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 15  
 16 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 17 **OAKLAND DIVISION**

18 EPIC GAMES, INC.,
19 Plaintiff, Counter-defendant,
20 v.
21 APPLE INC.,
22 Defendant, Counterclaimant.
23
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Case No. 4:20-CV-05640-YGR-TSH

**EPIC GAMES, INC.’S OPPOSITION TO  
 APPLE INC.’S MOTION FOR ENTRY OF  
 JUDGMENT ON ITS INDEMNIFICATION  
 COUNTERCLAIM**

Date: On or after March 19, 2024 (stipulated date)

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

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27  
28

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

FACTUAL BACKGROUND..... 4

    A.    The District Court Case ..... 4

    B.    Parallel Class Proceedings ..... 5

    C.    Subsequent Procedural History..... 6

    D.    Apple’s Motion ..... 7

LEGAL STANDARDS ..... 8

ARGUMENT ..... 9

    I.    Apple’s Claim for Fees and Costs Incurred in Litigating Epic’s Antitrust and UCL  
    Claims Is Barred by Black Letter Law Prohibiting Fee Shifting in Favor of  
    Antitrust Defendants ..... 9

    II.   The Indemnification Provision Permits Apple To Recover Only for Fees and  
    Costs Arising from or Related to Epic’s Breach of the DPLA, Not Fees and Costs  
    for Antitrust Claims that Apple Would Have Incurred Regardless of the Breach..... 12

    III.  Apple Is Not Entitled To Recover from Epic for Third Parties’ Antitrust Claims ..... 16

    IV.  Apple Is Barred from Recovering for Any “Losses” Other than Attorneys’ Fees ..... 16

    V.    Apple Should Not Be Granted Fees or Costs for This Motion ..... 19

CONCLUSION..... 21

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

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499 F.3d 950 (9th Cir. 2007) .....10

*Bear Creek Plan. Comm. v. Ferwerda*,  
193 Cal. App. 4th 1178 (2011) .....18

*Burkhalter Kessler Clement & George LLP v. Hamilton*,  
19 Cal. App. 5th 38 (2018) .....15

*Carver v. Chevron U.S.A., Inc.*,  
119 Cal. App. 4th 498 (2004) .....1, 9, 11, 15

*Chen v. Valstock Ventures, LLC*,  
81 Cal. App. 5th 957 (2022), .....15

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538 F.3d 1128 (9th Cir. 2008) .....10

*Dane-Elec Corp., USA v. Bodokh*,  
35 Cal. App. 5th 761 (2019) .....9

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2013 WL 990825 (C.D. Cal. Mar. 13, 2013).....1, 9, 10, 12

*El Escorial Owners’ Assn. v. DLC Plastering, Inc.*,  
154 Cal. App. 4th 1337 (2007), .....14

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67 F.4th 946 (9th Cir. 2023) .....2, 12, 17, 19

*Hall v. City of Los Angeles*,  
697 F.3d 1059 (9th Cir. 2012) .....17

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2013 WL 12049070 (S.D. Cal. Mar. 28, 2013) .....20

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303 F.3d 1039 (9th Cir. 2002) .....18

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2013 WL 6623889 (N.D. Cal. Dec. 16, 2013).....13

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132 Cal. App. 4th 1058 (2005) .....13

1 *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*,  
13 Cal. App. 4th 949 (1993) .....13

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3 371 F.3d 1119 (9th Cir. 2004) .....20

4 *Reudy v. Clear Channel Outdoors, Inc.*,  
5 693 F. Supp. 2d 1091 (N.D. Cal. 2010), .....11

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25 Cal.3d 124 (1979) .....11

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8 2013 WL 1915865 (N.D. Cal. May 8, 2013) .....17

9 *Tax Servs. of Am., Inc. v. Mitchell*,  
10 2008 WL 2834271 (D. Colo. July 21, 2008) .....18

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84 Cal. App. 5th 1119 (2022) .....15

12 *Turner v. Ass’n of Am. Med. Colleges*,  
13 193 Cal. App. 4th 1047 (2011) .....9

14 *Walker v. Countrywide Home Loans, Inc.*,  
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2023 WL 4770431 (N.D. Cal. July 26, 2023).....20

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26

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**PRELIMINARY STATEMENT**

Controlling precedent bars defendants from recovering attorneys’ fees or costs incurred in connection with defending against antitrust claims. In direct contravention of that precedent—and the plain language of the Developer Program Licensing Agreement (“DPLA”), which entitles Apple only to fees and costs arising from or relating to Epic’s (largely uncontested) breach of the DPLA—Apple seeks from Epic a striking sum of more than \$73 million in attorneys’ fees and other costs, the vast majority of which Apple incurred in defending against the very types of claims for which recovery is prohibited.

Apple’s Motion for Entry of Judgment on Its Indemnification Counterclaim (Dkt. 876 *et seq.* (the “Motion”)) overreaches at every turn. Apple seeks recovery of unrecoverable fees and costs incurred in defending against Epic’s antitrust claims; it seeks recovery of fees and costs it incurred in defending against *other plaintiffs’* antitrust claims; and it seeks recovery of categories of expenditures that go beyond what the Ninth Circuit’s ruling in this case permitted. Apple even seeks its fees and costs incurred in seeking its fees and costs, even though the vast majority of those fees and costs it seeks are not recoverable and Apple made no effort to meet and confer with Epic to determine the scope of any dispute before filing the Motion. Apple’s Motion should be denied for the following reasons.

*First*, it is black letter law that Apple may not recover *any* fees or costs it incurred in defending against antitrust claims. An unbroken line of precedent going back 20 years firmly establishes that, as a matter of public policy, a prevailing defendant cannot recover fees or costs associated with defending against antitrust claims, even where there is an express agreement that purports to require a plaintiff to cover the defendant’s attorneys’ fees and costs in those circumstances. *See Carver v. Chevron U.S.A., Inc.*, 119 Cal. App. 4th 498, 504-05 (2004); *Dominick v. Collectors Universe, Inc.*, 2013 WL 990825, at \*5 (C.D. Cal. Mar. 13, 2013). Moreover, any fees and costs that are “inextricably intertwined” with those incurred in defending against antitrust claims also cannot be recovered, even if they were incurred also in connection with a breach of contract claim. Apple may thus recover *only* those fees and costs it incurred specifically to litigate separable, *non*-antitrust claims—*i.e.*, fees and costs attributable to work

1 performed for Apple’s contract claims that did not overlap with its defense against Epic’s (or  
2 other plaintiffs’) antitrust claims. Here, Apple has not taken any steps to identify such separate  
3 fees or costs. To the contrary, *Apple completely ignores this binding precedent* and seeks  
4 primarily and specifically the unrecoverable fees and costs it incurred in defending against Epic’s  
5 antitrust claims. (*See infra* Section I.)

