

The Honorable John C. Coughenour

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

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

DARK CATT STUDIOS HOLDINGS, INC.,
a Delaware corporation, and DARK CATT
STUDIOS INTERACTIVE LLC, an Illinois
limited liability company, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

VALVE CORPORATION, a Washington
corporation,

Defendant.

Case No. 2:21-cv-00872-JCC

**DEFENDANT VALVE CORPORATION'S
MOTION TO DISMISS PLAINTIFFS'
CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF**

**NOTE ON MOTION CALENDAR:
September 24, 2021**

TABLE OF CONTENTS

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

I. INTRODUCTION 1

II. STATEMENT OF FACTS 4

III. ARGUMENT 6

 A. LEGAL STANDARD..... 6

 B. DARK CATT FAILS TO ALLEGE ANTITRUST INJURY. 6

 1. DARK CATT MUST PLAUSIBLY ALLEGE ANTITRUST INJURY. 6

 2. DARK CATT PREDICATES ITS ALLEGED INJURY ON VALVE’S COMMISSION BEING SUPRACOMPETITIVE. 7

 3. DARK CATT’S ALLEGATIONS OF SUPRACOMPETITIVE PRICING ARE IMPLAUSIBLE. 7

 4. OTHER ALLEGATIONS DO NOT CURE THE IMPLAUSIBLE SUPRACOMPETITIVE PRICE..... 10

 5. DARK CATT’S ALLEGED NON-PRICE ANTITRUST INJURIES ARE ALSO IMPLAUSIBLE. 12

 C. DARK CATT FAILS TO ALLEGE A 75% MARKET SHARE OR MARKET POWER..... 13

 D. VALVE’S STEAM KEY GUIDELINES AND TWO PROVISIONS DARK CATT CITES IN VALVE’S DEVELOPER CONTRACTS DO NOT COMBINE INTO AN ANTICOMPETITIVE MFN..... 15

 1. DARK CATT FAILS TO ALLEGE VALVE’S FREE STEAM KEYS INJURE COMPETITION. 15

 2. DARK CATT’S ALLEGATIONS OF NON-STEAM KEYS CONTRACTUAL PROVISIONS WITH DEVELOPERS ALSO FAIL TO ALLEGE INJURY TO COMPETITION. 19

 E. ALLEGATIONS OF THE STEAM REVIEW SYSTEM DO NOT ALLEGE INJURY TO COMPETITION. 22

 F. DARK CATT’S CPA CLAIM FALLS WITH ITS FEDERAL ANTITRUST CLAIMS. 24

IV. CONCLUSION..... 24

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3 *Abbott Labs. v. Adelpia Supply USA,*

4 2017 WL 5992355 (E.D.N.Y. Aug. 10, 2017).....10

5 *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.,*

6 836 F.3d 1171 (9th Cir. 2016)17

7 *Ashcroft v. Iqbal,*

8 556 U.S. 662 (2009).....6, 7

9 *Bell Atl. Corp. v. Twombly,*

10 550 U.S. 544 (2007).....6, 7

11 *Bio-Rad Labs., Inc. v. 10X Genomics, Inc.,*

12 483 F. Supp. 3d 38 (D. Mass. 2020)7

13 *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,*

14 65 F.3d 1406 (7th Cir. 1995)10

15 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,*

16 509 U.S. 209 (1993).....8

17 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,*

18 429 U.S. 477 (1977).....22, 23

19 *Cargill, Inc. v. Monfort of Colorado, Inc.,*

20 479 U.S. 104 (1986).....12

21 *Digene Corp. v. Third Wave Techs., Inc.,*

22 323 F. App’x 902 (Fed. Cir. 2009)22

23 *Dominguez v. UAL Corp.,*

24 666 F.3d 1359 (D.C. Cir. 2012).....12

25 *F.T.C. v. Facebook, Inc.,*

26 2021 WL 2643627 (D.D.C. June 28, 2021).....2, 14, 15

F.T.C. v. Qualcomm Inc.,

969 F.3d 974 (9th Cir. 2020)11, 16, 22, 23

Free FreeHand Corp. v. Adobe Sys. Inc.,

852 F. Supp. 2d 1171 (N.D. Cal. 2012)18

	Page(s)
1 <i>Harrison Aire, Inc. v. Aerostar Int’l, Inc.</i> , 423 F.3d 374 (3d Cir. 2005).....	10
2	
3 <i>Hicks v. PGA Tour, Inc.</i> , 897 F.3d 1109 (9th Cir. 2018)	6
4	
5 <i>Insulate SB, Inc. v. Advanced Finishing Sys., Inc.</i> , 797 F.3d 538 (8th Cir. 2015)	6
6	
7 <i>Intel Corp. v. Fortress Inv. Grp. LLC</i> , 511 F. Supp. 3d 1006 (N.D. Cal. 2021)	7
8	
9 <i>LePage’s Inc. v. 3M</i> , 324 F.3d 141 (3d Cir. 2003).....	12
10	
11 <i>Lubic v. Fid. Nat. Fin., Inc.</i> , 2009 WL 2160777 (W.D. Wash. July 20, 2009)	24
12	
13 <i>Metronet Servs. Corp. v. Qwest Corp.</i> , 2001 WL 765167 (W.D. Wash. Apr. 16, 2001).....	11
14	
15 <i>N.C.A.A. v. Alston</i> , 141 S. Ct. 2141 (2021).....	23, 24
16	
17 <i>In re NCAA I-A Walk-On Football Players Litig.</i> , 2006 WL 1207915 (W.D. Wash. May 3, 2006).....	7
18	
19 <i>Nicolosi Distrib., Inc. v. FinishMaster, Inc.</i> , 2018 WL 4904918 (N.D. Cal. Oct. 9, 2018).....	22
20	
21 <i>Northstar Fin. Advisors Inc. v. Schwab Invs.</i> , 779 F.3d 1036 (9th Cir. 2015)	18
22	
23 <i>Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.</i> , 883 F.2d 1101 (1st Cir. 1989).....	3, 5, 19, 21
24	
25 <i>Olympia Equip. Leasing Co. v. W. Union Tel. Co.</i> , 797 F.2d 370 (7th Cir. 1986)	16
26	
27 <i>PBTM LLC v. Football Nw., LLC</i> , 511 F. Supp. 3d 1158 (W.D. Wash. 2021).....	24
28	
29 <i>Pool Water Products v. Olin Corp.</i> , 258 F.3d 1024 (9th Cir. 2001)	7
30	
31 <i>Power Analytics Corp. v. Operation Tech., Inc.</i> , 820 F. App’x 1005 (Fed. Cir. 2020)	13

	Page(s)
1 <i>Rebel Oil Co., Inc. v. Atl. Richfield Co.,</i> 51 F.3d 1421 (9th Cir. 1995)	6
2	
3 <i>Sanderson v. Culligan Int’l Co.,</i> 415 F.3d 620 (7th Cir. 2005)	24
4	
5 <i>Somers v. Apple, Inc.,</i> 729 F.3d 953 (9th Cir. 2013)	<i>passim</i>
6 <i>Top Rank, Inc. v. Haymon,</i> 2015 WL 9948936 (C.D. Cal. Oct. 16, 2015).....	7
7	
8 <i>U.S. v. Topco Associates, Inc.,</i> 405 U.S. 596 (1972).....	24
9	
10 <i>Wolfire Games, LLC, et al. v. Valve Corp.,</i> No. 2:21-cv-00563	<i>passim</i>
11 Statutes	
12 Washington Consumer Protection Act, RCW 19.86	1, 24
13 Sherman Act, 15 U.S.C. § 2.....	1, 16, 24
14 Other Authorities	
15 Fed. R. Civ. P. 12(b)(6).....	1
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	

1 **I. INTRODUCTION**

2 On June 23, 2021, Valve moved to compel the individual plaintiffs in *Wolfire Games,*
3 *LLC, et al. v. Valve Corp.*, No. 2:21-cv-00563 (“*Wolfire*”), to arbitrate as agreed in the Steam
4 Subscriber Agreement, and to stay the claims of Wolfire Games (“Wolfire”), the sole developer
5 plaintiff, pending arbitration. *Wolfire* Dkt. # 35. Plaintiffs here, parent and subsidiary (“Dark
6 Catt”), are a developer like Wolfire. If the Court stays Wolfire’s claims, Valve will move to stay
7 Dark Catt’s as well. Alternatively, Valve moves under Fed. R. Civ. P. 12(b)(6) to dismiss Dark
8 Catt’s Complaint (Dkt. # 1) because it does not state claims upon which relief can be granted
9 under Section 2 of the Sherman Act or the Washington Consumer Protection Act (“CPA”).

