Nos. 21-16506 & 21-16695

United States Court of Appeals for the Ninth Circuit

EPIC GAMES, INC.,
Plaintiff, Counter-defendant – Appellant, Cross-Appellee,

v.

APPLE INC.,
Defendant, Counterclaimant – Appellee, Cross-Appellant.

Appeal from the U.S. District Court
for the Northern District of California
The Honorable Yvonne Gonzalez Rogers (No. 4:20-CV-05640-YGR-TSH)

OPPOSITION TO APPLE INC.'S MOTION FOR ADMINISTRATIVE STAY AND TO STAY INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Epic Games, Inc. ("Epic") states that it has no parent corporation and that Tencent Holdings Limited owns more than 10% of Epic stock.

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Epic Games, Inc. ("Epic") respectfully requests that this Court deny Apple's motion for an administrative stay and to stay the injunction pending appeal ("Mot.").

INTRODUCTION

This case challenges Apple's conduct relating to its App Store, the only means through which app developers can distribute their apps to iPhones and iPads. Unlike on personal computers, where consumers can get software from a variety of sources, Apple makes it impossible for consumers to get apps from anywhere other than Apple's own store. Apple further requires all developers selling digital content inside an app to use Apple's own in-app payment solution ("IAP"), for which Apple charges a commission that is typically 30%. Through so-called "anti-steering provisions" in Apple's App Store Review Guidelines ("Guidelines"), Apple prohibits developers from even telling iOS users that they can purchase the same digital content directly from the developer elsewhere. Using these restrictions, Apple has maintained a supracompetitive commission and reaped extraordinary

profit margins of 70%-80% on its App Store for years. (A-A at 118, 41-42.)[1]

After a 16-day trial, the district court entered an injunction against the anti-steering provisions, in order to provide consumers with information about, and readier access to, competitive alternatives to Apple's IAP. The district court found that these provisions "contractually enforce[] silence" concerning purchasing alternatives other than IAP and thereby "hide critical information from consumers and illegally stifle consumer choice" (A-A at 2, 166). After the court's decision, Apple shrugged off the impact of the injunction, dismissing it as "one or two sentences scratched out of an agreement" and declaring the outcome "a resounding victory". (E-H; E-I.) But a month later, Apple suddenly claimed the injunction would "threaten[]" the iOS ecosystem (Mot. 2) and asked the court to stay the injunction until all appeals have been resolved—a period that could last years. The district court denied Apple's motion, which Apple now pursues in this Court. Apple's Motion should be denied.

[1] Citations to "A-[letter]" refer to Apple's Exhibits. Citations to "E-[letter]" refer to Epic's Exhibits.

First, Apple has not shown that it will suffer irreparable harm absent a stay. Throughout the trial, Apple argued that its power over consumers and developers was constrained by consumers' ability to make purchases outside an app, such as on a website. But Apple now claims it would be irreparably harmed by an injunction that makes that option visible to consumers. Apple cannot credibly claim that "a cascading series of injuries will ensue" (Mot. 22) should Apple have to face the very competition on which it relied to defend itself at trial. Apple's arguments regarding irreparable harm to users and iOS security should also be rejected. Purchasing options outside of apps are *already* available on iOS devices; the injunction simply removes obstacles that Apple imposed to prevent users from learning about and choosing those options.

Second, Apple has not demonstrated likelihood of success on the merits. The district court made detailed factual findings regarding the anticompetitive harms resulting from Apple's anti-steering provisions, and Apple's challenges to the sufficiency of the evidence supporting those findings fall flat. Apple's legal challenges fare no better. Its "relevant market" argument is based exclusively on federal

law and ignores the California Supreme Court's authoritative interpretation of California's Unfair Competition Law ("UCL"). Nor is Apple correct that its decision to kick Epic off iOS devices, which Epic continues to challenge as unlawful, deprives Epic of standing and compels the Court to grant a stay, regardless of the merits. Apple's gamesmanship aside, Epic still faces injury through its financial interest in its subsidiaries' iOS apps and in revenue Epic earns from iOS apps of its *Unreal Engine* licensees.

