

EXHIBIT A

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE VALVE ANTITRUST LITIGATION

Case No. 2:21-cv-00563-JCC

**MOTION FOR CLASS
CERTIFICATION AND
APPOINTMENT OF CO-LEAD CLASS
COUNSEL**

**NOTE ON MOTION CALENDAR:
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1 Plaintiffs Wolfire Games, LLC; Dark Catt Studios Holdings, Inc.; and Dark Catt Studios
2 Interactive LLC respectfully move for class certification pursuant to Fed. R. Civ. P. 23(b)(3).

3 **PRELIMINARY STATEMENT**

4 As this Court has recognized, “[m]ost-favored-nations restraints, such as those allegedly
5 utilized by Defendant, are unlawful if used to further anticompetitive goals.” Dkt. 80 at 6 (citing
6 *U.S. v. Apple, Inc.*, 791 F.3d 290, 305 (2d. Cir. 2015)). As detailed below, with the benefit of a
7 developed discovery record, Plaintiffs now have abundant common evidence that Defendant
8 Valve Corporation (“Valve”) does, in fact, use most-favored-nations restraints to block
9 competition and maintain its monopoly. The common evidence further shows that, as a result of
10 these restraints, Valve has been able to charge supracompetitive commissions to *every* member
11 of the proposed class, which consists of entities who paid a commission to Valve in connection
12 with the sale or use of a game on the Steam platform on or after January 28, 2017. Plaintiffs now
13 ask this Court to certify this class pursuant to Rule 23(b)(3), because Plaintiffs can prove *all*
14 aspects of their claims on a class-wide basis, and because the issues common to the class easily
15 predominate over any individualized ones.

16 Video games were historically sold at brick-and-mortar retailers, which entailed high
17 inventory, shipment, and overhead costs. In the early 2000s, Valve saw an opportunity to
18 distribute games more cheaply online. Valve originally built the Steam platform to distribute its
19 own games, but after recognizing it could also use Steam to sell and distribute *all* PC games,
20 Valve launched the Steam Store in 2005. Soon thereafter, Valve began to dominate the market
21 for PC game distribution.

22 Valve recognized, however, that its success could be threatened by other platforms,
23 which could compete to attract video game publishers by charging them commissions far lower
24 than the 30% commission (or “revenue share”) that Valve charged. Valve did not want to lose
25 either its dominant position or the inflated profits resulting from its 30% commission. Valve,
26 therefore, implemented and enforced a “platform most-favored-nations” policy (“PMFN
27 Policy”), to block such competition. Valve’s PMFN Policy, which remains in effect today,
28

1 prevents any publisher that sells its game on Steam—and given Valve’s dominance, nearly all
2 publishers must sell on Steam to survive—from (a) providing additional game content on another
3 platform that it does not make available on Steam (content parity); or (b) selling a game for a
4 lower price on another platform (price parity). By design, Valve’s PMFN Policy blocks the
5 exact ways that other platforms would compete with Valve in a well-functioning market (*i.e.*, on
6 content and price).

7 Absent Valve’s PMFN Policy, if a competing platform set a lower commission (*e.g.*,
8 12%) for sales on its platform, publishers would be incentivized to use that platform because
9 they could keep more of the revenue from each sale, while also lowering the retail prices charged
10 to consumers. Consumers would be able to buy more games at lower prices, and those
11 lower-priced games could also have enhanced content (like extra game levels). Facing this type
12 of competition, Valve would have to respond by lowering its own commission. More
13 competitive commissions would thus prevail across the market. This result would be a win/win
14 for everyone—except Valve. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Ex. 3 (Newell Ex. 362) at ’022 (emphasis added).

19 Valve’s PMFN Policy blocks Valve from having to face competition from better and
20 lower-priced alternatives. Rival platforms cannot gain market share by charging publishers
21 lower commissions because, even when they do, Valve’s PMFN Policy blocks publishers from
22 offering lower prices, or superior content, on those competing platforms, removing the incentive
23 for consumers to purchase games on those platforms. The marketplace experience has proven
24 this time and again. Numerous platforms have tried to compete with Valve by setting lower
25 commissions or providing differentiated content that would benefit both game publishers and
26 consumers, but Valve’s PMFN Policy has blocked them *all* from succeeding. As a result, Valve
27 has dominated the market for twenty years without having to compete on price. All the while,
28

1 Valve maintains its 30% monopoly tax, reaping billions in profits by stifling competition.

2 Valve’s profits far exceed what would prevail in a competitive market. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] Ex. 4 (VALVE_ANT_0058963) at ’963-965 (emphasis added).

7 Valve makes game publishers aware of its PMFN Policy, and threatens and punishes
8 those who violate it. When a publisher does not comply, Valve typically begins a “conversation”
9 with the publisher, where Valve often threatens to drop the game from Steam if the publisher
10 does not fall in line. Valve can also threaten to punish a publisher by making its games less
11 visible to consumers on Steam, starving the publisher of revenue. Because Steam is a must-have
12 distribution platform for publishers, given that Valve has squashed all competitive threats,
13 publishers have no viable option but to comply with Valve’s PMFN Policy. Game publishers—
14 the proposed class members here—are thus left with no option but to pay an inflated commission
15 to Valve of 30% in connection with every game sold on Steam.¹

16 At trial, Plaintiffs will rely on the testimony of Dr. Steven Schwartz, an expert economist,
17 and Prof. Joost Rietveld, an industry expert, to prove that Valve’s conduct harms every class
18 member every time they pay this inflated commission to Valve. In his report, Dr. Schwartz
19 explains how common evidence and analyses can be used to prove Valve’s market power and to
20 demonstrate how Valve has used its PMFN Policy to harm competition by imposing
21 supracompetitive commissions on all class members. Among other things, Dr. Schwartz has
22 constructed a series of rigorous economic models, grounded in the leading economic literature
23 about PMFN policies, to demonstrate how Valve’s PMFN Policy imposes higher commissions
24 than would prevail in a competitive market. Dr. Schwartz also shows how he can use these same

25
26 ¹ In late 2018, Valve modified the revenue share agreement to three tiers as follows: Valve takes 30% on all of a
27 game’s earnings under \$10 million; 25% on all of a game’s earnings between \$10 million and \$50 million; and 20%
28 on all of a game’s earnings over \$50 million. Schwartz Rpt. ¶44. All games except the very largest are subject to
the 30% commission on every sale. *Id.*

1 economic models to calculate both class-wide and individual damages. Prof. Rietveld, who is
2 recognized as one of the leading researchers in the video game industry, explains how Dr.
3 Schwartz’s methodologies and conclusions are consistent with the dynamics of the PC gaming
4 industry.

5 Based on the work of these experts, and a robust discovery record full of ample common
6 evidence that supports each and every aspect of Plaintiffs’ claims, Plaintiffs now move under
7 Rule 23(b)(3) for the Court to certify the following class:

8 All persons or entities who, directly or through an agent, paid a
9 commission to Valve in connection with the sale or use of a game
10 on the Steam platform on or after January 28, 2017, and continuing
11 through the present until the effects of its scheme are eliminated
12 (the “Class Period”), and where either (1) the person or entity was
13 based in the United States and its territories or (2) the game was
14 purchased or acquired by a United States-based consumer during
15 the Class Period. Excluded from the Class are (a) Defendant, its
16 parents, subsidiaries, affiliate entities, and employees, and (b) the
17 Court and its personnel.

18 Dkt. 127 ¶375.²

19 Because Plaintiffs satisfy every applicable requirement of Rule 23, a class action is
20 clearly the method “best suited to adjudication of the controversy fairly and efficiently.” *Amgen,*
21 *Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).³ Accordingly, this Court should
22 certify the proposed class.

23 FACTUAL BACKGROUND

24 **A. As An Early Mover In The Market For Digital PC Game Distribution, Steam 25 Attained A Dominant Position**

26 PC game publishers—the class members—sell PC games to consumers. Ex. 1
27 (“Schwartz Rpt.”) ¶¶23-28. Through the 1990s and into the start of the new millennium, PC
28 game publishers primarily distributed PC games via physical media, such as floppy disks or

29 ² Consistent with federal antitrust law, this definition limits class membership to entities that (i) directly paid a
30 supracompetitive commission to Valve, and (ii) are harmed by Valve, a U.S.-based entity. This definition excludes
31 foreign entities that exclusively sold games to foreign consumers.

