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19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 EPIC GAMES, INC.
 23
 Plaintiff, Counter-defendant
 24 v.
 25 APPLE INC.,
 26 Defendant, Counterclaimant
 27

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

**APPLE INC.’S MOTION FOR ENTRY OF
 JUDGMENT ON ITS INDEMNIFICATION
 COUNTERCLAIM**

The Honorable Yvonne Gonzalez Rogers

**REDACTED VERSION OF DOCUMENT
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NOTICE OF MOTION

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on March 5, 2024 at 10:00 a.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Yvonne Gonzalez Rogers, Courtroom 1 – 4th Floor, United States District Court, 1301 Clay Street, Oakland, California, Apple Inc. (“Apple”) will and hereby does move that this Court, pursuant to the mandate of the Ninth Circuit, enter judgment ordering Epic Games, Inc. (“Epic”) to pay Apple \$73,404,326, plus additional amounts Apple is incurring during this ongoing litigation, under the indemnification provision of the Developer Program License Agreement. *See* PX-2619.40 (§ 10).

This motion is based on this notice and supporting memorandum, the trial record, the appellate record, the Declarations of Mark Rollins (Apple), Carlyn Irwin (Cornerstone Research), Mark A. Perry (Weil), and Richard M. Pearl, and other information of which the Court may take judicial notice.

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INTRODUCTION

1
2 When Epic Games, Inc. entered into the Developer Program License Agreement (“DPLA”) with
3 Apple in 2010, it agreed to indemnify Apple for “any and all claims, losses, liabilities, damages, taxes,
4 expenses and costs, including without limitation, attorneys’ fees and court costs (collectively, ‘Losses’),
5 incurred by [Apple] and arising from or related to . . . [Epic’s] breach of any certification, covenant,
6 obligation, representation or warranty in [the DPLA], including Schedule 2.” PX-2619.40 (DPLA § 10).
7 Only a few weeks after it renewed the DPLA in 2020, Epic willfully breached the contract as part of a
8 multifaceted and worldwide attack against Apple and the iOS App Store.

9 One front in Epic’s war against Apple was the lawsuit it filed against Apple in this Court. In that
10 suit, Epic sought to have key provisions of Apple’s DPLA—including Apple’s right to collect a
11 commission on in-app purchases of digital content—declared void and unenforceable under the antitrust
12 laws. At trial, however, Epic lost on all of its antitrust claims, and Apple prevailed on its counterclaim
13 for Epic’s breach of contract. This Court found that Epic had intentionally breached the DPLA, even
14 though (as the Court further found) it was not necessary for Epic to do so to bring this lawsuit. The
15 Ninth Circuit affirmed the judgment in favor of Apple on Epic’s antitrust claims and Apple’s breach-of-
16 contract counterclaim, and it held that Apple is entitled to recover its “Losses” arising from or related to
17 Epic’s breach under the indemnification provision in the DPLA. The court of appeals remanded solely
18 for this Court to determine the amount of such Losses.

19 Because the DPLA’s indemnification provision defines Losses broadly as “any and all . . .
20 expenses and costs, including *without limitation*, attorneys’ fees and court costs,” Apple is entitled to
21 recover *all* of its out-of-pocket expenses and costs arising from Epic’s lawsuit. That includes all
22 expenditures defending against Epic’s claims, at both the trial and appellate level, as well as Apple’s
23 ongoing litigation of its indemnification counterclaim on remand. Further, under the plain terms of the
24 DPLA, recoverable Losses encompass all of Apple’s litigation “expenses . . . without limitation”—a
25 term that includes not only attorneys’ fees and court costs, but also expert fees, vendor costs, travel
26 expenses, and other outlays actually made in connection with the litigation.

27 Apple has spent a total of \$81,560,362 to defend against the United States litigation, from its
28

1 inception by Epic in August 2020 through October 31, 2023. By this motion, Apple seeks to recover
 2 \$73,404,326, or 90% of the total amount expended, plus additional amounts Apple is incurring during
 3 this ongoing litigation. This 10% discount, while not required by the DPLA or California law, recognizes
 4 that Epic prevailed on 1 of the 10 claims it asserted.

5 The total amount of Losses is substantiated in the supporting declarations submitted with this
 6 motion. Apple attests in its declaration to the amount of attorneys' fees and other costs that it actually
 7 paid in connection with this lawsuit to the vendors who submitted invoices directly to Apple.
 8 Cornerstone Research, a third-party expert in forensic accounting and data analytics, has corroborated
 9 that total amount based on its independent and extensive review of the billing records maintained by
 10 Apple and its vendors (including pass-through amounts). Apple and Cornerstone, working with Apple's
 11 vendors to understand and/or reconcile billing and payment records, have made various reductions to
 12 ensure that every dollar sought by this motion falls within the DPLA's indemnification provision. The
 13 total amount sought thus reflects both those downward adjustments and the 10% reduction—yielding a
 14 number below the amount Apple is contractually entitled to:

Apple's Actual Payments	Adjusted Total	Adjusted Total Minus 10%
\$82,971,401	\$81,560,362	\$73,404,326

17 Although the DPLA contains no reasonableness requirement, the Losses sought by Apple are
 18 "reasonable" under California law applicable to post-judgment motions for attorneys' fees and costs.
 19 The stakes in this lawsuit were enormous, and Apple's defense was appropriate in light of the challenge
 20 to Apple's business model. Apple's total expenditures are also commensurate with Epic's own
 21 substantial investment in the litigation. Both Epic and Apple chose to retain sophisticated law firms,
 22 multiple experts, and vendors capable of managing the huge quantity of documents and data produced
 23 in discovery. The declaration of Richard M. Pearl, an expert on California attorneys' fees and court
 24 costs, further supports a finding of reasonableness.

25 Epic has no legitimate grounds to dispute the amount of Losses sought by Apple. Accordingly,
 26 the Court should enter judgment on Apple's indemnification counterclaim in the amount of \$73,404,326,
 27 plus the additional amounts related to the ongoing litigation that Apple has incurred and will continue to
 28

1 incur from October 31, 2023 through final resolution.

2 BACKGROUND

3 From approximately 2010 until the events that precipitated this lawsuit, Epic was a member of
4 Apple’s developer program and was a signatory to the DPLA. That contract contains an express
5 indemnification provision that requires each developer (referred to as “You” in the agreement) to
6 reimburse Apple for, among other things, “attorneys’ fees and court costs . . . arising from or related to”
7 the developer’s “breach” of any part of the DPLA. The indemnification provision reads, in relevant part:

8 To the extent permitted by applicable law, **You agree to indemnify and**
9 **hold harmless**, and upon Apple’s request, defend, Apple, its directors,
10 officers, employees, independent contractors and agents (each an “Apple
11 Indemnified Party”) from **any and all claims, losses, liabilities, damages,**
12 **taxes, expenses and costs, including without limitation, attorneys’ fees**
13 **and court costs** (collectively, “Losses”), incurred by an Apple Indemnified
14 Party and **arising from or related to** any of the following (but excluding
15 for purposes of this Section, any Application for macOS that is distributed
outside of the App Store and does not use any Apple Services or
Certificates): **(i) Your breach of any certification, covenant, obligation,**
representation or warranty in this Agreement, including Schedule 2 and
Schedule 3 (if applicable)

16 PX-2619.40 (DPLA § 10) (emphases added). The Ninth Circuit has already ruled that Apple is entitled
17 to recover its Losses under this provision. The only issue before this Court on remand is the amount of
18 such Losses.

19 A. Epic’s Intentional Breach Of The DPLA

20 Apple’s App Store is a two-sided transaction platform that allows third-party developers of apps
21 built using Apple’s proprietary software and technology to engage with consumers who use devices,
22 such as iPhones, running Apple’s iOS operating system. Dkt. No. 812 (“Rule 52 Order”), at 28–29, 34.
23 Developers who wish to gain access to Apple’s proprietary tools must join the Developer Program. *Id.*
24 at 93 n.462. To develop and distribute iOS apps, developers must also sign and agree to the terms of the
25 DPLA. *Id.* at 28–29. As of the time of trial, all native iOS apps must have been distributed through the
26 App Store, and all in-app purchases of digital goods and services must have used Apple’s IAP payment
27 mechanism. *Id.* at 29–33. Apple charges a commission on downloads of paid apps and for transactions
28 effected through IAP. *Id.* at 35–36. The DPLA includes certain “anti-steering” provisions to help Apple

1 enforce the IAP requirement. *Id.* at 31; PX-2619.17; PX-2790.10.