6 *Second*, even apart from the legal principle described above, Apple’s contractual  
7 entitlement is limited to recovery of only those fees and costs it incurred in pursuing its contract  
8 claims. Under the plain language of Section 10 of the DPLA (the “Indemnification Provision”),  
9 Epic agreed to indemnify Apple only for fees and costs “arising from or related to . . . [Epic’s]  
10 breach of any certification, covenant, obligation, representation or warranty in [the DPLA]”.  
11 (PX-2619 § 10(i).) The Ninth Circuit’s decision similarly makes clear that Apple’s entitlement to  
12 recovery is limited to “attorney fees incurred in this litigation [that] can be *fairly attributed to*  
13 *Epic’s breach of the DPLA*”. *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 1004 n.24  
14 (9th Cir. 2023) (emphasis added). The substance of Epic’s antitrust and UCL claims have nothing  
15 to do with Epic’s breach of the DPLA. Indeed, as this Court has recognized, Epic could have  
16 brought its antitrust claims even if it had never breached the DPLA. (Dkt. 812 at 178 (the  
17 “Rule 52 Order”).) Controlling California law applying Section 1717 of the California Civil  
18 Code—which applies to this Motion—also requires Apple to segregate its fees and costs as  
19 between its recoverable breach claims and non-recoverable antitrust and UCL claims. But again,  
20 Apple did not attempt to segregate the fees and costs it incurred defending against Epic’s antitrust  
21 and UCL claims from those it incurred pursuing its contract claims. (*See infra* Section II.)

22 *Third*, Apple improperly seeks to recover from Epic fees and costs that Apple  
23 incurred in defending against the antitrust claims of *other plaintiffs* in parallel class proceedings.  
24 As this Court is aware, alongside this lawsuit, Apple defended against two separate class  
25 proceedings—*Pepper* and *Cameron*—that raised substantially similar antitrust claims. Consistent  
26 with the Court’s directive, fact discovery was coordinated across these proceedings; documents  
27 were produced in all three cases and many depositions proceeded jointly in all three cases. Yet

28 Apple’s Motion makes no mention of these parallel proceedings and does not attempt to apportion  
EPIC’S OPPOSITION TO APPLE’S 2 CASE NO. 4:20-CV-05640-YGR-TSH  
MOTION FOR ENTRY OF JUDGMENT

1 any fees or costs among these proceedings. This is doubly inappropriate: not only is Apple  
2 prohibited from recovering fees or costs for defending antitrust claims—which the class  
3 proceedings were, as no contract claims were at issue there—but Epic certainly is not required to  
4 subsidize Apple’s defense to claims brought by other plaintiffs. (*See infra* Section III.)

5 *Fourth*, the mandate rule bars Apple’s recovery of any costs other than attorneys’  
6 fees. Apple asked for, and the Ninth Circuit instructed this Court on remand to determine, only  
7 the appropriate amount of attorneys’ fees—as distinct from other types of costs—that Apple is  
8 entitled to. Yet roughly 40% of the amount Apple is seeking in its Motion represents costs other  
9 than attorneys’ fees, which are unrecoverable pursuant to the Ninth Circuit’s mandate. (*See infra*  
10 Section IV.)

11 *Fifth*, Apple is not entitled to recover fees or costs that it incurred in putting  
12 together this Motion. Apple has completely overreached in what it is seeking and much of the  
13 work it did to put together this Motion relates to fees and costs that are not recoverable.  
14 Moreover, Apple did not meet and confer with Epic prior to filing its Motion as required by Civil  
15 Local Rule 54-5, and, as a result, incurred attorneys’ fees and costs that it could well have  
16 avoided. Specifically, Apple unilaterally engaged two experts and a team of nine analysts from  
17 an expert consulting shop to review its invoices, without so much as checking whether Epic  
18 intended to dispute any of its calculations or the reasonableness of the fees and costs it incurred.  
19 (*See infra* Section V.)

20 \* \* \*

21 For these reasons (and as explained further below), Apple seeks a far broader  
22 scope of recovery than it is entitled to receive. There are separate questions regarding the  
23 accuracy of Apple’s calculations and the reasonableness of the fees and costs that Apple alleges it  
24 has incurred. Epic does not address those questions in this brief, both because (1) a detailed  
25 review of the specific fees and other costs would be wasteful when Apple has sought to sweep in  
26 much to which it is not legally entitled; and (2) Apple denied Epic reasonable access to the  
27 evidentiary support for its claimed fees and costs, providing Epic only an incomplete set of  
28 materials just days before this Opposition was due. Epic therefore reserves its right to challenge

1 Apple’s calculations and the reasonableness of its fees and costs once this Court determines the  
2 appropriate scope of Apple’s recovery—*i.e.*, whether Apple can recover attorneys’ fees and other  
3 costs related to the entire case or just attorneys’ fees that “can be fairly attributed to Epic’s breach  
4 of the DPLA” and are not intertwined with the attorneys’ fees that Apple incurred to defend  
5 against Epic’s (and other plaintiffs’) antitrust claims.

## 6 FACTUAL BACKGROUND

### 7 **A. The District Court Case**

8 On August 13, 2020, Epic filed this lawsuit alleging that Apple illegally harmed  
9 competition in an iOS app distribution market and in an iOS in-app payment processing market.  
10 (Dkt. 1.) Specifically, in its Complaint, Epic brought 10 counts under Sections 1 and 2 of the  
11 Sherman Act, the California Cartwright Act and the California Unfair Competition Law (“UCL”).  
12 The claims related to a variety of Apple’s App Store conduct including technical and contractual  
13 limitations placed on iOS app distribution and in-app payment processing, deliberate policies to  
14 “lock in” users to the Apple ecosystem to reduce competitive restraints on its market power and  
15 contractual limitations on steering that prevent the effective dissemination of pricing information.  
16 As both a would-be competitor of Apple in iOS app distribution and a business consumer of its  
17 iOS app distribution and in-app payment processing services, Epic could have brought this suit  
18 without breaching the DPLA. (*See, e.g.*, Dkt. 812 at 160-61.) Nonetheless, just prior to bringing  
19 this suit, Epic offered Apple users a choice to use an Epic direct payment option in *Fortnite*. That  
20 payment method offered users a 20% reduction on prices for in-app purchases. (Dkt. 1 ¶ 19.)  
21 Epic then approached Apple and suggested that Apple open up iOS app distribution and in-app  
22 payments to competition. (*Id.* ¶ 18.) Apple responded by removing *Fortnite* from the Apple App  
23 Store, so that new users could not download the app and *Fortnite* players that had already  
24 downloaded the app could not receive updates. (*Id.* ¶ 20.) Epic had anticipated that possibility  
25 and filed this suit shortly thereafter.

26 In its September 8, 2020 Answer to Epic’s Complaint, Apple brought a  
27 counterclaim asserting that Epic had breached the DPLA by activating Epic’s payment  
28 mechanism in the *Fortnite* build it had distributed to iOS users. (Dkt. 66 at 53-54, 56-57.) Epic



1 never disputed that it violated the terms of the DPLA. (Dkt. 106 ¶ 37 (Epic’s Answer to Apple’s  
2 counterclaims admitting that its conduct was prohibited by the express provisions of the DPLA);  
3 *id.* ¶ 41 (admitting that Epic gave users choices for payment processing that violated the terms of  
4 the DPLA).) Instead, Epic maintained that the terms of the DPLA were illegal because they  
5 violated federal and state antitrust and unfair competition laws. Apple’s claim that Epic breached  
6 the DPLA was therefore never litigated by the Parties; instead, on April 23, 2021, the Court  
7 entered a stipulation whereby Epic agreed that “Apple has proven all elements of its cause of  
8 action for breach of . . . the ‘DPLA’”, subject to Epic’s defenses. (Dkt. 474 ¶ 1.)