32 ³ Unless otherwise stated, internal citations and quotation marks are omitted.

1 CD-ROMs, and consumers would typically buy PC games at brick-and-mortar retailers. *Id.*
 2 ¶¶17-22; Ex. 2 (“Rietveld Rpt.”) ¶25.

3 Valve started out as a PC game developer. Rietveld Rpt. ¶18. Before launching Steam,
 4 Valve developed two successful computer games (Half-Life and Counter-Strike), which by 2002
 5 had an average of 3.4 billion player minutes per month. *See* Schwartz Rpt. ¶31. Valve
 6 developed Steam to update and maintain those games. Ex. 5 (Lynch Tr.) at 31-33. In 2003,
 7 Valve forced its entire user base of 2-3 million players to install and use Steam when they
 8 purchased the blockbuster sequel to Half-Life, Half-Life 2. *See* Schwartz Rpt. ¶¶32-33; Rietveld
 9 Rpt. ¶¶122-126.

10 But Valve realized that Steam need not be limited to Valve’s own games. Rather, it
 11 could be used to distribute *all* PC games via the internet, at a fraction of the cost of traditional
 12 brick-and-mortar distribution. Schwartz Rpt. ¶¶19-22, 34-35; Rietveld Rpt. ¶¶26, 38-39. But
 13 while Valve had lower costs than traditional distributors, it set a *price* roughly equal to those
 14 distributors (*i.e.*, 30%).⁴ Schwartz Rpt. ¶¶42-43. By earning revenue roughly equal to
 15 traditional distributors, but at much lower cost, Valve earned significantly more profit per sale
 16 than brick-and-mortar retailers. *Id.* ¶¶17-22, 43, 145-149.

17 Steam became a must-have platform for consumers from nearly the moment it launched.
 18 *Id.* ¶¶31-33. By 2007, most major publishers were distributing their PC games on Steam,
 19 including publishers such as Epic, Atari, Activision, Eidos, 2K, Ubisoft, Sega, THQ, Bethesda,
 20 and Electronic Arts (“EA”). *See id.* ¶34. [REDACTED]

21 [REDACTED]
 22 [REDACTED]. *Id.* ¶¶130-134.

23
 24 ⁴ [REDACTED]. Ex. 79 (Lynch 30(b)(6) Tr.) at 100 ([REDACTED]
 25 [REDACTED]); *see, e.g.*, Ex. 7 (VALVE_ANT_0019722) at ’724; Ex. 8
 (VALVE_ANT_0042738) at ’741; Ex. 9 (VALVE_ANT_0038381) at ’384; Ex. 10 (VALVE_ANT_0019732) at
 26 ’735; Ex. 11 (VALVE_ANT_0040316) at ’319 [REDACTED]

27 These commissions were also set in a period when Valve exercised market
 power, *see* Schwartz Rpt. ¶42, and likely reflect Valve’s experimentation with finding the optimal monopoly price
 for its platform.

1 While Valve set its 30% commission in line with existing brick-and-mortar retailers, it
 2 had an immense competitive advantage over those retailers, because Steam’s costs were
 3 significantly lower than brick-and-mortar retail channels. *Id.* ¶74. [REDACTED]
 4 [REDACTED], *id.*
 5 ¶353, and Valve’s primary rival—Epic—observed that a 12% commission could more than
 6 cover the costs of an online distribution platform, *id.* ¶149; Ex. 6 (EPIC_VALVE_0000004) at
 7 ’004 (noting Epic “should be able to not lose money” in running Epic Games Store “EGS” with a
 8 10% commission).⁵ In a well-functioning competitive market, Valve would not have been able
 9 to maintain its commission level for decades [REDACTED].
 10 [REDACTED]
 11 [REDACTED] Schwartz Rpt. ¶148, D-5,
 12 D-8. [REDACTED]
 13 [REDACTED] *id.* ¶148; Ex. 4 (VALVE_ANT_0058963) at ’963-964 ([REDACTED])
 14 [REDACTED]

15 **B. To Maintain Its Monopoly, Valve Implemented A PMFN Policy Requiring**
 16 **Publishers Ensure Content And Price Parity Across Competing Distribution**
 17 **Platforms**

18 Valve has maintained its monopoly—and protects its bloated 30% commission—through
 19 its PMFN Policy, which requires both content and price parity. Valve enforced its PMFN Policy
 20 through the “Steam Business Team,” one of Valve’s “cabals,”⁶ throughout the class period.

21 Valve sets forth its content parity requirement in its Steam Distribution Agreements
 22 (“SDAs”), which Valve requires all Steam publishers to sign. Specifically, the SDAs call for
 23

24 ⁵ See also Ex. 12 (EPIC_VALVE_0000001) at ’001 (Epic determining the “Final Platform Splits” to be “88/12”
 25 based on financial model); Ex. 13 (EPIC_VALVE_0000391) at ’391 (Epic analyzing the costs of EGS and showing
 26 a 12% commission will be profitable); Ex. 14 (EPIC_VALVE_0000058) at ’059 (noting that EGS would still be
 27 profitable with a 12% commission); Ex. 15 (Lynch Ex. 135) at ’654-655 (Tim Sweeney informing Valve EGS
 28 would be launched with a 12% commission); Ex. 16 (VALVE_ANT_1244411) at ’411 (Tim Sweeney noting the
 “fully loaded cost of distributing a >\$25 game in North America and Western Europe is under 7% of gross”).

⁶ A “cabal” is Valve “shorthand for a team or a product group.” Ex. 17 (Giardino Tr.) at 179.

1 “material parity” between the “downloadable content” (or “DLC”) that a publisher offers on
2 Steam and the same game sold through other channels:

3 **2.4 DLC [Downloadable Content].** If Company distributes the
4 Application through any other (non-Steam) distribution channel,
5 and if Company distributes any material DLC for the Application
6 through that other channel, *it will deliver the DLC to Valve at the*
7 *same time such that Steam Account Owners will receive*
8 *comparable DLC with customers acquiring the Application*
9 *through other channels.* Company is free to offer special and
10 unique promotional content through other distribution channels,
11 *provided that material parity is maintained between Steam*
12 *Account Owners and users of other distribution channels* who
13 make a comparable investment in the Application and the
14 associated DLC.

15
16 Ex. 18 (Gerber Ex. 98) at ’371 (emphases added). The SDA also requires that publishers agree
17 to make content available on Steam no later than it is available on another store. *Id.* In effect,
18 Valve’s content parity requirement means that the version of a game offered for sale on Steam
19 must be “as good as” any version offered for sale through any competing store. Ex. 19 (Gerber
20 Tr.) at 45-46, 59-60; *see also* Ex. 20 (Schenck Tr.) at 167-68 [REDACTED]

21 Valve also mandates price parity. Valve has communicated this aspect of its PMFN
22 Policy in various ways over time. Schwartz Rpt. ¶¶150-167. For example, Valve expressly
23 requires publishers requesting Steam Keys to agree to price parity—not only for sales of Steam
24 Keys, but for all game sales.⁷ Specifically, Valve requires publishers to agree to the following
25 two commitments:

26 I understand that I need to sell my game on other stores in a similar
27 way to how I am selling my game on Steam. I agree that I am not
28 giving Steam customers a worse deal.

I understand that while it’s OK to run a discount on different stores
at different times, I agree to give the same offer to Steam
customers within a reasonable amount of time.

⁷ Steam Keys are codes that customers purchase outside of Steam (including at other online stores and at retail stores), which they can activate to play games on Steam. Schwartz Rpt. ¶¶45-47.

1 Ex. 21 (Giardino Ex. 186) at '087. [REDACTED]

2 [REDACTED]
3 [REDACTED] Schwartz Rpt. ¶158.

