from in-app sales of V-Bucks. *See* Ex. A, at 24–25. In response, Apple removed *Fortnite* from the App Store and terminated Epic's developer account. *See id.* at 25–26.

Epic sued, challenging Apple's requirements that all iOS apps developed using Apple's proprietary software be distributed only through the App Store and use IAP for purchases of digital content within the app. *See* Ex. E ¶¶ 184–291. Epic did not challenge the anti-steering provisions as independently unlawful, undoubtedly because its antitrust claims were all premised on single-brand "aftermarkets" in which steering provisions can have no anticompetitive effects, as Epic's principal economist admitted at trial. Ex. F, at 2407:6–2408:5. Instead, Epic's allegations regarding steering were part and parcel of its challenge to the IAP requirement itself. Ex. E ¶¶ 132, 227, 263.

After a 16-day bench trial, including over 800 exhibits and testimony from 45 witnesses, the district court issued a 185-page opinion concluding that Epic had

failed to prove any antitrust violations and ruling for Apple on 9 of the 10 claims asserted by Epic. *See* Ex. A. The district court found that Epic had not proven that either "iOS app distribution" or "iOS in-app payment solutions" constituted a relevant antitrust market. *Id.* at 120–21. Instead, the court adopted a product market of its own making—"mobile gaming transactions." *Id.* at 126. The court expressly excluded from this market subscription apps (*see id.* at 32 n.194, 61 n.310, 123 n.571), which are monetized through recurring subscription payments rather than in-app purchases. Within its defined market, the court found that Apple does *not* exercise monopoly power as required for a claim under Section 2 of the Sherman Act (*id.* at 139), that the Developer Program License Agreement ("DPLA") did not satisfy the "concerted action" requirement for a claim under Section 1 of the Sherman Act (*see id.* at 141–43), and that Epic's related "tying" claim—the only theory involving the anti-steering provisions—failed because, among other things, IAP is not a separate product (*see id.* at 154–55).

Although these findings were sufficient to dispose of Epic's antitrust claims, the court went on to address the competitive effects of Apple's challenged business and product design decisions. As the court recognized, the App Store is a two-sided transactional platform, and thus such effects must be evaluated on both sides of the platform. Ex. A, at 121, 145, 156. With respect to the required use of IAP, the court found that Apple had "proffered more than three procompetitive justifications for

the terms of the DPLA relating to IAP." *Id.* at 149–50. These benefits to competition were sufficient to overcome the court's concerns that Apple's industry-standard 30% commission is "artificially high" and that Apple has enjoyed "extraordinary profits." *Id.* at 144. As the court recognized, "[s]uccess is not illegal." *Id.* at 1. It therefore rejected all of Epic's claims under federal and state antitrust laws.

The court then proceeded to consider Apple's anti-steering provisions on a standalone basis under California's Unfair Competition Law (the "UCL"), Cal. Bus. & Prof. Code § 17200, even though Epic had not done so in its complaint or at trial. *See* Ex. A, at 159. The court acknowledged that the evidentiary record "was less fulsome" (*id.* at 163), and did not rely on the testimony of any Epic executives or employees (*see* Ex. N). Instead, relying on the testimony of two third-party developers that offer subscription apps (expressly excluded from the court's market definition) and its own views on "the open flow of information," the court reasoned that removal of Apple's anti-steering provisions could help app users "discover[] the lowest cost seller" and in turn use that information to "attribute costs to the platform versus the developer." Ex. A, at 164. The court recognized that the Supreme Court had sustained anti-steering provisions in *Amex* as procompetitive, but purported to distinguish that case. *Id.* at 165.

The court concluded that even though Apple's anti-steering provisions are not "unlawful" under any law, state or federal, they constitute an "incipient antitrust

violation" that are "unfair" within the meaning of the UCL. *See* Ex. A, at 166. The court then entered a nationwide injunction, based on California's UCL, that will prohibit Apple from enforcing those provisions with respect to *any* developer. *See* Ex. G. Apple has already revised its Guidelines to permit out-of-app communications between all developers and users, thus satisfying half of the injunction. Ex. H. The other half, concerning in-app advertising and links, is the subject of this motion.