9           From May 3, 2021 to May 24, 2021, this case proceeded to trial. In light of the  
10 above stipulation, virtually all of the evidence presented at trial concerned Epic’s claims that  
11 Apple had violated Sections 1 and 2 of the Sherman Act, California’s Cartwright Act and the  
12 UCL. Following the trial, on September 10, 2021, this Court found for Epic on one of its claims  
13 under the UCL (the anti-steering provision) and against Epic on its remaining claims. (Dkt. 812.)  
14 Out of the 180 pages of the Court’s analysis of the facts and law, 167 related squarely to Epic’s  
15 antitrust claims. (*Id.*) The Court then resolved Apple’s counterclaim for breach of contract—  
16 including Epic’s affirmative defenses related thereto, which again implicated Epic’s antitrust  
17 claims—in just five pages. (*Id.* at 169-73.) The Court also found that Epic’s breach was not  
18 necessary in order for Epic to bring its antitrust suit against Apple. (*Id.* at 178.)

### 19           **B. Parallel Class Proceedings**

20           Epic’s case was related to two parallel class proceedings raising similar antitrust  
21 claims against Apple: (i) a class action lawsuit brought by a putative class of app developers,  
22 titled *Cameron, et al. v. Apple Inc.*, No. 19-cv-03074-YGR (N.D. Cal.); and (ii) a class-action  
23 lawsuit brought on behalf of a putative class of consumers, titled *Pepper v. Apple Inc. (In re*  
24 *Apple iPhone Antitrust Litigation)*, No. 11-cv-06714-YGR (N.D. Cal.). Both *Cameron* and  
25 *Pepper* pre-dated the *Epic* action and were subject to an order coordinating discovery across the  
26 two actions. (Order Granting Stipulation Regarding Coordination of Discovery, *In re Apple*  
27 *iPhone Antitrust Litigation*, No. 11-cv-06714-YGR (N.D. Cal. Jan. 6, 2020), Dkt. 80.) This  
28 coordinated discovery order also included a provision binding all cases that were subsequently

1 related to the *Cameron* and *Pepper* litigations. (*Id.* ¶ 7.) Pursuant to that order, the same  
2 documents were produced across the *Epic*, *Cameron* and *Pepper* cases. (Even Decl. ¶ 6.).  
3 Further, of the 22 depositions of non-Epic fact witnesses (*i.e.*, Apple or third-party fact witnesses)  
4 conducted in this case, 17 were taken jointly by plaintiffs in the *Cameron* and/or *Pepper* cases,  
5 and three others were non-party witnesses for whom Apple issued a joint subpoena across the  
6 *Epic*, *Cameron* and *Pepper* cases. (*Id.* ¶¶ 7, 8.)

7 **C. Subsequent Procedural History**

8 Following this Court’s September 10, 2021 decision, Apple and Epic appealed the  
9 Rule 52 Order. On January 20, 2022, Epic filed its opening appeal brief, which was based  
10 entirely on this Court’s decisions on Epic’s antitrust claims. (C.A.9. No. 21-16695, Dkt. 28.) On  
11 March 24, 2022, Apple filed its brief in response to Epic’s opening appeal brief and its principal  
12 brief on its cross appeal. (C.A.9. No. 21-16695, Dkt. 80.) In the responsive portion of its brief,  
13 Apple acknowledged that “[i]f the Court affirms the Sherman Act judgment . . . , then Epic’s  
14 defense of illegality also fails”. (*Id.* at 100.) And the cross-appeal portion of Apple’s brief spent  
15 just over three pages (out of 15) discussing its breach of contract claim, focusing its argument on  
16 its challenge to this Court’s decision on Apple’s indemnification counterclaim. (*Id.* at 112-14.)

17 On April 24, 2023, the Court of Appeals issued its merits Opinion affirming this  
18 Court’s judgment as to Epic’s Sherman Act, California Cartwright Act and UCL claims.  
19 (Dkt. 200-1.) The Court of Appeals reversed this Court’s judgment as to the Indemnification  
20 Provision, which it found not to be limited to third-party actions against Apple. (*Id.* at 86.) The  
21 Court of Appeals “express[ed] no opinion on what portion of Apple’s attorney fees incurred in  
22 this litigation can be fairly attributed to Epic’s breach of the DPLA” (*Id.* at 87 n.24), and  
23 remanded to this Court to decide the amount to which Apple was entitled.

24 On September 27 and 28, 2023, Epic and Apple, respectively, filed petitions for  
25 writ of certiorari exclusively related to antitrust and UCL issues. (Pet. for Writ of Cert., *Epic*  
26 *Games, Inc. v. Apple Inc.*, No. 23-337 (Sept. 27, 2023); Pet. for Writ of Cert., *Apple Inc. v. Epic*  
27 *Games, Inc.*, No. 23-344 (Sept. 28, 2023).) On January 16, 2024, both Epic’s and Apple’s  
28

1 petitions were denied. 2024 WL 156473 (Mem) (U.S. Jan. 16, 2024); 2024 WL 156474 (Mem)  
2 (U.S. Jan. 16, 2024).

3 **D. Apple's Motion**

4 Apple filed this Motion the same day that Apple's and Epic's petitions for a writ of  
5 certiorari were denied. (*See* Dkt. 876 *et seq.*) Apple never met and conferred with Epic regarding  
6 this Motion in order to identify whether there were any disputes that might be resolved between  
7 the parties prior to filing, as required by Civil Local Rule 54-5. (Even Decl. ¶ 9.)

8 Once Apple filed its Motion, Epic initiated a meet and confer with Apple and  
9 proposed a staged briefing schedule so that the Court could first determine the appropriate scope  
10 of fees and costs (*id.* Ex. A at 7, 8)—which, as explained above and below, Epic believes to be far  
11 narrower than Apple has sought in its Motion. Under Epic's proposal, with the benefit of the  
12 Court's guidance as to the scope of allowed recovery, Apple could submit updated calculations  
13 consistent with the Court's decision, after which Epic could assess whether it wished to challenge  
14 Apple's calculations or the reasonableness of the fees and costs Apple seeks. (*Id.* Ex. A at 7.)  
15 Apple rejected Epic's proposal for staged briefing. (*Id.* Ex. A at 6.)

16 Apple also refused to provide the backup data relied upon by its experts, Ms. Irwin  
17 and Mr. Pearl, in the declarations they submitted in support of Apple's Motion—unless Epic  
18 agreed that the complete data would be provided only to independent experts retained by Epic in  
19 connection with this Opposition (with Epic *and* its outside counsel only receiving redacted data).<sup>1</sup>  
20 (*Id.* Ex. A at 3-4.) Apple insisted that if Epic challenged the reasonableness of the fees and costs  
21 Apple seeks, then Apple would require a “reciprocal” production of data concerning the fees and  
22 costs incurred by Epic in pursuing its claims. (*Id.* Ex. A at 6.) After Epic rejected these demands,  
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24 <sup>1</sup> Epic told Apple that it could not agree to the proposed limitations Apple seeks to place on  
25 this data. (Even Decl. Ex. A at 1, 3, 5.) For one thing, Apple assumed Epic would be retaining a  
26 team of experts to analyze the data. (*Id.* Ex. A at 1.) Based on Epic's preliminary review of the  
27 data Apple did produce, which consists of only 317 documents, all but one of which are PDF  
28 documents consisting of invoices and draft declarations, it is not clear that Epic will need to retain  
experts in connection with its opposition to this Motion. Furthermore, Apple has not sufficiently  
explained why the existing Protective Order does not provide adequate protections for the  
documents at issue. (*Id.* Ex. A at 1, 3.)