4 At the motion to dismiss stage, Valve represented to the Court that the PMFN Policy
5 either did not exist at all, or that it applied only to the sale of Steam Keys. Dkt. 74 at 3 (“Wolfire
6 suggests the Guidelines require non-Steam-enabled games to have the same price as well, *but*
7 *that’s simply not true*”) (emphasis added), *id.* at 19 (“Wolfire’s suggestion that this provision
8 supports a broader price constraint flatly contradicts this plain meaning.”); Dkt. 79 at 11-12 (“*No*
9 *one has ever seen this shadow policy.* . . . In short, Wolfire’s claims regarding this alleged policy
10 are *thoroughly fanciful.*”) (emphases added). Valve likely made these representations because it
11 is aware that its PMFN Policy raises serious questions under the antitrust laws. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED] Ex. 22 (Newell Ex. 352) at '963.

15 The common evidence shows, however, that Valve’s representations were unequivocally
16 false. In fact, the PMFN Policy is central to Valve’s business model, and applies across *all*
17 transactions on the Steam platform. That is why, for example, Valve sent publishers an
18 announcement instructing them to generally “make sure that you’re not disadvantaging Steam
19 customers” when setting game prices on Steam. Ex. 23 (Giardino Ex. 188) at '240. Moreover,
20 the record is replete with common evidence that Valve regularly confirmed to publishers in no
21 uncertain terms that its PMFN Policy (including pricing parity specifically) applies in equal force
22 regardless of whether Steam Keys are involved. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] Ex. 24 (Powers 30(b)(6) Ex. 55) at '921 (emphases added); *see*
27 *also, e.g.,* Ex. 25 (Butlin Ex. 120) at '353 [REDACTED]

1 [REDACTED]; Ex. 26 (VALVE_ANT_1204851 at '851-52 [REDACTED]

2 [REDACTED]

3 [REDACTED] Ex. 27 (MSFT_VALVE_00000555) at '556-657 (Microsoft
4 employee asking “does Steam require price parity?” and another responding “Yes – they
5 absolutely do. . . . Its [sic] not formally listed in documentation in Steamworks, but always
6 addressed in-person.”).

7 Many (many) more examples abound. *See, e.g.*, Ex. 28 (VALVE_ANT_2602243) at
8 '243 [REDACTED]

9 [REDACTED]

10 [REDACTED] (emphasis added); Ex. 21 (Giardino Ex. 186) at '087 [REDACTED]

11 [REDACTED]

12 [REDACTED]; Ex. 29 (Kroll Ex. 304) at '440 (“We do not take any revenue share
13 from non-Steam sales, whether you’re selling a Steam key or not. We do ask that the pricing is
14 fair - in other words, you shouldn’t sell your product on Steam for \$10 and then sell it on another
15 storefront for \$5.”); Ex. 30 (Giardino Ex. 178) at '439 [REDACTED]

16 [REDACTED]) (emphasis added);

17 Ex. 31 (Newell Ex. 353) at '439 [REDACTED]

18 [REDACTED]) (emphasis added); Ex. 32 (Giardino Ex. 195) at '887 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]”).

22 Any claim by Valve to the contrary lacks credibility and cannot be reconciled with the
23 abundant evidence on this common issue.

24 **C. Valve Enforced Its PMFN Policy Against Publishers Across The Industry**

25 In addition to laying out its content and pricing parity requirements directly in rules and
26 guidelines, Valve also seized every opportunity to continuously remind publishers about its
27 PMFN Policy. [REDACTED]

28

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Ex. 33 (Powers 30(b)(6) Tr.) at 57, 64-68; *see also* Ex. 27
 4 (MSFT_VALVE_000000555) at '556 (stating that Valve “always addressed” its PMFN Policy
 5 “in-person” with publishers). [REDACTED]
 6 [REDACTED]. *See, e.g.*, Ex. 34 (Butlin Ex. 131) at '289 (“[REDACTED]
 7 [REDACTED]
 8 [REDACTED]”). If these “conversations” and “reminders” were not enough to stop the
 9 violations, Valve took more punitive measures.

10 Valve has punished publishers for violating its PMFN Policy by delisting (or threatening
 11 to delist) a publisher’s game from Steam altogether. [REDACTED]

12 [REDACTED]
 13 [REDACTED] Ex. 35 (Malone Ex. 248) at '684. [REDACTED]

14 [REDACTED]
 15 [REDACTED] *Id.* [REDACTED]

16 [REDACTED]. *Id.* In other words,
 17 Valve directly blocked price competition. [REDACTED]

18 [REDACTED]
 19 [REDACTED]. Ex. 36 (Gerber Ex. 107) at

20 '883-84. [REDACTED]
 21 [REDACTED]. Ex. 37 (Blue Ex. 86) at '912-13.

22 [REDACTED]
 23 [REDACTED]

24 [REDACTED]
 25 [REDACTED]

26 [REDACTED] Ex. 38 (Schenck Ex. 385) at '943. [REDACTED]
 27 [REDACTED]

28

1 [REDACTED].” *Id.* [REDACTED]
2 [REDACTED]
3 [REDACTED]. *Id.* at ’942. [REDACTED]
4 [REDACTED].
5 *Id.* at ’936.

6 Again, the common evidence here is overwhelming. Time and again, Valve threatened
7 game publishers with delisting their games if they did not comply with Valve’s PMFN Policy.
8 *See, e.g.*, Ex. 39 (Ruymen Ex. 1) at ’483 ([REDACTED]
9 [REDACTED] Ex. 40 (Giardino Ex. 196) at ’521 [REDACTED]
10 [REDACTED]
11 [REDACTED]); Ex. 41 (VALVE_ANT_0048944) at ’944
12 ([REDACTED] [REDACTED]
13 [REDACTED] [REDACTED]); Ex. 42
14 (VALVE_ANT_1207052) at ’054 (“Once the price on Steam matches the price elsewhere, we’ll
15 be ready to release the game!”); Ex. 43 (Malone Ex. 249) at ’343 [REDACTED]
16 [REDACTED]
17 Ex. 44 (VALVE_ANT_0340706) at ’709 [REDACTED]
18 [REDACTED]); Ex. 45
19 (VALVE_ANT_0051718) at ’718 ([REDACTED] [REDACTED]
20 [REDACTED]
21 [REDACTED] [REDACTED]”); Ex. 46 (Gerber
22 Ex. 101) at ’289-290 ([REDACTED]
23 [REDACTED]); Ex 30 (Giardino Ex. 178) at ’439 ([REDACTED]
24 [REDACTED] [REDACTED]
25 [REDACTED]
26 [REDACTED]); Ex 47 (Giardino Ex. 191) at ’819 (telling a self-described “tiny
27
28

1 company” that “if you wanted to disadvantage Steam customers by charging them a higher price,
2 we would opt to not sell your game on our store”).

3 In addition to delisting, Valve enforced its PMFN Policy by reducing (or threatening to
4 reduce) the visibility of publishers’ games on the Steam platform, thereby hindering their ability
5 to make sales. [REDACTED]

6 [REDACTED]
7 [REDACTED] Ex. 48 (Powers 30(b)(6) Ex. 60) at ’129. [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED] *Id.* at ’128. [REDACTED]

11 [REDACTED] *Id.* at ’127. This conduct was common and
12 persistent. Ex. 49 (Malone Ex. 245) at ’157 ([REDACTED])

13 [REDACTED]
14 [REDACTED]
15 Ex. 50 (Ruymen Ex. 9) at ’254-256 ([REDACTED])

16 [REDACTED]
17 [REDACTED]); Ex. 51 (VALVE_ANT_1193238) at ’241 ([REDACTED])

18 [REDACTED]; Ex. 52 (Newell Ex. 346) at ’932 ([REDACTED])
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 During discovery, Valve unconvincingly claimed that the multitude of emails enforcing
23 its PMFN Policy each constituted nothing more than one-off deviations from Valve’s actual
24 policies. Again, this claim is simply incredible. [REDACTED]

25 [REDACTED]
26 [REDACTED] *See, e.g.*, Ex. 53 (Powers Ex. 45) at ’489 ([REDACTED])

27 [REDACTED]”); Ex 54 (Giardino Ex. 194)
28

1 at '191 [REDACTED]
2 [REDACTED]; Ex 32 (Giardino Ex. 195) at '887 ([REDACTED]
3 [REDACTED]); Ex. 24 (Powers 30(b)(6) Ex. 55) at '922 [REDACTED]
4 [REDACTED]
5 [REDACTED] (emphasis
6 added); Ex. 55 (Kroll Ex. 305) at '865 [REDACTED]
7 [REDACTED]
8 [REDACTED] (emphasis added); Ex. 56 (VALVE_ANT_0262762) at '763 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]; Ex. 57 (VALVE_ANT_1220449) at '456 [REDACTED]
12 [REDACTED] (emphasis
13 added); Ex. 50 (Ruymen Ex. 9) at '255 [REDACTED]
14 [REDACTED] (emphasis added); Ex. 58
15 (Giardino Ex. 189) at '426 (Steam Business Team member Tom Giardino suggested he might get
16 Valve's parity rules "tattooed on [his] back like it's the Declaration of Independence").