Finally, the public interest weighs strongly against a stay. The injunction would "uncloak[] the veil hiding pricing information on mobile devices and bring[] transparency to the marketplace", benefiting millions of developers and U.S. consumers. (A-A at 166.)

STATEMENT OF THE CASE

Epic develops entertainment applications, including video games, for mobile devices, personal computers ("PCs") and gaming consoles. Epic also develops and licenses *Unreal Engine*, a revolutionary software suite that allows developers to create three-dimensional immersive digital content. In this case, Epic challenges certain Apple Guidelines, including the anti-steering

provisions, under the Sherman Act, California's Cartwright Act, and the UCL. (A-E ¶¶ 130-32, 227, 263.)

The Guidelines, which Apple requires all developers to follow, compel developers to use Apple's IAP for all *in-app* sales of *digital content*—be it a book, an online yoga class, or a new map for a game. This restriction does not exist for in-app sales of physical goods or real world services, such as a rideshare or pizza.

Apple typically collects a 30% commission on every in-app purchase made through IAP. For digital goods purchased *outside* an app—for example, on the website of a game developer or a newspaper publisher—Apple does not collect a commission. However, Apple restricts developers' ability to inform consumers about the availability of such out-of-app purchases. Under Guideline § 3.1.1, Apple prohibits developers from including in their apps any "buttons, external links or other calls to action that direct customers to purchasing mechanisms other than in-app purchase" for *digital* content. (A-D § 3.1.1.) At the time of trial, the Guidelines also prohibited developers from "either within the app or through communications sent to points of contact obtained from account registration within the app (like email or text),

encourag[ing] users to use a purchasing method other than [IAP]". (A-D § 3.1.3.) These two Guidelines are the "anti-steering provisions".

During trial, in an attempt to rebut any findings of market power or anticompetitive harm, Apple argued that developers' ability to sell content on the web constrained Apple's ability to charge supracompetitive prices for sales within iOS apps using IAP. One of Apple's economists testified that despite Apple's restrictions, users can "can still download and have free apps on iOS, use all the services of the Apple ecosystem, and transact elsewhere". (E-A at 2139:18-2140:15; *see also* E-E ¶ 512 ("If Apple sought to raise its commission . . . developers could monetize . . . through a web browser."); *id.* ¶ 244 ("Developers have many options for monetizing apps that avoid Apple's commission entirely, including selling . . . through other platforms (including on a web browser).").)

Against this backdrop, the district court heard extensive evidence showing that Apple's anti-steering provisions stunted the competitive impact of web purchases. For example, the district court credited testimony from "both Down Dog [a yoga app developer] and Match Group [a dating app developer] . . . that they have been unable to

entice users to other platforms with lower prices" and that "Apple's anti-steering provision[s] ha[ve] prevented [Down Dog] from directing users to the cheaper price" on the web. (A-A at 93.) The district court concluded that the anti-steering provisions "hide critical information from consumers and illegally stifle consumer choice", "prevent[] informed choice among users of the iOS platform" and "contractually enforce[] silence", in violation of the UCL. (A-A at 2, 164, 166.)

Pursuant to these findings, the court entered an injunction directing Apple to cease "prohibiting developers from (i) including in their apps and their metadata buttons, external links or other calls to action that direct customers to purchasing mechanisms, in addition to [IAP] and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the app". (A-G ¶ 1.) The injunction is to take effect on December 9, 2021.

The court found for Apple on Epic's other counts and on Apple's breach of contract and declaratory relief counterclaims, ordering Epic to pay Apple damages, which Epic promptly did. (A-A at 173, 179; E-J.)

ARGUMENT

To obtain a stay pending appeal, Apple bears the burden of showing that: (1) it will be irreparably injured absent a stay; (2) it is likely to succeed on the merits; (3) the issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

I. APPLE WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY.

A party seeking to stay an injunction "must demonstrate that irreparable harm is probable—as opposed to merely possible—if the stay is not granted". *United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020). Apple does not meet this standard.