1 Apple ultimately produced some of the data Epic requested,<sup>2</sup> with redactions, near midnight  
 2 Pacific Time on Monday, February 12, four days before the due date of this Opposition. (*See id.*  
 3 Ex. B.) This was too little information, produced far too late to be useful. Epic reserves the right  
 4 to raise objections to Apple’s experts’ conclusions once the Court has resolved the Parties’  
 5 dispute as to the appropriate scope of recovery, as well as any remaining dispute regarding  
 6 Apple’s disclosure of the materials considered by Apple’s experts in forming the opinions  
 7 presented to this Court.

### LEGAL STANDARDS

8  
 9 Apple’s indemnification counterclaim is based on Section 10(i) of the DPLA,  
 10 which sets forth, in relevant part:

11 “To the extent permitted by applicable law, You agree to indemnify and hold  
 12 harmless, and upon Apple’s request, defend, Apple, its directors, officers,  
 13 employees, independent contractors and agents (each an “Apple Indemnified  
 14 Party”) from any and all claims, losses, liabilities, damages, taxes, expenses and  
 15 costs, including without limitation, attorneys’ fees and court costs . . . incurred by  
 an Apple Indemnified Party and arising from or related to any of the  
 following . . . : (i) Your breach of any certification, covenant, obligation,  
 representation or warranty in this Agreement, including Schedule 2.”  
 (PX-2619 § 10.)

16 Section 14.10 of the DPLA sets forth that disputes over the agreement “will be governed by and  
 17 construed in accordance with the laws of the United States and the State of California”. (*Id.*  
 18 § 14.10.) As Apple admits, “[t]he substance of [this] inquiry is governed by the plain terms of the  
 19 parties’ contract and by California law”. (Dkt. 876 at 9.)

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22 <sup>2</sup> Epic requested all data listed in the materials identified on pages 2-3 of Exhibit D to  
 23 Ms. Irwin’s declaration, under the headings “Data”, “Declarations” and “Invoices” (*see*  
 24 Dkt. 876-6 at 2-3), and the materials identified on page 2 of Exhibit A to Mr. Pearl’s declaration  
 25 under the headings “Data from Cornerstone” and “Other” (*see* Dkt. 876-10 at 2), with the  
 26 limitation that Epic did not initially demand individual time entries from counsel, subject to a  
 27 reservation of rights to demand such information later. (Even Decl. Ex. A at 5.) Apple refused to  
 28 provide internal Apple policy documents, claiming that they are “not relevant”, notwithstanding  
 the fact that they were considered by Apple’s experts. (*Id.* Ex. B at 2.) Based on Epic’s  
 preliminary review of the production, it appears that other data that Epic requested simply is not  
 in Apple’s production. For example, the production contains only one Excel spreadsheet,  
 whereas Exhibit D to Ms. Irwin’s declaration lists at least three spreadsheets as material that  
 Ms. Irwin considered, under the heading “Data”.

**ARGUMENT**

**I. Apple’s Claim for Fees and Costs Incurred in Litigating Epic’s Antitrust and UCL Claims Is Barred by Black Letter Law Prohibiting Fee Shifting in Favor of Antitrust Defendants**

The seminal decision that controls Apple’s Motion is *Carver v. Chevron U.S.A., Inc.*, 119 Cal. App. 4th 498 (2004). The court there held that (i) prevailing defendants cannot recover attorneys’ fees or litigation costs they incurred while defending against antitrust claims (there under the Cartwright Act), even where the parties have entered into a private contract that otherwise permits fee shifting; and (ii) recovery is likewise barred where fees and costs were incurred in connection with *contract* claims if the litigation of those claims inextricably overlapped with the defense against antitrust claims. *Carver*, 119 Cal. App. 4th at 505 (“[T]he Cartwright Act’s unilateral fee-shifting provision precludes an award of attorney fees to a prevailing defendant for defending claims common to both Cartwright Act and non-Cartwright causes of action”). Since that decision, courts applying California law have further recognized that the same bar on recovery applies equally to defense against federal antitrust claims and California UCL claims. *Dominick*, 2013 WL 990825, at \*2-3 (finding prevailing defendants could not recover fees and costs for defending against Sherman Act, Clayton Act, California Cartwright Act or California UCL claims); *see also Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1179-81 (2002) (pre-*Carver* decision affirming trial court’s denial of recovery for UCL-related portion of fees in an action involving multiple claims because “where a plaintiff sues solely under the unfair competition law, fees may not be recovered by a prevailing defendant”).<sup>3</sup>

*Dominick*, which applied *Carver* to claims under Sections 1 and 2 of the Sherman Act, the Cartwright Act and the UCL, is instructive. There, the prevailing defendant sought to recover its attorneys’ fees pursuant to a fee-shifting provision in the licensing agreement between

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<sup>3</sup> Cases subsequent to *Carver* have also broadly applied its holding outside of the antitrust context, to other areas where a statute bars the recovery of fees by a prevailing defendant. *See, e.g., Dane-Elec Corp., USA v. Bodokh*, 35 Cal. App. 5th 761, 770-72 (2019) (fee request under California labor law); *Turner v. Ass’n of Am. Med. Colleges*, 193 Cal. App. 4th 1047, 1062 (2011) (fee request under California Unruh Civil Rights Act and Disabled Persons Act).

1 the parties.<sup>4</sup> *Dominick*, 2013 WL 990825, at \*4-5. The court refused to allow the defendants to  
 2 invoke the provision to recover fees for defending against the antitrust claims, finding that “under  
 3 California law, prevailing defendants may not recover attorneys’ fees for successfully defending  
 4 against antitrust claims, even if a contractual fee-shifting clause may have otherwise allowed for  
 5 such fees”. *Id.* at \*5. In reaching this decision, the court held that private parties may not, by  
 6 contract, “override congressional intent” that prevailing defendants not recover attorneys’ fees.  
 7 *Id.* The congressional intent applicable here is well established; recovery of attorneys’ fees under  
 8 federal antitrust statutes is purposefully asymmetrical “to encourage private enforcement of the  
 9 antitrust laws”, “insulate the treble damages award from the costs of obtaining recovery” and  
 10 “deter violations of the antitrust laws”. *Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950,  
 11 959-60 (9th Cir. 2007); *see also Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1138 (9th Cir.  
 12 2008) (“[T]he purpose of fee-shifting under [the Clayton Act] is to protect the potential plaintiff’s  
 13 incentive for suit”). As such, allowing fee-shifting to Apple for its defense of antitrust claims  
 14 would violate public policy, congressional intent and controlling California law.

