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14
15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION
18

19 EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

20 v.

21 APPLE INC.,

22 Defendant,
23 Counterclaimant.
24

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

**APPLE INC.’S REPLY IN SUPPORT OF
MOTION FOR STAY OF INJUNCTION
PENDING APPEAL**

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INTRODUCTION

1
2 Apple has already complied with one-half of the Court’s injunction by striking the Guidelines
3 restricting targeted out-of-app communications. Apple has moved to stay the other half of the
4 injunction, which precludes Apple from enforcing the Guidelines’ prohibition on in-app “buttons,
5 external links, or other calls to action,” because immediate implementation of that aspect of the
6 injunction would upset the integrity of the iOS ecosystem. Epic has endorsed a broad interpretation of
7 the injunction (so broad, indeed, that its own hotfix would be permitted under the injunction), yet it
8 objects to Apple’s request for a stay during the resolution of both parties’ appeals. Epic’s arguments
9 against staying the injunction, however, are unavailing.

10 *First*, Apple would be irreparably harmed by immediate implementation of the injunction with
11 respect to in-app messaging and, especially, mechanisms. Restrictions on linking out are inextricably
12 tied to Apple’s requirement that developers use IAP for purchases of digital content—a requirement
13 this Court considered in detail and *upheld* against Epic’s challenge. Eliminating these restrictions
14 entirely would undermine the IAP requirement, force Apple to make its intellectual property available
15 without compensation, and lessen the security and privacy afforded consumers. Epic’s half-hearted
16 attempt to dispute that Apple would suffer these harms is contradicted by the evidentiary record.

17 *Second*, the injunction is not likely to survive appellate review. Epic Games, Inc.—the sole
18 plaintiff in this litigation—lacks standing to secure or enforce an injunction because its developer
19 program account has been terminated and it has no apps on the App Store. Epic’s termination was a
20 direct result of its own misconduct in triggering the hotfix; Epic’s CEO and corporate representative
21 “acknowledge[d]” at trial “that Apple has the right to terminate Epic for any reason or no reason,” and
22 this Court confirmed that right in its declaratory judgment. Epic also failed to prove that the anti-
23 steering provisions harm competition in any relevant market or that they constitute either actual or
24 incipient violations of the antitrust laws. Moreover, Epic failed to prove any harm to itself—or, for
25 that matter, to any of its subsidiaries or their licensees—from the anti-steering provisions and thus
26 would not be harmed by a stay pending appeal.

27 Apple respectfully requests that the Court stay the injunction pending final resolution of the
28 appellate proceedings.

DISCUSSION

1
2 The injunction prohibits Apple from enforcing two provisions of the App Store Review
3 Guidelines: A sentence in Guideline 3.1.1 regarding in-app mechanisms and messaging, and a sentence
4 in Guideline 3.1.3 regarding targeted out-of-app communications. Apple has *already complied* with
5 the second part of the injunction by deleting the provision and allowing developers to communicate
6 with consumers outside the app. Reply Decl. of Mark A. Perry Ex. A. By this motion, Apple seeks a
7 stay of the first part of the injunction pending appeal, to allow it to develop and implement a global
8 solution to increased in-app communications without upsetting the integrity of the iOS ecosystem.
9 Because all of the traditional factors are satisfied, the requested stay should be granted.

A. Apple Would Be Irreparably Harmed In The Absence Of A Stay

10
11 As Epic does not dispute, the portion of the injunction striking the Guidelines' prohibition on
12 "buttons, external links, or other calls to action" has created confusion among developers regarding
13 what Apple can and cannot do to run its business and protect consumers. *See* Mot. at 1. The injunction
14 prohibits Apple from enforcing this provision, but does not address what Apple may do in its stead.
15 Epic contends the injunction only "removes an artificial barrier that Apple had placed on consumers'
16 ability to become aware of and choose [an alternative to IAP]," yet under Epic's construction, Apple
17 would be required to permit developers to include links to external sites and even to install competing
18 payment mechanisms—just as Epic did with the hotfix. Opp'n at 7–8. Apple would be harmed by
19 precipitous implementation of the injunction, however construed, and Epic's broad interpretation in
20 particular would visit irreparable harm on Apple and its users.

21 Epic does not dispute that Apple is entitled to collect a commission from developers for use of
22 its platform, or that "IAP is the method" Apple has chosen to "collect[] its licensing fee from developers
23 for the use of Apple's intellectual property" and that allowing other payment mechanisms would make
24 it "more difficult for Apple to collect that commission." Op. at 150. Requiring Apple to allow other
25 payment solutions in apps—or allowing links or other mechanisms directing consumers to alternatives
26 outside the app—would undermine the "promise of a frictionless transaction," which in turn "endangers
27 the viability of the entire [platform's] network." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289
28 (2018). In-app messaging regarding payment alternatives raise many of the same concerns, particularly

1 if Apple cannot constrain their placement, format, or content. Yet, if Apple imposes such constraints,
2 it will face complaints from developers and possibly a contempt action from Epic. In light of this
3 uncertainty, Apple faces harm regardless of how the injunction is construed and implemented.
4 Kosmynka Decl. ¶ 10.