10 Valve also moved to dismiss the *Wolfire* Complaint, *Wolfire* Dkt. # 37 (“*Wolfire* MTD”),
11 which is much like Dark Catt’s. The main differences are: (1) developer Dark Catt is not joined
12 by consumer plaintiffs; (2) Dark Catt does not advance a tying claim or propose two separate
13 antitrust markets; and (3) Dark Catt adds to its Steam Keys claims two provisions in Valve’s
14 contract with developers (one about game and update release timing, the other about add-on
15 content), and says together they amount to an anticompetitive Most-Favored-Nations agreement.

16 Dark Catt’s Complaint fails to state a monopolization or CPA claim for two
17 straightforward reasons like those set forth in Valve’s motion to dismiss the *Wolfire* Complaint.

18 First, just as in *Wolfire*, Dark Catt claims injury solely from paying Valve an allegedly
19 supracompetitive 30% commission on games it sold to consumers on Steam. But it alleges no
20 facts from which the Court could plausibly infer that Valve’s 30% commission (less for high-
21 volume games) is above a competitive level. This alone dooms the Complaint. Valve, an
22 innovator that created Steam in 2003 and shortly after 2004 began allowing other developers to
23 sell their games on Steam, set the 30% rate at the very beginning. In fact, the 30% rate, chosen
24 when Valve had zero market share and no power to charge anything other than a competitive
25 rate, has remained the same (save volume discounts added in 2018), while Valve has allegedly
26 faced “competitive pressures for almost twenty years” from “billion-dollar companies with

1 popular PC games.” ¶¶ 8, 67.¹ In this environment, Valve has continuously enhanced Steam
 2 with many new features prized by developers and gamers alike, meaning its quality-adjusted
 3 price has fallen steadily over that period. Competitive prices do not cause antitrust injury.

4 Second, just as in *Wolfire*, Dark Catt alleges that Valve has a 75% market share but
 5 pleads no factual support, which alone also justifies dismissal. In fact, the website the Complaint
 6 cites for the 75% allegation, and an article the website relies on for Valve’s sales, eviscerates the
 7 75% assertion. “If the numbers are right, that means Valve own[s] at least 18% of their specific
 8 market” (the “dedicated PC digital game business”) “and likely far more than that once in-game
 9 purchases are accounted for.” ¶ 5 n.3 (cited article). That is nowhere near 75%. As in the recent
 10 *Facebook* decision, the lack of factual support for the market share allegation means the essential
 11 element of market power is insufficiently alleged. *See F.T.C. v. Facebook, Inc.*, 2021 WL
 12 2643627, at *1, *13–14 (D.D.C. June 28, 2021).

13 While these two deficiencies independently warrant dismissal (just as in *Wolfire*), Dark
 14 Catt also fails to plausibly allege any unlawful conduct by Valve for three reasons:

15 First, Dark Catt fails to allege anything unlawful about Valve’s “Steam Keys” program.
 16 Steam Keys are code numbers that allow Steam-enabled games to be activated on Steam. Valve
 17 gives Steam Keys to developers *for free* as an accommodation. Developers can then sell them at
 18 retail stores or online to gamers, or give them to reviewers. The customer buys (or the reviewer
 19 receives) a Steam Key from the developer, logs into Steam, enters the code, and downloads and
 20 plays the game on Steam using Valve’s infrastructure just as if the game was purchased on
 21 Steam—all without anyone paying Valve anything. Dark Catt alleges Valve’s Steam Key
 22 guidelines violate the antitrust laws because they ask developers who want to take advantage of
 23 Steam’s features and popularity for free to treat Steam customers fairly by setting their prices for
 24 Steam-enabled games on Steam as low as they charge for those same Steam-enabled games
 25 when sold elsewhere using Steam Keys. Dark Catt, like *Wolfire*, says this request is

26 _____
¹ Unless otherwise specified, paragraph references are to Dark Catt’s Complaint, Dkt. # 1.

1 anticompetitive. But Valve has no duty under antitrust law to allow developers to use free Steam
2 Keys to undersell prices for the games they sell on Steam—or to provide Steam Keys at all.

3 Dark Catt goes one step further and alleges that Steam Keys are “required” by the
4 industry and that Valve uses them to “punish behavior seen as contrary to its position ...
5 including ... speaking out.” ¶ 158. But, as to itself and others, the facts Dark Catt alleges and
6 documents it cites are either hollow or contradict its allegation, rendering this theory implausible.

7 Second, Dark Catt claims the Steam Key guidelines and two provisions in its contract
8 with developers somehow add up to a “Most Favored Nations (‘MFN’) provision preventing
9 price competition between storefronts.” ¶ 54. But Dark Catt misrepresents the provisions’
10 applicability and alleges no harm to competition from any of them. The Steam Key guidelines
11 ask developers who choose to use Steam Keys to give Steam customers the *lowest* available
12 price developers set for the game, and, contrary to Dark Catt’s assertions, do not apply to non-
13 Steam Key versions of the game a developer may choose to sell elsewhere. The two other terms
14 ask developers to keep their Steam games and downloadable content (“DLC”) up to date.
15 Seeking the best price and up-to-date products for your customers is not harm to competition; it
16 *is* competition. *See, e.g., Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*
17 *of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) (upholding “Prudent Buyer” policy under which
18 insurer paid the lowest price physicians charged to any insurer). Thus, Dark Catt alleges no
19 plausible antitrust injury. Dark Catt also claims these terms prevent developers from offering
20 exclusive content or deals through other stores, but the facts it alleges show developers often
21 make exclusive deals with Valve’s “billion-dollar” competitors like Epic. ¶¶ 67, 164, 172, 176,
22 177. Finally, contrary to Dark Catt’s assertion, the DLC term specifically allows developers to
23 offer exclusive content through other distributors. None of the provisions is plausibly alleged to
24 be anticompetitive; collectively, they do not add up to an unlawful MFN.

25 Finally, Dark Catt claims that Valve harms competition by allowing Steam users to post
26 reviews of games they purchase and play. But that alleges no anticompetitive conduct. Rather,

1 it improperly invites the Court to become the arbiter of whether Valve and other online sellers
2 should allow customer reviews and, if so, what customers should be allowed to say.

3 **II. STATEMENT OF FACTS**

4 Valve started as a video game developer in 1996, and in 2003 launched Steam, a
5 pioneering online gaming platform to facilitate game updates and other enhancements gamers
6 value as they play. ¶ 3. A year later, it opened up Steam to third-party game developers. ¶ 4.
7 Those developers, not Valve, now produce the overwhelming majority of games customers buy
8 and play on Steam. ¶ 89 n.23 (cited Letter Brief at 5). Steam has been tremendously successful,
9 currently hosting over 50,000 games, with 120 million monthly active users. *See* ¶¶ 4, 6.