15 Apple does not acknowledge, let alone address, this binding precedent or these  
 16 policy considerations.<sup>5</sup> Apple argues that because its defense against Epic’s antitrust claims and  
 17 its pursuit of its contract claims are inextricably intertwined, Apple is entitled to recover its *full*  
 18 *fees and costs* and need not segregate or apportion its fees and costs as between the two litigation  
 19

20 <sup>4</sup> That agreement was even broader than the Indemnification Provision at issue here, stating  
 21 in relevant part: “In the event of any controversy, claim or dispute between the parties hereto  
 22 *arising from, under, out of, or relating to this Agreement or breach thereof* . . . [t]he prevailing  
 party shall be entitled to recover all of its reasonable attorneys’ fees, expenses and costs.”  
*Dominick*, 2013 WL 990825, at \*4 (emphasis and alteration in original).

23 <sup>5</sup> Apple is well aware of this case law. In fact, in recent antitrust litigation brought against  
 24 Apple by AliveCor, Inc., Apple filed an indemnification counterclaim pursuant to Section 10 of  
 25 the DPLA, seeking to recover its attorneys’ fees and costs incurred in litigating AliveCor’s  
 26 claims. (Defendant and Counterclaimant Apple, Inc.’s Answer, Defenses and Counterclaim to  
 27 AliveCor, Inc.’s Complaint, No. 21-cv-03958-JSW (N.D. Cal. Apr. 4, 2022) (hereinafter  
 28 “*AliveCor Dkt.*”), Dkt. 46 at 24-25.) AliveCor moved to dismiss Apple’s indemnification  
 counterclaim, including on the grounds that *Carver* and its progeny foreclosed recovery of  
 attorneys’ fees incurred in litigating its antitrust and California UCL claims. (*AliveCor Dkt.* 47.)  
 The court there ruled for AliveCor on other grounds, but Apple addressed AliveCor’s arguments  
 in its opposition to the motion to dismiss. (*AliveCor Dkt.* 48.)

1 efforts. In support of this argument, Apple relies on *Reynolds Metals Co. v. Alperson*, 25 Cal.3d  
2 124 (1979), which stands for the general proposition that attorneys’ fees need not be apportioned  
3 when they are incurred for representation on an issue common to two causes of action, only one  
4 of which is covered by a contract that entitles the defendant to fees. (*Id.* at 129-30.) But in  
5 *Carver*, the *Reynolds* holding was rejected as inapplicable in the context of antitrust claims.  
6 Specifically, the *Carver* court held that *Reynolds* is inapposite in the context of antitrust claims  
7 “because [*Reynolds*] did not involve a conflict between a contractual right to attorney fees and a  
8 statutory prohibition against awarding such fees”. 119 Cal. App. 4th at 504-05. As a result,  
9 “[t]he court in *Reynolds* did not address the public policy concern that fee awards not deter  
10 enforcement of important statutory rights”. *Id.* at 505.

11           Thus, while the *Reynolds* court allowed recovery of *all* attorneys’ fees when  
12 defending against inextricably overlapping compensable and noncompensable claims, the *Carver*  
13 court announced the exact opposite rule—*barring* recovery of *any* attorneys’ fees or costs—in the  
14 context of defending against inextricably overlapping compensable claims and noncompensable  
15 *antitrust* claims, finding that “[b]ecause [the Cartwright Act] expressly authorizes recovery of  
16 attorney fees for prevailing plaintiffs only, a prevailing defendant cannot use an alternative  
17 contractual fee provision to claim entitlement to fees for overlapping compensable and  
18 noncompensable claims”. *Id.* Thus, the court in *Carver* held:

19           “When a defendant incurs attorney fees for successfully defending both Cartwright  
20 Act and non-Cartwright Act claims, the portion of those fees related exclusively or  
21 by ‘inextricable overlap’ to Cartwright Act claims *are not recoverable*.” *Id.* at 506  
(emphasis added).

22           Apple cites no case abrogating *Carver* or otherwise permitting a prevailing  
23 defendant to recover attorneys’ fees or other costs associated with an antitrust or unfair  
24 competition claim on the basis of a contractual fee-shifting or indemnification provision.<sup>6</sup>

25           <sup>6</sup> In Apple’s briefing in *AliveCor*, when addressing the *Carver* issue, Apple cited *Reudy v.*  
26 *Clear Channel Outdoors, Inc.*, 693 F. Supp. 2d 1091, 1101 (N.D. Cal. 2010), *aff’d sub nom.*  
27 *Reudy v. CBS Corp.*, 430 F. App’x 568 (9th Cir. 2011), as an example where recovery was  
28 allowed. But as the court noted in *Reudy*, the plaintiff there did not cite any authority to support  
the position that the attorneys’ fees sought were not recoverable, and thus, the court had no  
occasion to address *Carver* and its progeny. *Id.* Cases that have engaged with this issue, such as

1 Consistent with the above principles, Apple’s Motion should be denied because it  
 2 fails to segregate the fees and costs Apple incurred in defending against Epic’s antitrust and UCL  
 3 claims—which are not recoverable as a matter of law—from any fees and costs that Apple  
 4 incurred *solely* to pursue its breach of contract claim. Instead, as noted above, Apple takes the  
 5 position that it cannot separate these fees and costs because the “vast majority of the litigation and  
 6 trial related to the antitrust issues implicated by 9 of Epic’s claims”. (Dkt. 876 at 16.) But those  
 7 are precisely the types of fees and costs that *Carver* found to be unrecoverable. Under *Carver*,  
 8 any fees and costs that “inextricably overlap” with those Apple incurred in defending against  
 9 Epic’s antitrust and UCL claims cannot be recovered, even if they were also incurred in  
 10 furtherance of Apple’s pursuit of its breach of contract claim. To recover *any* fees or costs, Apple  
 11 needed to identify the fees and costs that it incurred *solely* in pursuing its contract claims. Apple  
 12 has identified no such fees or costs, and its Motion should be denied.

13 **II. The Indemnification Provision Permits Apple To Recover Only for Fees and Costs**  
 14 **Arising from or Related to Epic’s Breach of the DPLA, Not Fees and Costs for**  
 15 **Antitrust Claims that Apple Would Have Incurred Regardless of the Breach**

16 Even if *Carver* and its progeny did not bar the recovery Apple’s seeks (they do),  
 17 neither the plain language of the Indemnification Provision nor applicable California law supports  
 18 Apple’s Motion to recover fees and costs that Apple would have incurred irrespective of Epic’s  
 19 breach of the DPLA. Specifically, the Indemnification Provision only permits recovery for the  
 20 “attorneys’ fees and court costs . . . incurred by [Apple] *arising from or related to* . . . [Epic’s]  
 21 *breach* of any certification, covenant, obligation, representation or warranty in [the DPLA]”.  
 22 (PX-2619 § 10(i) (emphasis added).) The Ninth Circuit left it to this Court on remand to  
 23 determine “what portion of Apple’s attorney fees incurred in this litigation can be fairly attributed  
 24 to Epic’s breach of the DPLA, such that they fall within the scope of the [Indemnification  
 25 Provision]”. *Epic Games, Inc.*, 67 F.4th at 1004 n.24. California Civil Code Section 1717(a)  
 26 therefore also requires that Apple segregate the attorneys’ fees and costs attributable to the claims

27 \_\_\_\_\_  
 28 *Dominick* (which post-dates *Reudy*), invariably have applied *Carver* and its progeny to reject fees  
 sought by defendants for defending claims under the Sherman Act. *Dominick*, 2013 WL 990825,  
 at \*5.



