ACTION REQUESTED BY DECEMBER 8, 2021

Nos. 21-16506 & 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

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

v.

APPLE INC.,

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

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

REPLY IN SUPPORT OF MOTION FOR ADMINISTRATIVE STAY AND TO STAY INJUNCTION PENDING APPEAL

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DISCUSSION

The district court sustained Apple's requirement that in-app purchases of digital content use the App Store's IAP functionality, yet enjoined as "unfair" the rule prohibiting developers from circumventing that requirement by including in their apps "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP]." Ex. D § 3.1.1; *see* Ex. A, at 166–68. That injunction—which Epic has no standing to enforce—will not survive appellate review. Virtually all digital transaction platforms employ similar anti-steering provisions (Ex. C), which have been recognized as procompetitive in this novel technological context. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 989 (9th Cir. 2020) (discussing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018)). Moreover, *undisputed evidence* establishes that immediate implementation of the injunction "*will harm* users, developers, and the iOS platform more generally" (Ex. L ¶ 10 (emphasis added)), while maintaining the status quo would not harm Epic or anyone else. A stay is urgently needed.

I. A Stay Pending Appeal Is Warranted

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

1. There Is No Basis For UCL Liability

The district court's determination that Apple's anti-steering provisions do not violate the antitrust laws precludes the imposition of UCL liability for the same conduct. "An independent claim under California's UCL is . . . barred so long as

[the defendant's] activities are lawful under the antitrust laws." *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015) (citing *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001)). Epic parrots a footnote in which the district court attempted to distinguish *Chavez* (Opp. 20 (quoting Ex. A, at 162 n.631)), but that approach has already been rejected by this Court. *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) ("Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition"). The district court "disagree[d]" with *LiveUniverse* (Ex. A, at 163 n.632), raising at least a "substantial question" as to whether the UCL judgment is consistent with this Court's precedent.

The "testimony" from "app developers" touted by Epic (Opp. 19) all involved subscription apps, which the court found "are not part of this case" (Ex. A, at 33 n.198) because they comprise a "separate submarket for which there is insufficient evidence." *Id.* at 123 n.571. Although Epic contends that Apple has not presented evidence of "disparate effects on gaming and non-gaming apps" (Opp. 18), the district court found that "[g]ames and subscription apps . . . are distinct," including in their ability to "steer consumers to web transactions" (Ex. A, at 123 n.571). For example, developer Down Dog offers subscriptions at lower prices on its website (Ex. O, at 402:20–403:15), while Epic has always offered V-Bucks for the same

price on all available platforms (Ex. P, at 227:19–228:7). There is *no evidence* that Apple's anti-steering provisions have any anticompetitive effects in the market for mobile gaming transactions—the only relevant market in which Epic operates.

Epic argues that the UCL does not require "a full-blown market definition exercise of the kind courts undertake in Sherman Act cases." Opp. 16. That is wrong, and in any event elides the question whether a court can avoid *any* consideration of the relevant market. The sole California case cited by Epic on this point (*id.*) does not address this issue. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999). By contrast, the Supreme Court has explained in the context of anti-steering provisions that "[w]ithout a definition of the market there is no way to measure the defendant's ability to lessen or destroy *competition*." *Amex*, 138 S. Ct. at 2285 (emphasis added; alterations and quotation marks omitted). The same is true under the UCL, using either the tethering test or the balancing test: Competitive effects cannot be analyzed without some reference to the market in which those effects are experienced.

Epic does not dispute that the *Amex* framework is applicable to UCL claims. *See* Mot. 12–13. Instead, Epic contends that *Amex* "did not even hold that Amex's own anti-steering provisions were procompetitive." Opp. 21. This Court disagrees. *Qualcomm*, 969 F.3d at 989 (recognizing that *Amex* held the "use of antisteering clauses" to be "*pro*competitive and innovative"). The Supreme Court detailed the

ways in which anti-steering provisions reduce transaction friction, increase interbrand competition, and allow recoupment of investment in a two-sided platform. *See Amex*, 138 S. Ct. at 2289. Here, the district court found that the App Store is a two-sided transaction platform and that Apple's IAP requirement serves identical procompetitive purposes (*see* Ex. A, at 150), yet ignored those benefits when considering the anti-steering provisions, which enforce the IAP requirement. If these procompetitive benefits are considered, as they must be, the UCL judgment must be reversed.

2. Epic Lacks Standing

Because Epic has no apps on the App Store, Epic cannot show either direct harm from the anti-steering provisions or that it "personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998). Epic ignores redressability entirely, and its arguments as to direct harm are makeweight.