First, Apple argues that the injunction will "interfere with Apple's ability to efficiently collect its commission". (Mot. 17.) But the injunction allows Apple to continue requiring developers to use Apple's IAP, with its associated commissions, for *all* in-app sales. The only transactions on which Apple will not receive a commission are transactions that happen *outside* the app, such as on the web, on which Apple has *never* charged a commission. (*See e.g.*, E-A at 66:2-5 ("I can

even buy V-Bucks through the web browser on my iPhone and spend them on purchases in the app . . . [and] no commission goes to Apple.").) The injunction simply makes it easier for consumers to learn about and take advantage of the existing ability to make purchases outside an app. Apple is concerned that greater information flow to consumers will lead to more competition, but that is not irreparable harm.

Importantly, at trial Apple maintained that consumers have always had paths outside iOS apps to purchase digital content for use in those apps, without Apple collecting a commission, and that those options constrained Apple's pricing. (*See, e.g.*, E-A at 3236:16-3238:3 (Apple witness demonstrating payments on a web browser as an alternative channel for purchasing digital content for games); E-D ¶ 152 (Apple is "constrained by the fact that consumers can make purchases from developers through an iOS web browser"); E-A at 2139:18-2140:15; E-E ¶ 512; *id.* ¶ 244.) Apple cannot claim that its "business model" (Mot. 18) will be irreparably harmed if these existing out-of-app transacting alternatives become more salient. *See Costco Wholesale Corp. v. Hoen*, No. C04-360P, 2006 WL 2645183, at *5 (W.D. Wash.

Sept. 14, 2006) ("The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.").[2]

Second, Apple argues that the injunction will "adversely affect iOS users" because (i) "[a] number of important features implemented through IAP are unavailable through external links" and (ii) external links may "exploit[] users or violat[e] Apple's privacy guidelines". (Mot. 18-19.) Even if these supposed harms to users constituted harms *to Apple*, as required for a stay (*see Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014)), Apple's arguments wrongly suggest that the injunction prevents consumers from using IAP. It does not. Consumers who value IAP or Apple's promises of privacy can continue to make in-app purchases using IAP. The injunction simply gives consumers a *choice* by removing an artificial barrier that Apple had placed on developers' ability to advise consumers of other options.

[2] Apple's claim that the injunction would put Apple at a competitive disadvantage by "rais[ing] Apple's cost of commission collection compared to other platforms" (Mot. 18) is without merit. Apple will still be able to collect commissions on all in-app purchases, as it does now. Out-of-app purchases of the type facilitated by the injunction have never been subject to a commission.

Apple's other arguments about the supposed dangers of external links are contradicted by the fact that thousands and thousands of iOS apps *already* have external payment mechanisms. Apple allows external links and payment solutions other than IAP for the purchase of physical goods and services, like food or transportation. (*See e.g.*, E-A at 2769:7-18 (developers sold over $400 billion worth of physical goods through iOS apps in 2019), 1987:5-9 (sales of physical goods do not use IAP).) During trial, Apple did not show that these payment solutions impede its ability to "protect the iOS ecosystem". (*See, e.g.*, E-A at 3109:20-3110:3 (Apple executive was unaware of "any analysis within Apple that has examined whether or not . . . alternative payment processing methods utilized by sellers of physical goods have introduced security vulnerabilities into the iPhone").)

Moreover, Apple does not deny the district court's observation that external links can be tested and reviewed as part of Apple's App Review process. (A-B at 3.) Instead, Apple suggests that using App Review to test external links would impose a "'substantial' time and resource burden" on Apple. (Mot. 19.) But the time or monetary cost of complying with an injunction is not irreparable harm.

See Al Otro Lado v. Wolf, 952 F.3d 999, 1008 (9th Cir. 2020) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough."). Apple's claims that it would be "costly" to "develop new App Review processes, write and enforce new Guidelines, and implement alternative solutions for collecting its commission" (Mot. 21) are unavailing for the same reason.