17 **D. Valve Has Maintained Its High Commission While Blocking Competitive Threats**

18 The harmful effects of Valve's PMFN Policy can be seen in how Valve has blocked
19 competition from rivals. Although several major game publishers have attempted to leverage
20 their size to launch digital PC game stores, *see* Rietveld Rpt. ¶¶43, each attempt has failed to
21 make material inroads that would check Valve's monopoly power.

22 EA & Origin. EA is a major PC game publisher and developer that explored a variety of
23 ways to avoid Valve's 30% commission. Valve's PMFN Policy has blocked each attempt.
24 Rietveld Rpt. ¶¶92, 96-97, 223; *see also* Schwartz Rpt. ¶¶215-217.

25 EA first attempted to avoid Valve's commission by using an alternative, cheaper payment
26 method for in-game purchases made on Steam. In-game purchases (also called "in-game
27 content," "in-app purchases," "IAPs," "downloadable content," or "micro-transactions") are
28

1 purchases of content within a game, rather than the purchase of a game itself, Rietveld Rpt.
2 ¶¶117-121, and they are also subject to Valve’s 30% commission. Schwartz Rpt. ¶¶42-44, 215.

3 [REDACTED]
4 [REDACTED] Ex. 59 (Lynch Ex. 138) at ’478. [REDACTED]

5 [REDACTED]
6 [REDACTED] Ex. 59 (Lynch Ex. 138) at ’478.

7 EA next attempted to launch the Origin PC game store in June 2011, as a competitor to
8 Steam. To jumpstart Origin’s user base, EA began publishing its new titles on Origin and other
9 distribution platforms, which also avoided paying Steam’s commission. Rietveld Rpt. ¶¶96-97;
10 Schwartz Rpt. ¶216. In October 2011, EA also began publishing third-party games, including
11 games from major publishers such as Capcom. Rietveld Rpt. ¶¶92, 96-97. But Valve’s PMFN
12 Policy meant that publishers could not offer their games for lower prices on Origin than they did
13 on Steam, so consumers had little incentive to use Origin. As a result, publishers’ and
14 consumers’ adoption of Origin was minimal. Schwartz Rpt. ¶¶216-217; Rietveld Rpt. ¶96-97.
15 EA ultimately surrendered, announcing it would bring its games back to Steam in 2019. Ex. 60
16 (VALVE_ANT_0059430) at ’430. Origin withered and ultimately died, Rietveld Rpt. ¶¶96-97;
17 Schwartz Rpt. ¶¶216-217.

18 Ubisoft & Uplay/Uconnect. [REDACTED]

19 [REDACTED] Ex. 61 (Malone Tr.) at 44. Ubisoft attempted to self-
20 distribute through its own platform, Uplay, launching in 2012. Rietveld Rpt. ¶¶94-95; Schwartz
21 Rpt. ¶¶213-214. [REDACTED]

22 [REDACTED] Ex. 62 (Malone Ex. 263) at ’128. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 Ex. 63 (Lynch Ex. 141) at ’961-962. [REDACTED]

26 [REDACTED]

1 [REDACTED] *Id.* [REDACTED]

2 [REDACTED] Ex. 64 (Malone Ex. 261) at '197.

3 [REDACTED]
4 [REDACTED] *see* Ex. 65 (Lo Ex. 379) at '247, [REDACTED] *see* Ex. 66
5 (Lynch Ex. 143) at '988 ([REDACTED])

6 [REDACTED]). As a result, Ubisoft launched Division 2 solely on Uplay and EGS. Rietveld Rpt. ¶94.
7 Ultimately, this strategy failed and Division 2 is now available on Steam. *See id.*

8 Epic & EGS. Epic began development of EGS around June 2018. *See* Ex. 67
9 (EPIC_VALVE_0000338) at '338. Epic planned to leverage its first-party games—specifically
10 Fortnite—to build an instant customer base for EGS. *Id.* at '340-342; Ex. 14
11 (EPIC_VALVE_0000058) at '058 (Tim Sweeney Q&A noting the launching of EGS was
12 prompted by Fortnite bringing in PC gamers). The cost to run EGS was sufficiently low that
13 Epic could charge publishers a 12% commission, less than half of Valve's. Ex. 68
14 (EPIC_VALVE_0000007) at '007.

15 On November 26, 2018, Epic CEO Tim Sweeney privately informed Valve CEO Gabe
16 Newell that he planned to launch EGS at a 12% commission, because major tech monopolists
17 were extracting obscene commissions and their “antitrust practices” were facing legal scrutiny.
18 Ex. 15 (Lynch Ex. 135) at '654-655. Sweeney urged Newell and Valve to “improve Steam
19 economics for all,” because “store competition leads to better rates for all developers.” *Id.* at
20 '655. EGS launched with, and continues to offer, a host of financial benefits to publishers.
21 Rietveld Rpt. ¶88. Epic's announcement of EGS spurred a brief outbreak of competition in the
22 market. Schwartz Rpt. ¶302-313. Epic found initial success, securing an exclusive deal with
23 Ubisoft to publish Division 2. Rietveld Rpt. ¶¶94, 156, 170-171.

24 But, because of Valve's PMFN policy, EGS has been unable to gain market share. [REDACTED]

25 [REDACTED]
26 [REDACTED] Schwartz Report, Attachment E-1. Given this low
27 share, it has yet to become profitable. Rietveld Rpt. ¶89. The vast majority of its formerly

1 EGS-exclusive content is now available on Steam, reflecting Steam’s immense market power.
2 Schwartz Rpt. ¶¶213, 310. Because Valve’s PMFN Policy precludes publishers from
3 differentiating content offered on Steam and EGS, publishers have little incentive to offer games
4 on EGS and consumers have little incentive to use the platform. Rietveld Rpt. ¶¶168-225. Put
5 simply, Epic cannot break the Steam monopoly, even though it offers a commission *less than*
6 *half* of Valve’s, because Valve’s PMFN Policy prevents Epic from competing on prices charged
7 to consumers for games sold on both EGS and Steam. Schwartz Rpt. ¶¶302-313.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Ex. 51 (VALVE_ANT_1193238) at ’240-241. [REDACTED]

12 [REDACTED]
13 [REDACTED] *Id.* at ’239.

14 [REDACTED]
15 [REDACTED]. Ex. 61 (Malone Tr.) at 212.

16 [REDACTED]
17 [REDACTED]. Ex. 69 (Lynch Ex. 134) at ’674 ([REDACTED])
18 [REDACTED]
19 [REDACTED]); Ex. 70

20 (VALVE_ANT_0471786) at ’188 ([REDACTED]);
21 Schwartz Rpt. ¶308. The new tiered structure was intended to keep publishers within Steam’s
22 orbit. Ex. 5 (Lynch Tr.) at 101-02 (agreeing that one of Valve’s goals in implementing the tiered
23 structure was to “bring back certain developers or publishers who had stopped publishing games
24 on Steam”). As Plaintiffs’ experts demonstrate, this small change by Valve illustrates that,
25 without the PMFN Policy, full competition would lead to much more significant reductions in
26 Valve’s commission, benefiting game publishers and consumers across the market. Schwartz
27 Rpt. ¶¶302-313.