10 Valve has always made Steam available for free to play games. Like Wolfire, Dark Catt
11 disingenuously omits this fact, which the Court must glean from allegations of what Valve does
12 charge for: selling games on Steam. Developers set their own prices and discounts on Steam.
13 *See* ¶¶ 106, 195. Valve sells their games on Steam at these prices and sends developers the
14 revenue, less Valve's commission, sales tax, and refunds. ¶ 8. Thus, Valve earns revenue to pay
15 for Steam—for the servers and other infrastructure all over the world to enable players to access
16 their Steam accounts to buy and play games, for customer service agents, for employees who add
17 features to make it more popular with customers and developers, and other Steam expenses—by
18 charging a commission when game developers sell games to players on Steam. *See* ¶¶ 1–5.

19 In 2007, Steam hosted just 150 games. ¶ 4. But over time, Valve developed and
20 improved Steam's features, providing increased value to its developer partners and customers.
21 Steam includes a digital storefront offering state-of-the-art content delivery, cybersecurity, and
22 digital rights management. *See* ¶ 117. Steam gives developers access to a large pool of potential
23 customers, ¶¶ 5, 20, 42, 110, 124, support in 26 languages with locally customizable store pages,
24 and Steam's sizable following in North America, Europe, and beyond, ¶¶ 105–07. The Steam
25 review system allows players to rate and comment on games, generating a game review score.
26 *See* ¶¶ 17, 178, 182–83. Customers trust and rely on that system—other stores now import, and

1 other systems look to, a game’s Steam score—such that games by even unknown developers
2 garnering favorable reviews from Steam users can quickly generate large sales. *See* ¶¶ 18, 97,
3 179, 181. Finally, Valve developed Steam Keys, an accommodation to developers to enable
4 them to sell copies of their Steam-enabled games in brick-and-mortar stores or online, or give
5 them away to beta test new games or generate media and influencer publicity before release.
6 ¶¶ 12, 58, 125, 147–48. As explained below, Valve gives developers Steam Keys *for free*.

7 The industry did not stand by idly. As Dark Catt concedes, Valve has been facing
8 “competitive pressures for almost twenty years,” ¶ 8, from rival platform-stores by Epic,
9 Electronic Arts, Microsoft, Tiny Build, Discord, ¶ 21, and as Wolfire alleged, Amazon, *Wolfire*
10 CAC ¶ 252. Valve competes with these platforms to offer developers’ games. When developers
11 choose to sell their games on Steam and other platforms, Valve competes for gamers’ business
12 with the non-Steam-enabled versions these platforms sell. And because Valve allows developers
13 to resell their free Steam Keys without paying Valve anything, Steam faces competition from
14 Steam Key resellers, who sell licenses for games users can then play on Steam. ¶¶ 41, 150–51.

15 Dark Catt, a developer, allegedly “created a PC game and made it compatible with
16 Steam,” then “sold its game to consumers on Steam and paid ... Valve’s mandatory 30% revenue
17 share on game sales on Steam.” ¶¶ 26–27. Unlike Wolfire and the seven individual plaintiffs in
18 that case, Dark Catt here seeks to represent a class comprising only game developers. *See* ¶ 202.
19 Also unlike Wolfire, Dart Catt does not argue that game sales and gaming platforms are separate
20 products sold in separate markets. Rather, Dark Catt seeks to represent a class of developers that
21 contracted with Valve to “distribute a PC game via Steam and sold such game on or after April
22 27, 2017.” *Id.* Since it alleges the single market that Steam serves, Dark Catt omits the tying
23 claims Wolfire asserted. Thus, Dark Catt’s Complaint turns on whether it has plausibly alleged
24 that Valve, amidst “competitive pressures for almost twenty years,” ¶ 8, from “billion-dollar
25 companies with popular PC games,” ¶ 67, and “[i]ndustry behemoths,” ¶ 119, has somehow
26 “crossed the line into illegal monopolization,” comparing it to Microsoft in the late 1990s, ¶ 23.

1 The sole alleged harm for which Dark Catt seeks damages, for itself and its proposed
 2 class, is paying “a supracompetitive revenue share to Valve” for sales of its games on Steam.
 3 ¶¶ 220, 221, 230, 231, 238, 239. Like Wolfire, Dark Catt concludes, without alleging facts that
 4 could plausibly support its conclusion, that Valve’s commission is above what “would be offered
 5 in a competitive market.” ¶ 114. As detailed below, the facts alleged establish the opposite.

6 **III. ARGUMENT**

7 **A. Legal Standard**

8 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 9 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
 10 556 U.S. 662, 678 (2009) (quotation marks omitted). “A claim has facial plausibility when the
 11 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 12 defendant is liable for the misconduct alleged.” *Id.* “Where a complaint pleads facts that are
 13 merely consistent with a defendant’s liability, it stops short of the line between possibility and
 14 plausibility of entitlement to relief.” *Id.* (quotation marks omitted). “Applying this standard is a
 15 context-specific task that requires drawing on judicial experience and common sense.” *Hicks v.*
 16 *PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018) (quotation marks omitted).

17 This is especially true in antitrust cases. “[I]t is one thing to be cautious before
 18 dismissing an antitrust complaint in advance of discovery, but quite another to forget that
 19 proceeding to antitrust discovery can be expensive.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 20 558 (2007) (citation omitted). Consequently, “the federal courts have been reasonably
 21 aggressive in weeding out meritless antitrust claims at the pleading stage.” *Insulate SB, Inc. v.*
 22 *Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015) (quotation marks omitted).

23 **B. Dark Catt Fails to Allege Antitrust Injury.²**

24 **1. Dark Catt must plausibly allege antitrust injury.**

25 All private antitrust claims require antitrust injury, *Rebel Oil Co., Inc. v. Atl. Richfield*

26 ² This section closely tracks Part III.D of the *Wolfire* MTD and for substantially similar reasons provides a basis to dismiss the Complaint independent of the allegedly unlawful conduct.

1 Co., 51 F.3d 1421, 1433 (9th Cir. 1995), and a plaintiff who fails to adequately plead antitrust
 2 injury lacks standing, *Somers v. Apple, Inc.*, 729 F.3d 953, 964 n.5 (9th Cir. 2013); *see also In re*
 3 *NCAA I-A Walk-On Football Players Litig.*, 2006 WL 1207915, at *14 (W.D. Wash. May 3,
 4 2006) (“Plaintiffs can obtain no remedy without proving antitrust injury.”) (Coughenour, J.).

5 2. **Dark Catt predicates its alleged injury on Valve’s commission being**
 6 **supracompetitive.**

7 Just as in *Wolfire*, the alleged injury to Dark Catt and the proposed class is based entirely
 8 on the commission Valve receives on Steam’s third-party sales (also termed Valve’s “revenue
 9 share” or fee). ¶¶ 2, 220–21, 230–31, 238–39. That injury must flow from aspects of Valve’s
 10 conduct that harm competition, *see Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1034 (9th
 11 Cir. 2001) (“If the injury flows from aspects of the defendant’s conduct that are beneficial or
 12 neutral to competition, there is no antitrust injury.”), so Dark Catt alleges (just as the *Wolfire*
 13 Plaintiffs) that Valve’s commission is “supracompetitive,” *e.g.*, ¶¶ 20, 22, 75, 200.

14 “Claiming that prices are supra-competitive is a legal conclusion rather than a fact,
 15 however, and must be supported by specific factual allegations.” *Bio-Rad Labs., Inc. v. 10X*
 16 *Genomics, Inc.*, 483 F. Supp. 3d 38, 59 (D. Mass. 2020). Thus, Dark Catt must allege facts
 17 supporting an inference that Valve’s commission is supracompetitive. *See Intel Corp. v.*
 18 *Fortress Inv. Grp. LLC*, 511 F. Supp. 3d 1006, 1027–29 (N.D. Cal. 2021) (dismissing antitrust
 19 claims where allegations “arguably suggest that supracompetitive pricing is possible; however,
 20 *Twombly* and *Iqbal* require plausibility and not just possibility”); *Top Rank, Inc. v. Haymon*,
 21 2015 WL 9948936, at *8–9 (C.D. Cal. Oct. 16, 2015) (same where plaintiff “fail[ed] to allege
 22 any evidentiary facts plausibly suggesting [...] supracompetitive prices”).