Regarding Apple's concern that external links may be changed by the developer after the app has been reviewed (Mot. 19), Apple has a mechanism for removing rogue apps from the App Store that change their behavior post-App Review. (*See* E-A at 3509:10-13; E-B ¶ 115.) In addition, there is no genuine risk to the iOS ecosystem from external links, given that Apple *currently* allows countless external links for buying physical goods and services. Apple's scaremongering is pure pretext, contradicted by its existing behavior.

Ultimately, as the district court found, Apple's motion does not raise any substantial security argument that was not already considered and rejected by the court in its post-trial decisions. (*See* A-A at 166 ("Apple's business justifications . . . will not be significantly

impacted by the increase of information to and choice for consumers."); A-B at 3 ("The reader rule, cross-play, and cross-wallet all reflect trial examples that alternatives outside the app can be accommodated. Mr. Kosmynka's declaration does not change the result. In most ways, he merely repeats arguments that the Court considered as part of its Order.").)

Third, Apple argues that it will suffer harm because the injunction "*will* expose users with *much greater frequency* to the risks of external payment links", will "lower user confidence in the safety, security, and reliability of digital content purchases", and developers "*will suffer* from this lowered confidence as well, as users will be less inclined to make purchases". (Mot. 20 (emphasis in original).) Apple has not put forward, at trial or now, a single developer that shares this concern. Instead, Apple relies solely on the assertions of its employee Mr. Kosmynka. (Mot. 20.) But Mr. Kosmynka does not explain why the supposed decline in user confidence has not afflicted the sales of physical goods and services, as to which external links have always been allowed.

Moreover, Mr. Kosmynka does not grapple with the fact that the injunction does not *require* developers to offer external links and does not *require* consumers to use them; the injunction simply removes prohibitions imposed by Apple. Under the injunction, Apple may continue to require developers to use IAP for *in-app* purchases, and consumers who do not have "confidence" in external links need not use them. Speculative and unsubstantiated statements like Mr. Kosmynka's cannot support irreparable harm. *See e.g.*, *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (rejecting affidavits claiming irreparable harm as "conclusory and without sufficient support in facts"); *Amylin Pharms., Inc. v. Eli Lilly & Co.,* 456 F. App'x 676, 679 (9th Cir. 2011) (no irreparable harm absent "concrete evidence").

Fourth, Apple's argument that the "implementation of the injunction would require costly technical and engineering changes" lacks any factual basis in the record. (Mot. 21.) Mr. Kosmynka's declaration provides no detail regarding the required changes, and the argument is belied by the existing "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other

than [IAP]" (A-D § 3.1.1) permitted in apps selling physical goods or services.

II. APPLE IS UNLIKELY TO SUCCEED ON THE MERITS.

A. Epic Proved a UCL Violation.

Apple has not identified any errors by the district court that would warrant reversal.

First, the district court properly applied the balancing test to assess Apple's UCL liability. Apple's cursory statement that the balancing test "is inapplicable here as a matter of law" (Mot. 9) lacks merit. In *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 735 (9th Cir. 2007), the sole case that Apple cites for this proposition, this Court found that in *consumer* actions—as opposed to competitor actions—courts may apply the tethering test *or* the balancing test to determine unfairness, and that these options "are not mutually exclusive". *Id.* at 736; *see also Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214-15 (9th Cir. 2020). As the district court found that "Epic Games has standing to bring a UCL claim as a quasi-consumer, not merely as a competitor" (A-A at 161), its use of the balancing test was appropriate. In any event, the district court concluded that Apple

violates the UCL under *both* tests. (A-A at 162-66; A-B at 2 ("Contrary to Apple's assertions, the Court evaluated the UCL claims using two tests, not one.").)