1 for which it is entitled to recover as compared to those for which it is not. *Martinez v. Extra*  
2 *Space Storage, Inc.*, 2013 WL 6623889, at \*2-3 (N.D. Cal. Dec. 16, 2013) (applying § 1717(a) to  
3 deny recovery of fees and costs where they were not attributable to an action on a contract).

4 Under California law, indemnification agreements are “to be interpreted according  
5 to the language and contents of the contract as well as the intention of the parties as indicated by  
6 the contract”. *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 968 (1993).  
7 The term “breach” is commonly understood to refer simply to the issue of whether a contract or  
8 law has been violated. Breach, Black’s Law Dictionary (11th Ed. 2019) (defining breach as a  
9 “violation or infraction of law, obligation, or agreement”). The term “breach” in the DPLA has  
10 the same meaning, as made clear in Section 11.2(a), which refers to a “breach” as a “fail[ure] to  
11 comply with any term of this Agreement”. (PX-2619 § 11.2(a).) See *Mirpad, LLC v. California*  
12 *Ins. Guarantee Assn.*, 132 Cal. App. 4th 1058, 1069 (2005) (“Our Supreme Court has long  
13 followed the ‘same meaning rule’ in the construction of contracts. Words used in a certain sense  
14 in one part of an instrument are deemed to have been used in the same sense in another.”  
15 (quotation marks and citation omitted)).

16 Epic’s antitrust claims cannot be said to arise out of or relate to a breach of the  
17 DPLA because they are completely independent of Epic’s violation of the terms of the DPLA. It  
18 is undisputed that Epic’s antitrust claims could have been brought against Apple even if Epic had  
19 not violated the terms of the DPLA, and conversely, that Epic could have breached the DPLA  
20 without bringing any antitrust claims. The core of this case was Epic’s claims that Apple  
21 monopolized and harmed competition in the markets for iOS app distribution and payment  
22 processing, not Epic’s breach of the DPLA. The anticompetitive and unfair conduct at issue was  
23 ongoing before Epic violated the terms of the DPLA and continued thereafter. The parallel  
24 *Pepper* and *Cameron* proceedings further illustrate this point: In those cases, substantially similar  
25 antitrust claims were brought by classes of app developers and consumers with no allegation by  
26 Apple of any attendant breach by either class. Thus, no claims for breach of the DPLA were or  
27 are being litigated in those matters. As a matter of contractual interpretation, Apple’s fees and  
28

1 costs incurred in defending against Epic’s antitrust and UCL claims did not arise out of, and do  
2 not relate to, Epic’s breach of the DPLA.

3 Apple nonetheless argues that it is entitled to all of the attorneys’ fees and costs it  
4 incurred in this litigation because “Apple’s breach-of-contract claim would have implicated all of  
5 the antitrust issues that were the principal focus of the parties’ litigation”. (Dkt. 876 at 17.)  
6 Apple’s basis for this assertion is that one of Epic’s affirmative defenses to Apple’s breach of  
7 contract claim was that the DPLA was unlawful (because it violated the antitrust laws). But if  
8 this argument were successful, then that would interfere with the public policy of encouraging  
9 private enforcement of the antitrust laws, as it would impose significant costs on any party that  
10 has a legitimate defense that a contract they breached is illegal under the antitrust laws.

11 Section 1717(a) of the California Civil Code, which governs Apple’s Motion.  
12 further requires Apple to apportion its fees and costs as between those that are recoverable under  
13 the Indemnification Provision (*i.e.*, those arising from or related to Epic’s breach of the DPLA)  
14 and those that are not recoverable (*i.e.*, those that have nothing to do with Epic’s breach of the  
15 DPLA). *See Zintel Holdings, LLC v. McLean*, 209 Cal. App. 4th 431, 443 (2012) (collecting  
16 cases and noting that Section 1717(a) requires that fees be apportioned between claims for which  
17 they are recoverable and those for which they are not, and noting that “[a] court may apportion  
18 fees even where the issues are connected, related or intertwined” (quotation marks and citation  
19 omitted)); *El Escorial Owners’ Assn. v. DLC Plastering, Inc.*, 154 Cal. App. 4th 1337, 1365  
20 (2007), *as modified on denial of reh’g* (Oct. 3, 2007) (similar). Since, as described above in  
21 Section I, Apple has made no effort to segregate its fees and costs incurred in defending against  
22 Epic’s antitrust and UCL claims from those incurred in pursuing its claim for Epic’s breach of the  
23 DPLA, Apple’s Motion also fails to satisfy this requirement under Section 1717(a).

24 At certain points in its Motion, Apple suggests that Section 1717(a) does not apply  
25 here because it only applies to “post-judgment” motions for attorneys’ fees and costs, whereas  
26 this is supposedly a pre-judgment motion. (*See, e.g.*, Dkt. 876 at 18 (describing § 1717 as  
27 “California law applicable to *post*-judgment motions for attorneys’ fees and costs”) (emphasis in  
28 original).) This is incorrect. Section 1717 by its plain terms applies broadly to any motion to

1 recover attorneys’ fees and costs based on a contract, as Apple admits in other portions of its  
2 Motion. (*Id.* at 9.) While it is true that Section 1717 cannot apply to requests for *interim* fee  
3 awards before a “prevailing party” under the contract has been determined, *Chen v. Valstock*  
4 *Ventures, LLC*, 81 Cal. App. 5th 957, 977-78, 983 (2022), *as modified* (Aug. 24, 2022), that is not  
5 the case here, where Apple has already been determined to be the prevailing party on its contract  
6 claims and all appeals of that determination are exhausted. Section 1717 applies even in this  
7 “pre-judgment” context. *Burkhalter Kessler Clement & George LLP v. Hamilton*, 19 Cal. App.  
8 5th 38, 46-47 (2018) (Section 1717 does not require that one “wait[] to file the motion for  
9 attorney fees until after the trial court had ruled on the motion for entry of judgment”).

10           Notwithstanding its position that Section 1717(a) does not apply to its Motion,  
11 Apple argues in the alternative that, if it applies (it does, for the reasons stated above), then  
12 “Epic’s entire lawsuit—including its antitrust claims—was an ‘action on the contract’, within the  
13 meaning of [Section 1717(a)]” (Dkt. 876 at 19), therefore entitling Apple to fees and costs it  
14 indisputably incurred in defending against Epic’s antitrust claims. Apple’s basis for this  
15 argument is that *any* antitrust claim that challenges the legality of the DPLA under the antitrust  
16 laws is an “action on the contract”. (*Id.*) As set out in *Carver*, Apple’s approach would raise the  
17 risk significantly for plaintiffs challenging a contract as unlawful under the antitrust laws. *See*  
18 *Carver*, 119 Cal. App. 4th at 504. Even setting aside that negative policy implication, this  
19 approach cannot stand as a matter of statutory and contractual interpretation. Section 1717(a) is  
20 not an independent source of an entitlement to recover fees and costs, and it cannot be used in a  
21 way that would change the parties’ agreed scope of recovery in the underlying Indemnification  
22 Provision. *See The Travelers Indem. Co. v. Lara*, 84 Cal. App. 5th 1119, 1136 (2022) (“Before  
23 section 1717 comes into play, it is necessary to determine whether the parties entered an  
24 agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement.”  
25 (citations omitted)); *id.* at 1137 (“If the action is outside the scope of the attorney fee provision,  
26 that is the end of the matter; section 1717 does not apply.” (citations omitted)). Here, the  
27 underlying obligation is to indemnify Apple only for those fees and costs that arise from or relate  
28 to a breach of the DPLA, which cannot include the antitrust claims.