23 3. **Dark Catt’s allegations of supracompetitive pricing are implausible.**

24 Dark Catt claims that Valve uses its alleged “monopoly tactics” to charge a supra-
 25 competitive commission. ¶ 8. That commission is 30% for most developers, with volume
 26 discounts added in October 2018 for high-selling games. ¶¶ 191–92. And just as in *Wolfire*,
 Dark Catt crucially alleges that Valve has maintained the same 30% commission “for almost

1 twenty years.” See ¶ 8 (“Valve has not been forced to lower [its 30% tax] through competitive
2 pressures for almost twenty years.”).

3 Steam launched in 2003 and began selling third-party games soon after the release of its
4 popular game, Half-Life 2, in November 2004. ¶¶ 3–4. Valve is allegedly now “the world’s
5 largest distributor of PC games.” ¶ 5. The Complaint does not allege precisely when Valve
6 assumed its purportedly dominant position, see ¶ 110 (“Since it was launched in 2003, Steam has
7 become the dominant distributor of PC games.”), but the only reasonable inference based on its
8 factual allegations is that it took at least five and likely several more years, see ¶ 6 (“Valve’s
9 success as a company has largely tracked the growth of Steam. In 2005, Forbes estimated that
10 Valve had grossed \$70 million. As of 2012, the company was worth over \$3 billion.”). This
11 means Valve allegedly charged the same 30% for *at least five years* before becoming dominant,
12 beginning when it was a “plucky gaming upstart” with “business acumen,” ¶ 7, and had zero
13 market share (apart from selling its own games). These factual allegations make it implausible
14 that 30% is supracompetitive and that Valve can charge it only because of its alleged dominance.

15 Other factual allegations render Dark Catt’s theory even less plausible. Valve has not
16 raised its 30% commission in nearly two decades, during which it went from zero to an alleged
17 75% market share, e.g., ¶ 5, and the industry saw substantial growth in both output and demand,
18 see ¶ 4 (games on Steam went from 150 in 2007 to now over 50,000), ¶ 6 (Valve worth over \$3
19 billion in 2021, \$10 billion in 2019). And the alleged facts establish that over time Valve has
20 enhanced Steam with many features prized by developers and gamers alike, meaning its quality-
21 adjusted commission rate has actually fallen over this period. See Part II, *supra*. While “in a
22 concentrated market, the occurrence of a price *increase* does not in itself permit a rational
23 inference of [...] supracompetitive pricing,” *Brooke Grp. Ltd. v. Brown & Williamson Tobacco*
24 *Corp.*, 509 U.S. 209, 237 (1993) (emphasis added), Dark Catt fails to allege an increase for
25 nearly twenty years. In fact, the only price change alleged is a *decrease* of up to 33% for high-
26 volume games. See ¶ 191 (30% to 20%). None of this permits a rational inference that Valve’s

1 commission is supracompetitive.

2 Moreover (and contradicting its conclusory allegations to the contrary), the Complaint
3 factually alleges that Valve has faced substantial competition from “billion-dollar companies
4 with popular PC games,” ¶ 67, “more efficient business models and [...] more favorable
5 opportunities for Developers,” ¶ 21, including (1) a nine-year campaign by “[i]ndustry
6 behemoth[]” Electronic Arts (“EA”), leveraging “popular franchises,” ¶¶ 68, 119; (2) an ongoing
7 campaign by Microsoft, leveraging not only its “popular games and Windows operating system,”
8 but also its Xbox console, ¶¶ 69, 79, 81, 96, 193; (3) a rival storefront by Ubisoft launched in
9 2009 and leveraging its “blockbuster franchises,” ¶ 70; (4) an entry by popular communications
10 service Discord in late 2018 (the same time Valve implemented its volume discounts, *see* ¶ 113),
11 leveraging its “existing user base of millions of active PC gamers and [...] more favorable terms
12 for developers,” ¶ 71; (5) Epic’s store, launched with the “highly popular Fortnite game” and
13 spending hundreds of millions of dollars to attract developers and customers, ¶¶ 64–65; and (6)
14 Amazon, *Wolfire* CAC ¶¶ 20, 231, 252. These facts make it implausible that the 30% (or less
15 with volume discounts) Valve charged throughout nearly twenty years of intense competition is
16 supracompetitive.

17 The Ninth Circuit ruled on this very issue under indistinguishable facts. *Somers v. Apple*,
18 *Inc.*, 729 F.3d 953 (9th Cir. 2013). Somers brought antitrust claims based on Apple’s purported
19 monopoly of digital music sales. *Id.* at 956. Under her “overcharge theory,” Somers alleged that
20 Apple was able to charge supracompetitive prices for digital music by thwarting competitors
21 with its anticompetitive conduct. *Id.* at 964. But the Ninth Circuit affirmed dismissal of Somers’
22 overcharge claims because the market facts rendered her overcharge theory implausible. *Id.* at
23 964–66. Apple had allegedly charged the same price (99 cents per song) since it entered the
24 market—both before and after it obtained a monopoly—and never changed that price, even after
25 a large seller (Amazon) entered the market. *Id.* at 964. These alleged market facts rendered
26 implausible Somers’ overcharge theory, warranting dismissal of her antitrust claims. *Id.*

1 Just as in *Somers*, Dark Catt’s theory of harm is that Valve would be forced to lower its
2 commission but for its dominance and anticompetitive conduct. See ¶¶ 8, 216. And Dark Catt’s
3 market allegations, detailed above, are actually weaker than those in *Somers*. Compare *Somers*,
4 729 F.3d at 964 (alleging Apple had always charged the same price, including for one year
5 before obtaining a monopoly) with ¶¶ 6, 8, 43 (alleging Valve has charged the same price for
6 almost twenty years, including for many years before becoming dominant, and added volume
7 discounts in 2018). Dark Catt’s factual allegations render implausible its claim that Valve’s
8 commission is supracompetitive, warranting dismissal. *Somers*, 729 F.3d at 964; see also *Abbott*
9 *Labs. v. Adelpia Supply USA*, 2017 WL 5992355, at *7 (E.D.N.Y. Aug. 10, 2017) (dismissing
10 antitrust claims because allegations that price had stayed the same before and after competitor
11 exclusion rendered implausible theory that unlawful conduct affected price).

12 4. **Other allegations do not cure the implausible supracompetitive price.**

13 Dark Catt may try to sidestep *Somers* with other allegations, but they don’t save the
14 Complaint. First, it may argue that some competitors charge less than Valve, e.g., ¶ 193, making
15 it plausible that Valve’s rate is supracompetitive. The Ninth Circuit rejected that argument in
16 *Somers*. 729 F.3d at 965–66 (“[S]uch variations in pricing exist even in competitive markets.”).
17 Here, Dark Catt admits the market regards Steam as superior, ¶ 68 (“[Steam is] where the
18 players are”); ¶ 176 (describing gamer backlash when publisher 2K/Take Two did not release
19 *Borderlands 3* on Steam), which is consistent with Valve’s ability to fairly command allegedly
20 higher prices, see *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005)
21 (“Competitive markets are characterized by both price and quality competition, and a firm’s
22 comparatively high price may simply reflect a superior product.”); *Blue Cross & Blue Shield*
23 *United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (“Generally you
24 must pay more for higher quality.”). Moreover, 28% of Steam-enabled game sales are allegedly
25 made via Steam Keys by third-party resellers. See ¶ 150. Since developers pay Valve no
26 commission for games sold via free Steam Keys, those sales (as well as the volume-discount

1 rates of 25% and 20%) drop Valve’s effective commission well below 30%.