2 Founded in 1991, Epic is a “multi-billion dollar video game company” and the developer of the
3 popular video game, *Fortnite*. Rule 52 Order at 2–3. In 2010, Epic entered into a DPLA with Apple,
4 which allowed Epic to leverage Apple’s developer tools and technology to develop and produce iOS
5 games offered through Apple’s App Store. *See id.* at 18. During the two years *Fortnite* was on the App
6 Store, Epic earned more than \$700 million in revenue from iOS users. *Id.* at 14.

7 Despite its commercial success on iOS, Epic had expressed objection to two core Apple policies
8 for developers: the requirements that iOS apps be distributed through the App Store and that in-app
9 purchases of digital goods and services be executed through IAP. Rule 52 Order at 21, 25. What Epic
10 really wants is to avoid paying Apple’s commission. *See id.* at 92 (“Epic games’ theory [is] that no
11 commission should be levied”). In 2019, Epic devised a plan called “Project Liberty” to attack Apple’s
12 App Store policies through public relations, lobbying, and litigation. Epic had two primary motivations
13 for Project Liberty: first, its pursuit of “tremendous monetary gain and wealth”; second, its desire to
14 change the policies and practices of Apple, “which are an impediment to Mr. Sweeney’s [Epic’s CEO]
15 vision of the oncoming metaverse.” *Id.* at 19. As this Court explained, the plan was multifaceted and
16 “highly choreographed” (*id.*), including to the point of having a Cravath antitrust partner, Gary
17 Bornstein, embedded at Epic’s headquarters with an Epic e-mail address (Dkt. No. 779-1 ¶ 274.4).

18 After renewing its DPLA with Apple on June 30, 2020, Epic sent a letter that same day to Apple
19 executives requesting that Apple make “(i) competing payment processing options . . . ; and (ii) a
20 competing Epic Games Store app” available through the App Store. Rule 52 Order at 24; Dkt No. 779-
21 1 ¶¶ 276–77. On July 10, 2020, Apple declined Epic’s request, noting that not only “has [Apple] never
22 allowed this,” but also that doing so would undermine the “safe[ty], secur[ity] and reliab[ility]” of the
23 iOS and App Store environments. Rule 52 Order at 24 (citations omitted); Dkt. No. 779-1 ¶¶ 278.1–.4.
24 Epic replied a week later, promising to continue its crusade, but never “reveal[ing to Apple] its plans to
25 enable an alternate payment system” by subterfuge—despite tipping off Nintendo, Microsoft, and Sony
26 to Epic’s impending “fireworks show.” Rule 52 Order at 23, 25 (citations omitted); Dkt. No. 779-1
27 ¶ 279.

1 The cornerstone of Epic’s plan was a surreptitious “hotfix” that Epic “introduced . . . into the
2 *Fortnite* version 13.40 update [submitted for App Review] on August 3, 2020.” Rule 52 Order at 25.
3 The hotfix “required extensive planning and testing,” including “[s]pecialized engineers” and an
4 information security team whose sole purpose was to ensure that Apple’s App Review Team could not
5 detect the embedded threat lurking in the version update. *Id.* at 23; *see also* Dkt. No. 779-1 ¶ 272 (Epic’s
6 Project Liberty team comprised “about 100–200 [of its] employees”), ¶ 274.1 (“Epic ‘investigated’
7 various ways it could surreptitiously implement an alternative payment system, ‘like, obfuscating the
8 code’ or ‘encrypt[ing]’ the relevant features.”). This secret code “clandestinely enabled substantive
9 features in willful violation of [Epic’s] contractual obligations” under the DPLA (Rule 52 Order at 21),
10 including “a direct pay option to Epic Games that would be activated when signaled by Epic Games’
11 servers” (*id.* at 25). The hotfix, in short, would “circumvent Apple’s IAP system,” once Epic “activated
12 the undisclosed code.” *Id.*; *see also id.* at 21–22 (“We submit a build to[] Apple with the ability to
13 hotfix on our payment method. . . . We flip the switch when we know we can get by without having to
14 update the client for 3 weeks or so.” (citing DX-4419.002)). After “intentionally omitt[ing] the full
15 extent” of the changes in its “disclosure” to Apple—which relied upon Epic’s misrepresentations in
16 approving the new version of *Fortnite*—Epic triggered the hotfix on August 13, 2020. *Id.* at 23, 25; Dkt.
17 No. 779-1 ¶ 300 (Epic notified Apple at 2:00 AM on August 13, 2020 of the hotfix, only after having
18 already activated it).

19 As this Court found, by implementing the hotfix, Epic “willful[ly] violat[ed its] contractual
20 obligations and guidelines” with Apple, as set out in the DPLA that Epic entered into with Apple in
21 2010. Rule 52 Order at 18, 21.

22 Apple removed *Fortnite* from its App Store on August 13, 2020, fewer than ten hours after Epic
23 implemented the hotfix. Dkt. No. 779-1 ¶ 301; Rule 52 Order at 25. That day, Apple sent a letter
24 notifying Epic that *Fortnite* had been removed from the App Store due to violations of the App Store
25 Review Guidelines. Dkt. No. 779-1 ¶ 302. Apple also explained how Epic could cure its breach:
26 removing the alternative payment feature and any other features hidden from Apple; clearly describing
27 the changes to *Fortnite* version 13.40; and resubmitting the new version of *Fortnite* for review. *Id.* Epic
28

1 responded in an email to Apple executives that threatened Apple would be “in conflict with” Epic on a
2 number of fronts—including legal. *Id.* ¶ 303 (citing DX-3906.002).

3 Shortly after triggering the hotfix, Epic sued Apple under Sections 1 and 2 of the Sherman Act,
4 the California Cartwright Act, and the California Unfair Competition Law (“UCL”). Epic alleged that
5 Apple unlawfully maintained a monopoly over iOS app distribution and in-app payment markets, via the
6 App Store and IAP, and sought a declaration and injunction against the challenged DPLA provisions.
7 Rule 52 Order at 148, 151–52.

8 Apple sent another letter to Epic the following day, on August 14, 2020, providing additional
9 detail on how Epic’s hotfix breached its agreements with Apple. Dkt. No. 779-1 ¶ 309. Reminding Epic
10 of Apple’s app review process, Apple reiterated its rules regarding user privacy and security, and how
11 Epic had violated many provisions of the DPLA. *Id.* Apple also notified Epic that its membership in
12 Apple’s Developer Program was suspended as a result of its actions, although Epic could still cure its
13 breaches within a fourteen-day period. *Id.* ¶ 310. But Epic declined to do so, and Apple subsequently
14 terminated Epic’s Developer Program Account, along with its DPLA, on August 28, 2020. *Id.* ¶ 311.

15 Along with its hotfix and this long-planned litigation, Epic simultaneously launched a “pre-
16 planned[] and blistering” global public relations campaign, and lobbied both legislatures and regulators
17 to impose new requirements on Apple. Rule 52 Order at 25. Epic sought to turn developer and user
18 opinions against Apple, including through public relations campaigns and other media, such as the “1980
19 Fortnite” video. *See* Dkt. No. 779-1 ¶¶ 284.1–.3, 286–87. Epic went so far as to host the
20 “#FreeFortniteCup” tournament, where it advertised Sony, Microsoft, PC, Nintendo, and Samsung
21 offerings as alternative platforms. *Id.* ¶ 304. Epic also created the so-called Coalition for App Fairness
22 to advance its arguments in various forums. Rule 52 Order at 22; Dkt. No. 779-1 ¶¶ 283.1–.3, 285. Epic
23 did all of this knowing its actions would make Epic “not sympathetic” (Dkt. No. 779-1 ¶ 280 (citing
24 DX-4177.011)), and that forcing Apple to block the *Fortnite* app due to the hotfix and ensuing breach
25 of contract would cause consumer sentiment to “trend negative towards Epic” (*id.* (citing DX-
26 4018.054)). To avoid this, Epic worked with its public relations firm to create a narrative “that [Epic
27 is] benevolent,” and to “[g]et players, media, and industry on Epic’s side,” and against Apple. Rule
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1 52 Order at 22 (citing DX-4561.020; DX-3641.001)).

2 In response, Apple brought counterclaims against Epic for breach of contract and indemnification
3 under the DPLA. Specifically, Apple alleged—just as it had advised Epic in its letter on August 14,
4 2020—that Epic had breached several provisions of the DPLA, including DPLA §§ 3.2, 3.3.2, 3.3.3,
5 3.3.25, and 6.1. *See* Dkt. No. 66 at 56; Dkt. No. 779-1 ¶ 309; Rule 52 Order at 178–79. Among other
6 things, these provisions required Epic not to “‘hide, misrepresent or obscure any features, content,
7 services or functionality’ in their apps and not to ‘provide, unlock or enable additional features or
8 functionality through distribution mechanisms other than the App Store’” and required Epic to pay Apple
9 a 30% commission of end-user payments through the App Store. Rule 52 Order at 173 (citing PX-2619
10 §§ 3.2, 3.3.2, 3.3.3, 3.3.25).