5 The harm is not, as Epic contends, that “IAP will have to compete on price and/or quality.”
6 Opp’n at 8. This is the same argument Epic repeatedly made at trial, Dkt. 777-3 (Proposed Conclusions
7 of Law) ¶ 286—which the Court rejected, *see* Op. at 150. IAP is not a separate product, *id.* at 155,
8 and, as Epic appears to acknowledge, Apple already competes with other platforms for purchases of
9 digital content. Opp’n at 11; *see also* Op. at 71–72. Indeed, Apple itself has facilitated this competition
10 by adopting its Multiplatform Rule and (unlike some consoles) allowing cross-wallet play. *See* Op.
11 13, 84, 123 n.571. The actual issue, as the Court found, is that “[t]he requirement of usage of IAP
12 accomplishes [Apple’s goal of collecting compensation for licensing its intellectual property] in the
13 easiest and most direct manner.” Op. at 150. Thus, the injunction threatens the integrity of Apple’s
14 monetization model itself, which the Court upheld. *See id.*

15 Epic attempts to miscast Apple’s position as equating “consumers’ increased awareness” with
16 “irreparable harm.” Opp’n at 11; *see also id.* at 1, 17 (suggesting the injunction will “simply provide[]
17 consumers increased information” by enabling developers “to offer information and a choice”). But
18 Apple does not seek to stay the injunction insofar as it allows developers to “communicat[e] with
19 customers through points of contact obtained voluntarily from customers through account registration
20 within the app.” Dkt. 813. To the contrary, Apple has *already* stricken the Guideline provision
21 restricting targeted *out-of-app* communications. Perry Reply Decl. Ex. A. This is directly responsive
22 to the Court’s concern with the information available to consumers. *See* Op. at 166. The other
23 Guideline provision at issue, which speaks to *in-app* “buttons, [external links,] or other calls to action,”
24 Mot. at 7, raises significantly more difficult problems as Apple attempts to ensure that “other parts of
25 the Apple ecosystem . . . will not be significantly impacted.” Op. at 166. “Links” and “buttons,” in
26 particular, go far beyond *information* to include payment *mechanisms*. Epic’s opposition conflates
27 those two concepts, even though the Court’s opinion consistently speaks of information rather than
28 mechanisms. *See, e.g.,* Op. at 2–3, 50–51, 93, 117–19, 163–67, 179.

1 Epic also ignores the record in arguing that the injunction will not impair users’ security or
2 privacy. *See* Opp’n at 9. The Court found that “if Apple could no longer require developers to use
3 IAP for digital transactions, Apple’s competitive advantage on security issues, in the broad sense,
4 would be undermined.” Op. at 150 (citation omitted); *see also, e.g., id.* at 65 (“Apple’s IAP, as used
5 here, is a secured system which tracks and verifies digital purchases, then determines and collects the
6 appropriate commission on those transactions.”). Epic unwittingly proves the point by touting the
7 “innovat[ions]” other developers have already begun to announce, Opp’n at 24, while ignoring the
8 serious risks that those alternatives entail. *See* Mot. at 7–8 & Perry Decl. Ex. H. Reportedly, multiple
9 developers are creating systems with unknown protections, controls, and privacy measures (if any).
10 Perry Reply Decl. Ex. F.

11 Even though Epic offers *only* digital products and services (such as V-Bucks), it notes that
12 Apple already permits alternative payment options for apps that deliver physical goods and services.
13 Opp’n at 10. But the security and privacy risks associated with external links and alternative payment
14 mechanisms exist in connection with apps that deliver physical goods and services. The difference is
15 that for digital goods, Apple has the ability to facilitate a secure transaction, because unlike physical
16 goods delivered to a user’s door, Apple can ensure the delivery of digital goods. Kosmyinka Decl.
17 ¶¶ 13–15; *see also* Perry Reply Decl. Ex. C at 958:6–960:9 (Fisher). The injunction thus could
18 transform one of the most secure kinds of transactions on iOS into one of the least secure. Epic does
19 not contest this, nor does it rebut Mr. Kosmyinka’s declaration; instead, Epic asks the Court to disregard
20 that evidence. But Apple, as the stay applicant, is entitled to prove the harm that it would suffer from
21 the injunction—particularly because Epic’s proposed injunction did not even address Apple’s so-called
22 anti-steering provisions. *See* Dkt. 276-1. Apple therefore had no reason to submit the substance of
23 Mr. Kosmyinka’s declaration at trial, and Epic’s suggestion to the contrary is unfounded.¹

24 Epic also calls Apple’s security justification “pretextual.” Opp’n at 6. But while the Court said

25
26 ¹ In the sole case Epic cites, the defendants pursued a stay based on a waived argument that the
27 plaintiff had failed to exhaust state-law remedies. *O’Donnell v. Harris County*, 260 F. Supp. 3d
28 810, 815 (S.D. Tex. 2017). That says nothing about a party’s ability to identify irreparable harm
through a declaration in seeking a motion to stay, particularly where, as here, the relevant record
“was less fulsome.” Op. at 163; *see also, e.g., Wisc. Educ. Ass’n Council v. Walker*, No. 11-CV-
428-WMC, 2012 WL 13069917, at *4 (W.D. Wis. Apr. 27, 2012) (crediting declarations submitted
with motion to stay injunction pending appeal).