Second, UCL jurisprudence does not require the district court to "analyze the steering provisions using the same market it had used for Epic's other claims", as Apple claims (Mot. 9), or to conduct a full-blown market definition exercise of the kind courts undertake in Sherman Act cases. Indeed, in *Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.*, 20 Cal. 4th 163 (1999), the California Supreme Court allowed an unfair competition claim to proceed without such a market definition exercise. *Id.* at 180, 187. Other UCL cases have recognized cognizable threats to competition without a full market definition analysis. *See, e.g.*, *LegalForce RAPC Worldwide P.C. v. UpCounsel, Inc.*, No. 18-cv-02573-YGR, 2019 WL 160335, at *18 (N.D. Cal. Jan. 10, 2019) (denying dispositive motion under the UCL unfairness prong without a full-scale market definition); *Sundance Image Tech., Inc. v. Inkjetmall.com, Ltd.*, No. 02-cv-2258, 2005 WL 8173280, at *9 (S.D. Cal. Oct. 13, 2005) (same).

In the sole UCL case Apple relies on, the court recognized in a preceding order that "a plaintiff need not always allege a Sherman Act violation to state a UCL claim based on 'unfair' conduct". *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 WL 662168, at *10 (N.D. Cal. Feb. 19, 2021). But the plaintiff there failed to allege "circumstances that would allow something other than an antitrust violation to support an 'unfair' prong claim", so the court proceeded to rely on Sherman Act cases requiring market definition. *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 WL 2354751, at *15 (N.D. Cal. June 9, 2021). Here, by contrast, the district court found that Epic's UCL claim "warrants separate consideration apart from antitrust laws". (A-A at 162.)

Further, the district court's analysis was not done "in the abstract", as Apple suggests. (Mot. 9.) The court considered whether to use the mobile gaming transactions market it had defined under the Sherman Act but concluded it could not "discern any principled reason for eliminating the anti-steering provisions to mobile gaming only" because "[t]he lack of information and transparency extends to all apps, not just gaming apps". (A-A at 167.)

Apple's challenges to the sufficiency of the evidence are also unavailing. It contends that anticompetitive effects of the anti-steering provisions on developers of non-gaming apps are "insufficient evidence to support the UCL judgment in the market for mobile gaming transactions". (Mot. 10.) But as noted above, the district court specifically found that Apple's concealment "extends to all apps". (A-A at 167.) That conclusion stands unrebutted. Apple does not present *any* evidence, or even argument, showing disparate effects on gaming and non-gaming apps.[3]

Apple also contends that "Epic's economic experts did not testify about the anti-steering provisions independent of any other challenged provisions". (Mot. 10.) But Epic's expert did address the harms caused by the provisions. (*See, e.g.*, E-A at 1715:11-16 (anti-steering provisions "make[] it much more difficult for Epic to communicate to the iOS app user that they have another alternative to

[3] Apple claims that Epic itself alleged that mobile game developers would be harmed "if customers were sent outside the app to make a purchase". (Mot. 10 (citing A-E ¶ 116).) But Epic was referring to the harm that would result if out-of-app purchases were the *only* option—not a world in which in-app purchases remain available and consumers have a choice.

go to"); *see also id.* at 1726:16-18, 2408:15-2409:5, 2436:3-6.) Moreover, no rule of law requires separate economic expert opinion about each of a defendant's interlocking anticompetitive acts. The district court also heard ample testimony on the effects of the anti-steering provisions from those directly harmed by them—app developers. (*See, e.g.*, A-A at 93; E-A at 363:4-364:17 (Down Dog CEO testifying that average subscription price for iOS users is roughly 15% higher than on Android due to Apple's prohibition on telling users about discounted purchase options on the web); *id.* at 366:6-367:10 (inability to steer users to cheaper subscription on the web resulted in a 28% reduction in the number of [Down Dog] subscribers).) Apple similarly misses the mark in arguing that "novel business practices—especially in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal". (Mot. 10 (emphasis omitted).) Apple's restrictions were not "presumed" to be unreasonable; they were *found* to be harmful based on concrete evidence at trial.[4]

[4] Nor are they "novel". They were adopted over a decade ago (Mot. 7-8), leading to extensive evidence of years of supracompetitive prices and extraordinary profit margins.