11 Before this Court, Epic “d[id] not contest that it breached the DPLA and Schedule 2. Nor d[id]
12 Epic contest that if the Court [found] the breached provisions enforceable against Epic in this matter,
13 then Epic would be liable to Apple for breach of contract.” Dkt. No. 407 ¶ 497; Dkt. No. 474, at 2. Epic
14 instead defended its willful breach solely by claiming that the DPLA was unlawful and unenforceable
15 under the antitrust laws. *See* Rule 52 Order at 172 (“Epic Games alleges that Apple’s counterclaims
16 [including its breach of contract claim] are barred because ‘the contracts on which Apple’s counterclaims
17 are based are unconscionable’ on the basis that they ‘are contrary to the antitrust laws and unfair
18 competition laws[.]’” (citing Dkt. No. 106, at 17–18)).

19 After a 16-day bench trial involving 26 witnesses and 520 exhibits, the Court issued a 180-page
20 order rejecting Epic’s antitrust claims in their entirety. The Court also rejected Epic’s challenge to the
21 app distribution and IAP requirements under the California UCL. *See* Rule 52 Order at 162 (“Epic
22 Games’ [UCL] claims based on the app distribution and in app payment processing restrictions fail for
23 the same reasons as stated for the Sherman Act”). But the Court found that Apple’s anti-steering
24 provision violated the UCL and enjoined Apple from enforcing it. *Id.* at 168.

25 In light of its rejection of Epic’s antitrust claims, the Court also rejected Epic’s defense to Apple’s
26 breach-of-contract claim, holding that except for “one unrelated provision,” the DPLA was not
27 “substantively unconscionable.” Rule 52 Order at 172. Epic “admitted that it breached the DPLA in the
28

1 manner that Apple alleg[ed],” and thus the Court held that Apple prevailed on its breach-of-contract
2 counterclaim and was entitled to relief. *Id.* at 168. The Court granted Apple relief in the form of damages
3 and a declaration that (i) Epic’s DPLA and related agreements were lawfully terminated, and (ii) Apple
4 could lawfully terminate its DPLA with “any or all of Epic Games’ wholly owned subsidiaries, affiliates,
5 and/or other entities [under its control].” *Id.* at 179.

6 The Court ruled against Apple on its counterclaim for indemnification based on Epic’s willful
7 breach of the DPLA, concluding that Section 10 of the DPLA does not apply to intra-party disputes
8 between signatories, such as this dispute between Epic and Apple. *Id.* at 176–77.

9 **B. Apple’s Entitlement To Indemnification Under The DPLA**

10 Epic appealed this Court’s decision dismissing its Sherman Act claims and entering judgment
11 for Apple on its breach-of-contract claim. *See* C.A.9 Dkt. No. 41, at 29–32. Apple cross-appealed this
12 Court’s UCL judgment and injunction, as well as its rejection of the indemnification counterclaim under
13 the DPLA. *See* C.A.9 Dkt. No. 93, at 101, 112. On appeal, Epic again asserted its unconscionability
14 defense to its deliberate breach of the DPLA, arguing that “*Apple’s breach of contract counterclaims*
15 *rise and fall on the determination of Epic’s Sherman Act claims.*” C.A.9 Dkt. No. 163, at 84 (emphasis
16 added); *see also* C.A.9 Dkt. No. 41, at 13 (“Epic stipulated to its noncompliance with the DPLA, but
17 asserted that the relevant provisions are unlawful, void against public policy, and unconscionable
18 [because they are alleged to violate the Sherman Act]”); C.A.9 Dkt. No. 222, at 76–77.

19 The Ninth Circuit affirmed this Court’s rulings that Epic’s Sherman Act claims failed and that
20 those claims could not justify Epic’s breach of contract. C.A.9 Dkt. No. 222, at 77. In so holding, the
21 panel expressly noted that “[t]he parties agree that Epic’s illegality defense rises and falls with its
22 Sherman Act claims.” *Id.* The Ninth Circuit also affirmed the UCL judgment and injunction. *Id.* at 77,
23 83.

24 On Apple’s counterclaim for indemnification, the Ninth Circuit held that the DPLA applies to
25 “intra-party disputes” and that “Apple is entitled to attorney fees pursuant to it.” *Id.* at 87. The Ninth
26 Circuit explained that while California courts presume that the words “indemnify” and “hold harmless”
27 obligate the indemnitor to reimburse the indemnitee for third-party claims, courts also look to the context
28

1 in which language appears and may find that the contract rebuts this presumption. *Id.* at 85–86. Here,
2 the Ninth Circuit concluded that clause (i) of Section 10 of the DPLA rebuts the presumption because it
3 “specifically provide[s] for attorneys’ fees” in actions on the contract, and “contemplat[es] an intra-party
4 action for breach of contract” insofar as a third party could not sue Apple under clause (i). *Id.* at 86. In
5 holding that Apple is entitled to indemnification, the Ninth Circuit “express[ed] no opinion on what
6 portion of Apple’s attorney fees incurred in this litigation can be fairly attributed to Epic’s breach of the
7 DPLA.” *Id.* at 87 n.24. Accordingly, it remanded for this Court to determine the amount of Losses that
8 Epic is contractually obligated to pay to Apple. *Id.* at 10, 85–87.

9 LEGAL STANDARD

10 The Ninth Circuit has determined that Apple is entitled to indemnification under Section 10 of
11 the DPLA, and remanded for a determination of the amount of Losses that Epic is contractually obligated
12 to pay. C.A.9 Dkt. No. 222, at 10, 85–87. The substance of that inquiry is governed by the plain terms
13 of the parties’ contract and by California law. *See* PX-2619.45–46 (DPLA § 14.10); *see also* Cal. Civ.
14 Code § 1717(a) (governing recovery of attorneys’ fees based on contract disputes). While the DPLA
15 does not specify an indemnification procedure, the provisions of Federal Rule 54 provide a useful
16 analogue. *J.P. Morgan Sec., LLC v. Baumann*, 2015 WL 13916932, at *3 (C.D. Cal. Dec. 1, 2015);
17 *Martinez v. Extra Space Storage, Inc.*, 2013 WL 6623889, at *1 (N.D. Cal. Dec. 16, 2013). Accordingly,
18 Apple sets forth below and in the accompanying declarations “the amount sought.” Fed. R. Civ. P.
19 54(d)(2)(B)(iii); *see also* Civil L.R. 54-5.

20 ARGUMENT

21 Epic planned its campaign against Apple for almost two years before triggering the hotfix and
22 intentionally breaching the DPLA. It retained one of the world’s elite law firms (Cravath, Swaine &
23 Moore) to lead the charge. *See* Dkt. No. 779-1 ¶ 274.4. Epic also retained public and media relations
24 consultants to shift the blame from itself to Apple. *See id.* ¶¶ 283–87. Epic *knew* that the actions it was
25 contemplating would breach its contract with Apple—imposing enormous litigation costs on Apple—
26 and it went ahead anyway. *Id.* ¶ 300; *see also* Rule 52 Order at 178–79 (internal documents showed that
27 Epic believed Apple would enforce its contract rights after the breach). Epic decided to commit an
28

1 intentional breach even though, as this Court has already found, Epic *could* have continued performing
2 under the contract while it sued Apple for allegedly violating the antitrust laws. Rule 52 Order at 178
3 (“Epic Games never showed why it had to breach its agreements to challenge the conduct litigated.”).
4 The legal consequence of Epic’s own intentional actions is that it must indemnify Apple for all Losses
5 as defined in the DPLA..

6 *First*, Epic signed and then intentionally breached the DPLA, knowing that it would be obligated
7 to indemnify Apple for all of its “Losses” “arising from” or “related to” that breach. The contractual
8 term “Losses” that the parties agreed to is broadly defined to include “any and all” of Apple’s expenses,
9 including attorneys’ fees and other court costs, “without limitation.” Thus, *all* of Apple’s litigation
10 expenses fall squarely within the scope of the DPLA’s indemnification provision, and are recoverable
11 by contract. And because Epic opposed Apple’s contract counterclaim only on antitrust grounds, the
12 expenses Apple incurred in litigating the antitrust claims likewise falls within the scope of “Losses” and
13 are recoverable. They are also recoverable under California law applicable to post-judgment motions
14 for attorneys’ fees and costs. California law requires the Court to award Apple, as the “prevailing party,”
15 its contractual indemnification for Epic’s failed “action on the contract,” meaning Epic’s failed attempt
16 to have DPLA provisions declared void and unenforceable.