1 an increase of information in general might not impair Apple’s security, it made no findings about the
2 specific security and privacy threats imposed by unrestricted linking out, in-app buttons, or other
3 mechanisms. Nor did it have occasion to do so. Epic’s evidence was “less fulsome” on anti-steering
4 generally, *Op.* at 163, and non-existent on mechanisms as distinguished from information. Nor can
5 Epic dismiss the security and privacy threats as harm to developers and users, not Apple. *See* *Opp’n*
6 at 8. Just as Epic sought to do throughout trial, this argument ignores the nature of a two-sided
7 transaction platform. The approach advocated by Epic and others will disrupt “the optimal balance”
8 between the two sides of the App Store platform. *Amex*, 138 S. Ct. at 2281. This “risk[s] a feedback
9 loop of declining demand.” *Id.* Thus, making the platform less attractive to users or developers *is* an
10 injury to Apple.

11 Nothing in Apple’s “post-decision statements” suggest otherwise. *Opp’n* at 7. That Apple was
12 “pleased with the Court’s ruling,” *id.*, is hardly surprising given that Epic’s assault on the App Store’s
13 business model failed and the Court ruled against Epic on nine of the ten claims it asserted. *Op.* at 1.
14 Indeed, Apple’s statements were the natural corollary of Mr. Sweeney’s admission that the Court’s
15 “ruling isn’t a win.” *Perry Reply Decl. Ex. B.* Whereas Apple has relied on Mr. Sweeney’s very public
16 statements on Twitter and elsewhere, Epic quotes an unauthorized report of one confidential statement
17 by Mr. Cook, *Byars Decl. Ex. B*; but even assuming the statement was accurately reported, it correctly
18 summarized the Court’s injunction, which requires Apple to strike two sentences from Guidelines 3.1.1
19 and 3.1.3. *See* *Dkt. 813*. Nor do Apple’s comments provide any basis to “heavily discount” Apple’s
20 arguments, *Opp’n* at 7, as none of them had anything to do with the challenges Apple faces in replacing
21 the sentence in Guideline 3.1.1 with a framework that comports with the Court’s opinion, provides
22 clarity for developers, maintains Apple’s business model, and protects iOS users. *See* *Kosmynka Decl.*
23 ¶¶ 15-18. Apple would suffer irreparable harm from precipitous implementation of *that* aspect of the
24 injunction.

25 At bottom, the Court’s injunction was not intended to have “any impact on the integrity of the
26 ecosystem.” *Op.* at 164. But Epic does not, because it cannot, dispute that immediate implementation
27 of the injunction’s first clause would do just that, especially if it is interpreted as broadly as Epic has
28 proposed. Apple has therefore made a more-than-sufficient showing that it will be irreparably injured

1 absent a stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

2 **B. Apple Has A Substantial Case For Relief On The Merits**

3 This Court need not conclude that Apple will win its cross-appeal to enter the requested stay.
4 Rather, the question at this stage is whether Apple has a substantial case for relief from the Ninth
5 Circuit, and that question can only be answered in the affirmative. If anything, Epic’s response to the
6 stay motion confirms this point.

7 **1. There Is No Legal Or Factual Basis For UCL Liability**

8 Epic does not dispute that the Court did not “identify a product market” before assessing the
9 competitive effects of Apple’s anti-steering provisions under the UCL; nor does Epic dispute that the
10 identification of a product market is a threshold requirement in *any* assessment of competitive effects
11 (including one under the UCL). *Facebook, Inc. v. Brandtotal, Ltd.*, No. 20-CV-7182, 2021 WL
12 2354751, at *15 (N.D. Cal. June 9, 2021) (dismissing UCL claim for failure to allege a cognizable
13 market). While the UCL ruling is premised on the Court’s conclusion that the anti-steering provisions
14 are “anticompetitive,” Op. at 163, “[w]ithout a definition of the market there is no way to measure the
15 defendant’s ability to lessen or destroy competition,” *Amex*, 138 S. Ct. at 2285 (alterations and
16 quotation marks omitted). Given that there is *no evidence* of competitive harm in the sole market the
17 Court did identify (for mobile gaming apps), Apple will argue that the UCL ruling cannot stand.