2 Second, Dark Catt may point to its allegation that Valve’s commission “would be forced
3 down by competitive market pressure.” ¶ 195. Not only does that conclusion ignore the wealth
4 of competitive pressures factually alleged, *see* Part III.B.3, *supra*, but it ignores a host of other
5 factors, including Steam’s quality and the price-*increasing* effect of rising demand. *See*
6 *Metronet Servs. Corp. v. Qwest Corp.*, 2001 WL 765167, at *6 n.4 (W.D. Wash. Apr. 16, 2001)
7 (Coughenour, J.) (“According to standard price theory, prices increase as output decreases and
8 demand rises.”). Dark Catt alleges just that for PC game digital distribution, ¶ 87 (“PC games
9 moved to digital distribution earlier than console games, which still have a significant physical
10 distribution component.”), and for Steam, ¶ 110 (Steam has grown since 2003 to more than a
11 billion user accounts). The Complaint also alleges an evolving gaming landscape, *e.g.*, ¶ 7
12 (“[Valve made the] early development of a digital distribution system that can support third-
13 party applications.”), particularly ill-suited to inferences from simplified theories. *See F.T.C. v.*
14 *Qualcomm Inc.*, 969 F.3d 974, 1003 (9th Cir. 2020) (“We decline to ascribe antitrust liability in
15 these dynamic and rapidly changing technology markets without clearer proof of anticompetitive
16 effect.”). Alleging a supracompetitive price requires facts, not vague predictions.

17 The fallacy in Dark Catt’s logic is demonstrated by its example, where a hypothetical
18 developer selling on both Steam and a lower commission store could earn more money while
19 charging the customer less on the latter, leading to increased sales and revenue. ¶ 196. But Dark
20 Catt alleges numerous examples of developers taking advantage of just such lower commission
21 stores, and thus reaping all of the benefits—and applying all of the “competitive pressure”—
22 alleged, none of which depends on concurrently selling on Steam. *See* ¶¶ 164, 172, 176, 177.³

23 Finally, Dark Catt alleges that the volume discounts Valve added in 2018 are “an
24 admission that the 30% rate was supracompetitive.” ¶ 114. But volume discounts are a means of
25

26 ³ For single-player games like Metro Exodus, Dark Catt alleges there is no advantage to
selling on Steam. *See* ¶ 175. And while some lower commission stores may not be options for
some developers, those alleged limitations are imposed by those stores, not by Valve. *See* ¶ 123.

1 price competition which “often reflect cost savings.” *LePage’s Inc. v. 3M*, 324 F.3d 141, 154
2 (3d Cir. 2003). Thus, Dark Catt seeks to establish antitrust injury with evidence of price
3 competition. “The antitrust laws require no such perverse result, for it is in the interest of
4 competition to permit dominant firms to engage in vigorous competition, including price
5 competition.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (cleaned up).
6 Dark Catt has alleged no plausible basis for making that conclusion, or its unsupported follow-up
7 conclusion that even those volume discounts “remain[] supracompetitive.” ¶ 114.

8 **5. Dark Catt’s alleged non-price antitrust injuries are also implausible.**

9 Alternatively, Dark Catt may attempt to shift the inquiry to its various allegations of non-
10 price injury. *E.g.*, ¶ 135 (“suppresses quantity and quality”). But those alleged injuries would
11 mostly harm consumers, not Dark Catt (or the proposed class), *see* ¶ 22 (“Valve’s practices have
12 also harmed [...] consumers, who are now inured to Steam, paying supracompetitive prices [...] and/or being denied the benefits of the higher quality, higher quantity, and/or cheaper games and
13 more innovative delivery systems.”); *see also* ¶¶ 49, 201, and so do not plead antitrust injury to
14 Dark Catt. Antitrust injury requires “an injury to the plaintiff.” *Somers*, 729 F.3d at 963.

15 The few non-price harms alleged to affect developers are just other ways of saying they
16 lost out on sales. *See* ¶ 11 (“greater exposure,” “more money”); ¶ 75 (“better marketing
17 support”). And Dark Catt’s allegations of harm by lost game sales are either premised on
18 Valve’s legitimate regulation of its free Steam Key accommodation, *see* ¶¶ 14, 144 (which as
19 discussed in Part III.D.1, *supra*, is not cognizable under the antitrust laws) or inextricably linked
20 to Valve’s revenue sharing being supracompetitive, *see* ¶¶ 75, 133, 195–96. And predicating
21 that harm on the notion that Valve’s commission is supracompetitive impermissibly “piles
22 speculation atop speculation.” *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1364 (D.C. Cir. 2012)
23 (vacating judgment for lack of standing based on speculative injury). The remaining alleged
24 non-price harm to developers is rendered implausible by contradictory factual allegations.
25 *Compare* ¶ 11 (harm in lack of developer choice) *with* ¶¶ 63–71 (detailing numerous rival
26

1 platforms for developers to choose).

2 Moreover, conspicuously absent from the Complaint are any alleged *facts* of reduced
3 output, quality, innovation, or choice, making Dark Catt’s allegations of non-price harms
4 conclusory. *See Power Analytics Corp. v. Operation Tech., Inc.*, 820 F. App’x 1005, 1019–20
5 (Fed. Cir. 2020) (rejecting as conclusory allegations of reduced output, stifled innovation, and
6 customer choice and accordingly dismissing antitrust claims for failure to plead antitrust injury).
7 And tellingly, the facts that are alleged show an *increase* in these non-price metrics. *See* ¶ 4
8 (games available on Steam increased from 150 in 2007 to more than 50,000 in 2021); ¶¶ 63–71
9 (numerous new platforms launched). Dark Catt even gives examples of developers choosing
10 other platforms over Steam for their revenue-sharing terms. ¶¶ 164, 165, 172, 176.

11 In sum, Dark Catt stakes all its claims on its conclusion that Valve’s commission is
12 supracompetitive, *see* ¶¶ 220–21, 230–31, 238–39 (sole allegations of injury/harm to Dark Catt
13 and proposed class members in all three counts is paying “a supracompetitive revenue share”),
14 but its factual allegations render that conclusion implausible. *Somers*, 729 F.3d at 964–67. Dark
15 Catt thus fails to allege antitrust injury, *id.* at 967, lacks standing, *id.* at 964 n.5, and has no basis
16 for damages, *id.* at 965, warranting dismissal of all claims on this basis alone.

17 **C. Dark Catt Fails to Allege a 75% Market Share or Market Power.**

18 Like the *Wolfire* Plaintiffs, Dark Catt alleges that Valve has 75% of the relevant market it
19 calls “PC game distribution.” ¶¶ 5, 7. It then alleges this gives Valve market or monopoly
20 power, supposedly enabling it “to profitably maintain the prices offered on Steam at
21 supracompetitive levels without losing sales to other stores that offer the same games[, and ...] to
22 exclude potential competitors from the PC game distribution market, harming Developers and
23 potentially PC gaming customers.” ¶ 78. But Dark Catt’s 75% share allegations are no better
24 than the *Wolfire* Plaintiffs’ (*see Wolfire* MTD at 14). The Court should reject them here as well.

25 The Complaint’s only “support” for the allegation that Valve has a 75% market share,
26 and hence market power, is a citation to a third-party article in footnote 3. *See* Arthur

1 Zuckerman, [75 Steam Statistics](#) (cited at ¶ 5 n.3, visited Aug. 30, 2021). That article includes a
2 line saying “Steam is the world’s largest distributor of PC games, taking up 75% of the global
3 market share.” *Id.* That’s it; the article contains no source, analysis, or data for its 75% figure.