17 *Second*, Apple has substantiated the total amount of its Losses with supporting declarations and
18 records, which provide more than sufficient evidentiary basis for entry of judgment on the
19 indemnification counterclaim in the amount set forth herein. That amount is also “reasonable” under
20 California law. Epic challenged core aspects of Apple’s business model and it sought to eliminate a
21 revenue stream by preventing Apple from collecting any commission from developers. Accordingly,
22 Apple hired renowned law firms, experts, and vendors that were up to the considerable task. Apple is
23 also a sophisticated party that negotiates its outside vendor rates, including involving its Corporate
24 Procurement function in the law-firm pricing negotiations, and then closely monitors its invoices, as its
25 supporting declaration explains. And Apple did, in fact, pay the amount that it seeks to recover, evincing
26 the reasonableness of those fees and costs. Richard M. Pearl, an expert on attorneys’ fees and costs in
27 California has also closely reviewed the record and investigated Apple’s billing practices in this case,
28

1 and he has offered his expert opinion that the amount Apple spent is reasonable under California law.

2 **I. Epic Is Obligated To Indemnify Apple For All Its Expenses and Costs—Without**
 3 **Limitation—Arising From or Related To Epic’s Breach**

4 **A. Apple Is Entitled To Its “Losses,” Broadly Defined Under The DPLA**

5 The Ninth Circuit held that Apple is entitled to indemnification under the DPLA. In relevant
 6 part, the DPLA provides that Apple may recover “*any and all . . . expenses and costs, including without*
 7 *limitation, attorneys’ fees and court costs.*” PX-2619.40 (DPLA § 10) (emphases added). The parties
 8 thus agreed that *any* out-of-pocket payment that arose from or related to Epic’s breach of the DPLA is
 9 within the scope of the indemnification provision. *See Thrifty Payless, Inc. v. Mariners Mile Gateway,*
 10 *LLC*, 185 Cal. App. 4th 1050, 1066 (2010) (“[W]here sophisticated parties knowingly and intentionally
 11 negotiate” broad indemnification provisions, “the intent of the parties should be upheld by the court”);
 12 *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 491–92 (1996)
 13 (California law does not “prevent sophisticated parties from freely choosing a broader standard
 14 authorizing recovery of reasonable litigation charges and expenses”); *see also, e.g., Crawford Fitting*
 15 *Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (noting that parties may contract out of or expand
 16 federal statutory definitions of “costs”).

17 Under California law, “the measure and mode of compensation of attorneys and counselors at
 18 law is left to the agreement, express or implied, of the parties.” Cal. Civ. Proc. Code § 1021. Thus, a
 19 contractual indemnity provision may provide for fees arising from contract-based claims—or, “if
 20 worded[] broadly, [it] can also provide for a fee award in any litigation between the parties.” *Windsor*
 21 *Pac. LLC v. Samwood Co.*, 213 Cal. App. 4th 263, 273 (2013) (citing *Santisas v. Goodin*, 17 Cal. 4th
 22 599, 608 (1998)). California courts interpret attorneys’ fee provisions “broadly,” and in line with
 23 “ordinary popular speech.” *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338, 1343–44 (1992);
 24 *see also Hot Rods, LLC v. Northrop Grumman Sys. Corp.*, 242 Cal. App. 4th 1166, 1181–182 (2015)
 25 (phrases that are “quite broad” reflect the intent of the contracting parties).

26 Here, the applicable standard is as broad as could be: Epic expressly agreed to indemnify Apple
 27 for “any and all” “expenses” *and* “costs,” which include (but not are not limited to) attorneys’ fees,
 28 “arising from or related to” Epic’s breach of the DPLA. PX-2619.40 (DPLA § 10). This broad language

1 must be given its full effect. *See* Cal. Civ. Proc. Code § 1021; *Santisas v. Goodin*, 17 Cal. 4th at 608;
2 *see also Pearson v. U.S. Bank Nat’l Ass’n*, 2017 WL 8186764, at *6 (C.D. Cal. Aug. 14, 2017) (parties
3 may “validly agree that the prevailing party will be awarded attorney fees incurred in *any* litigation
4 between themselves, whether such litigation sounds in tort or in contract” (emphasis added)) (citing
5 *Xuereb*, 3 Cal. App. 4th at 1341); *Xuereb*, 3 Cal. App. 4th at 1344 (the phrase “gives rise to” is interpreted
6 “expansively,” in keeping with “ordinary popular speech”).

7 The DPLA indemnification provision thus encompasses all of the categories of litigation outlays
8 that Apple now seeks, such as its expert fees. At the outset, those outlays fall within the term “expenses,”
9 which is separate from and broader than “costs,” a term-of-art typically defined by statute. *See, e.g., Tax*
10 *Servs. of Am., Inc. v. Mitchell*, 2008 WL 2834271, at *5 (D. Colo. July 21, 2008) (holding that
11 “[a]lthough ‘costs’ is a term of art referring to only those costs recoverable pursuant to statute, the term
12 ‘expenses’ is not so narrowly circumscribed” and allowing the prevailing party “to recover its costs and
13 expert witness fees”) (citations omitted). Thus, the Ninth Circuit has held that “the term ‘litigation
14 expenses’ normally encompasses expert witness fees.” *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th
15 Cir. 2002) (discussing expense-shifting under the Americans with Disabilities Act). The Supreme Court
16 has likewise indicated that “reasonable litigation expenses” includes expert witness fees. *W. Va. Univ.*
17 *Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (suggesting such language would allow for recovery of
18 expert fees); *see also Peter v. NantKwest, Inc.*, 140 S. Ct. 365, 373–74 (2019) (citing this passage with
19 approval). And numerous other courts have awarded expert fees based on contractual provisions or
20 common law doctrines providing for reimbursement of “expenses.” *See Scholastic Inc. v. M/V Kitano*,
21 362 F. Supp. 2d 449, 460–61 (S.D.N.Y. 2005) (awarding expert fees based on indemnification clause
22 allowing reimbursement of “expenses (including attorney’s fees), suffered by the [defendant]”);
23 *Gabourel v. Bouchard Transp. Co.*, 1996 WL 447991, at *2 (S.D.N.Y. Aug. 7, 1996) (awarding
24 “litigation expenses” under common law doctrine and holding that “[p]lainly, expert fees and other costs
25 are litigation expenses”); *see also Goldberg v. Mallinckrodt, Inc.*, 792 F.2d 305, 309 (2d Cir. 1986) (“The
26 term ‘expenses’ is more suggestive of traditional litigation costs such as filing fees or fees paid to expert
27 witnesses”); *Cap. Bank, PLC v. M/Y Birgitta*, 2010 WL 4241584, at *6 (C.D. Cal. Oct. 18, 2010) (noting
28

1 that “courts regularly award expert witness fees where the parties’ contract provides for the recovery of
2 costs,” and holding that under English law, the phrase “all costs and expenses” encompasses expert fees);
3 *Armada Bulk Carriers v. ConocoPhillips Co.*, 505 F. Supp. 2d 621, 623 (N.D. Cal. 2007) (under New
4 York law, the phrase “all costs and expenses (including reasonable attorney fees)” includes expert fees).

5 Moreover, the DPLA covers not only “expenses,” but “any and all . . . expenses . . . without
6 limitation.” Thus, although the DPLA specifies two frequently recurring categories of expenses (i.e.,
7 attorneys’ fees and court costs), it was not necessary to specifically enumerate other categories of
8 expenses, in light of these catchall clauses. The phrase “any and all” “could not be plainer,” and includes
9 items not specifically enumerated. *Skrbina v. Fleming Companies*, 45 Cal. App. 4th 1353, 1368–69
10 (1996) (rejecting plaintiff’s claim that release of “any all claims” did not include plaintiff’s causes of
11 action); *see also Bardin v. Lockheed Aeronautical Sys. Co.*, 70 Cal. App. 4th 494, 505 (1999) (rejecting
12 argument that release of “any and all” claims includes exception for claims grounded in fraud or malice).
13 The same is true of the phrase “without limitation,” which is also clear on its face. *See Hegarty v.*
14 *Transamerica Life Ins. Co.*, 2021 WL 4899482, at *3 (N.D. Cal. Oct. 21, 2021) (noting that the plaintiff
15 was “grasping at straws because ‘without limitation’ means ‘without limitation,’” and thus a category
16 that is “without limitation” must “include[] every type of” that category); *Travelers Indem. Co. v. Crown*
17 *Corr, Inc.*, 2012 WL 2798653, at *2 (D. Ariz. July 9, 2012) (“The phrase ‘without limitation’ means that
18 the terms listed are not the only terms included.”), *aff’d*, 589 F. App’x 828 (9th Cir. 2014). Epic therefore
19 cannot seek post-hoc limitations on Apple’s Losses, after agreeing to the indemnification provision. *In*
20 *re Khaury*, 2012 WL 2373655, at *1 (Bankr. N.D. Cal. June 22, 2012) (“The court interprets the words
21 ‘without limitation’ as meaning just that, and prohibiting Khaury’s post-hoc attempt to impose
22 limitations.”).