The court also entered a declaratory judgment that "Apple's termination of the DPLA and the related agreements between Epic Games and Apple was valid, lawful, and enforceable" as a result of Epic's breach of contract. Ex. A, at 179. As authorized by that judgment, Apple denied Epic's post-trial request to reinstate its developer account. Ex. I. Thus, Epic has no apps on the App Store.

Epic appealed, and Apple cross-appealed. Apple also sought a stay of the injunction in the district court, which was denied on November 9, 2021. Ex. B.

DISCUSSION

The district court erred in entering a nationwide, class-type injunction in a single-plaintiff case brought by a developer that has no apps on the App Store, proved no harm from the provisions at issue, and did not even directly challenge or seek to enjoin them. Undisputed evidence establishes that Apple will be harmed by precipitous implementation of this unlawful and inequitable injunction. Apple

should not be required to change an integral part of its business model, which has been in place for more than a decade, until this Court decides the appeals on the merits.

I. A Stay Pending Appeal Is Warranted

The traditional factors strongly favor a stay of the injunction:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012); *see also* Fed. R. App. P. 8(a)(2).

A. Apple Has A Substantial Case For Relief On The Merits

To obtain a stay, Apple need not show that it is more likely than not to prevail on appeal, but rather only "that there is a substantial case for relief on the merits." *Lair*, 697 F.3d at 1204 (quotation marks omitted); *see also FTC v. Qualcomm Inc.*, 935 F.3d 752, 755 (9th Cir. 2019) (movant "must show 'a reasonable probability' or 'fair prospect' of success"). Apple will prevail in its cross-appeal because the anti-steering provisions do not violate the UCL, Epic lacks standing, and the injunction is inequitable.

1. There Is No Basis For UCL Liability

The UCL judgment cannot be sustained because the court failed to analyze the competitive effects of the anti-steering provisions in any relevant market, and

the court's own findings regarding the procompetitive benefits of IAP foreclose a contrary ruling with respect to the anti-steering provisions. Reversal is required under either the "tethering test" or the "balancing test" for UCL liability. Moreover, the balancing test is inapplicable here as a matter of law. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007).

The UCL requires consideration of competitive effects within a relevant market rather than in the abstract. *See Facebook, Inc. v. BrandTotal Ltd.*, No. 20-CV-7182, 2021 WL 2354751, at *15 (N.D. Cal. June 9, 2021). The Supreme Court has instructed with specific application to anti-steering provisions that "[w]ithout a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition." *Amex*, 138 S. Ct. at 2285 (alterations and quotation marks omitted). Yet the district court did not analyze the steering provisions using the same market it had used for Epic's other claims (for mobile gaming transactions), and indeed there is *no evidence* that the steering provisions had any anticompetitive effects in *that* market (or any other).

The only fact witnesses Epic presented on the anti-steering provisions were developers of non-gaming *subscription* apps (Ex. A, at 93), yet the district court unequivocally ruled that subscription apps "are not part of this case" (*id.* at 33 n.198; *see also id.* at 32 n.194 ("subscriptions are not part of the action")). That is because subscriptions "are a separate submarket *for which there is insufficient evidence*." *Id.*

at 123 n.571 (emphasis added). "Games and subscription apps . . . are distinct," the court found, and "the record is mixed whether game developers may be more or less able [than subscription app developers] to similarly steer consumers to web transactions." *Id.* This evidence is legally insufficient evidence to support the UCL judgment in the market for mobile gaming transactions (or any other in which Epic participates).

There is no trial evidence regarding the effect of anti-steering provisions on game app developers, who Epic alleged in its complaint actually would be *harmed* if customers were sent outside the app to make a purchase (as a link does). Ex. E ¶ 116. Moreover, the district court observed that "[b]ecause Apple has created an ecosystem with interlocking rules and regulations, it is difficult to evaluate any specific restriction in isolation or in a vacuum." Ex. A, at 118. Yet, Epic's economic experts did not testify about the anti-steering provisions independent of any other challenged provisions. *See* Ex. F, at 1552:3–14, 1574:1–4, 1716:15–20. This Court has expressly warned that "novel business practices—*especially* in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990–91 (9th Cir. 2020) (quotation marks omitted). The court did not even state *when* the decade-old steering provisions supposedly became anticompetitive.