Third, Apple argues that the district court's UCL ruling is "contrary to precedent" because "the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers". (Mot. 11 (quoting *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691-92 (9th Cir. 2015) (quoting *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001))).) But as the district court explained, *Chavez* "expressly rejected the notion that 'an "unfair" business act or practice must violate an antitrust law to be actionable under the [UCL]'", but reached the more limited holding that "conduct cannot be unfair where it is 'deemed reasonable and condoned under the antitrust laws'". (A-A at 162 n.631 (quoting *Chavez*).) In ruling on Apple's UCL violation, the district court correctly concluded that "there is a difference between conduct 'deemed reasonable' and conduct for which a violation has not been shown". (A-A at 162 n.631.)

Apple also suggests that the district court contravened precedent by discounting the claimed procompetitive effects of the anti-steering provisions. (*See* Mot. 11-12.) This, too, lacks merit. Apple points to *Amex*, but the Supreme Court did not establish a rule there

that anti-steering provisions are *always* procompetitive. The Supreme Court did not even hold that Amex's own anti-steering provisions were procompetitive; it merely recognized that anti-steering provisions *could be* procompetitive in appropriate circumstances, and rejected the plaintiffs' claims there because they failed to prove anticompetitive effects on both sides of a two-sided market. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018).

Here, after hearing the evidence at trial, the district court found that Apple's anti-steering provisions harm both developers *and* users, and therefore "harm competition and result in supracompetitive pricing and profits". (A-A at 166.) The district court considered and distinguished *Amex*, noting that "[i]n retail brick-and-mortar stores, consumers do not lack knowledge of options" (A-A at 165) because, among other things, "you can see the sign that says, Visa, Mastercard, Discover, AmEx" on the store door. (E-A at 1891:13-15.) But "[t]echnology platforms differ" (A-A at 165), for reasons including that "[t]hose visual indications of options don't exist" (E-A at 1891:17-19), making the payment solutions on iOS "a black box" (A-A at 165). In response, Apple points to evidence that many iOS *Fortnite* players made

purchases on platforms other than iOS (Mot. 11). However, Apple ignores its own expert's testimony that approximately two-thirds of *Fortnite* accounts that made purchases on iOS made them *only* on iOS. (E-A at 2136:18-2137:18.) Apple also ignores that, unlike *Fortnite*, many apps are not available on other platforms, making web-based purchases on iOS the only competitive alternative for those apps. Moreover, the district court found that, contrary to Apple's contention, most users do *not* know of out-of-app purchasing options because Apple "enforced silence to control information and actively impede[d] users from obtaining the knowledge to obtain digital goods on other platforms". (A-A at 165.)

B. Epic Continues To Have Standing.

Despite "repeatedly[] offer[ing] to allow Epic Games to return *Fortnite* to the App Store" (A-A at 26), including at trial (E-A at 58:6-9), Apple changed course shortly after Epic appealed the district court's decision. Apple refused to reinstate Epic's Developer Program account, which it used to distribute *Fortnite* on the App Store, until the resolution of all appeals. (A-I.) Apple now argues that its own decision to bar Epic from the App Store deprives Epic of standing, such that the

Court has no choice but to grant Apple's motion for a stay, even if Apple has not met its burden. But the lawfulness of Apple's decision to terminate Epic's account is in dispute on appeal, as it has been since Epic filed suit, and the controversy over Apple's anti-steering policies remains very much alive. *See, e.g.*, *Freitag v. Ayers*, 468 F.3d 528, 548 (9th Cir. 2006) (terminated employee retained standing to seek an injunction affecting an agency's employment practices "pending the final resolution of the administrative proceeding" regarding the lawfulness of her termination). Condoning Apple's gamesmanship would allow Apple to continue engaging in unfair conduct—affecting thousands of developers and many millions of users—for years. (*See* E-B at 13:19-21 (Apple's requested stay until resolution of appeals "would effectively take years").)

In any event, Apple's tactic fails, as Epic continues to suffer "actual financial injury". *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). Apple's anti-steering provisions enable it to "extract supracompetitive commissions". (A-A at 118, 163.) This reduces the payments Epic receives from licensees and through subsidiaries. *First*, Epic licenses its software development tool, *Unreal*

Engine, to other app developers and typically receives a 5% royalty after the licensee's first $1 million in revenue. (E-A at 681:3-7.)[5] The supracompetitive commissions sustained by Apple's anti-steering provisions reduce the royalties that Epic receives.