23 Indeed, all of the categories of Apple’s litigation expenditures—at both the trial and appellate
24 level—are well-recognized, “traditional” expenses that sophisticated parties may agree to by contract,
25 and that courts have awarded. *See, e.g., Singh v. Hancock Nat. Res. Grp., Inc.*, 2017 WL 2275029, at
26 *15 (E.D. Cal. May 25, 2017) (expert fees recoverable under contract); *Thrifty*, 185 Cal. App. 4th at
27 1066 (sophisticated parties may agree to include broad definition of costs, including expert fees);
28

1 *Eastwood Ins. Servs., Inc. v. Titan Auto Ins. of N.M., Inc.*, 2010 WL 11595919, at *6 (C.D. Cal. Nov.
2 23, 2010) (e-discovery cost recoverable under contract); *Roman v. Queen Mary*, 2002 WL 787769, at *4
3 (Cal. Ct. App. Apr. 29, 2002) (“travel expenses” and other costs recoverable under contract). Thus,
4 under the plain and objective meaning of the DPLA—which governs and clearly covers all of the
5 categories of “expenses” that Apple now requests—Epic cannot credibly argue that it did not have a
6 reasonable expectation that “any and all . . . expenses and costs . . . without limitation” would include
7 such things as expert fees and other common categories of litigation expenses that courts have awarded
8 by contract. Apple is not seeking any novel categories of expenses that were not reasonably foreseeable
9 by Epic.

10 For the same reasons, moreover, Apple is entitled to its expenses for the entire lawsuit, at all
11 *stages* of the litigation, in both this Court and on appeal in the Ninth Circuit. The DPLA encompasses
12 “any and all . . . expenses and costs . . . without limitation,” which necessarily includes expenses incurred
13 on appeal. *See M.C. & D. Capital Corp. v. Gilmaker*, 204 Cal. App. 3d 671, 676–78 (1988) (“attorney’s
14 fees on appeal are recoverable when authorized by statute or contract”). Moreover, this Court has
15 jurisdiction to adjudicate Apple’s contractually based indemnification claim, and make an award of
16 losses that includes expenses for the successful appeal. *See* C.A.9 Dkt. No. 222, at 87 (remanding with
17 mandate to assess indemnification claim); *see also Harbour Landing-Dolfann, Ltd. v. Anderson*, 48 Cal.
18 App. 4th 260, 264–65 (1996) (“[C]ontractually authorized attorney fees . . . may either be requested of
19 the appellate court while the appeal is pending, or of the trial court upon issuance of the remittitur. The
20 trial court has jurisdiction to award them, regardless of the lack of specific instructions in the opinion or
21 the remittitur.”); *Butler-Rupp v. Lourdeaux*, 154 Cal. App. 4th 918, 927 (2007).

22 Apple is also entitled to its fees currently being incurred to enforce the indemnification provision.
23 Under California law, when fees are recoverable under a contractual indemnification provision, the
24 prevailing party can recover its fees for time spent preparing the fee application. *See Minor v. Christie’s,*
25 *Inc.*, 2011 WL 902235, at *6 (N.D. Cal. Jan. 29, 2011) (“[W]hen attorney’s fees are authorized by
26 contract, courts allow parties to recover the reasonable expenses of preparing the fee application.”),
27 *report and recommendation adopted*, 2011 WL 902033 (N.D. Cal. Mar. 14, 2011); *Finjan, Inc. v.*
28

1 *Juniper Network, Inc.*, 2021 WL 3674101, at *12 (N.D. Cal. May 20, 2021) (“A litigant that is entitled
 2 to recover its attorney’s fees is also generally entitled to recover fees on fees.”), *report and*
 3 *recommendation adopted sub nom. Finjan, Inc. v. Juniper Networks, Inc.*, 2021 WL 3140716 (N.D. Cal.
 4 July 26, 2021), *aff’d sub nom. Finjan, LLC v. Juniper Networks, Inc.*, 2022 WL 17576350 (Fed. Cir.
 5 Dec. 12, 2022); *cf. Doppes v. Bentley Motors, Inc.*, 174 Cal. App. 4th 967, 1002 (2009) (“[W]hen
 6 attorney fees are recoverable by statute, the reasonable attorney fees incurred in preparing the motion
 7 are also recoverable.”). Apple is therefore entitled to its fees in prosecuting this motion for judgment.

8 As detailed in the accompanying declarations, the amounts Apple actually spent on the principal
 9 categories of litigation expenses through October 31, 2023 are summarized below:

CATEGORY	ACTUAL PAYMENTS	ADJUSTED TOTALS	MINUS 10%
Attorneys’ Fees			
Expert Witness and Consulting Fees			
Document and Information Technology Expenses			
Travel and Meal Expenses			
Arbitration Expenses			
Other Expenses			
LOSSES:	\$82,971,401	\$81,560,362	\$73,404,326

20 The DPLA also has no prevailing party limitation, and thus Apple is contractually entitled to
 21 recover 100% of these Losses arising out of or related to the litigation. In any event, Apple is
 22 unequivocally the prevailing party in this case, having won 9 out of 10 claims that Epic asserted
 23 challenging the DPLA, and having prevailed on its counterclaim that Epic intentionally breached the
 24 DPLA. C.A.9 Dkt. No. 222, at 77, 83, 87.

25 For reasons explained below, Apple has made certain reductions to the total Losses that it seeks,
 26 to ensure that every dollar is covered by the DPLA. And, although both “parties agree that Epic’s
 27 illegality defense rises and falls with its Sherman Act claims” (C.A.9 Dkt. No. 222, at 77), in recognition
 28 of the fact that Epic prevailed on the UCL claim, Apple is also seeking only 90% of those adjusted

1 Losses arising out of or related to the lawsuit in this Court.¹ Rather than undertake a costly and time-
2 consuming review of invoices in an effort to segregate out the UCL-related Losses from those
3 inextricably incurred in connection with the other claims, Apple is giving Epic the benefit of every doubt:
4 Epic brought 10 claims, losing 9 and winning 1. For the sake of simplicity, Apple is willing to assume
5 that each claim resulted in equal Losses—even though the vast majority of the litigation and trial related
6 to the antitrust issues implicated by 9 of Epic’s claims and its defenses to the contractual counterclaim.
7 Irwin Decl. ¶¶ 20, 39. Because Apple won 9 of 10 claims (90%), it is seeking only a conservative 90%
8 of its total Losses. Accordingly, the total amount actually sought by Apple as indemnification is only
9 \$73,404,326, plus any additional Losses from the ongoing litigation that will be reflected in Apple’s
10 supplemental filings.

11 Apple’s contractual Losses are not mitigated by Epic’s stipulation to liability for breach of
12 contract, as made clear by Epic’s own representations to this Court and the Ninth Circuit. Any such
13 argument would be erroneous, contrary to Epic’s own representations to this Court and the Ninth Circuit,
14 and futile. Epic brought its antitrust claims in an effort to have the DPLA declared unlawful; and the
15 breach-of-contract stipulation itself was subject to Epic’s continued maintenance of an illegality defense
16 that hinged on its antitrust theories. *See* C.A.9 Dkt. No. 163, at 84 (“Apple’s breach of contract
17 counterclaims rise and fall on the determination of Epic’s Sherman Act claims”). So while the stipulation
18 may have streamlined Epic’s defense to Apple’s breach of contract counterclaim, it did not in any way
19 minimize Apple’s defense to the underlying antitrust claims—and it was these antitrust claims that Epic
20 relied on as a defense to Apple’s breach of contract counterclaim. Epic acknowledged, and the Ninth
21 Circuit recognized, that contract liability turned on antitrust liability. *See* C.A.9 Dkt. No. 163, at 84;
22 C.A.9 Dkt. No. 222, at 76–77 (noting that “[t]he parties agree that Epic’s illegality defense rises and falls
23 with its Sherman Act claims,” and rejecting Epic’s argument that its claims justified its breach of
24 contract). Apple incurred substantial fees, expenses, and costs to defend and enforce the contract, in the
25 district court and Ninth Circuit, and it prevailed.

26
27 ¹ Apple is also seeking only Losses arising out of or related to the lawsuit filed in this Court. Epic has
28 initiated actions against Apple in the United Kingdom and Australia that have resulted in additional
Losses within the meaning of the indemnification provision, and Apple reserves all rights to recover
such Losses in the appropriate tribunal.