The court's UCL ruling also is contrary to precedent. "[I]f the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason[,] . . . the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015). The Supreme Court in *Amex* held that anti-steering provisions are *pro*competitive, explaining that "[t]hese agreements actually stem negative externalities in the [relevant] market and promote interbrand competition," while steering efforts by competitors undermine the "promise of a frictionless transaction" and "the investments that [the platform provider] has made to encourage [customer] spending" on its platform. 138 S. Ct. at 2289. This Court has recognized the same: "[W]hat appeared at first to be *anti*competitive—Amex's unique business model and its use of antisteering clauses—was actually *pro*competitive and innovative." *Qualcomm*, 969 F.3d at 989.

The district court said that Apple's anti-steering provisions are more akin to "a prohibition on letting users know that [other] options exist in the first place." Ex. A, at 165. The trial evidence regarding *Fortnite*, however, established that players are well aware of such other options: The majority of iOS *Fortnite* players who purchased V-Bucks did so *exclusively* on platforms other than iOS. *See* Ex. J ¶ 74. Moreover, while many of its competitors do not allow customers to use digital

content purchased through other platforms, Apple has been a trailblazer in allowing customers to purchase that content anywhere. *See* Ex. D § 3.1.3(b). Developers are free to communicate such options to customers outside the iOS App (Ex. F, at 2823:16–2828:18); they simply cannot advertise or link to those alternatives *within* apps developed and distributed using Apple's proprietary software.

In upholding the IAP requirement, the district court recognized a number of procompetitive benefits. *See* Ex. A, at 150. The court found that "IAP is the method by which Apple collects its licensing fee from developers for the use of Apple's intellectual property" (i.e., the return on Apple's investments), and that without IAP, "[i]t would simply be more difficult for Apple to collect that commission." *Id.* The court further observed that "if Apple could no longer require developers to use IAP for digital transactions, Apple's competitive advantage on security issues" (i.e., interbrand competition) "would be undermined." *Id.* Finally, the court noted that "the use of different payment solutions for each app may reduce the quality of the experience for some consumers by denying users the centralized option of managing a single account through IAP" (i.e., the promise of a frictionless transaction). *Id.*

Amex provides the analytical framework for evaluating the competitive effects of anti-steering provisions implemented by two-sided transaction platforms—and its analysis of their competitive effects must inform the UCL inquiry. *See People's Choice Wireless, Inc. v. Verizon Wireless*, 131 Cal. App. 4th 656, 667 (Cal. Ct. App.

2005). Yet despite finding that the *required* use of IAP was procompetitive, the district court nevertheless concluded that *enforcing* this requirement through the anti-steering provisions was somehow "unfair" under the UCL. This contradiction, among other defects, will lead to the reversal of the UCL judgment on appeal.

2. Epic Lacks Standing

To have Article III standing, a plaintiff must show that (1) it has suffered some actual or threatened injury, (2) that injury can fairly be traced to the challenged action of the defendant, and (3) the injury is likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "[I]n the context of injunctive relief, the plaintiff must demonstrate a *real or immediate threat* of an irreparable injury." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (quotation marks omitted) (emphasis in original). Because standing must exist at all stages of a lawsuit (including appeal), intervening events may divest a plaintiff of standing and render the controversy moot, even after the entry of judgment. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67–69 (1997).

As a result of its surreptitious "hotfix," Epic's developer account with Apple was terminated at the outset of this litigation, and it has not since been able to offer any apps through the App Store. Ex. A, at 25–26. Moreover, the district court expressly confirmed Apple's unqualified right to terminate Epic's developer account

(*see id.* at 173), a right that Apple has exercised (Ex. I). Accordingly, Epic cannot directly receive any prospective benefit from the injunction. Epic did not dispute this point in the district court. This Court cannot sustain an injunction that has no impact on the sole plaintiff.

Long after trial, Epic maintained—and the district court agreed—that it had standing because unidentified *subsidiaries* and *licensees* (from which it collects royalties) might be harmed by the anti-steering provisions. *See* Ex. B, at 2–3. There is no evidence in the record that any of these non-parties have actually been harmed, and this reasoning does not withstand scrutiny.