4 Not only that, but that article also makes the apparently contradictory assertion that,
5 “Steam already accounts for more than 18% of PC game sales worldwide without taking in-game
6 purchases into account.” *Id.* A closer look at its cited source reconciles the discrepancy and
7 further explains why the 75% figure has no support. In the same paragraph where Dark Catt first
8 makes the 75% allegation, it alleges, “In 2017, Steam generated over \$4 billion worth of sales.”
9 ¶ 5. That is where Dark Catt cites the *75 Steam Statistics* article, ¶ 5 n.3, and when one looks to
10 the sources that website lists, one sees that the author drew “over \$4 billion worth of sales” from
11 an article entitled “[With \\$4.3 billion in sales, 2017 was Steam’s biggest year yet](#)” (cited as note
12 20 in *75 Steam Statistics*, visited Aug. 30, 2021). When the latter article places Valve’s asserted
13 \$4.3 billion sales in context, it eviscerates Plaintiffs’ 75% allegation. First, it accepts the \$4.3
14 billion in sales from some unnamed source: “The \$4.3 billion number is an estimate, but it’s
15 likely the most accurate one we’re going to get, and it doesn’t include revenue generated by DLC
16 [downloadable content] or microtransactions.” *Id.* Second, far from supporting a 75% market
17 share, the article all but denies it: “If the numbers are right, *that means Valve own[s] at least*
18 *18% of their specific market*” (the “dedicated digital PC game business”), “and likely far more
19 than that once in-game purchases are accounted for.” *Id.* (emphasis added).

20 Thus on an apples-to-apples basis—*i.e.*, comparing game sales without DLC and
21 microtransactions—the article on which Dark Catt’s 75% allegation rests concluded that Steam
22 had “at least 18%” of the market. That is a long way from 75% and well under any threshold for
23 market power. In *F.T.C. v. Facebook, Inc.*, 2021 WL 2643627, at *1 (D.D.C. June 28, 2021), the
24 court dismissed the FTC’s antitrust complaint because “the FTC’s inability to offer any
25 indication of the metric(s) or method(s) it used to calculate Facebook’s market share renders its
26 vague ‘60%-plus’ assertion too speculative and conclusory to go forward.” Dark Catt’s

1 allegation of a 75% market share is even worse because the source Dark Catt relies on
 2 contradicts its allegations. Like the *Wolfire* Plaintiffs, Dark Catt has failed to plausibly allege
 3 market power under *Facebook*, and the Court should dismiss the Complaint for that reason alone.

4 **D. Valve’s Steam Key Guidelines and Two Provisions Dark Catt Cites in**
Valve’s Developer Contracts Do Not Combine into an Anticompetitive MFN.

5 1. **Dark Catt Fails to Allege Valve’s Free Steam Keys Injure Competition.**

6 As in *Wolfire*, Dark Catt alleges that Valve’s Steam Keys program helps Valve maintain
 7 “monopoly power” in PC game distribution. ¶ 222. But Dark Catt never mentions that Valve
 8 doesn’t charge developers for Steam Keys, and *receives no revenue* when a developer sells a
 9 Steam-enabled game through a brick-and-mortar or online store or gives one away for free.

10 Valve showed in the *Wolfire* MTD that it had no legal obligation to establish or continue
 11 the Steam Keys program, let alone voluntarily forego all revenue from it. Nor must Valve let
 12 developers free-ride on its investment in creating and maintaining Steam. Rather, as Valve’s
 13 “Steamworks” documentation (the “[Steam Key guidelines](#)”)—which Dark Catt quotes and cites,
 14 *see* ¶ 59 & n.12—states, “Steam keys are meant to be a convenient tool for game developers to
 15 sell their game on other stores and at retail. *Steam keys are free* and can be activated by
 16 customers on Steam to grant a license to a product.” (visited Aug. 30, 2021) (emphasis added).
 17 Steam Keys give gamers the same experience as if they purchased a game on Steam. Valve is
 18 justifiably concerned about abuse of Steam Keys, whereby competitors (or fraudsters, *see* ¶ 151)
 19 obtain free Steam Keys to use to Valve’s disadvantage.⁴

20 Dark Catt’s allegations of anticompetitive conduct are no more plausible than *Wolfire*’s,
 21 and in fact reinforce Valve’s response that *Wolfire*, and now Dark Catt, seeks to enjoy the
 22 benefits of Steam Keys without adhering to Valve’s guidelines for Steam Keys sales—sales on
 23 which the developer pays no commission to Valve yet enable the developers’ customers to enjoy
 24 every feature of Steam. Dark Catt makes several serious-sounding allegations about Valve’s

25 ⁴ “Valve provides the same free bandwidth and services to customers activating a Steam
 26 key that it provides to customers buying a license on Steam. We ask you to treat Steam cus-
 tomers no worse than customers buying Steam keys outside of Steam. While there is no fee to
 generate keys on Steam, we ask that partners use the service judiciously.” Steam Key guidelines.

1 alleged anticompetitive use of the Steam Keys program, but, as with *Wolfire*, fails to allege facts
2 that show anything abusive or that Valve had any obligation to provide Steam Keys at all:

3 As the Supreme Court has repeatedly emphasized, there is no duty to deal
4 under the terms and conditions preferred by a competitor's rivals.
5 Likewise, the Sherman Act does not restrict the long recognized right of a
6 trader or manufacturer engaged in an entirely private business, freely to
exercise his own independent discretion as to parties with whom he will
deal. This is because the antitrust laws, including the Sherman Act, were
enacted for the protection of *competition*, not *competitors*.

7 *Qualcomm Inc.*, 969 F.3d at 993 (cleaned up, emphases in original); *see also Olympia Equip.*
8 *Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375–76 (7th Cir. 1986) (Posner, J.) (“[A] firm
9 with lawful monopoly power has no general duty to help its competitors, whether by holding a
10 price umbrella over their heads or by otherwise pulling its competitive punches” [...] “to reduce
11 its prices in order to help consumers, [or ...] to extend a helping hand to new entrants.”).

12 Dark Catt alleges that Steam Keys are “the industry standard for distributing authorized,
13 licensed copies of games.” ¶ 13. That is a very peculiar allegation, since Steam Keys have
14 nothing to do with non-Steam enabled versions of games that Epic, Microsoft, and others sell.
15 *See* ¶ 41. In addition, Steam Keys allegedly represent only 28% of Steam-enabled versions.
16 ¶ 150. Combined with Dark Catt’s allegation that distribution of Steam-enabled games is
17 dominated by sales on Steam (which do not rely on Steam Keys), *see* ¶ 154, most distribution
18 does not even allegedly conform to the supposed “industry standard.” Thus, Dark Catt’s
19 allegation that Steam Keys are an “industry standard” is implausible on its face.

20 Dark Catt goes on to allege that “[a]s the industry standard, PC distributors and
21 publishers require Steam keys to evaluate a game for possible funding, marketing support, or
22 distribution, and industry media require Developers to provide Steam keys to trial games.”
23 ¶ 157. But the fact that Valve makes them available for these purposes for free, subject to the
24 Steam Key guidelines, does not enable Dark Catt to declare them an “industry standard” and ask
25 the Court to nullify the guidelines. And the Steam Keys guidelines make clear Steam Keys are
26 not required; some of the media can access free copies through the “Curator Connect” program:

1 When you are nearing release and want to get a copy of your game in the
 2 hands of reviewers, press, influencers, streamers, or other individuals that
 3 can help bring awareness of your game and amplify your efforts, you can
 4 do so directly in Steam. *Many of the popular streamers, journalists, and
 5 community gaming sites are set up as Curators in Steam, and you can use
 6 Curator Connect to send them a copy of your game without having to
 7 email out keys.* These influencers can post their reviews on Steam or
 8 wherever else they already post reviews or stream your game.