Apple disputes this, noting that royalties are calculated based on gross revenues, and arguing that "Epic failed to prove any restriction of output". (Mot. 14 (citing A-A at 100).) As an initial matter, the court's finding on output assessed all of Apple's restrictions in the aggregate, including those that the court found to be *pro*competitive. (A-A at 99.) The court did not find *any* procompetitive justification for the anti-steering restrictions, but did find they result in supracompetitive prices. (*Id.* at 165-66.) Apple cannot dispute the basic economic principle that supracompetitive prices lead to fewer transactions, meaning fewer royalties for Epic. Moreover, Apple's argument is pure bootstrapping. Epic has appealed the district court's decision. Apple cannot ask this Court to *assume* the correctness of the

[5] Apple's assertion in the district court that these royalties are irrelevant because they are paid to Epic subsidiaries is incorrect. Developers in the United States contract with and pay royalties to Epic Games, Inc., the plaintiff in this case. (A-K at 1, 7-8.)

district court's finding on output to deny Epic standing *even while that finding is being challenged on appeal*.

Second, five Epic subsidiaries maintain Developer Program accounts, some of which have apps on the App Store, including apps that allow in-app purchases. (E-A at 724:8-725:21; E-K.) The diminution in app revenue from Apple's supracompetitive commissions is "actual financial injury" to Epic, which supports Article III standing. *Franchise Tax Bd.*, 493 U.S. at 336.

C. Granting the UCL Injunction Was Within the District Court's Equitable Authority.

"A district court has 'broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004). And "[t]he UCL authorizes broad injunctive relief to protect the public from unfair business practices". *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013). Apple's challenges to the court's authority are meritless.

First, Apple's claim that the district court failed to make "an express finding" that Epic had proved "irreparable injury from the anti-

steering provisions" (Mot. 15-16) is incorrect. The district court found that the lack of competition caused by the anti-steering provisions means that "[t]he costs to developer[s] are higher because competition is not driving the commission rate". (A-A at 163.) Epic is among the developers that have incurred these higher costs in the past and, as noted above, will continue bearing their consequences in the future.

Second, Apple contends that "[t]he court had no license to award Epic injunctive relief it did not even ask for". (Mot. 16.) But as the district court recognized, "Epic Games did challenge and litigate the anti-steering provisions", along with Apple's policies prohibiting competing in-app payment solutions. (A-A at 163.) Epic accordingly sought relief that would allow developers to offer users alternative payment mechanisms both within *and* outside their apps. The district court's injunction did not grant Epic relief it "did not even ask for" but rather partial relief that is *narrower* than the relief Epic sought. Regardless, district courts are to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings". Fed. R. Civ. P. 54(c); *see Kirola v. City & Cty. of S.F.*, 860

F.3d 1164, 1176 (9th Cir. 2017) (district court "not bound by" plaintiff's proposal).

Third, Apple complains that "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'". (Mot. 16 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987)).) In Apple's view, market-wide relief cannot be granted outside the context of a class action. That is not the law. Indeed, courts have recognized that public injunctive relief is appropriate under the UCL. *See Montano v. Bonnie Brae Convalescent Hosp., Inc.*, 79 F. Supp. 3d 1120, 1134-35 (C.D. Cal. 2015) (UCL injunctive relief extended to other residents of plaintiff's nursing home facility); *Herr v. Nestlé U.S.A., Inc.*, 109 Cal. App. 4th 779, 790 (2003) (affirming UCL company-wide injunction).