LEGAL STANDARDS

1
2 First, under Rule 23(a), Plaintiffs must show that there are “questions of law or fact
3 common to the class,” and the requirements of “numerosity, typicality and adequacy of
4 representation” are also met. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*,
5 31 F.4th 651, 663 (9th Cir.) (2022). Second, Plaintiffs must show, by a “preponderance of
6 evidence,” that the class fits into one of three categories of Rule 23(b). *Id.* at 665. To certify a
7 class under Rule 23(b)(3), Plaintiffs must show “the questions of law or fact common to class
8 members predominate over any questions affecting only individual members, and that a class
9 action is superior to other available methods for fairly and efficiently adjudicating the
10 controversy.” Fed. R. Civ. P. 23(b)(3).

11 While the Court’s “class certification analysis must be rigorous and may entail some
12 overlap with the merits of the plaintiff’s underlying claim, . . . [m]erits questions may be
13 considered to the extent—but only to the extent—that they are relevant to determining whether
14 the Rule 23 prerequisites for class certification are satisfied.” *Amgen*, 568 U.S. at 465-66.
15 “[P]laintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to [a]
16 common question of law or fact” if their “evidence ‘could have sustained a reasonable jury
17 finding’ on the merits of [that] common question.” *Olean*, 31 F.4th at 667 (citing *Tyson Foods,*
18 *Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016)).

ARGUMENT

I. THE PROPOSED CLASS SATISFIES RULE 23(A)

21 ***The Class is Sufficiently Numerous.*** The proposed class consists of at least 31,824
22 members and easily satisfies Rule 23(a)(1)’s numerosity requirement. Schwartz Rpt. ¶399;
23 *Ochoa v. McDonald’s Corp.*, 2016 WL 3648550, at *4 (N.D. Cal. July 7, 2016) (“40 or more
24 members” is sufficient).

25 ***Common Questions of Law and Fact Exist.*** To satisfy commonality, “even a single
26 common question will do.” *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).
27 “Rule 23(a)(2)’s commonality requirement is subsumed under, or superseded by, the more
28

1 stringent Rule 23(b)(3) requirement that questions common to the class predominate over other
2 questions.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). As set forth in detail in
3 § II *infra*, numerous common issues of law and fact that are central to Plaintiffs’ claims exist,
4 including questions of (1) market definition and market power, (2) anticompetitive conduct and
5 effects, (3) class-wide injury, and (4) damages, and those common issues predominate in this
6 case.

7 ***The Named Plaintiffs’ Claims are Typical of the Class.*** Rule 23(a)(3) requires that “the
8 claims or defenses of the representative parties are typical of the claims or defenses of the class.”
9 Fed. R. Civ. P. 23(a)(3). “[This] requirement is permissive, such that representative claims are
10 typical if they are reasonably coextensive with those of absent class members; they need not be
11 substantially identical.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017).
12 Typicality is “established by plaintiffs and all class members alleging the same antitrust violation
13 by the defendants,” and may be satisfied even if there is a disparity in the damages claimed by
14 representative parties and other class members. *In re Tableware Antitrust Litig.*, 241 F.R.D. 644,
15 649 (N.D. Cal. 2007). Here, the named Plaintiffs are typical because, like all other proposed
16 class members, they paid commissions to Steam and suffered an antitrust injury when they did
17 so. *See Sidibe v. Sutter Health*, 333 F.R.D. 463, 486-87 (N.D. Cal. 2019) (finding typicality in
18 an antitrust case because “the overarching gravamen of the plaintiffs’ claims is [the defendant’s]
19 alleged anticompetitive” conduct).

20 ***Named Plaintiffs Will Adequately Represent the Class.*** Rule 23(a)(4) requires that “the
21 representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
22 23(a)(4). This requirement is satisfied if the representative plaintiffs have no conflicts of interest
23 with class members and they and their counsel will vigorously prosecute the action on behalf of
24 the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Named Plaintiffs readily
25 meet these requirements. There is no intra-class conflict, as all class members share a common
26 interest in recovery of their supracompetitive commissions paid to Valve, and both named
27 Plaintiffs have vigorously prosecuted the action and will continue to do so.

1 Wolfire is a game publisher that sold five titles on Steam, including the popular game
2 Overgrowth. See Ex. 71 (*Wolfire Games*, STEAM, [https://store.steampowered.com/franchise/
3 wolfire/](https://store.steampowered.com/franchise/wolfire/) (last visited Feb. 7, 2024)). Wolfire brought this lawsuit because “gamers and game
4 developers are being harmed by Valve’s conduct” and “most developers have little or no choice
5 but to sell on Steam and do as they’re told by Valve.” Ex. 72 (Rosen Ex. 73) at 1. Wolfire
6 helped counsel develop the first-to-file Complaint in this district, and has continued to provide
7 valuable industry knowledge and insights to litigate this matter.

8 Dark Catt is a game publisher that sold one title on Steam, *Djinni & Thaco: Trial by*
9 *Spire*. Valve removed Dark Catt’s game from Steam without prior notice, asserting that certain
10 game reviews amounted to review manipulation, which has effectively ended Dark Catt’s ability
11 to sell games because “not being on Steam means you’re not going to make any money in the PC
12 market.” Ex. 73 (Owens Tr.) 371. Dark Catt brought this lawsuit to “make sure that no game
13 company ever goes through what we went through” in being closed out of the PC game
14 distribution market. Ex. 74 (Robb Tr.) 287-88. As explained by Dark Catt’s CEO: “if Steam
15 doesn’t want to do business with us, fine, I accept that. But I want to be able to go down the
16 street and be able to sell my game and be able to go to their competitor. But there is no
17 competition in the marketplace.” *Id.* at 287-88. Like Wolfire, Dark Catt has provided valuable
18 industry knowledge to counsel.

19 The named Plaintiffs have each responded to Valve’s voluminous document requests,
20 produced thousands of documents from their files, and prepared and sat for nine depositions,
21 collectively. Their commitment to the litigation and their discovery obligations further
22 demonstrates their adequacy. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583,
23 595 (N.D. Cal. 2010).

24 **II. COMMON QUESTIONS PREDOMINATE UNDER RULE 23(B)(3)**

25 Rule 23(b)(3) requires that “questions of law or fact common to class members
26 predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3).
27 “Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.”
28

1 *Amchem*, 521 U.S. at 625. “The predominance inquiry asks whether the common,
2 aggregation-enabling, issues in the case are more prevalent or important than the non-common,
3 aggregation-defeating, individual issues.” *Olean*, 31 F.4th at 661. “Predominance is not . . . a
4 matter of nose-counting,” *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir.
5 2016), and certification “may be considered proper under Rule 23(b)(3) even though other
6 important matters will have to be tried separately,” *Tyson*, 577 U.S. at 453. To establish
7 predominance, Plaintiffs need only show that “*questions* common to the class predominate, not
8 that those questions will be answered, on the merits, in favor of the Class.” *Amgen*, 568 U.S. at
9 459 (emphasis in original).

10 Analysis of predominance under Rule 23(b)(3) begins with the elements of the
11 underlying cause of action. Plaintiffs will establish, with common evidence: (1) a violation of
12 antitrust law (both Section 1 and Section 2 of the Sherman Act); (2) injury or impact resulting
13 from those violations; and (3) damages. *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d
14 1167, 1183 (N.D. Cal. 2013). More specifically, Plaintiffs’ principal claim arises under Section 2
15 of the Sherman Act, which requires proof that (a) Valve possesses monopoly power in a relevant
16 market; (b) Valve willfully acquired or maintained that power; and (c) Valve’s conduct resulted
17 in antitrust injury. *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020).

18 As to Section 1 of the Sherman Act, challenging Valve’s imposition of its PMFN Policy,
19 that claim requires proof of: “(1) an agreement, conspiracy, or combination among two or more
20 persons or distinct business entities; (2) which is intended to harm or unreasonably restrain
21 competition; and (3) which actually causes injury to competition, beyond the impact on the
22 claimant, within a field of commerce in which the claimant is engaged (i.e., ‘antitrust injury’).”
23 *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992). In assessing either the Section 1 or the
24 Section 2 claims here, a court will look to a Rule of Reason analysis to determine the restraint’s
25 “actual effect” on competition. *See, e.g., Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th
26 Cir. 2023).