Epic first argues that it has standing because the lawfulness of Apple's termination of Epic's developer account is in dispute on appeal. Opp. 22–23. But Epic has neither sought nor obtained a stay of the judgment authorizing that termination (Ex. A, at 179), which binds Epic until the appellate mandate issues. *See Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993). That is the same period for which Apple seeks to stay the injunction.

Epic next speculates, without any evidence, that the anti-steering provisions might affect royalties paid by licensees of its *Unreal Engine* software. Opp. 23–24. Epic misled the district court into concluding that commission rates would affect licensee royalties, but Epic's own license agreement makes clear that royalties are based on gross sales, without regard to the amount of commission paid. Mot. 14 (citing Ex. K). Rather than coming clean here, Epic simply repeats the district court's erroneous conclusion. Opp. 28–29. Epic's alternative theory that Apple's commission "lead[s] to fewer transactions" (Opp. 24) is contrary to the district court's finding that Epic failed to prove any reduction in output. *See* Ex. A, at 100.

Finally, Epic speculates, again without evidence, that five of its subsidiaries might experience a "diminution in app revenue from Apple's supracompetitive commissions." Opp. 25. Yet, Epic nowhere argues that *its own* revenue will be affected by this supposed diminution, and has no answer to the rule that "shareholders do not have standing to assert the claims of the corporation, unless they do so through derivative actions." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1037 (9th Cir. 2010). Epic chose not to join its subsidiaries as plaintiffs or provide any evidence about the ownership structure.

Epic's focus on licensees and subsidiaries confirms the absence of *direct* injury to Epic, and therefore the lack of antitrust standing—as Apple has consistently argued. *See* D.C. Dkt. 779-1, COL ¶¶ 183–86, 653–60. The Second Circuit recently

reached the same conclusion, holding that merchants who do not accept American Express cards lack antitrust standing to challenge anti-steering provisions under the antitrust laws *or* the UCL. *See In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 20-1766, 2021 WL 5441263 (2d Cir. Nov. 22, 2021). That presents yet another substantial issue for appeal.

3. The UCL Injunction Is Inequitable

Irreparable harm is a necessary prerequisite to the issuance of an injunction, yet the district court *never* found that Apple's anti-steering provisions caused any harm *to Epic*. Epic's argument that these provisions may raise developer costs (Opp. 26) is insufficient because Epic did not prove any increase in *its* costs caused by the anti-steering provisions—and it could have sought monetary relief in any event. There is no irreparable harm here.

In the district court, Epic never directly challenged the anti-steering provisions (indeed, any such challenge was foreclosed by its own proposed market definition), and never sought to enjoin them. Contrary to Epic's suggestion, this is not a case in which the plaintiff "proposed an injunction that the district court thought too narrow" (*Kirola v. City & Cty. of S.F.*, 860 F.3d 1164, 1176 (9th Cir. 2017))—Epic's proposed injunctions were exceedingly broad, but the district court entered an *entirely different* injunction that Epic neither requested nor proved its entitlement to. No authority cited by Epic (or the district court) supports this approach.

Epic notes that courts *may* sometimes enter an injunction that extends beyond the individual plaintiff. Opp. 27–28. Epic's principal authorities both involved challenges to government policies and made clear that relief ordinarily should be limited to the named plaintiff. *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996). Because Epic opted out of a developer class action and "went forward on its own" (Ex. A, at 23), the injunction is overbroad as a matter of law and equity.

B. Apple Would Suffer Irreparable Injury Absent A Stay

The declaration of Trystan Kosmynka, Apple's Senior Director of App Review, details the numerous harms that precipitous implementation of the injunction would cause Apple as well as iOS users and developers. Ex. L. Epic has offered no contrary evidence. Instead, it rehashes the argument that these concerns are "pretext[ual]" because Apple allows external payment solutions for purchases of physical goods and services, as distinguished from the digital content at issue here. *See* Opp. 8–15. Epic's false analogy between digital content and physical goods and services did not carry the day at trial on the merits (where Epic unsuccessfully made the same arguments against the IAP requirement, Ex. A, at 149–50), and at this stage it does not rebut the *fact* of irreparable injury from implementation of the injunction (which would impair Apple's ability to enforce that requirement).

First, Mr. Kosmynka's testimony establishes that the injunction will "lower user confidence in . . . digital content purchases," harming both Apple and developers because "users will be less inclined to make purchases." Ex. L ¶ 16. Epic responds that "Mr. Kosmynka does not explain why the supposed decline in user confidence has not afflicted the sales of physical goods and services." Opp. 13. Not so: Mr. Kosmynka identifies several features that Apple offers *only for digital content*, such as "completion or restoration of purchases," "family sharing," "content check," and "ask to buy." Ex. L ¶ 12. These features would be unavailable for purchases made on developer web sites and accessed through external links within apps, making consumers less likely to transact on the App Store and making the platform less valuable for all participants. *See Amex*, 138 S. Ct. at 2289 (noting that anti-steering provisions stem "negative externalities" that can "endanger[] the viability of the entire … network").