The district court ruled, based on Epic's representation, that "Apple's commission rates depress [the] royalties" paid by licensees of the Unreal Engine software. Ex. B, at 2. But those royalties are based on the gross sale price of those licensees' apps—*not* the net profit the licensee receives after a platform's commission is deducted as Epic implied. *See* Ex. K, at .007. As Epic's own licensing agreement explains, "if your Product earns $10 on the App Store, Apple may pay you $7 (having deducted 30% as a distribution fee), but your royalty to Epic would still be 5% of $10 (or $0.50)." *Id.* at .008. Apple's commission rate cannot depress those royalties. Nor can Epic argue that it would have collected royalties on more transactions absent Apple's anti-steering provisions, as Epic failed to prove any restriction of output at trial. Ex. A, at 100.

Epic's subsidiaries are separate companies as to which there is no proof of harm from the anti-steering provisions. Moreover, Epic failed to prove that any (hypothetical) harm would flow through the ownership structure. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Accordingly, this Court has held that "shareholders do not have standing to assert the claims of the corporation, unless they do so through derivative actions." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1037 (9th Cir. 2010). In *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)—relied on by Epic and the district court—there was a threat of "actual financial injury to" the plaintiff as a result of the taxation of its subsidiary. Epic failed to prove any actual financial injury to itself at trial.

3. The UCL Injunction Is Inequitable

The district court failed to find whether Epic had proved irreparable injury from the anti-steering provisions, as required for the entry of permanent injunctive relief. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). As shown above, Epic did not prove *any* harm to itself from the anti-steering provisions, much less *irreparable* harm. The court's bare statements that it "finds the elements for equitable relief are satisfied" and that "[t]he injury has occurred and continues" (Ex.

A, at 166) say nothing about any supposed irreparable injury to *Epic*. No injunction can be maintained without an express finding as to this required element.

Epic did not independently challenge the anti-steering provisions in the complaint and barely addressed them at trial. Epic submitted *five* proposed injunctions to the district court, yet *none* addressed the anti-steering provisions. D.C. Dkts. 17-11, 61-36, 276-1, 407, 777-3. The district court stated that "[w]hile its strategy of seeking broad sweeping relief failed, narrow remedies are not precluded" (Ex. A, at 163)—citing a case involving government enforcement and a not a private plaintiff. The court had no license to award Epic injunctive relief it did not even ask for and that was inconsistent with its litigation strategy.

Moreover, the district court failed to adhere to the principle that "[w]here relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). Epic opted out of an earlier-filed class action lawsuit brought on behalf of developers, and it did not seek to certify any class here. Any injunctive relief therefore *must* be limited "to apply only to named plaintiffs," that is, Epic. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996). Indeed, Epic's own CEO testified that Epic would have been content with relief for Epic and no one else, Ex. F, at 338:3–6, 337:13–19, making any theoretical

exceptions for other circumstances unjustified here. Having chosen to go it alone, Epic may not now obtain injunctive relief on behalf of others.

B. Apple Would Suffer Irreparable Injury Absent A Stay

While there is no evidence of any injury to Epic from the anti-steering rules, the record leaves no doubt that Apple faces irreparable harm from the injunction. Uniquely qualified to "anticipate what would happen as a practical matter following the denial of the stay" (*Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)), Apple's Senior Director of App Review, Trystan Kosmynka, has "stud[ied] the effect of" the injunction and concluded that it "*will harm users, developers, and the iOS platform more generally*" (Ex. L ¶ 10 (emphasis added)). Mr. Kosmynka's conclusion is supported by explanation and analysis, and Epic adduced no contrary evidence below. A stay is therefore needed to forestall "untold, irreversible consequences" to Apple and iOS ecosystem participants. *Lair*, 697 F.3d at 1215.

First, the injunction requires a change to the App Store business model that will interfere with Apple's ability to efficiently collect its commission. As noted above, the district court found that Apple is entitled to charge a commission for use of its iOS platform and that "IAP is the method" Apple has chosen to collect its commission. Ex. A, at 150. But requiring Apple to allow in-app links or advertising would allow developers to circumvent IAP—making it harder, if not impossible, for Apple to collect a commission for those purchases. *Id.* ("Even in the absence of IAP,

Apple could still charge a commission on developers. It would simply be more difficult for Apple to collect that commission."); *see* Ex. F, at 2798:11–13. This will impair Apple's commission-based monetization model. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017) ("undermin[ing]" a company's "business model" is irreparable harm).