1 As detailed below, Plaintiffs can show the elements of both their Section 1 and Section 2
2 claims using common evidence. Accordingly, common issues predominate over any individual
3 ones.⁸

4 **A. Common Evidence Establishes The Relevant Market And Valve’s Monopoly Power
5 In That Market**

6 *First*, the relevant market inquiry, and all evidence related to it, is necessarily common to
7 the class and will not vary based on which class member is asserting an antitrust claim. *Castro v.*
8 *Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 846 (D.N.J. 2015) (“Defining the relevant market
9 focuses on common data, expert analysis, and economic tests; such proof generally does not vary
10 by class member.”). Plaintiffs’ economist, Dr. Schwartz, has explained why common economic
11 principles warrant treating third-party digital PC game distribution platforms as a distinct
12 relevant market, and common evidence supports his conclusions. Schwartz Rpt. ¶¶48-116; *see*
13 *also* Rietveld Rpt. ¶¶49-82.

14 *Second*, Valve’s “market power is capable of being proved at trial through common
15 evidence.” *Giuliano v. Sandisk Corp.*, 2015 WL 10890654, at *17 (N.D. Cal. May 14, 2015).
16 As the first major mover in the digital PC game distribution market, Valve achieved monopoly
17 power relatively soon after the Steam Store’s launch. Schwartz Rpt. ¶¶17-22, 32-36, 121-149.
18 Steam became a must-have platform across the industry, given the advantages of digital
19 distribution (such as avoiding physical packaging costs or the need to visit a brick-and-mortar
20 retailer in person). *Id.* ¶¶17-22, 67, 69-77. [REDACTED]

21 [REDACTED]
22 [REDACTED] *Id.*

23 _____
24 ⁸ Because common evidence supports Plaintiffs’ Sherman Act claims, common evidence also supports Plaintiffs’
25 claims under the Washington Consumer Protection Act (“WCPA”), which “closely parallels federal antitrust laws.”
26 *Golob Sons v. Schaake Packing Co.*, 93 Wash. 2d 257, 259 (Wash. 1980). Under Washington’s choice-of-law rules,
27 Plaintiffs are entitled to proceed under the WCPA because, as determined by the applicable Restatement factors,
28 Washington is the state with the “most significant relationship” to this action: Valve is based and incorporated in
Washington, Valve injured Plaintiffs by creating and enforcing the PMFN Policy from Washington, and Valve’s
relationship with Plaintiffs is centered in Washington—the state where Valve develops and services Steam, and the
state specified in choice-of-law and choice-of-forum provisions in Valve’s standard SDA (*e.g.*, Ex. 75 (Giardino Ex.
199) at ’461). *See Johnson v. Spider Staging Corp.*, 87 Wash.2d 577, 580-81 (1976).

¶¶130-134, Attachment E-1. And there is ample direct and indirect evidence of Valve’s market power. *See Supra* Factual Background § D; *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1112 (9th Cir. 2021) (“Market power is the ability to raise prices above those that would be charged in a competitive market.”).

B. Common Evidence Regarding Anticompetitive Harm In The Relevant Market

In addition, the common evidence detailed above shows that Valve requires publishers to agree to a PMFN Policy, encompassing both price and content parity. *Supra* Factual Background; *see also In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d at 1187-91 (N.D. Cal. 2013). Common evidence also demonstrates that Valve uses its PMFN Policy to maintain its dominant position in the market for third-party digital PC game distribution platforms. *See In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 475 (N.D. Cal. 2020) (Section 2 claims “readily lend themselves to common evidence” because “defendants’ use and maintenance of monopoly power, as opposed to individual plaintiff’s conduct, drives the claim.”); *see also* Schwartz Rpt. ¶¶150-196.

Moreover, applying a Rule of Reason framework to each of their claims, *see Epic Games*, 67 F.4th at 998; *Qualcomm*, 969 F.3d at 991, Plaintiffs will show that Valve’s PMFN Policy “has a substantial anticompetitive effect that harms consumers” in market for third-party digital distribution of PC games via platforms, *Epic Games*, 67 F.4th at 983. Plaintiffs can make this showing either “directly or indirectly.” *Id.* Under either approach, Plaintiffs can make their showing using common evidence. *Cf. In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 622 F. Supp. 3d 22, 46-49 (E.D. Pa. 2022) (denying defendant’s summary judgment motion where class plaintiffs adduced common direct and indirect evidence of anticompetitive effects).

To demonstrate anticompetitive effects directly, “the plaintiff must provide proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market.” *Epic Games*, 67 F.4th at 983. Common direct evidence of

1 anticompetitive effects supports a finding of predominance. *See In re Processed Egg Prod.*
 2 *Antitrust Litig.*, 312 F.R.D. 171, 183 (E.D. Pa. 2015).

3 As discussed above, Valve’s 30% commission far exceeds the competitive level (17.7%),
 4 which is direct evidence of anticompetitive effects. *Epic Games*, 67 F.4th at 984 (“A
 5 supracompetitive price is simply a price above competitive levels.”); *see also US Airways, Inc. v.*
 6 *Sabre Holdings Corp.*, 938 F.3d 43, 61-63 (2d Cir. 2019) (evidence of supracompetitive pricing
 7 sufficient to sustain a jury verdict on competitive effects); Schwartz Rpt. ¶377. Valve’s
 8 excessive profits, *Id.* ¶¶135-149, are further direct evidence of supracompetitive pricing, *US*
 9 *Airways*, 938 F.3d at 61, 63 (in discussing a “mountain of evidence” supporting anticompetitive
 10 effects, citing expert testimony that the Defendant’s profits were “very, very, very high”).

11 Dr. Schwartz also explains how Valve’s conduct has suppressed overall output in the
 12 relevant market. As a matter of basic economics, when game prices to consumers are higher
 13 than competitive levels, consumers will buy fewer games. *Id.* ¶129. Additionally, Valve’s
 14 conduct diminishes PC desktop game variety, and accordingly limits consumer choice. *Id.*
 15 ¶¶232-236.

16 Dr. Schwartz also demonstrates how Valve’s conduct leads to reduced quality. *Id.*
 17 ¶¶220-240. Because it faces virtually no competition, Valve does not significantly invest in
 18 improving the Steam platform. Ex. 33 (Powers 30(b)(6) Tr.) at 37-38 (“Q. Are there reasons
 19 why Steam users might be willing to pay a higher price on Steam for the same game? A. Not
 20 really.”); Ex. 76 (Johnson Ex. 27) at ’458 ([REDACTED]
 21 [REDACTED]
 22 [REDACTED]). For example, Valve regularly
 23 disrupts gamers using Steam by taking Steam down for “planned weekly downtime
 24 maintenance.” Ex. 77 (Boyd Tr.) at 67. Valve has not even bothered to assess whether or how it
 25 could maintain Steam without subjecting customers to disruptive downtimes. *Id.* at 69-70. In a
 26 but-for world without Valve’s PMFN Policy, Valve would face more competition and would be
 27 compelled to improve the quality of its platform. Schwartz Rpt. ¶240.
 28

1 Antitrust plaintiffs can also demonstrate anticompetitive effects indirectly, which requires
 2 “some evidence” that the defendant used “market power to harm competition.” *Epic Games*, 67
 3 F.4th at 983. This inquiry need not be “extensive” or “highly technical”—it is “sufficient that
 4 the plaintiff prove the defendant’s conduct, as matter of economic theory, harms competition.”
 5 *Id.* One form of such indirect evidence is “excluding would-be competitors that would offer
 6 differentiated products,” *id.* at 983-84, while other forms may include, for example, increased
 7 prices, reduced output or quality, or reduced consumer choice, as discussed above, *see e.g., N.*
 8 *Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018).

9 Plaintiffs have ample indirect evidence of anticompetitive effects. Relying purely on
 10 common evidence, Dr. Schwartz concludes that Valve has monopoly power. *Supra* § II.A.
 11 Further, Plaintiffs have adduced ample evidence of would-be competitors whose attempts to
 12 enter the market failed or are failing. *Supra* Factual Background. This common evidence
 13 likewise supports a predominance finding. *In re Suboxone (Buprenorphine Hydrochloride &*
 14 *Nalaxone) Antitrust Litig.*, 421 F. Supp. 3d 12, 32-33 (E.D. Pa. 2019), *aff’d*, 967 F.3d 264 (3d
 15 Cir. 2020) (certifying class where theory of injury was that “[a]bsent [the defendant]’s actions,
 16 the generic Suboxone tablets would theoretically have entered the market and competed with”
 17 the defendant).