1 Again, the indemnification provision of the DPLA is clear: Apple is entitled to “any and all” of
2 its expenses and costs. And the expenses and costs that Apple incurred defending against Epic’s antitrust
3 claims all “arise from” and “relate to” Epic’s intentional breach of the DPLA. Indeed, Epic’s *sole*
4 defense against Apple’s breach-of-contract claim was that the contract was unenforceable under the
5 antitrust laws. *See* Dkt. No. 111, at 95:19–21 (“[Epic is] conceding that if there has been—if we’re
6 wrong about the antitrust claim, there’s been a breach of contract. We’re conceding that.”). As Epic has
7 consistently admitted, its liability for breach of the DPLA “rise[s] and [f]alls on the determination of
8 [its] Sherman Act claims.” C.A.9 Dkt. No. 163, at 84; C.A.9 Dkt. No. 222, at 77. Thus, even if Epic
9 had brought no antitrust claims of its own, Apple’s breach-of-contract claim would have implicated all
10 of the antitrust issues that were the principal focus of the parties’ litigation. Accordingly, all of Epic’s
11 antitrust arguments were inextricably intertwined with the contract counterclaim and fall within the
12 DPLA’s indemnification provision.

13 Moreover, Epic’s antitrust claims were part and parcel of Epic’s broader campaign, Project
14 Liberty. For months, Epic planned Project Liberty in secret, employing teams of engineers, lawyers, and
15 P.R. consultants to attack Apple and undertake an expensive legal battle. *See, e.g.*, Dkt. No. 779-1
16 ¶¶ 275, 283, 284. After implementing and activating the hotfix in violation of the DPLA, Epic “rush[ed]
17 to the courthouse,” asserting its antitrust claims as its *sole* shield against its willful and stipulated breach
18 of contract. Rule 52 Order at 25, 171. Epic even framed the “key question before this Court” as “whether
19 Apple . . . violates the antitrust laws when it uses its control of iOS to determine how apps are distributed
20 and in-app payments are processed,” and “urge[d] this Court to find that Apple’s requirements,”
21 governed by the DPLA and Schedule 2, “violate antitrust law” such that Epic could prove the agreement
22 illegal. Dkt. No. 407, at 1.

23 Thus, at every step, Epic’s antitrust claims inescapably “arise from” and certainly are “related
24 to” its underlying breach of contract. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383
25 (1992) (“The ordinary meaning of these words is a broad one—‘to stand in some relation; to have bearing
26 or concern; to pertain; refer; to bring into association with or connection with.’” (quoting Black’s Law
27 Dictionary 1158 (5th ed. 1979)); *see also Hot Rods, LLC*, 242 Cal. App. 4th at 1181–82 (“quite broad”
28

1 phrases reflect the intent of the contracting parties); *Xuereb*, 3 Cal. App. 4th at 1344; *Cheema v. L.S.*
2 *Trucking, Inc.*, 39 Cal. App. 5th 1142, 1153 (2019) (language stating clause applies to “all claims ‘arising
3 from or [in] relation to’ the Agreement” covers arguably noncontract claims) (citation omitted); *San*
4 *Francisco CDC LLC v. Webcor Constr. L.P.*, 62 Cal. App. 5th 266, 286–87 (2021). Epic engineered its
5 breach and subsequent lawsuit to attack Apple’s App Store and IAP policy.

6 Indeed, Epic’s ultimate goal in bringing its antitrust claims was to have this Court declare
7 provisions of the DPLA “unlawful and unenforceable,” and enjoin enforcement of those provisions. Dkt.
8 No. 1, at 61; *see also id.* ¶¶ 188, 197, 211 (claiming that the challenged provisions of the DPLA are
9 unlawful); Rule 52 Order at 151 (Epic alleged that Apple “unlawfully maintained [a] monopoly by
10 prohibiting iOS app developers from distributing their apps through alternative channels”), 152 (Epic
11 alleged that Apple “unlawfully maintained [a] monopoly by requiring ‘iOS app developers that sell in-
12 app content to exclusively use Apple’s In-App Purchase.’”). Epic wanted all the same access to iOS
13 consumers without paying Apple’s commission. The Losses that Apple incurred in defending against
14 that attack on a core aspect of its business model are recoverable under the DPLA.

15 In short, Epic intentionally breached the DPLA knowing that the clear terms of its contract would
16 require it to indemnify Apple for the full scope of expenses in this litigation, and knowing that Apple
17 would enforce its contractual rights once it breached the contract. *See* Rule 52 Order at 178–79. Epic
18 has no basis to limit its indemnification obligations now, by trying to argue that only certain claims or
19 aspects of this case *should be* covered. All of the claims and counterclaims in this litigation—at all
20 phases of the case—and all of Apple’s litigation expenditures are covered “Losses” for which Epic must
21 now legally repay Apple and, by extension, its shareholders.

22 **B. Apple Is Also Entitled To Its Losses Under California Law Applicable To Post-**
23 **Judgment Motions For Attorneys’ Fees And Costs**

24 As set forth above, the plain terms of the DPLA require that Apple be indemnified for all its
25 Losses—i.e., any and all of its attorneys’ fees and court costs, without limitation, incurred in this
26 litigation. California law applicable to *post*-judgment motions for attorneys’ fees and costs would lead
27 to the same result.

28 California Civil Code Section 1717 governs post-judgment attorneys’ fees and costs when the

1 parties' indemnification provision provides for fees specifically arising from "action[s] on a contract."

2 Section 1717(a) states that:

3 In any action on a contract, where the contract specifically provides that
4 attorney's fees and costs, which are incurred to enforce that contract, shall
5 be awarded either to one of the parties or to the prevailing party, then the
6 party who is determined to be the party prevailing on the contract, whether
 he or she is the party specified in the contract or not, shall be entitled to
 reasonable attorney's fees in addition to other costs.

7 Cal. Civ. Code § 1717(a). An "action on a contract" within the meaning of Section 1717 is not limited
8 to contract-based claims; it also includes a lawsuit in which one of the parties—here, Epic—invokes
9 non-contract law to seek a declaration that the contract is void. *See, e.g., Eden Twp. Healthcare Dist. v.*
10 *Eden Med. Ctr.*, 220 Cal. App. 4th 418, 426 (2013) (an action to avoid contract enforcement is an "action
11 on a contract"); *Travelers Indem. Co. v. Lara*, 84 Cal. App. 5th 1119, 1138-39 (2022) ("[A] complaint
12 alleging a contract is void under Government Code 1090 is an action 'on a contract' for purposes of
13 section 1717 regardless of whether contract claims are alleged"); *id.* ("[I]t is difficult to think of an action
14 that is more likely to be characterized as an 'action on a contract' than one in which the party bringing
15 the action explicitly seeks to have the subject contract declared void and invalid in its entirety") (citation
16 omitted); *see also, e.g., Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 442-43 (9th Cir. 1997). Moreover,
17 declaratory relief actions that "seek[] to establish the parties' rights under a contract [are] action[s] to
18 enforce [a] contract." *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.*, 173 Cal. App. 4th 1533,
19 1538 (2009).

20 Accordingly, Epic's entire lawsuit—including its antitrust claims—was an "action on the
21 contract," within the meaning of the statute. And, again, Apple was clearly the prevailing party in Epic's
22 "action on the contract," having defeated all of Epic's antitrust claims at trial and on appeal. Rule 52
23 Order at 1, 179; C.A.9 Dkt. No. 222, at 3-4; *see also* Cal. Civ. Code § 1717.5(a) ("The prevailing party
24 on the contract shall be the party who recovered a greater relief in the action on the contract."); *Hsu v.*
25 *Abbara*, 9 Cal. 4th 863, 876 (1995) ("[W]hen a defendant defeats recovery by the plaintiff on the only
26 contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a
27 matter of law"). Section 1717 thus compels the same result as the plain meaning of the DPLA—that
28 Apple is entitled to recover its fees under the DPLA's indemnification provision for that defense at both

1 the trial and appellate level. *See Turner v. Schultz*, 175 Cal. App. 4th 974, 980 (2009) (“Where an
 2 attorney fee clause provides for an award of fees incurred in enforcing the contract, the prevailing party
 3 is entitled to fees for any action ‘on the contract,’ whether incurred offensively or defensively”). And,
 4 again, because of the DPLA’s indemnification provision expanding the coverage beyond the statutory
 5 definition, Apple would be entitled under Section 1717, not just to “attorneys’ fees and costs” under that
 6 statute, but “any and all expenses without limitation.” *See Arntz*, 47 Cal. App. 4th at 491–92 (California
 7 law does not “prevent sophisticated parties from freely choosing a broader standard authorizing recovery
 8 of reasonable litigation charges and expenses”).