18 Epic contends that it is sufficient that the Court observed no “principled reason” to limit the
19 injunctive relief to mobile gaming apps. Opp’n at 16 (citing Op. at 167). Elsewhere in the opinion,
20 however, the Court explained in detail the differing competitive conditions that justified separating
21 mobile gaming app transactions from all other app transactions. *See* Op. at 61–64, 122–24. And the
22 Court expressly excluded subscription apps from the relevant market. *See id.* at 123 n.571; *see also id.*
23 at 61 n.310. Yet the *only* evidence of competitive effects on app developers came from representatives
24 of companies offering subscription apps (Down Dog and Match Group). *See* Perry Reply Decl. Ex. C
25 at 360:7–13 (Simon); Dkt. 667-1 at 24:17–26:5, 28:9–22 (Ong). If Apple’s anti-steering provisions
26 implicated a different product market than the one the Court adopted for all other purposes, it was
27 incumbent on Epic to *prove* such a market. *See Thurman Indus., Inc. v. Pay ‘N Pak Stores, Inc.*, 875
28 F.2d 1369, 1373 (9th Cir. 1989). Indeed, the Court *rejected* Epic’s alleged “iOS In-App Payment

1 Processing Market,” which was the *only* market that Epic suggested was relevant to its anti-steering
2 contentions. *See* Dkt. 1 ¶¶ 10, 130–32, 227–28, 263–64; *see also* Dkt. 777-3 (Proposed Findings of
3 Fact) ¶¶ 368, 419–22.

4 Epic’s attempt to disavow its *own* allegation that game developers would be affirmatively
5 harmed if users “were directed to” purchase mechanisms outside of the app is disingenuous. *See* Opp’n
6 at 17 (citing Dkt. 1 ¶ 116). The point is not whether some game developers might prefer to include
7 links to external payment solutions, but rather that the competitive considerations for requiring Apple
8 to permit such links are different from those that apply to non-gaming apps. *See ProMedica Health*
9 *Sys., Inc. v. FTC*, 749 F.3d 559, 565-66 (6th Cir. 2014). By Epic’s own reckoning, whether Apple’s
10 anti-steering provisions are “unfair” vis-à-vis game transactions raises issues that the Court did not
11 analyze. *See, e.g., Cal. Dental v. FTC*, 224 F.3d 942, 951–52 (9th Cir. 2000) (“[O]ur rule-of-reason
12 case law usually requires the antitrust plaintiff to show some relevant data [of anticompetitive effects]
13 from the precise market at issue in the litigation.”).

14 As to the purported evidence regarding the anti-steering provisions more generally, Epic insists
15 that the “Court’s factual findings were supported by substantial evidence in the record, including
16 quantitative evidence.” Opp’n at 18. But the representative from Down Dog testified only as to his
17 anecdotal recollection of statistics from an indeterminate timeframe, and no witness offered any data
18 regarding the effects of Apple’s anti-steering provisions—notwithstanding that the Court “warned the
19 parties in advance that actual data was an important consideration.” Op. at 50. Epic further
20 acknowledges that its lead economist, Dr. Evans, did not separately analyze the competitive effects of
21 the anti-steering provisions, *see* Perry Reply Decl. Ex. C at 1552:3–14, 1574:1–4, 1716:15–20 (Evans),
22 but attempts to excuse that evidentiary gap on the ground that “no rule of law requires a party to
23 independently analyze from an economic perspective each of the defendant’s anticompetitive acts,”
24 Opp’n at 18 (alteration and quotation marks omitted). As the Court recognized in the context of this
25 case, however, “[e]valuating competitive effects . . . would require isolating the effects of a particular
26 restriction.” Op. at 144. Epic does not explain how two specific provisions in Apple’s Guidelines can
27 be deemed “unfair” without any independent economic analysis of *those* provisions—as distinguished
28 from all other provisions challenged by Epic and actually analyzed by the parties and their experts.

1 Epic blithely asserts that the Supreme Court did not “hold that Amex’s anti-steering provisions
2 were procompetitive.” Opp’n at 19. It does not even acknowledge the Court’s statement that “there is
3 *nothing inherently anticompetitive* about Amex’s antisteering provisions,” because those provisions
4 “actually stem negative externalities in the credit-card market and promote interbrand competition.”
5 *Amex*, 138 S. Ct. at 2289. Indeed, anti-steering and anti-circumvention policies are commonplace
6 among digital marketplaces, *see* DX-3120.016–.018, .025–.030—“prior information,” in the words of
7 Epic’s economic expert, “that these practices are efficient,” Perry Reply Decl. Ex. C at 2414:20–23
8 (Evans). As for the purported “enforced silence” regarding payment alternatives, Opp’n at 20
9 (quotation marks omitted), Epic does not respond at all to the undisputed evidence showing that
10 although earlier versions of the Guidelines were less clear, Apple has long permitted developers to
11 contact users, including regarding alternative payment options, *see, e.g.*, Perry Reply Decl. Ex. C at
12 2824:15–2828:18 (Schiller). Apple’s recent amendment to the Guidelines makes explicit the ability of
13 developers to engage in targeted out-of-app communications. At the same time, however, Epic cannot
14 explain how compelling Apple to allow in-app messaging, which would transform the App Store into
15 an advertising platform for its competitors, is consistent with *Amex*. Epic cites no case in which a firm
16 was required to permit use of *its* facilities to advertise competitors’ offerings.