18 **C. Common Evidence Shows That All Or Virtually All Class Members Suffered**
 19 **Antitrust Injury**

20 Antitrust impact “is the ‘fact of damage’ that results from a violation of the antitrust
 21 laws.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166 at
 22 *7 (N.D. Cal. June 5, 2006). Plaintiffs can show with common evidence that Defendants’
 23 anticompetitive conduct had class-wide impact. To do so, Plaintiffs will rely principally on the
 24 work of Dr. Schwartz, an economist with expertise in industrial economics and platform
 25 competition.

26 Proof of class-wide impact flows directly from some basic economic facts about the
 27 market. As Dr. Schwartz explains: “All major platforms that digitally distribute third-party PC
 28 games, including Valve, impose a standardized pricing structure on all publishers, typically a

1 fixed commission.” Schwartz Rpt. ¶242. In Valve’s case, Valve sets its commission structure in
 2 the SDA that applies to *all* Valve publishers. *Id.* Given this uniform pricing policy, if Plaintiffs
 3 are capable of showing that the default commission rate would decrease to some degree because
 4 of price competition if Valve did not have a PMFN Policy, then it readily follows that *all* class
 5 members would benefit by being able to pay the new, lower default commission rate. *Id.* ■

6 ■

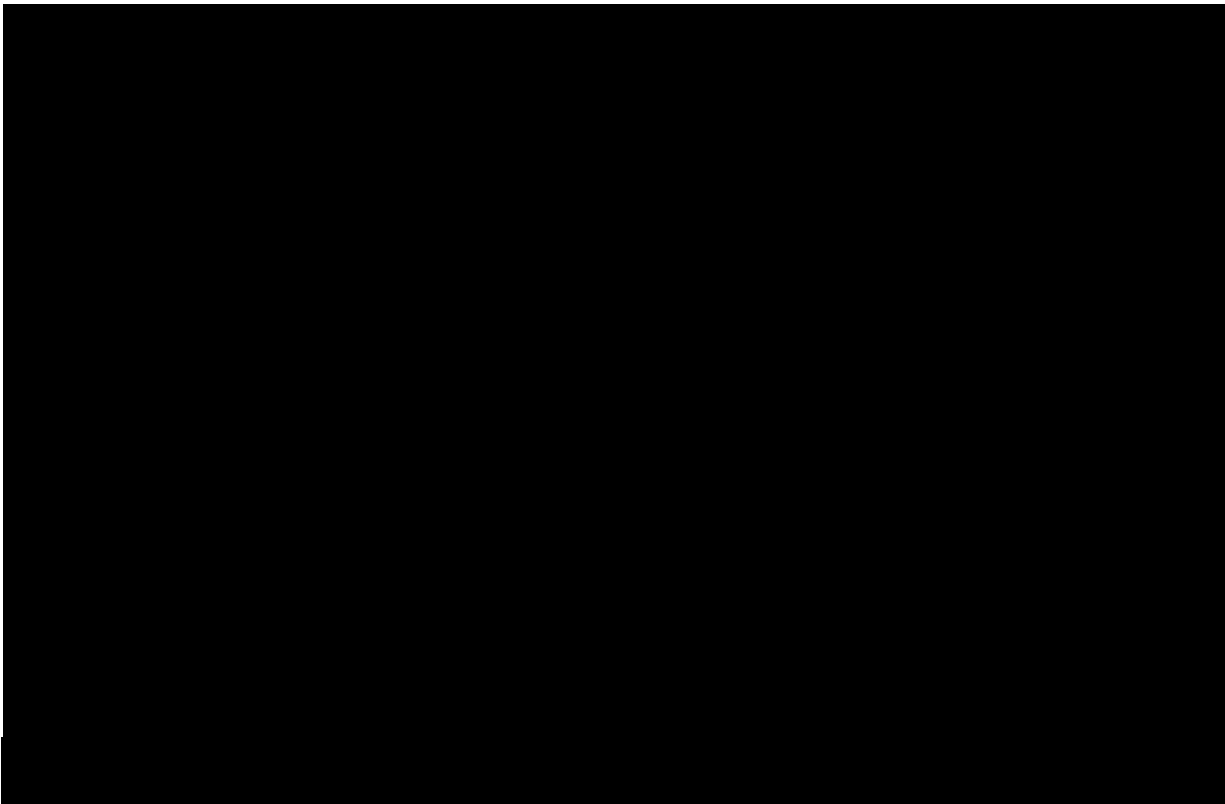
7 ■

8 ■. *Id.* ¶¶315-319.

9 Given these economic facts, Dr. Schwartz can show class-wide impact by demonstrating
 10 the default commission rate Valve charges would decrease in a but-for world free of Valve’s
 11 PMFN Policy. *Id.* ¶¶241-244. He does so in three distinct but complementary ways.

12 *First*, Dr. Schwartz constructs and applies economic models of platform competition that
 13 show that Valve’s PMFN Policy has both short- and long-term harmful effects on *all* class
 14 members. He begins by constructing a Platform Competition Model, derived from a model
 15 found in the relevant economic literature, the Boik-Corts model, which demonstrates that
 16 “PMFN clauses typically raise platform fees and retail prices and curtail entry or skew
 17 positioning decisions by potential entrants pursuing low-end business models.” *Id.* ¶245; Ex. 78
 18 (Andre Boik & Kenneth S. Corts, The Effects of Most-Favored-Nation Clauses on Competition
 19 and Entry, 59 J.L. & Econ. 105, 105 (2016)). Dr. Schwartz adapts that model to the facts and
 20 circumstances of this case as his Platform Competition Model by using empirical estimates for
 21 the model’s inputs to study what would happen when Valve’s PMFN Policy is removed.
 22 Schwartz Rpt. ¶¶272-281. His model demonstrates that, if a competing platform entered the
 23 market and Valve did not have a PMFN Policy, the competing platform would have a much

1 lower commission and Valve would respond by lowering its own commission. At the same time,
2 retail prices overall would decrease, leading to more games being sold in the market:



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16 Schwartz Rpt. ¶¶274-276. These results are compelling evidence that Valve’s PMFN
17 Policy is causing both supracompetitive prices and reduced output. [REDACTED]

18 [REDACTED]

19 [REDACTED] *Id.* [REDACTED]

20 [REDACTED]

21 [REDACTED] *Id.*

22 But Dr. Schwartz does not stop there. As he explains, the results of this model depict the
23 short-term competition caused by one platform’s entry in the absence of the PMFN Policy. *Id.*

24 ¶¶250, 279-280. To compete against this new platform (and others), Valve would need to lower
25 its commission even more, or risk a significant loss of market share. *Id.* ¶279. That lowering
26 would quickly lead to *all* commissions in the market being set at a competitive equilibrium. *Id.*

27 ¶¶279, 334. To model that equilibrium, Dr. Schwartz constructs his Landes-Posner model,
28

1 which uses well-recognized literature to estimate what commission would prevail in a
2 competitive market, but for Valve’s illegal conduct. *Id.* ¶332-340. Dr. Schwartz shows that in
3 this competitive equilibrium, Steam’s but-for commission would be just 17.7%. *Id.* ¶377. These
4 results thus confirm that all class members were harmed by paying significantly higher prices
5 (commissions) to Valve because of its PMFN Policy. In sum, Dr. Schwartz’s results show
6 Valve’s PMFN Policy “leads to higher platform fees, deters entry by rivals, and increases
7 consumer prices.” *Id.* ¶243. These results are common evidence that all class members can rely
8 upon at trial to prove that they have experienced some amount of harm from Valve’s PMFN
9 Policy. *See, e.g., Iowa Pub. Employees’ Ret. Sys. v. Bank of Am. Corp.*, 2022 WL 2829880, at
10 *25 (S.D.N.Y. June 30, 2022) (accepting use of economic analytical model to show class-wide
11 impact).