**III. Apple Is Not Entitled To Recover from Epic for Third Parties' Antitrust Claims**

Apple's Motion further should be denied because Apple seeks to recover from Epic attorneys' fees and costs it incurred in defending against pure antitrust claims, with no contractual aspects at all, that were pursued by other plaintiff groups in two separate cases.

As noted above, discovery in this case was coordinated, to a large extent, with discovery in the related *Cameron* and *Pepper* actions: More than a dozen depositions were conducted jointly in all three actions and all document discovery conducted after the filing of this Action was likewise conducted in all three parallel proceedings. (*See supra* Section B.) The Indemnification Provision does not require Epic to subsidize Apple's defense in the *Cameron* and *Pepper* proceedings, as these proceedings plainly do not "arise from" or "relate to" Epic's breach of the DPLA. Yet Apple appears to be seeking from Epic the full fees and costs it incurred with respect to any coordinated discovery efforts, including the portions relating to *Cameron* and *Pepper*. Indeed, Apple's Motion reflects no effort to apportion its claimed fees and costs to account for the fact that only a portion of those fees and costs are attributable to this case. And in a meet and confer following the filing of this Motion (which was initiated by Epic), Apple stated that its calculations assume that the fees and costs associated with certain jointly conducted depositions should be charged to and recovered from Epic, on the theory that Epic was the plaintiff that happened to have sent the deposition notice.<sup>7</sup> This Court should deny Apple's Motion to the extent it seeks recovery of fees and costs that should appropriately be apportioned to Apple's defense in the *Pepper* and *Cameron* cases.

**IV. Apple Is Barred from Recovering for Any "Losses" Other than Attorneys' Fees**

Apple also overreaches by seeking costs that go beyond the scope of the Ninth Circuit's mandate, which allows Apple to seek only "attorney fees". That mandate was so limited based on Apple's own argument on appeal. Apple's attempt now to shoehorn in costs that it concedes are distinct from its attorneys' fees is improper.

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<sup>7</sup> Specifically, Apple's counsel confirmed that the costs of Mr. Cook's deposition had been charged to Epic in Apple's Motion even though counsel for the class plaintiffs participated in the questioning of Mr. Cook. (Even Decl. ¶ 10.)

1 It is black letter law that the Ninth Circuit’s mandate is binding on this Court. *See,*  
2 *e.g., Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012) (“A district court that has  
3 received the mandate of an appellate court cannot vary or examine that mandate for any purpose  
4 other than executing it. . . . A district court is limited by our remand when the scope of the  
5 remand is clear. Violation of the rule of mandate is a jurisdictional error.” (citations omitted));  
6 *see also SK hynix Inc. v. Rambus Inc.*, 2013 WL 1915865, at \*6 (N.D. Cal. May 8, 2013) (“Unless  
7 remanded by the appellate court, all issues within the scope of the appealed judgment are deemed  
8 incorporated within the mandate and thus are precluded from further adjudication. The mandate  
9 rule precludes reconsideration of any issue within the scope of the judgment appealed from—not  
10 merely those issues actually raised.” (quotations and alterations omitted)).

11 Here, the Ninth Circuit mandate provides that this Court is to determine only  
12 “what portion of Apple’s *attorney fees* incurred in this litigation can be fairly attributed to Epic’s  
13 breach of the DPLA”. *Epic Games, Inc.*, 67 F.4th at 1004 n.24 (emphasis added). This mandate  
14 is limited in scope for good reason—it is exactly the argument that Apple presented to the Ninth  
15 Circuit in its appeal. For example, in its Principal and Response Brief on appeal, Apple stated  
16 that the relevant Issue Presented in its cross-appeal was “[w]hether the court committed legal  
17 error in construing the indemnification provision as not requiring Epic to pay Apple’s *attorneys’*  
18 *fees*”. (C.A.9. No. 21-16695, Dkt. 80 at 6 (emphasis added).) In describing this Court’s decision  
19 on this topic, Apple stated that this Court “denied Apple’s request for *attorneys’ fees*”. (*Id.* at 24  
20 (emphasis added).) Apple’s Cross Appeal Reply Brief likewise argues that “Epic Must Pay  
21 Apple’s *Attorneys’ Fees*” and concludes with the statement that “the judgment on Apple’s  
22 indemnity claim should be reversed and remanded for an award of *attorneys’ fees*”. (C.A.9.  
23 No. 21-16695, Dkt. 168 at 28, 30 (emphasis added).) In short, Apple asked the Ninth Circuit to  
24 order Epic to pay Apple its attorneys’ fees, and the Ninth Circuit granted that request. No more.

25 Because attorneys’ fees are well-recognized as distinct from “costs” or other  
26 “expenses”, this Court must consider only what *attorneys’ fees* Apple is entitled to recover under  
27 the Indemnification Provision, and not any other costs that Apple seeks in its Motion. *See, e.g.,*  
28 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2666 (4th Ed. 2023) (collecting cases  
EPIC’S OPPOSITION TO APPLE’S 17 CASE NO. 4:20-CV-05640-YGR-TSH  
MOTION FOR ENTRY OF JUDGMENT

1 and distinguishing between “costs”, “fees” and “expenses” and characterizing “attorney’s fees” as  
 2 a particular type of “expenses”). Indeed, cases cited by Apple in support of its Motion treat  
 3 attorneys’ fees as distinct from other costs and expenses, such as expert fees. *See, e.g., Lovell v.*  
 4 *Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002) (recognizing that the Americans with Disabilities  
 5 Act treats attorneys’ fees, litigation expenses (including “expert witness fees, travel expenses,  
 6 etc.”) and costs as distinct categories); *Tax Servs. of Am., Inc. v. Mitchell*, 2008 WL 2834271, at  
 7 \*5 (D. Colo. July 21, 2008) (granting distinct awards for attorneys’ fees, expert fees and other  
 8 costs).

9           The distinction between attorneys’ fees and other costs is in both the  
 10 Indemnification Provision and Apple’s own Motion. As to the Indemnification Provision, this  
 11 section of the DPLA provides that signatories “agree to indemnify and hold harmless, and upon  
 12 Apple’s request, defend, Apple[] . . . from any and all claims, losses, liabilities, damages, taxes,  
 13 expenses and costs, *including without limitation, attorneys’ fees and court costs*”. (PX-2619 § 10  
 14 (emphasis added).) The term “attorneys’ fees” must therefore be interpreted to be separate from  
 15 “court costs”, and only a specific category of “expenses and costs”, otherwise the term “attorneys’  
 16 fees” would be rendered superfluous and violate the “cardinal principle of document  
 17 construction . . . that document[s] must be construed as a whole so as to give effect to every part  
 18 thereof”. *Bear Creek Plan. Comm. v. Ferwerda*, 193 Cal. App. 4th 1178, 1183 (2011) (citation  
 19 and quotation marks omitted).