17 Finally, Epic argues that the balancing test under the UCL can apply here, essentially making
18 all inquiries into the competitive effects of the anti-steering provisions irrelevant. Opp’n at 15. The
19 Ninth Circuit has been clear that it “agree[s] with the Fourth District [Court of Appeals in California]
20 that *Cel-Tech* effectively rejects the balancing approach.” *Lozano v. AT&T Wireless Servs., Inc.*, 504
21 F.3d 718, 736 (9th Cir. 2007). The Ninth Circuit did go on to opine that for class certification purposes,
22 the district court did not err in considering the predominance of common questions under the balancing
23 test, but did not hold that the balancing test is, standing on its own, a viable test for unfairness under
24 the UCL. *See id.* Even applying a free-floating balancing test, however, would not alter the outcome
25 here because the Court expressly found that IAP, which is the very feature the anti-steering provisions
26 are intended to protect, has procompetitive benefits for consumers. *See Op.* at 150.

27 2. Epic Lacks Standing

28 Epic argues that notwithstanding the fact that it no longer has an active developer account and

1 it introduced *no* evidence of harm to it *or its subsidiaries* arising from Apple’s anti-steering provisions
2 at trial, it nonetheless has Article III standing. Opp’n at 12–15. Epic’s argument is contrary to
3 precedent, common sense, and the evidentiary record (or lack thereof).

4 *First*, Epic argues that it has standing because its *subsidiaries* still have active developer
5 accounts and apps on the App Store, and thus Epic, as their owner, will suffer indirect injury. Opp’n
6 at 13. That contention is flatly inconsistent with settled law—a “plaintiff generally must assert his own
7 legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third
8 parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Consequently, “shareholders do not have standing
9 to assert the claims of the corporation, unless they do so through derivative actions.” *Coto Settlement*
10 *v. Eisenberg*, 593 F.3d 1031, 1037 (9th Cir. 2012); *see also Motorola Mobility LLC v. AU Optronics*
11 *Corp.*, 775 F.3d 816, 820 (7th Cir. 2015) (“American law does not collapse parents and subsidiaries”
12 and “derivative injury rarely gives rise to a claim under antitrust law, for example by an owner or
13 employee of, or an investor in, a company that was the target of, and was injured by, an antitrust
14 violation”). In the case Epic cites to support standing, the court expressly did *not* reach the issue of
15 whether a foreign parent corporation has standing to assert the interests of its shareholders. *Franchise*
16 *Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 338 (1990) (“We need not decide this dispute
17 about respondents’ stockholder standing . . .”).

18 There is one plaintiff in this case: Epic Games, Inc. It elected to pursue this litigation in its
19 name only, and Apple has consistently taken the position that it cannot recover on behalf of (or
20 otherwise rely on) its subsidiaries. *See* Dkt 779-1 ¶¶ 546–52, 718–722. Epic, as the master of its
21 complaint, had ample opportunity to join subsidiary or affiliate companies as plaintiffs. Epic chose not
22 to do so, and benefitted from that choice by (for example) not subjecting those companies to the
23 discovery obligations imposed on parties to litigation. Epic may not now back its way into sweeping
24 equitable relief by asserting some indirect financial interest in apps developed by legally distinct
25 entities. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (“A basic tenet of American
26 corporate law is that the corporation and its shareholders are distinct entities.”).

27 Notably, Epic does not point to any evidence in the record about purported injury to its
28 *subsidiaries* from Apple’s anti-steering provisions. *See* Op. at 6 n.28. Epic’s witnesses mentioned

1 some of those subsidiaries (and their apps) at trial, but Epic made no effort to show (quantitatively or
2 even anecdotally) that they were affected in any way by the anti-steering provisions. Instead, it
3 attempts to introduce new evidence regarding its subsidiaries' apps that offer in-app purchases,
4 apparently attempting to prove standing *after* the close of evidence. See Opp'n at 13. Unlike the
5 declaration of Mr. Kosmynka—submitted by Apple to address one of the stay requirements that arose
6 only after trial, when the Court imposed an injunction that was not proposed by Epic—Epic has sought
7 to prove *a substantive element of its case* after the fact. Epic's own authorities foreclose this effort.
8 See *O'Donnell*, 260 F. Supp. 3d at 815 (cited at Opp'n at 10).