9 Last, as noted above, Apple has applied a 10% discount to account for the Court’s decision on
 10 the UCL claim. But, just as under the DPLA, those Losses are recoverable under California law because
 11 (1) Apple is the prevailing party in the case and (2) the attorneys’ fees and court costs from Epic’s sole
 12 successful claim in this case cannot be readily segregated from the other nine that it lost. *See Reynolds*
 13 *Metals Co. v. Alperson*, 25 Cal. 3d 124, 126–30 (1979) (“Attorney fees need not be apportioned when
 14 incurred for representation on an issue common to both a cause of action in which fees are proper and
 15 one in which they are not allowed.”); *see also Quevedo v. New Albertsons, Inc.*, 2015 WL 10939716, at
 16 *2 (C.D. Cal. May 27, 2015) (“[W]here attorney fees are recoverable for one cause of action but not
 17 another, a court need not apportion fees between the causes of action if there is an issue common to the
 18 causes of action or the issues are so interrelated that it would be impossible to separate them”); *Fed–*
 19 *Mart Corp. v. Pell Enters., Inc.*, 111 Cal. App. 3d 215, 227 (1980) (fees need not be apportioned where
 20 it would be “impracticable, if not impossible, to separate the multitude of conjoined activities into
 21 compensable or noncompensable time units”).

22 **II. Apple Has Substantiated The Amount Of Its Losses**

23 **A. Apple’s Records Show The Fees, Expenses, And Costs Of This Litigation**

24 In support of this motion for entry of judgment, Apple has submitted a declaration attesting to
 25 the total amount Apple actually paid directly to each individual law firm and other vendor that submitted
 26 invoices directly to Apple. Rollins Decl. ¶¶ 32–39. The total amount that Apple paid has been verified
 27 by Apple’s billing records and its forensic accounting expert, Cornerstone. Irwin Decl. ¶¶ 13–14. The
 28

1 vendors who submitted invoices (and the “pass-through” vendors on those invoices) are summarized in
2 a separate declaration from one of Apple’s lead counsel. Perry Decl. ¶¶ 8, 13, 16, 22, 27.

3 Cornerstone is a third-party economic and financial consulting firm with expertise in forensic
4 accounting and data analytics. Irwin Decl. ¶¶ 1, 3. Ms. Carlyn Irwin is a senior advisor with Cornerstone
5 and a Certified Public Accountant with substantial experience analyzing financial, economic, and
6 accounting issues, preparing valuations and damages claims, and conducting financial forensic analysis.
7 *Id.* ¶¶ 3–5. Cornerstone conducted a rigorous data collection and review of Apple’s bills and invoices,
8 as well as the underlying data, and Ms. Irwin confirms the total amount that Apple paid its vendors. *Id.*
9 ¶¶ 13–14, 21–25.

10 During their extensive review process, Ms. Irwin and her team of nine Cornerstone experts
11 analyzed Apple’s billing and invoice records from the *Epic* litigation. Irwin Decl. ¶¶ 8, 10, 21–25. Apple
12 provided Cornerstone with electronic files containing over 50,000 line items from more than 200
13 invoices. *Id.* ¶ 22. Ms. Irwin’s team had conversations with Apple representatives, to gather all relevant
14 data from Apple and to understand Apple’s data, as well as with the individual vendors to confirm the
15 relevant payment amounts and reconcile any discrepancies. *Id.* ¶ 24. Using programmatic methods, Ms.
16 Irwin and her team processed the data and identified each vendor paid by Apple, aggregating the fees
17 and expenses into totals by vendor and by expense category (i.e., attorneys’ fees, document expenses,
18 expert witnesses, etc.). *Id.* ¶¶ 30–37.

19 The total amount Apple paid those vendors also closely matches the total cost for the work
20 actually performed on this matter, at the rates negotiated and agreed to by each vendor. Irwin Decl.
21 ¶¶ 13–14; Rollins Decl. ¶¶ 22–27. As detailed in its declaration, Apple has extensive billing and provider
22 policies, as well as a rigorous, multi-step payment review process to ensure that its vendors comply with
23 the policies and submit accurate and timely invoices. Rollins Decl. ¶¶ 6–21. Apple’s policies include
24 meticulous instructions, and [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

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[REDACTED]

[REDACTED] This unusually rigorous billing process demonstrates that Apple’s calculated Losses are highly accurate, particularly for a matter of this size and with this many timekeepers and billing entries.

Still, as noted above, Apple is seeking less than its calculated Losses—i.e., actual payments made to vendors. As part of the review process, Apple and Cornerstone have coordinated with Apple’s vendors to understand and/or reconcile any discrepancies between the amount that Apple actually paid to vendors and each vendor’s assessment of the work performed for the domestic *Epic* litigation, and have made certain adjustments to avoid any dispute as to whether the amounts sought are covered by the DPLA’s indemnification clause. Irwin Decl. ¶¶ 16, 31, 36; Rollins Decl. ¶ 30. Those downward adjustments ensure that the total amount sought by this motion is an even more conservative calculation of Losses, ensuring that every dollar falls comfortably within the DPLA’s indemnification provision.

Apple’s Actual Payments	Adjusted Total	Adjusted Total Minus 10%
\$82,971,401	\$81,560,362	\$73,404,326

The two declarations submitted by Mr. Rollins and Ms. Irwin thus confirm that the total amount

1 sought in this motion is accurate and that it represents the total Losses that Apple incurred. Apple’s
2 invoice payment process is extensive and rigorous, and Cornerstone’s review of Apple’s billing and
3 payments during the *Epic* litigation was likewise painstaking. The fact that Apple and Cornerstone
4 worked with vendors to reconcile any remaining discrepancies in billing data and payments, and that
5 Apple has made only downward adjustments from Apple’s total payments to vendors, further ensures
6 that Apple is seeking indemnification only for DPLA-defined Losses.²

7 **B. The Total Amount Is “Reasonable” Under California Law**

8 Because the DPLA does not include a “reasonableness” limitation in its definition of “Losses,”
9 the Court need not determine whether the total expenses in this matter are reasonable under California
10 law. Nonetheless, Apple’s Losses are reasonable. This Court can make that finding on Apple’s motion
11 and supporting evidence: “It is well established that the determination of what constitutes reasonable
12 attorney fees is committed to the discretion of the trial court.” *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084,
13 1096 (2000) (citations omitted); *see also Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001) (noting that
14 “fee awards should be fully compensatory”).

15 *First*, Apple’s request is reasonable because this case involved Apple’s DPLA and core aspects
16 of its business model. Accordingly, Apple put forth a vigorous defense, and one that was commensurate
17 with Epic’s significant investment in developing and bringing its long-premeditated lawsuit. As this
18 Court noted, “[t]hese are billion and trillion dollar companies” involved in a business dispute that
19 presented a distinct threat to Apple’s entire business model. *See* Rule 52 Order at 172. Epic thought
20 this litigation was worth forgoing \$350 million in annual revenue from *Fortnite* on iOS. *Id.* at 14; *see*
21 *also id.* at 3 (*Fortnite* “generated an immensely profitable revenue stream for Epic Games”). The threat
22 to Apple’s business model—particularly from Epic’s effort to prevent Apple from collecting any
23 commission (*see id.* at 92)—was significant. Epic’s lawsuit threatened a significant source of Apple’s
24 revenue, as this Court recognized. *See id.* at 1, 73, 125. Accordingly, Apple retained law firms, experts,
25 and vendors whose credentials and resources were and are proportional to the task.

26 _____
27 ² If the Court deems it necessary, Apple can supplement the evidence submitted with this motion with
28 additional data or declarations, which will further confirm the amounts stated herein. Apple also reserves
the right to supplement its submission to establish the amount of additional Losses incurred after October
31, 2023.

1 *Second*, “the items on a verified cost bill are prima facie evidence the costs, expenses and services
2 listed were necessarily incurred.” *Hadley v. Krepel*, 167 Cal. App. 3d 677, 682 (1986). “[T]he verified
3 time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear
4 indication the records are erroneous.” *Horsford v. Bd. of Trustees of Cal. State Univ.*, 132 Cal. App. 4th
5 359, 396 (2005). Courts “defer to the winning lawyer’s professional judgment as to how much time he
6 was required to spend on the case.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).
7 As noted above, Apple and Cornerstone have verified the amount spent based on its well-kept billing
8 and invoice records. Rollins Decl. ¶¶ 33–38; Irwin Decl. ¶¶ 13–14, 31–37.