Epic obscures the fact that while purchases of digital content *must* use IAP, purchases of physical goods or services *cannot* use IAP. That is because "[w]hen users make purchases of *digital content* in the App Store using IAP, Apple is uniquely positioned to verify delivery of the content and to provide customer support for the transaction. Conversely, Guideline 3.1.1 *does not apply to transactions involving delivery of physical goods and services*, in part because Apple has no ability to verify delivery and troubleshoot problems with such purchases." Ex. L

¶ 13 (emphases added). The fact that Apple tolerates additional risks for purchases over which it has no control does not mean that Apple—or App Store participants—should have to bear such risks for digital content purchases, which it can control.

Second, Epic objects that "[s]peculative and unsubstantiated statements like Mr. Kosmynka's cannot support irreparable harm." Opp. 14. But Epic does not identify a single specific statement that is either "speculative" or "unsubstantiated." Mr. Kosmynka is the head of App Review and has personal knowledge of every fact set forth in his declaration. As Epic does not dispute, Mr. Kosmynka's declaration provides more evidence on anti-steering than all the testimony cited by the district court combined. *See* Mot. 22. He provides concrete examples of the harms that *will* befall users, developers, and the App Store itself if the injunction goes into effect. Ex. L ¶¶ 10, 12, 13, 14, 15, 16, 17, 18.

Epic suggests that Apple could ameliorate some of these harms by "test[ing]" and "review[ing]" links, and "removing rogue apps." Opp. 11–12; *see also* Ex. B, at 3. Yet such measures would require Apple (at minimum) to "develop new App Review processes" and "write and enforce new Guidelines." Opp. 12 (quoting Mot. 21). And Epic has no evidence that such efforts would be as effective as the current regime; nor does it dispute that increased transaction friction would lead to further disruption to both sides of the platform. *See* Mot. 21.

Third, Epic asserts that Mr. Kosmynka's testimony regarding technical and engineering changes "lacks any factual basis in the record." Opp. 14. But Mr. Kosmynka's declaration is evidence that *itself* provides the factual support for Apple's motion. *See FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009). He explains that "substantial engineering" will be required to accommodate the impact of the injunction on the "layers of protection" that IAP offers, including parental controls as well as purchase authorization, completion, and restoration. Ex. L ¶ 18. His testimony that the injunction would require additional such changes, based in part on Apple's past experience, stands unrebutted.

Finally, Epic suggests that "Apple will not receive a commission" on "transactions that happen *outside* the app, . . . on which Apple has *never* charged a commission." Opp. 8; *see also id.* at 10 n.2. That is not correct. Apple has not previously charged a commission on purchases of digital content via buttons and links because such purchases have not been permitted. If the injunction were to go into effect, Apple could charge a commission on purchases made through such mechanisms. *See* Ex. A, at 67 ("Under all [e-commerce] models, Apple would be entitled to a commission or licensing fee, even if IAP was optional"); *see also id.* at 150 & 155 n.621. Apple would have to create a system and process for doing so; but because Apple could not recoup those expenditures (of time and resources) from Epic even after prevailing on appeal, the injunction would impose irreparable injury.

Sampson v. Murray, 415 U.S. 61, 90 (1974). Moreover, an alternative commission structure could have indirect network effects on both sides of the App Store platform.

C. A Stay Would Not Harm Epic

Since Epic never sought to enjoin the anti-steering provisions, its suggestion that it would be harmed by a stay of the district court's *sua sponte* injunction is frivolous. Despite Epic's contention otherwise (Opp. 28), nowhere did the district court find that a stay pending appeal would cause any harm to Epic. *See* Ex. B, at 3. Indeed, because Epic has no apps on the App Store, it *cannot* be harmed by a stay.

D. A Stay Is In The Public Interest

Apple has *already* complied with half of the injunction—and settled with a class comprising 99% of U.S. developers of paid apps—by deleting the provision in Guideline 3.1.3 that precluded developers from engaging in targeted out-of-app communications with customers. *See* Ex. H. The expert testimony on which Epic relies (*see* Opp. 18–19) addressed only this provision.

In contrast, immediate implementation of the *other* half of the injunction—which requires Apple to delete the prohibition against buttons, external links, and other calls to action in Guideline 3.1.1—would harm millions of participants on both sides of the App Store platform. The proposed amicus brief by a few developers of subscription apps is not to the contrary, since subscriptions are subject to a different anti-steering provision that is unaffected by the injunction. *See* Ex. A, at 32 n.194.