The point is not, as Epic has contended, that "IAP will have to compete on price and/or quality." D.C. Dkt. 824, at 8. As the district court found, IAP is not a separate product. Ex. A, at 155. It is an integrated functionality of the App Store, a two-sided transaction platform, which already competes with other platforms for purchases of digital content generally and Epic's V-Bucks specifically. *See id.* at 71–72. The injunction would raise Apple's cost of commission collection compared to other platforms, who have similar anti-steering rules *they* are permitted to enforce. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) ("A rule putting [the movant] at a competitive disadvantage," including by raising its costs, "constitutes irreparable harm").

Second, undisputed evidence also shows the injunction will adversely affect iOS users. A number of important features implemented through IAP are unavailable through external links:

- Family sharing of app purchases and services;
- Face ID and Touch ID authorization of purchases;

- "Ask to buy" and other parental control features;
- Anti-fraud technology;
- Completion and restoration of purchases; and
- Refund and dispute resolution mechanisms.

See Ex. L ¶¶ 12 & 18. As Mr. Kosmynka explained, external links take users to websites outside of Apple's commerce engine, and, therefore, Apple has no visibility into whether such links are exploiting users or violating Apple's privacy guidelines. *Id.*

The district court asserted that "[l]inks can be tested by App Review." Ex. B, at 3. But even setting aside the "substantial" time and resource burden this will impose on Apple (itself an irreparable harm), nothing stops a developer from changing the landing page for a link or altering the content of the destination webpage after it has been reviewed. Ex. L ¶¶ 15, 18. Moreover, while Apple can review the content of apps distributed through the App Store, it cannot confirm that developers provide required privacy disclosures on external websites. *Id.* ¶¶ 15–16.

The district court also said that "[c]onsumers are quite used to linking from an app to a web browser" (Ex. B, at 3), but "Apple has *never* permitted external payment links" for purchases of digital goods and services (Ex. L ¶ 15 (emphasis added)); *see also id.* ¶ 13 (explaining differential treatment of physical goods and services). Ill-intentioned developers will deceive some users into providing their

payment information to what they think is a trusted payment platform (because it is associated with Apple)—only for that information to be stolen and sold. *Id.* ¶ 14. In short, the introduction of external payment links will lead to the very same threats that Apple protects users against with IAP more generally—a mission the district court found was procompetitive. Ex. A, at 149–50.

This will have clear consequences for Apple. As Mr. Kosmynka stated, the injunction "*will* expose users with *much greater frequency* to the risks of external payment links." Ex. L ¶ 16 (emphasis added). These added threats will "lower user confidence in the safety, security, and reliability of digital content purchases." *Id.* And developers in turn "*will suffer* from this lowered confidence as well, as users will be less inclined to make purchases." *Id.* (emphasis added). Mr. Kosmynka's sworn statements are more than sufficient to establish irreparable harm. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (risk of "los[ing] . . . customers or goodwill certainly supports a finding of the possibility of irreparable harm"); *Disney*, 869 F.3d at 866 (similar).

Moreover, because the App Store is a two-sided platform, making it less attractive to either developers or consumers will damage the integrity and value of the platform as a whole through indirect network effects. *See Amex*, 138 S. Ct. at 2289. As the district court found, Apple differentiates itself from competitors by offering enhanced security and privacy protection. Ex. A, at 45 n.250. The

injunction will *impair* Apple's efforts to protect security and privacy, and *impede* Apple's efforts to compete against more open but less secure platforms. That is not only irreparable harm to Apple, but also anathema to the purpose of antitrust law. *See State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("[T]he primary purpose of the antitrust laws is to protect interbrand competition").

Finally, implementation of the injunction would require costly technical and engineering changes. Ex. L ¶ 18. In addition to developing software to accommodate external payment links, Apple would have to develop technical solutions to mitigate the security and privacy vulnerabilities addressed above. *Id.* Apple would have to develop new App Review processes, write and enforce new Guidelines, and implement alternative solutions for collecting its commission—an undertaking the district court acknowledged could be costly. Ex. A, at 150 & n.617; *see also* Ex. F, at 2721:18–2723:16, 2732:14–24. Until this Court resolves the appeals, Apple should not be forced to expend unrecoverable sums to make the App Store *less* safe, *less* private, and *less* easy to use. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss . . . qualif[ies] as irreparable harm"). The App Store, like all two-sided transaction platforms, is a tightly calibrated system and changing one aspect will have effects throughout the system.