9 *Second*, Epic posits that licensees of *Unreal Engine* that pay royalties to Epic might be harmed
10 by the anti-steering provisions, thus giving Epic an interest in the injunction. Opp'n at 13. That is flat
11 wrong—as the Court correctly recognized: “Epic Games profits from *Unreal Engine* by charging fees
12 for paid content. *Separately*, Epic International charges a royalty on products that use any version of
13 the *Unreal Engine* (typically 5% of gross revenue).” Op. at 5 (emphasis added). Epic once again is
14 conflating *its* financial interests with those of its subsidiaries—Epic International is not a party to this
15 litigation. And in any event, Epic introduced no evidence that any *Unreal Engine* licensee was injured
16 in the past, or would be harmed in the future, by Apple's anti-steering provisions. There is no evidence
17 that Down Dog or Match Group, the only developers who testified on steering, use *Unreal Engine*.

18 *Third*, Epic argues that because it has appealed the Court's order regarding the lawfulness of
19 Apple's termination of Epic's developer account vests it with standing to continue to challenge the
20 anti-steering provisions. Not so. The Court granted Apple's request for declaratory judgment that
21 “Apple's termination of the DPLA and the related agreements between Epic Games and Apple was
22 valid, lawful, and enforceable.” Op. at 179. That is a final judgment, which Epic has not sought to
23 stay pending appeal. The mere prospect that Epic *might* obtain a different result on appeal does not
24 alter the preclusive effect of the Court's final judgment, see *Hawkins v. Risley*, 984 F.2d 321, 324 (9th
25 Cir. 1993), and does not vest Epic with standing *now* to seek equitable relief for an entirely different
26 claim. Moreover, the Court expressly found that “[t]his case does not involve retaliation,” and that
27 “Epic Games never showed why it had to breach its agreements to challenge the conduct litigated.”
28 Op. at 178. The issue of whether Apple's conduct is in violation of the antitrust laws is distinct from

1 the issue of whether Apple should be compelled to do business with an entity who has demonstrated a
2 willingness to deceive Apple about its app’s functionality.

3 Epic complains that, before the Court’s decision was rendered, Apple offered to allow *Fortnite*
4 to return to the App Store if Epic would play by the same rules as every other developer. Opp’n at 14.
5 But Epic spurned that offer, refusing to adhere to the Guidelines even under the supervision of this
6 Court. *See* Perry Reply Decl. Ex. D at 83:3–86:18. Epic also stipulated that Apple was entitled to
7 terminate its account for breach of contract, *see* Dkt. 473, a point confirmed by Mr. Sweeney at trial
8 upon direct questioning from the Court: “I acknowledge Apple would have the right to remove Epic
9 from the developer program for any reason or no reason.” Perry Reply Decl. Ex. C at 348:6–11
10 (Sweeney). And this Court entered a declaratory judgment confirming that Apple could terminate
11 Epic’s developer account. *See* Op. at 179. A key purpose of trials, and judgments, is to clarify the
12 parties’ respective rights and obligations. Apple has the right to terminate Epic’s account, and it has
13 exercised that right based on Epic’s own intentional misconduct. As a consequence, Epic has no
14 standing to benefit from or enforce the injunction. Both the “injury” and the “redressability” prongs
15 of Article III are unsatisfied here. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62 (1992).

16 *Finally*, Epic argues that because it paid commissions to Apple while *Fortnite* was on the App
17 Store, it suffered injury from the steering provisions. Opp’n at 14. As an initial matter, even if true,
18 this would not vest Epic with standing to receive prospective, injunctive relief. *See Hangarter v.*
19 *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (“In the context of injunctive
20 relief, the plaintiff must demonstrate a *real or immediate threat* of an irreparable injury.” (quotation
21 marks omitted) (emphasis in original)). And in any event, the fact that Epic was required to pay Apple
22 a commission does not establish standing—the Court found that “[b]ecause Apple has created an
23 ecosystem with interlocking rules and regulations, it is difficult to evaluate any specific restriction in
24 isolation or in a vacuum.” Op. at 118. Epic did not even attempt to prove that any portion of the
25 commissions it paid in the past were inflated by the steering provisions.

26 **3. The Equitable Relief Order Is Overbroad**

27 *Finally*, even if there were an adequate factual and legal basis for liability and standing under
28 the UCL, Apple has a substantial case on the merits that the injunctive relief ordered is overbroad.

1 *First*, even if *some* relief were appropriate with respect to Apple’s anti-steering provisions, the
2 Court made no findings regarding the prohibition of buttons and external links within an app (*i.e.*,
3 mechanisms as distinguished from information). As Epic does not dispute, the Court’s emphasis was
4 on the availability of *information* to users about alternative payment options. *See Op.* at 163–64.
5 Buttons and external links have nothing to do with providing users information, but instead are
6 *mechanisms* for accessing alternatives. Even if Apple were constrained in restricting in-app
7 *information*, nothing in the trial record or the Court’s opinion speaks to the Guidelines prohibition on
8 in-app mechanisms. On the contrary, the Court recognized the *procompetitive* effects of Apple’s policy
9 against external in-app purchasing options. *See id.* at 150.