9 <https://partner.steamgames.com/doc/marketing/tools> (emphasis added) (visited Aug. 30, 2021).⁵

10 The Complaint is devoid of *facts* that anyone evaluating a pre-release copy of a game “required”
 11 the copy to be provided via Steam Keys, let alone was “punished” by a denial of a Steam Key.⁶

12 Continuing in this vein, Dark Catt alleges that Valve “victimized” developer Ys Net
 13 because after Ys Net “anticipated being able to provide a Steam key at release to backers who
 14 wanted a PC version of” its *Shenmue 3* game, “Valve would not authorize Steam keys for Ys Net
 15 to provide its backers as anticipated.” ¶¶ 163–64. But Dark Catt’s account gives the lie to its
 16 story: Ys Net and its publisher announced that when released, *Shenmue 3* would be exclusively
 17 available *for one year on Epic Games Store—a Steam competitor.* ¶ 164. Ys Net “created a
 18 Steam page well in advance to generate user interest” in a game it decided to sell exclusively for
 19 a year on the Epic Games Store where Valve would not realize a cent. *Id.* And Ys Net expected
 20 (“anticipated” in Dark Catt’s mild-sounding formulation) that Valve would make Steam Keys
 21 available for free to its Kickstarter investors so they could play it on Steam upon release, again
 22 without Valve receiving a cent. *Id.* The antitrust laws do not require Valve to pay for such
 23 blatant free-riding, and it’s hard to imagine a better example of Valve taking a reasonable step to
 24 deter a developer from abusing Steam Keys to Valve’s detriment. “As the Supreme Court has
 25 repeatedly emphasized, there is ‘no duty to deal under the terms and conditions preferred by [a
 26 competitor’s] rivals’” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1184 (9th

⁵ From the Steamworks Documentation, which Dark Catt cites and quotes at ¶ 59 & n.12.

⁶ Dark Catt alleges in the sketchiest of terms that “Valve substantially delayed granting Dark Catt’s request for Steam keys it planned to sell on Humble Bundle.” ¶ 160. This is not an example of supposed “industry standard” pre-release distribution for evaluation by the press, etc., and in any event, Dark Catt fails to allege it sustained any injury from this delay in granting its request for Steam Keys.

1 Cir. 2016) (quoting *Pac. Bell Tel. Co. v. linkLine Comm., Inc.*, 555 U.S. 438, 457 (2009)).⁷

2 Nor does the Complaint plausibly allege anticompetitive conduct or retaliation when
 3 Valve allegedly “delayed approving additional Steam keys” for a developer promoting its game
 4 “on other sites.” ¶ 165. To begin, the documents Dark Catt cites in footnote 36 contain nothing
 5 to support its conclusory “retaliation” allegation.⁸ And those documents show what Dark Catt is
 6 really after: that developers get as many Steam Keys as they want so they can free-ride on
 7 Valve’s creation and maintenance of Steam without limit. The [press release](#) (cited at ¶ 165 n.36,
 8 visited Aug. 30, 2021) reports the free promotion of *Ark: Survival Evolved* on Epic (the “other
 9 site[],” ¶ 165) was set for June 11 to 18, 2020, but the first comment in the [Steam Community](#)
 10 [Discussion](#) (cited at ¶ 165 n.36, visited Aug. 30, 2021) about the game’s unavailability from
 11 Humble Bundle, allegedly due to Valve not providing enough Steam Keys, was three months
 12 later, on September 9, 2020. Far from containing anything about retaliation, the entire tenor of
 13 that discussing and a cited [Facebook post](#) (cited at ¶ 165 n.36, visited Aug. 17, 2021 (Facebook
 14 account may be needed)) is just that Humble Bundle got far too many orders when it put *Ark* on
 15 sale at \$9.99—understandable since the prevailing retail price was \$35. That led to the game
 16 publisher, Studio Weekend, being unable to supply enough Steam Keys to meet the big demand
 17 at the rock-bottom price. Valve has legitimate concerns over runaway usage of its free Steam
 18 Keys program to the detriment of purchases on Steam, and it is entitled to limit the availability of
 19 Steam Keys to deter free-riding on its investment in Steam. The antitrust laws don’t require
 20 Valve to subsidize cut-rate pricing. Dark Catt’s allegations about *Ark* do not state a claim.

21 Finally, there is nothing retaliatory in a so-called purge of games for abuse of the
 22 Steamworks tools that, if too broad, was, as Dark Catt admits, “soon” corrected. ¶¶ 166–67.

23 ⁷ See also *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1184 (N.D. Cal.
 24 2012) (“[A defendant] has no duty to license its technology to foster competition or to give away
 its technology for others to clone.”).

25 ⁸ The Court may consider the documents Dark Catt cites over its conclusory allegations.
 26 See *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015) (Court
 may “consider documents whose contents are alleged in a complaint and whose authenticity no
 party questions, but which are not physically attached to the plaintiff’s pleading.” (cleaned up)).

1 Valve showed in the *Wolfire* motion to dismiss that it has no duty to give away free
 2 Steam Keys and may ask developers who receive them to follow the Steam Key guidelines.
 3 Dark Catt alleges examples of the very free riding these guidelines are meant to prevent. Calling
 4 Steam Keys an “industry standard” converts none of Valve’s conduct into antitrust injury.

5 2. **Dark Catt’s Allegations of Non-Steam Keys Contractual Provisions with**
 6 **Developers Also Fail to Allege Injury to Competition.**

7 Dark Catt claims Valve’s Steam Key guidelines and a pair of non-Steam Key contractual
 8 terms with game developers create an anticompetitive MFN. *See* ¶¶ 54–55, 62, 128. They don’t.

9 Dark Catt alleges three provisions together add up to an anticompetitive MFN: (1) the
 10 Steam Key guidelines, quoted at ¶ 59; (2) the “Delivery” provision in the Software Development
 11 Agreement (“SDA”) “requiring Developers [if they decide to sell on Steam] to make their games
 12 (and any updated version) available on Steam at the same time they become commercially
 13 available through any other source,” ¶ 46; and (3) the “DLC” (downloadable content) provision
 14 “requir[ing] Developers to offer their DLC [additional content for games] to Steam customers at
 15 the best price and earliest availability for which it is available on any other marketplace,” ¶ 53.

16 As Dark Catt admits, most-favored-nations clauses can foster competition. ¶ 129.
 17 Seeking the best price for your customers can be the essence of competition. *See, e.g., Ocean*
 18 *State Physicians Health Plan, Inc.*, 883 F.2d at 1113 (upholding plan paying the lowest price
 19 physicians charged any insurer). But in claiming these guidelines and contractual terms create
 20 an anticompetitive MFN, the Complaint misrepresents what they do and fails to allege facts from
 21 which the Court could plausibly infer harm to competition.

22 *a. Steam Key Guidelines.* Falsely claiming that Steam Keys guidelines reach beyond
 23 Steam-enabled games to non-Steam versions sold on other platforms, Dark Catt quotes a tweet
 24 from Tim Sweeney, CEO of Steam competitor, Epic (*see* ¶¶ 63–65), asserting that “Valve can
 25 simply say ‘no’” if a “developer wishes to sell their game for a lower price on Epic Games store
 26 than Steam.” ¶ 61. But the Steam Keys guidelines, which require developers to offer Steam
 customers as good a price for their game on Steam as they charge elsewhere *for the same Steam-*

1 *enabled game sold via Steam Keys*, have nothing to do with the price developers charge for
 2 games enabled for the Epic Games Store, as they do not rely on Steam Keys. *See* Part III.D.1,
 3 *supra*. Mr. Sweeney’s tweet is not a factual allegation that Valve can “say ‘no’” to prices on
 4 Epic; indeed, one of his Twitter followers corrected his “disingenuous” assertion: “That clause
 5 only applies to steam KEYS sold elsewhere, not to something like a game being sold at the Epic
 6 store.” *See* [Tim Sweeney tweet](#), reply of Roberto Bruno (@ITurco) of Jan. 31, 2019 (emphasis
 7 added) (cited at ¶ 61 n.13, viewed on Aug. 30, 2021). No harm to competition is alleged.