II. An Administrative Stay Is Warranted

Given the injunction's effective date of December 9, Apple seeks immediate entry of an administrative stay that would expire 30 days after the Court's ruling on the stay motion. The anti-steering provisions have been in place more than a decade (Opp. 19 n.4), and Epic has no legitimate objection to their continued implementation. *See id.* at 30. In the absence of a stay, by contrast, the App Store will have to be reconfigured—to the detriment of consumers, developers, and Apple itself.

CONCLUSION

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

Dated: November 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Court Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 2799 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B).

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

Dated: November 30, 2021

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Reply in Support of Motion For Administrative Stay and to Stay Injunction Pending Appeal** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 30, 2021.

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

Dated: November 30, 2021

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

Exhibit O

01:22:54 **A.** That is roughly correct, yes.
01:22:55 **Q.** While a quarter to a third of Down Dog's total revenue
01:23:00 comes from in-app purchases on iOS devices, right?
01:23:03 **A.** Yes, it does.
01:23:04 **Q.** Okay.
01:23:04 And in 2018, Down Dog earned between about half a million
01:23:12 and $1 million from users who use only the iOS app, right?
01:23:18 **A.** That sounds right.
01:23:19 **Q.** Okay. And that number increased in 2019, right?
01:23:22 **A.** Yes.
01:23:23 **Q.** It grew to somewhere between 2 and 3 million?
01:23:27 **A.** That sounds correct.
01:23:28 **Q.** And in 2020, Down Dog earned $10 million from users who
01:23:34 practiced only on the iOS app, right?
01:23:37 **A.** That's roughly correct, yes.
01:23:43 **Q.** Now you talked in your direct testimony a little bit about
01:23:46 refunds.
01:23:47 Do you recall that testimony?
01:23:48 **A.** Yes, I do.
01:23:50 **Q.** So you also discussed how Down Dog charges a higher price
01:23:54 in its iOS app than it does on its website, right?
01:23:58 **A.** That's correct.
01:23:59 **Q.** So, for example, you offer a monthly subscription through
01:24:01 the iOS app for 9.99 and a monthly subscription on the
01:24:07 website for 7.99.

01:24:09 **A.** Correct.

01:24:12 **Q.** Thank you.

01:24:12 And Apple has no restrictions on promotions that you offer
01:24:20 to your users outside of the App Store, correct?

01:24:24 **A.** Except for the fact that we cannot publicize those from
01:24:30 within the app, correct.

01:24:31 **Q.** But Apple doesn't tell you what sales price -- what sale
01:24:34 price you can charge on your website, for example?

01:24:36 **A.** Correct.

01:24:37 **Q.** And you, the developer, decide how to set your prices,
01:24:40 right?

01:24:41 **A.** Yes, we do.

01:24:42 **Q.** Apple doesn't tell you what price to set on your website
01:24:45 whether sale or not?

01:24:46 **A.** Correct.

01:24:54 **Q.** So we also talked about how Apple's commission decreases
01:24:59 from 30 percent to 15 percent in years two and subsequent,
01:25:04 right?

01:25:05 **A.** Correct.

01:25:05 **Q.** Do you make any changes to the prices that you charged to
01:25:08 consumers in those subsequent years based on Apple's price
01:25:12 decreases?

01:25:13 **A.** No. Once a user subscribes, we never changed the price on
01:25:17 them.

01:25:18 **Q.** Okay.

Exhibit P

Did -- is this a discussion of what ultimately happened on mobile, where the direct payment option dropped the price of V-Bucks compared to what it used -- what it was before? 03:12:53

A. No. This is proposing charging -- or providing 18 percent more V-Bucks if someone used Epic payment services versus a lower price.

Q. Got it. So here the price would be the same, but you would get 18 percent more V-Bucks for 03:13:13 that same dollar value; is that right?

A. Correct.

Q. Okay. And that's what was being considered here. And you respond and say, "We did agree to keep identical pricing across all 03:13:26

platforms with Microsoft, Sony, and Nintendo." 03:13:31

And then -- but you say, "That being said, all they care about is that we are not using arbitrage to direct sales away from their platform." And then you say, "They are entirely 03:13:41 self-serving; so making mobile less attractive would likely work for them."

Do you know what you meant by that?

A. Yeah. I was giving Ed my interpretation of what Sony, Microsoft, and Nintendo would -- 03:13:54 would say to us if we decided to implement this strategy.

Q. And you're saying, though, initially that they would be okay with something like this, correct? 03:14:06

A. That's my supposition here. I'm not sure if that actually would have been correct.

Q. Well, I mean, he then -- he then says, "I think the idea is for the exact same purchase price a mobile player would get 18 percent more V-Bucks 03:14:18 if they chose our payment system versus the Apple or Google payment system." And to which you respond, "Making it more advantageous to buy on mobile than on console is not an option."

Do you see that? 03:14:32