10 *Second*, Epic urges that the Court “expressly found irreparable injury to Epic,” and then cites a
11 passage from the opinion that mentions neither irreparable injury nor Epic. Opp’n at 21 (citing Op. at
12 163). Epic does not dispute that irreparable injury to the plaintiff must be found before injunctive relief
13 may issue, and the only excerpts Epic cites to plainly do not contain such a finding. With respect to
14 the defense of unclean hands, Epic incorrectly claims that “the Court *did* consider this defense and
15 rejected it.” *Id.* Once again, though, Epic cites to a passage that says nothing about unclean hands
16 whatsoever, *see Op.* at 171, and there is no passage in the Court’s order addressing the defense. In
17 Epic’s view, because the Court (a) recognized Epic’s “clandestine tactics” and (b) ultimately granted
18 the injunction, it must necessarily have rejected Apple’s equitable defenses. Opp’n at 21. It cites no
19 precedent for this proposition except two cases holding that the application of the unclean hands
20 defense is within the trial court’s discretion. *See id.* at 21-22 (citing *Ticconi v. Blue Shield of Cal. Life*
21 *& Health Ins. Co.*, 160 Cal. App. 4th 528, 544-45 (2008); *Dickson, Carlson & Campillo v. Pole*, 83
22 Cal. App. 4th 436, 447 (2000)). Neither of those cases suggests that a court satisfies its responsibilities
23 under Rule 52(a)(1) by failing to address entirely a fully briefed and litigated defense to injunctive
24 relief. Notably, Epic does not dispute that both of the elements of unclean hands are satisfied here.

25 *Third*, the injunctive relief impermissibly extends to all developers. Epic opted out of the
26 pending class action suit brought on behalf of developers, instead making an affirmative election to
27 seek relief *only* for itself. *See Perry Reply Decl. Ex. C* at 338:3–6, 337:13–19 (Sweeney); *see also Op.*
28 at 23–24 (“Epic Games decided it would rush to court with its own plan to protect its self-avowed

1 interests” while it “ignored” the then-pending consumer and developer class actions). The Federal
2 Rules expressly provide for a mechanism—Rule 23(b)(2)—for plaintiffs seeking injunctive relief on
3 behalf of an entire class, but Epic elected not to seek class certification here. And while a plaintiff
4 may, in certain situations, receive relief that extends beyond the individual plaintiff, that is so only
5 where “*breadth is necessary to give prevailing parties the relief to which they are entitled.*” *Bresgal*
6 *v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis in original). Epic contends that a broad
7 injunction is necessary here because it could lead Apple to lower its commission, Opp’n at 14–15—
8 even though Epic made clear at the outset of the case that it was not “actually challeng[ing] specifically
9 the 30 percent,” Perry Reply Decl. Ex. D at 22:14–16. But if Epic were able to inform users that digital
10 content for *Fortnite* could be purchased elsewhere, any alleged harm from Apple’s anti-steering
11 provisions would be ameliorated as to Epic. The effects, if any, on *other* developers are irrelevant to
12 the appropriate scope of equitable relief in this single-plaintiff case, because an Epic-only injunction
13 would resolve any (unproven) injury suffered by Epic itself. Indeed, the developer class agreed to a
14 settlement that includes no changes to the Guidelines restrictions on in-app mechanisms and messaging.

15 C. A Stay Will Not Injure Epic

16 Epic’s only theory of harm is that its *subsidiary* will suffer financial losses in licensing *Unreal*
17 *Engine*. Opp’n at 23. Yet as noted above, Epic’s subsidiaries, including Epic International, are distinct
18 entities with distinct rights and distinct interests—and they are not parties to this litigation. *See supra*
19 *pp.* 9–10. Epic cannot rely on supposed injuries to third parties in opposing a stay. *See Nken v. Holder*,
20 556 U.S. 418, 435 (2009) (“[T]he traditional stay inquiry calls for assessing the harm to *the opposing*
21 *party.*”) (emphasis added). Moreover, Epic did not prove at trial any particular loss—to itself, to its
22 subsidiaries, or to any other developer—attributable to the anti-steering provisions themselves, and it
23 cites nothing more now. *See Op.* at 118. Epic’s claim to harm from a stay is purely speculative.

24 To distract from the absence of any harm to itself, Epic argues that the “injunction merely
25 requires Apple to comply with the law.” Opp’n at 23. That is irrelevant to whether “the stay will
26 substantially injure” Epic. *Lair*, 697 F.3d at 1203. Indeed, the only case Epic cites considered whether
27 to issue an injunction as part of a default judgment—not a motion to stay. *Deckers Outdoor Corp. v.*
28 *Ozwear Connection Pty Ltd.*, No. 14-CV-2307, 2014 WL 4679001, at *13 (C.D. Cal. Sept. 18, 2014).