12 **Second**, Dr. Schwartz confirms this result by using the well-accepted yardstick approach,
13 which analyzes the commissions that occur in reasonably comparable platform markets. *See In*
14 *re DRAM Antitrust Litig.*, 2006 WL 1530166, at *8-10 (accepting “yardstick” approach for
15 showing class-wide impact); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*,
16 335 F.R.D. 1, 25 n.31 (E.D.N.Y. 2020) (accepting “use in this case of a market yardstick to show
17 class-wide impact in the but-for world”). He considers online retail marketplaces and online
18 vacation home rentals as potential benchmarks for his yardstick approach. Schwartz Rpt.
19 ¶¶282-301. He finds that the yardstick approach ultimately indicates “the market but-for
20 commission rate would be between 15% and 20%” in the market for third-party digital PC game
21 distribution via platforms. *Id.* ¶301. Dr. Schwartz concludes that all the benchmark markets lead
22 to a singular conclusion—that Valve’s PMFN Policy causes supracompetitive commissions. *Id.*
23 ¶¶282-301

24 **Third**, Dr. Schwartz looks to the limited empirical evidence of impact available in *this*
25 market, such as the attempted entry of EGS and other platforms. As mentioned above, when
26 EGS entered the market, Valve responded by lowering its commission from a fixed 30% rate to a
27 tiered system that provides slightly lower commissions once games hit certain thresholds.
28

1 Dr. Schwartz explains that Valve’s response empirically demonstrates Valve’s commission for
2 Steam is sensitive to the presence and degree of competition. *Id.* ¶¶302-313.

3 But as Dr. Schwartz explains, “[i]n the but-for world, where there was no PMFN, Steam
4 would have likely faced a more expansive competitive threat and likely much earlier than Epic’s
5 entrance.” *Id.* ¶309. Valve’s competitive response would likewise be stronger, and its
6 commissions lower. Recognizing that economics predicts price approaches cost under
7 competitive conditions, he analyzes the relevant costs in the industry to determine a lower bound
8 for but-for commissions. *Id.* ¶311. He finds that “a 12% (or lower) take-rate would be
9 sustainable” for platforms in the relevant market like Valve. *Id.* ¶312. Based on an analysis of
10 Valve’s real-world costs, Dr. Schwartz shows empirically that matching Epic’s 12% commission
11 rate would be profitable for Steam. *Id.* ¶313. This empirical analysis thus confirms that, in the
12 but-for world, Valve would charge lower commissions to all class members—and demonstrates
13 that Dr. Schwartz’ 17.7% but-for commission used to estimate damages is conservative. Once
14 again, each class member could rely on this empirical showing to prove impact at trial. *Tyson*,
15 577 U.S. at 458 (assessing empirical evidence of class-wide impact based on “whether the
16 sample at issue could have been used to establish liability in an individual action”).

17 **D. Plaintiffs’ Model Is Capable Of Calculating Class-wide Damages**

18 A “putative class must establish that damages are susceptible of measurement across the
19 entire class.” *In re Glumetza Antitrust Litig.*, 336 F.R.D. at 479. “Antitrust plaintiffs may satisfy
20 the predominance requirement by using a model that estimates the damages attributable to the
21 antitrust injury, even if more individualized determinations are needed later to allocate damages
22 among class members.” *Id.* The calculation of damages is a low bar and “need not be exact.”
23 *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). The Supreme Court recognizes that
24 “[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff’s situation
25 would have been in the absence of the defendant’s antitrust violation.” *J. Truett Payne Co. v.*
26 *Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

1 Dr. Schwartz bases damages on the competitive equilibrium predicted by his
 2 Landes-Posner model, which predicts that Valve’s weighted-average commission in the but-for
 3 world will be 17.7%. Schwartz Rpt. ¶377. [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] *Id.* ¶¶400-402. Dr. Schwartz then assesses how much of this commission
 7 reduction would be passed down to consumers in the form of lower retail prices for PC games.
 8 [REDACTED]
 9 [REDACTED] *Id.* ¶¶379-397.
 10 He then offsets damages by this percentage. *Id.* ¶402.

11 Dr. Schwartz’s methodology arrives not only at an aggregate damages figure
 12 [REDACTED]), but can also derive individual damages awards for each class
 13 member. *Id.* ¶¶406-410. Dr. Schwartz’s methodology is repeatable and can be expanded to
 14 encompass later years when Valve produces additional transactional data during merits discovery
 15 or prior to trial. *Id.* ¶400. His methodology easily passes muster at this stage. *See In re High-*
 16 *Tech Emp. Antitrust Litig.*, 289 F.R.D. 555 (N.D. Cal. 2013) (“calculations need not be exact”)
 17 (quoting *Comcast*, 569 U.S. at 35). Indeed, it is substantially *more* robust than the minimal
 18 requirement, at this stage, of providing an aggregate damages figure. *See In re Cardizem CD*
 19 *Antitrust Litig.*, 200 F.R.D. 297, 324 (E.D. Mich. 2001).

20 **III. RESOLVING THE DISPUTE AS A CLASS ACTION IS SUPERIOR TO ANY** 21 **ALTERNATIVE**

22 Finally, class certification is far superior to any alternative method for adjudicating this
 23 case. *See Fed. R. Civ. P. 23(b)(3)*. *First*, as the Supreme Court has recognized, a “core” purpose
 24 of class actions is “to overcome the problem that small recoveries do not provide the incentive
 25 for any individual to bring a solo action.” *Amchem Prods.*, 521 U.S. at 617. That purpose is
 26 clearly served for a case of this scale and complexity, where prosecuting these claims requires
 27 many millions of dollars. *Second*, while superiority might be lessened based on “the extent of
 28

1 any independent litigation already begun by class members,” *In re Domestic Drywall Antitrust*
 2 *Litig.*, 322 F.R.D. 188, 200 (E.D. Pa. 2017), no class members have brought independent
 3 litigation here. *Third*, “class-wide litigation of common issues will reduce litigation costs and
 4 promote judicial efficiency.” *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 121 (S.D.N.Y. 2015).
 5 *Fourth*, no inherent difficulties undermine the maintenance of this case as a class action.

6 **IV. THE COURT SHOULD APPOINT PLAINTIFFS’ REQUESTED COUNSEL**

7 Finally, Plaintiffs request the appointment of Quinn Emanuel Urquhart & Sullivan, LLP,
 8 Constantine Cannon LLP, Lockridge Grindal Nauen P.L.L.P., and Wilson Sonsini Goodrich &
 9 Rosati, P.C. to serve as Co-Lead Class Counsel.

10 Rule 23(g)(1)(A) identifies four factors used to determine lead counsel: “the work
 11 counsel has done;” “counsel’s experience;” “knowledge of the applicable law;” and the
 12 “resources that counsel will commit.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL
 13 7882100, at *66 (E.D.N.Y. Oct. 15, 2014); *see also* Fed. R. Civ. P. 23(g)(1)(B). Each factor
 14 favors these top-tier firms’ appointment. They bring extensive expertise in antitrust class
 15 actions, have worked efficiently and effectively to investigate and prosecute this case, and have
 16 already committed tens of thousands of hours and many millions of dollars investigating,
 17 developing, and litigating this matter. As discussed in the attached firm resumes, the firms have
 18 ably litigated and served as lead class counsel in many major antitrust actions nationwide,
 19 recovered billions of dollars in antitrust and other cases, and received awards recognizing the
 20 quality of their work. Exs. 80-83. They have also done a tremendous amount of work in this
 21 case, taking over twenty depositions and developing the robust evidentiary record supporting this
 22 motion. They have also worked well with Executive Committee member Vorys, Sater, Seymour
 23 & Pease, LLP, whose firm resume is also attached. Ex. 84. Accordingly, they meet all the
 24 requirements for appointment as Class Counsel.

25 **CONCLUSION**

26 Plaintiffs respectfully request that the Court certify the proposed class, appoint the named
 27 Plaintiffs as class representatives, and appoint Co-Lead Class Counsel.

1 DATED: February 8, 2024

Respectfully submitted,

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28 *Executive Committee Member*

WORD COUNT CERTIFICATION

I certify that this memorandum contains 10,896 words, in compliance with the stipulated motion so ordered by the Court at Dkt. 178.

DATED: February 8, 2024

/s/ Alicia Cobb

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

DATED: February 8, 2024

/s/ Alicia Cobb

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