In denying a stay pending appeal, the district court dismissed Apple's "arguments" as "exaggerated." Ex. B, at 3. But Apple relies on evidence, not arguments—Mr. Kosmynka's sworn declaration provides more evidence on steering than all the testimony cited by the district court combined. *See* Exs. M, N. Mr. Kosmynka's analysis is detailed, uncontested, and unequivocal: Absent a stay, a cascading series of injuries *will* ensue. A stay pending appeal is warranted to protect Apple from all participants in the iOS ecosystem from those irreparable harms.

C. A Stay Would Not Harm Epic

For the same reasons that Epic cannot benefit from an injunction, there is no risk of harm to Epic if a stay is issued (and the court below found none). *See* Ex. B, at 3. Nor can Epic rely on the supposed injuries to other companies, since this aspect of the "stay inquiry calls for assessing the harm to *the opposing party*." *Nken v. Holder*, 556 U.S. 418, 435 (2009) (emphasis added). *Nothing* in the record shows that Epic Games, Inc. will suffer any harm from a stay of the injunction pending appeal. Indeed, Epic never even sought a steering injunction in the district court.

D. A Stay Is In The Public Interest

The public interest favors maintaining the status quo while the appeal is resolved. The millions of consumers and developers who use the iOS platform every day have come to trust the App Store experience. Yet the injunction requires Apple to permit developers to use Apple's own platform to offer advertising and links to

less secure, less transparent, and less trustworthy external payment mechanisms. This "will expose" users (including children) to new harms and threats, harming participants on both sides of the platform. Ex. L ¶ 16. These provisions have been in place for a decade, and the public interest lies in staying the course until the appeals are resolved.

II. An Administrative Stay Is Warranted

Given the December 9 deadline for compliance with the injunction, Apple respectfully requests that the Court issue an administrative stay "to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). The "status quo" is that Apple does not permit advertising or links to alternative payment systems within iOS apps. In the event the full stay is denied, Apple requests that the administrative stay be extended for an additional 30 days to allow Apple to seek Supreme Court review while undertaking the substantial changes that would be required to comply with the injunction while attempting to mitigate—but not eliminate—the irreparable harms it will cause Apple, customers, and developers.

CONCLUSION

The permanent injunction should be stayed until this Court's mandate issues.

Dated: November 16, 2021

Respectfully submitted,

s/ *Mark A. Perry*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Court Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 5,542 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B).

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 27(d) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

Dated: November 16, 2021

s/ *Mark A. Perry*
Mark A. Perry

INDEX OF EXHIBITS

Exhibit	Document Description
A	Rule 52 Order After Trial on the Merits, D.C. Dkt. 812 (Sept. 10, 2021)
B	Order Denying Apple's Motion to Stay Injunction Pending Appeal (Nov. 9, 2021)
C	Excerpt from DX-3120 – Appendix of anti-steering provisions at other digital transaction platforms
D	PX-2790 – App Store Review Guidelines effective at time of trial
E	Complaint for Injunctive Relief, D.C. Dkt. 1 (Aug. 13, 2020)
F	Excerpts from the Trial Transcript
G	Permanent Injunction, D.C. Dkt. 813 (Sept. 10, 2021)
H	Apple Press Release (Oct. 22, 2021)
I	Letter from Mark A. Perry to Gary Bornstein denying Epic Games, Inc.'s request for reinstatement (Sept. 21, 2021)
J	Excerpt from the Written Direct Testimony of Lorin M. Hitt, Ph.D. (May 23, 2021)
K	DX-4022 – Unreal Engine End User License Agreement
L	Declaration of Trystan Kosmynka, D.C. Dkt. 821-10 (Oct. 8, 2021)
M	Excerpts from Rule 52 Order (discussion of anti-steering provisions)
N	Excerpts of evidence cited by the district court in Exhibit M

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Motion For Administrative Stay and to Stay Injunction Pending Appeal** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 16, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 16, 2021

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