1 As Apple explained above and in its motion, immediate implementation of the injunction, especially
2 as Epic construes it, would irreparably harm Apple. *See supra* pp. 2–6; Mot. at 7–10.

3 **D. A Stay Is In The Public Interest**

4 A stay will allow Apple to study the effects on the iOS ecosystem, including on both developers
5 and consumers, posed by various options while the company evaluates changes that address the Court’s
6 concerns with user access to information regarding alternative payment options. *See* Mot. at 18. Epic
7 calls this “[a]n empty promise of some change that may not occur for years.” Opp’n at 24. That is
8 incorrect. Apple has made actual, concrete commitments with actual, concrete timelines. For example,
9 Apple agreed as part of the *Cameron* settlement to allow targeted communications outside
10 apps. Stipulation of Settlement § 5.1.3 *Cameron*, No. 19-CV-3074-YGR (Aug. 26, 2021), Dkt. 396-1
11 Ex. A. And Apple *already has deleted* the enjoined clause from Guideline 3.1.3 and added a clarifying
12 provision that “[a]pps may request basic contact information” subject to certain conditions. Perry
13 Reply Decl. Ex. A. Apple also has agreed, as part of a settlement with the Japanese Fair Trade
14 Commission, to allow certain links in reader apps in early 2022. Perry Reply Decl. Ex. E. These are
15 meaningful steps to address the Court’s concerns.

16 Apple is pursuing a global solution to best serve developers and users across the world. *See*
17 Mot. at 18; *see also* Kosmyinka Decl. ¶¶ 10 & 17. This is far from a “vague promise” that “every
18 antitrust defendant” could use to “avoid an injunction.” Opp’n at 24. Apple’s actions speak for
19 themselves: The *actual* steps Apple has *already* taken—including complying with one-half of the
20 Court’s injunction—show that the company is working in good faith to improve consumers’ access to
21 information in a way that will preserve the integrity of the ecosystem, including Apple’s monetization
22 structure and the security and privacy benefits that differentiate Apple’s platform from its competitors.
23 *See* Op. 104. At the same time, the App Store operates globally and Apple must balance the competing
24 regulatory and other demands made in multiple jurisdictions.

25 Moreover, Epic offers no evidence or authority to displace the obvious fact that “a stay would
26 avoid the parties and the Court wasting taxpayer resources on a litigation which might be mooted on
27 appeal.” *Hunt v. Check Recovery Sys., Inc.*, No. 05-CV-4993, 2008 WL 2468473, at *5 (N.D. Cal.
28 June 17, 2008). That the *Hunt* court made this remark in connection with a preliminary injunction,

1 Opp'n at 25, is a distinction that does not make a difference; there, as here, the costs of compliance
2 with the injunction—and the follow-on litigation that Epic's broad interpretation would all but
3 ensure—will be avoided with a stay. Indeed, Epic does not contest, and therefore tacitly concedes,
4 that a stay would merely maintain the status quo while the appellate process progresses to
5 completion. *See* Mot. at 19.

6 **E. In The Alternative, The Court Should Temporarily Stay The Injunction**

7 Ignoring that temporary stays are routinely entered to allow an appellant to seek relief from the
8 Court of Appeals, Mot. at 19, Epic's only argument is that Apple waited a month to move for a stay,
9 Opp'n at 25. Of course, Apple's motion was hardly tardy. Apple noticed this motion less than halfway
10 through the time allotted between judgment and the injunction's effective date. *See* Dkt. 813. And
11 Apple was not idle during that time, implementing new Guidelines that comply with the injunction and
12 exploring other options (well in advance of any need to do so under the settlement agreement). *See*
13 *supra* p 3.

14 Apple merely asks that, if the Court denies a stay, it allows a temporary stay so that the Ninth
15 Circuit can hear a prompt request from Apple rather than an emergency motion. This is what happened
16 in the case both parties cite: In *Campbell v. National Passenger Rail Road Corp.*, the court *did stay* the
17 injunction's effective date for ten days precisely to allow the defendant to seek a stay from the Ninth
18 Circuit. No. 05-CV-5434, 2009 WL 4546673, at *2 (N.D. Cal. Nov. 30, 2009); *see also Conservation*
19 *Cong. v. U.S. Forest Serv.*, No. CIV. S-11-2605 LKK, 2012 WL 3150307, at *2 (E.D. Cal. Aug. 1,
20 2012) (providing twenty-one days for the same purpose); *Elliot v. Williams*, No. 2:08-CV-00829-GMN,
21 2011 WL 5080169, at *10 (D. Nev. Oct. 25, 2011) (sixty days). Epic provides no reason why a different
22 result—that will disrupt the orderly adjudication of this case—is needed here.

23 **CONCLUSION**

24 For the foregoing reasons, Apple requests that the Court stay the injunction pending the
25 disposition of the appeals noticed by both Epic and Apple from the Court's judgment.

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