20           As to Apple’s Motion, Apple effectively concedes that attorneys’ fees are distinct  
 21 from and separable from other costs. Specifically, Apple sorts the fees and costs that it seeks to  
 22 recover into several different categories, including, on the one hand, “Attorneys’ Fees” and, on  
 23 the other hand, other costs, which include “Expert Witness and Consulting Fees”, “Document and  
 24 Information Technology Expenses”, “Travel and Meal Expenses”, “Arbitration Expenses”<sup>8</sup> and  
 25

26           <sup>8</sup> The inclusion of “Arbitration Expenses” in Apple’s chart is likely an indication of Apple’s  
 27 failure to segregate expenses between the instant litigation and the *Cameron* and *Pepper*  
 28 litigations, as no arbitration or mediation was conducted with Epic, neither separately nor in  
 conjunction with the other class actions.

1 “Other Expenses” (collectively, “Other Costs”), with these Other Costs accounting for  
2 approximately 40% of the total recovery Apple is requesting. (Dkt. 876 at 15.) Apple also  
3 spends portions of its Motion arguing that other categories of litigation outlays, including expert  
4 fees, are “expenses”, which Apple categorizes as “separate from and broader than ‘costs’”. (*Id.*  
5 at 12.) Tellingly, Apple never characterizes expert fees as “attorneys’ fees”. (*Id.*)

6 Apple attempts to justify its pursuit of these Other Costs in its Motion by its  
7 incorrect statement that “[t]he Ninth Circuit . . . held that Apple is entitled to recover its ‘Losses’  
8 arising from or related to Epic’s breach under the indemnification provision in the DPLA”.  
9 (Dkt. 876 at 1.) But the Ninth Circuit never used the term “Losses” in its operative decision  
10 (notwithstanding Apple’s use of quotation marks to suggest otherwise). Instead, consistent with  
11 how Apple presented the issue to the court as detailed above, in the section of its opinion entitled  
12 “Attorney Fees”, the Ninth Circuit reversed what the Ninth Circuit characterized as this Court’s  
13 holding that the Indemnification Provision “does not require Epic to pay Apple’s *attorney fees*  
14 related to this litigation”, finding instead that the Indemnification Provision “contemplates intra-  
15 party disputes and Apple is entitled to *attorney fees* pursuant to it”. *Epic Games, Inc.*, 67 F.4th  
16 at 1003-04 (emphases added). Therefore, Apple’s recovery for its indemnification counterclaim  
17 must be limited only to Apple’s attorneys’ fees, not the Other Costs that it seeks through this  
18 Motion.

19 Accordingly, Apple’s Motion should be denied to the extent it seeks Other Costs  
20 beyond attorneys’ fees.

## 21 **V. Apple Should Not Be Granted Fees or Costs for This Motion**

22 Apple’s Motion should also be denied to the extent it seeks recovery of fees and  
23 costs associated with preparing this Motion (as well as fees and costs for any follow-on briefing  
24 or proceedings related thereto). As explained above, Apple’s Motion seeks to recover vast  
25 amounts to which Apple clearly is not entitled. Furthermore, Apple incurred significant, and  
26 likely unnecessary, expenses, without first meeting and conferring with Epic as to the scope and  
27 substance of its motion, as it was required to do under Civil Local Rule 54-5. An orderly meet  
28 and confer process could have (and likely would have) focused Apple’s Motion on the issues

1 actually in dispute—namely the scope of recovery to which it is entitled—and avoided the  
 2 considerable additional fees and costs Apple has incurred in retaining experts and engaging large  
 3 support teams to calculate the overall fees and costs Apple has incurred, the vast majority of  
 4 which Apple is not entitled to recover as a matter of law.

5 Apple claims it was not required to meet and confer with Epic before filing its  
 6 Motion because the provisions of Federal Rule of Civil Procedure 54(d) do not apply to a pre-  
 7 judgment motion. (*See* Dkt. 876 at 9.) But those rules do apply because Apple’s Motion seeks  
 8 attorneys’ fees and costs through a post-trial motion, not having sought to prove them as an  
 9 element of damages at trial. *Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1121  
 10 (9th Cir. 2004) (applying Fed. R. Civ. P. 54(d) and Cal. Civ. Code § 1717(a) where attorneys’  
 11 fees and costs were not an element of damages at trial); *see also Zhu v. Li*, 2023 WL 4770431,  
 12 at \*1, 3-4 (N.D. Cal. July 26, 2023) (applying Fed. R. Civ. P. 54(d) to motion for attorneys’ fees  
 13 and court costs under contractual indemnification provision and noting similarity of  
 14 indemnification language in that case and in the *Epic Games, Inc. v. Apple Inc.* litigation);  
 15 *Instrumentation Lab. Co. v. Binder*, 2013 WL 12049070, at \*19 (S.D. Cal. Mar. 28, 2013)  
 16 (applying Fed. R. Civ. P. 54(d) to motion for attorneys’ fees and court costs under contractual  
 17 indemnification provision). And under Civil Local Rule 54-5, “[c]ounsel for the respective  
 18 parties must meet and confer for the purpose of resolving all disputed issues relating to attorney’s  
 19 fees before making a motion for award of attorney’s fees.” Civ. L. R. 54-5(a). Apple failed to  
 20 adhere to that requirement; indeed, Apple provided no advance notice at all to Epic that it planned  
 21 to file this Motion, let alone that it had engaged multiple experts and has asked them to form  
 22 opinions and to put together dozens of exhibits and tens of pages of analysis,<sup>9</sup> which Apple is  
 23 now asking the Court to make Epic pay for. (Even Decl. ¶ 9.)

24  
 25  
 26 <sup>9</sup> As one example, as noted above, Apple engaged an expert and a team of nine additional  
 27 analysts to “analyze[] Apple’s billing and invoice records from the *Epic* litigation” (Dkt. 876  
 28 at 21), work that likely carried on for weeks or months, all the while keeping Epic in the dark  
 about these additional costs.



1 As explained above, all of this expert work was unnecessary and misguided  
2 because it was for naught: Apple calculated all of its fees and costs for this case and engaged  
3 experts to opine on their reasonableness, when what it should have done was to identify only its  
4 attorneys' fees that were fairly attributable to Epic's breach of the DPLA, as required under  
5 California law, the Indemnification Provision and the Ninth Circuit's mandate. Had Apple  
6 consulted with Epic before conducting all of this work, at the very least the Parties could have  
7 jointly asked for the Court to determine the appropriate scope of recovery *before* Apple retained a  
8 large team of experts and sent them to answer what Epic believes to be entirely the wrong  
9 question.

10 There is no excuse for Apple's failure to follow the rules that apply to this briefing,  
11 and this conduct should not be rewarded. Apple should be required to bear its own attorneys' fees  
12 and costs as to this Motion and any follow-on briefing or proceedings.

13 **CONCLUSION**

14 For the foregoing reasons, Epic respectfully requests this Court deny Apple's  
15 Motion.

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Respectfully submitted,

2 By: /s/ Yonatan Even

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