9 *Third*, where the fees and costs incurred have been reviewed and monitored by a sophisticated
10 commercial party who is actually paying the bills, there is a strong presumption that they were reasonable
11 and appropriate. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 774 (7th Cir. 2010); *see*
12 *also Stonebrae, L.P. v. Toll Bros., Inc.*, 2011 WL 1334444, at *6 (N.D. Cal. Apr. 7, 2011), *aff’d* 521 Fed.
13 App’x 592 (9th Cir. 2013); *Calvo Fisher & Jacob LLP v. Lujan*, 234 Cal. App. 4th 608, 617 (2015)
14 (specifically noting that a client’s review of bills and efforts to minimize fees and maximize
15 effectiveness). Here, Apple is a sophisticated client and purchaser of legal services, and it negotiated
16 the rates its counsel and vendors charged. Rollins Decl. ¶¶ 5–6, 25. Apple’s in-house counsel were
17 closely involved in the litigation, closely supervised Apple’s outside law firms and vendors, and
18 monitored and approved their activities throughout the course of the case. *Id.* ¶¶ 17–21, 26 (describing
19 Apple’s multi-step review process, adhered to during the *Epic* litigation); *see generally* Perry Decl.
20 (describing the broad scope of work performed by each vendor).

21 *Fourth*, the strong presumption that the amount is reasonable is “particularly forceful where, as
22 here, the fees were billed to and *actually paid by the [litigant]* during the course of the litigation, the
23 relationship between counsel and the [client] was a valid business relationship, and the [client]
24 exercise[d] business judgment in retaining and paying counsel.” *Stonebrae*, 2011 WL 1334444, at *6
25 (emphasis added); *see also Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) (a fee
26 award should compensate “every item of service which, at the time rendered, would have been
27 undertaken by a reasonable and prudent lawyer to advance or protect his client’s interest” (citation
28

1 omitted)). Here, Apple ultimately paid its bills, reflecting its satisfaction with its firms' and vendors'
2 work product. Rollins Decl. ¶¶ 22, 25–27; Irwin Decl. ¶¶ 13–14, 31–37. And, where necessary, Apple
3 revised bills and wrote-off costs, further establishing the reasonableness of the total amounts that it
4 ultimately paid. Rollins Decl. ¶ 26; Irwin Decl. ¶¶ 15–16, 35.

5 Apple's sophistication, its close involvement in the litigation and monitoring of its vendors, and
6 its payment of bills in this high-stakes case all constitute powerful—if not dispositive—evidence of
7 reasonableness. But Apple has also submitted the declaration of Richard M. Pearl, an expert on
8 attorneys' fees, who also found that Apple's indemnification request is reasonable. Pearl Decl. ¶¶ 30,
9 58, 59, 78, 80.

10 Mr. Pearl is one of the leading experts on attorneys' fees and costs in California. He has decades
11 of experience litigating, researching, and writing about attorneys' fees, and has written extensively on
12 the topic, including authoring treatises and manuals. Pearl Decl. ¶¶ 4–8. Several courts have referred to
13 one of his treatises as “[t]he leading California attorney fee treatise.” *Calvo Godwin & Jacob LLP*, 234
14 Cal. App. 4th at 621; *see also Int'l Billing Servs., Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1193 (2000)
15 (“the leading treatise”); *Stratton v. Beck*, 30 Cal. App. 5th 901, 911 (2019) (“a leading treatise”); *Orozco*
16 *v. WPV San Jose, LLC*, 36 Cal. App. 5th 375, 409 (2018) (“a leading treatise on California attorney's
17 fees”). Mr. Pearl has appeared as the counsel of record in over 150 attorneys' fee applications in state
18 and federal courts, and dozens of courts have cited his testimony favorably. Pearl Decl. ¶ 9. He has
19 briefed and argued five successful attorneys' fees appeals in the California Supreme Court. *Id.*

20 In reaching his conclusion that Apple's indemnification request here is reasonable, Mr. Pearl
21 conducted an extensive review of Apple's billing and payment policies and data from Apple's vendors
22 regarding the rates charged and scope of work performed. Pearl Decl. ¶¶ 3, 24–27. That review led him
23 to conclude that Apple paid reasonable rates for the legal services performed and that the hours billed to
24 the matter were reasonable.

25 To begin, Mr. Pearl found that Apple paid reasonable rates for its legal services. Mr. Pearl
26 examined the case record, Apple's policies, and the billing attorney's qualifications, background, and
27 experience, and reviewed case documents and conferred with Apple's in-house counsel. Pearl Decl.
28

1 ¶¶ 3, 24–27. Based on his review, he determined that Apple is a sophisticated consumer of legal services
 2 with knowledge of the legal marketplace, and that the rates that it pays are reasonable. *Id.* ¶¶ 27, 31–35,
 3 38, 40, 47.

4 As he explained, moreover, California courts consider whether the requested attorneys’ fees are
 5 “within the range of reasonable rates charged by and judicially awarded comparable attorneys for
 6 comparable work.” *Children’s Hospital & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 746 (2002). In
 7 other words, “the reasonable market value of the attorney’s services is the measure of a reasonable hourly
 8 rate.” *Nemecek & Cole v. Horn*, 208 Cal. App. 4th 641, 651 (2012) (citation omitted). Mr. Pearl found
 9 that counsel’s rates were consistent with and often *below* those charged by comparable firms for
 10 comparable work, and in line with rates found reasonable by courts around the country. Pearl
 11 Decl. ¶¶ 36–58. [REDACTED]

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED].

15 Mr. Pearl also concluded that the amount of hours for which Apple paid its law firms was
 16 reasonable. Mr. Pearl closely examined the case record and obtained firsthand knowledge of Apple’s
 17 billing practices from its in-house counsel. Pearl Decl. ¶¶ 3, 61. As he explained, Apple closely
 18 monitored the attorneys’ work and scrutinized their invoices to ensure the bills did not include
 19 unreasonable or extraneous hours, and to ensure that each bill complied with Apple’s service policies.
 20 *Id.* ¶ 61–62. Apple’s policies impose high standards of quality *and* efficiency on its vendors, and [REDACTED]

21 [REDACTED]
 22 [REDACTED]. *Id.* ¶¶ 61–62, 70, 75–77. Further, Mr. Pearl examined the stakes of the case, the
 23 complexity of the legal issues, the quality of the work, the intensity of the litigation, the major work
 24 streams, and the results that Apple’s counsel and vendors achieved. This holistic review of the case led
 25 him to conclude that Apple paid for a reasonable number of hours (at the rigorously-negotiated rates) in
 26 this case. *Id.* ¶ 59; *see generally* Perry Decl. (describing the roles and work performed by Apple’s
 27 vendors).

1 Mr. Pearl also found that Apple’s other “expenses” were reasonable. Based on his review of
2 various factors (i.e., the complexity of the case, the stakes, and the results), Mr. Pearl concluded that
3 Apple’s outlays were reasonable. Pearl Decl. ¶ 80. For one, [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 Further, Apple has negotiated rates with its vendors, and closely monitored and scrutinized costs, just as
8 it does with its law firms. Pearl Decl. ¶¶ 80–84.

9 Finally, although it would be reasonable for Apple to seek the total amount of its Losses in this
10 matter, it has provided a 10% discount in recognition of Epic’s win on one out of ten of its claims. This
11 10% overall reduction is extremely generous, given the undisputed fact that the UCL claim did not
12 constitute nearly 10% of the litigation, as this Court recognized. *See* Rule 52 Order at 163. Using seven
13 relevant search terms, Ms. Irwin and her team searched the 50,000+ invoices, finding that line items with
14 those UCL-related search terms represented only \$275,030 or approximately 0.33% of the total expenses
15 in the billing data—i.e., substantially less than 10% of the total amount Apple paid in connection with
16 the *Epic* litigation. Irwin Decl. ¶¶ 20, 39; Pearl Decl. ¶ 78–79.

17 ***

18 Just as Epic has no basis to contest the scope or the total amount of Losses—after it willfully
19 breached its contract with a clear and broad indemnification provision—Epic also has no grounds to
20 dispute reasonableness at this stage. And certainly Epic could not do so without presenting evidence of
21 the amounts that it chose to spend on the litigation. Apple reasonably defended against Epic’s long-
22 planned, expensive, and multifaceted attack against Apple’s business model. To do so, Apple needed to
23 retain sophisticated law firms, world-class experts, and vendors to match those hired by Epic. Apple
24 negotiated, monitored, and ultimately paid its bills as they became due. California law requires Apple
25 to be fully compensated for those reasonable expenses.

26 CONCLUSION

27 For the foregoing reasons, Apple respectfully requests that the Court award Apple \$73,404,326
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1 in Losses under the DPLA, plus all additional Losses that Apple incurs during the ongoing litigation,
2 which will be reflected in supplemental filings.

3
4 Dated: January 16, 2023

Respectfully submitted,

5 By: /s/ Mark A. Perry
6 WEIL, GOTSHAL & MANGES LLP

7 Mark A. Perry

8 Attorney for Apple Inc.
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