Specifically here, Apple's own cases note that "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—*even if it is not a class action*—if such breadth is necessary to give prevailing parties the relief to which they are entitled". *Bresgal*, 843 F.2d at 1170-71

(emphasis altered); *see also Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (same). The harm to Epic is not merely its own inability to inform users of alternatives to IAP, but rather the supracompetitive fees Apple can charge to all developers for all in-app purchases because the anti-steering provisions shield it from competition. As the district court found, "the anti-steering provisions are one of the key provisions upon which Apple has been able to successfully charge supracompetitive commissions untethered to its intellectual property". (A-B at 2.) A remedy allowing only Epic to inform consumers of alternatives would not expose Apple to the competitive pressures the district court deemed necessary and therefore would not give Epic "the relief to which [it is] entitled". *Bresgal*, 843 F.2d at 1170-71.

III. EPIC WOULD BE HARMED BY A STAY.

Apple's argument that "there is no risk of harm to Epic if a stay is issued" (Mot. 22) fails for the reasons explained in Section II.B. Moreover, Apple's assertion that "the court below found" no harm to Epic (Mot. 22) mischaracterizes the district court's order, as the district court found that "Apple's commission rates depress th[e] royalties" paid

to Epic by the "numerous companies who use the *Unreal Engine* for apps". (A-B at 2.) It further found that Apple's commission rate "suppress[es] competition in the industry generally, and in which Epic Games operates". (*Id.*)

IV. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY.

The court's injunction increases consumer choice on a platform where Apple had "actively denie[d]" it for more than a decade. (A-A at 119.) As the court wrote: "this measured remedy will increase competition, increase transparency, increase consumer choice and information". (A-A at 179.) The court expressly found the injunction will further "the public interest in uncloaking the veil hiding pricing information on mobile devices and bringing transparency to the marketplace". (A-A at 166.) Apple will not voluntarily provide any relief to consumers and developers absent a court order. (*See* A-A at 36 ("[N]othing other than legal action seems to motivate Apple to reconsider pricing and reduce rates.").) The public interest thus heavily favors denial of Apple's Motion.

V. THE COURT SHOULD DENY APPLE'S ALTERNATIVE REQUEST FOR AN ADMINISTRATIVE STAY.

Apple was given 90 days to comply with the district court's order. It has offered no explanation for its 28-day delay before seeking a stay. To the contrary, Apple publicly and privately indicated that the injunction was not a serious problem. (*See* E-H, E-I.) Apple also declined to seek additional time for compliance. (*See* E-B at 23:7-8.) Having chosen to proceed this way, Apple is not entitled to an administrative stay, which would delay the freer flow of information and the increased competition that will arise from the district court's injunction.

CONCLUSION

For these reasons, Apple's Motion should be denied.

November 26, 2021

Respectfully submitted,

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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 5,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 27(d).

Dated: November 26, 2021

/s/ *Gary A. Bornstein*
Gary A. Bornstein

INDEX OF EXHIBITS

Exhibit	Document Description
E-A	Excerpts from the Trial Transcript
E-B	Excerpt from the District Court Stay Hearing Transcript (Nov. 9, 2021)
E-C	Excerpts from Written Direct Testimony of Aviel D. Rubin, Ph.D., D.C. Dkt. No. 742-5 (May 3, 2021)
E-D	Excerpts from Written Direct Testimony of Lorin M. Hitt, Ph.D., D.C. Dkt. No. 745-1 (May 3, 2021)
E-E	Excerpts from Apple's Proposed Findings of Facts and Conclusions of Law, D.C. Dkt. No. 779-1 (May 28, 2021)
E-F	Epic Games, Inc.'s Notice of Appeal, D.C. Dkt. No. 816 (Sept. 12, 2021)
E-G	Apple Inc.'s Notice of Appeal, D.C. Dkt. No. 820 (Oct. 8, 2021)
E-H	Article from 9to5Mac, "*Apple describes Epic Games ruling as a 'resounding victory' for the App Store*" (Sept. 10, 2021)
E-I	Article from The Verge, "*Tim Cook tells Apple employees he's 'looking forward to moving forward' after Epic ruling*" (Sept. 17, 2021)
E-J	Letter from Gary A. Bornstein to Mark A. Perry (Sept. 14, 2021)
E-K	Screenshots of *Unreal Engine* Apps on the App Store, (taken Oct. 18, 2021)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 26, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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