8 *b. The Delivery Provision.* This provision governs timing of releases if developers
 9 decide to sell a game on Steam. If so, they agree to release it (and later updates, if any) on Steam
 10 at the same time they release the game elsewhere. ¶¶ 46, 137; *see also* SDA § 2.1, Ex. A to
 11 Declaration of Karl Quackenbush (filed concurrently). It requires developers to keep their Steam
 12 versions up to date; otherwise Valve could wind up selling outdated goods, an obvious customer-
 13 service issue. Dark Catt alleges that it “prohibits Developers from entering exclusive offerings
 14 with other storefronts,” which “suppresses competition by ensuring Steam has access to the
 15 newest inventory, on its terms, instead of having to negotiate for the newest releases in a
 16 competitive market.” ¶ 47. But the assertions that it prohibits exclusive deals with competitors
 17 and “suppresses competition” rest on no facts; indeed, they contradict the facts alleged.

18 First, the Complaint alleges numerous instances of developers entering into exclusive
 19 offerings with other stores, as they are free to do. *See* ¶ 164 (Shenmue 3 initially released
 20 exclusively on Epic), ¶ 172 (same for Metro Exodus), ¶ 176 (Borderlands 3), ¶ 177 (Ooblets);
 21 *see also* ¶ 64 (Epic “committing \$444 million to exclusivity deals in 2020”), ¶ 140 (“Epic Games
 22 Store solicits timed exclusives from Developers.”), ¶ 186 (Unfold Games refused offer from Epic
 23 for one-year exclusive, as owner “did not want to upset customers” after announcing it “would
 24 be available on Steam on a specific date.”).⁹ Competition abounds.

25 _____
 26 ⁹ Plaintiffs allege that competing platforms are “not options for many Developers because
 (a) they only host and sell their own games; (b) they only take high-profile games or games with

1 [REDACTED] SDA

2 § 2.4, Ex. A to Quackenbush Decl. DLC exclusives with Valve’s competitors are *explicitly*
3 *allowed*, and Dark Catt alleges no instance of Valve thwarting one. No competitive harm here.

4 In sum, Dark Catt’s factual allegations do not allege injury to competition from any of the
5 three provisions that supposedly combine to make an MFN. *See Nicolosi Distrib., Inc. v.*
6 *FinishMaster, Inc.*, 2018 WL 4904918, at *5 (N.D. Cal. Oct. 9, 2018) (“Nicolosi must
7 sufficiently allege an injury to competition by identifying a contract with some anticompetitive
8 effect.”) (cleaned up); *see also Digene Corp. v. Third Wave Techs., Inc.*, 323 F. App’x 902, 912
9 (Fed. Cir. 2009) (finding no anticompetitive effect from a never-enforced termination clause).

10 **E. Allegations of the Steam Review System Do Not Allege Injury to**
11 **Competition.**

12 Dark Catt claims Valve harms competition by allowing Steam users to post game
13 reviews. ¶¶ 16, 19. Dark Catt admits they “are not posted by Valve itself,” ¶ 185, yet “must
14 prove [that it suffered] antitrust injury, which is to say injury of the type the antitrust laws were
15 intended to prevent and that flows from that which makes *defendants’* acts unlawful.” *Brunswick*
16 *Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added)).

17 The Complaint implausibly attempts to transform customer reviews into anticompetitive
18 conduct on Valve’s part. First, it alleges that Valve “does not timely remove [...] inappropriate
19 reviews.” ¶ 168. But under the *facts* alleged, the antitrust laws impose no duty on Valve to
20 remove reviews Dark Catt deems inappropriate. *See Qualcomm Inc.*, 969 F.3d at 993. The
21 Complaint leaves one guessing what standard of censorship would satisfy Dark Catt or if it’s
22 even feasible with 120 million monthly and 25 million peak concurrent Steam users. *See* ¶ 42.

23 Even if Valve had such a duty, the Complaint alleges that Valve voluntarily implemented
24 a process in 2019 to identify “anomalous review activity” for internal review, and an article it
25 quotes reports Valve adopted another to enable customers to easily view a game’s long-term
26 trend of reviews and home in on any negative spike to judge it for themselves. ¶¶ 182–83 & n.7.
According to the 2019 The Next Web [article](#) the Complaint quotes at ¶ 17 n.7 (viewed on

1 Aug. 30, 2021), “Steam has already attempted to curtail the effect of review bombing by
 2 implementing graphs, which let you chart whether reviews have been generally positive or
 3 negative over the game’s lifespan, and to jump straight to a spike of negative reviews to see the
 4 complaint behind it.” As the article explained, “[t]his allows you to judge for yourself how
 5 seriously you want to take the issue. It’s much the same as jumping straight to the one-star
 6 reviews on Amazon, only with more context.” *Id.* As the author concludes, “[s]hort of taking
 7 the nuclear option—removing reviews entirely—it’s hard to see what else platforms like Steam
 8 and Amazon could do to ameliorate review bombs.” *Id.* As the Supreme Court recently
 9 reaffirmed, “antitrust courts must give wide berth to business judgments before finding liability.”
 10 *N.C.A.A. v. Alston*, 141 S. Ct. 2141, 2163 (2021). Dark Catt’s beef with how Valve manages
 11 user reviews invites the Court, improperly, to become the arbiter of how Valve and many other
 12 companies do it, but it does not allege conduct that gives rise to antitrust liability.¹⁰

13 Second, the Complaint nebulously alleges that Valve “encourages and/or allows its users
 14 to improperly attack Developers using Steam reviews,” ¶ 168, but never alleges this happened to
 15 Dark Catt. As its “example,” the Complaint alleges that, “when Developers offer exclusives on
 16 other stores, Valve *may* use social media channels to notify its followers of the Developers’
 17 action, resulting in an attack on the Developer.” ¶ 169 (emphasis added). The only factual
 18 allegation of what “may” happen is the release of the game Metro Exodus. *See* ¶ 172. Its
 19 developer pre-sold the game on Steam before releasing it, but then changed its mind and made a
 20 one-year exclusive deal with Epic, which meant gamers who had pre-purchased on Steam would
 21 have to wait a full year after release to play. *See* ¶¶ 172–73.

22 Dark Catt says that “Valve issued a statement criticizing the exclusive, calling it unfair to
 23 Steam customers.” ¶ 172. In fact, Valve criticized the developers pre-selling the game to Steam

24
 25 ¹⁰ Moreover, none of the Complaint’s factual allegations about customer reviews allege any
 26 loss in sales. *See* ¶ 164 (Shenmue 3), ¶¶ 172–75 (Metro Exodus), ¶ 176 (Borderlands 3), ¶ 177
 (Ooblets), ¶ 186 (Darq). Thus, the Complaint does not even allege harm to competitors, let alone
 to competition. *See Brunswick Corp.*, 429 U.S. at 488 (“The antitrust laws, however, were
 enacted for ‘the protection of competition not competitors.’”).

1 customers before making the “decision to pledge their exclusivity to Epic’s offering.” Trusted
 2 Reviews [article](#) (cited at ¶ 172 n.39, viewed Aug. 30, 2021). Valve said, ““We think the decision
 3 to remove the game is unfair to Steam customers,” “[e]specially after a long pre-sale period.”
 4 *Id.* Again, Dark Catt improperly invites the Court to arbitrate how companies manage customer
 5 reviews and what Valve said online about this conduct, but alleges no injury to competition. *See*
 6 *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) (Easterbrook, J.) (“What
 7 producers say about each others’ goods in an effort to sway consumers is competition in
 8 action.”).¹¹ Indeed, this allegation shows competition in action—the “continuing war between
 9 the Epic Game Store and Steam.” ¶ 172 n.39 (cited article).

10 Steam allows users to express themselves, allegedly by “a policy of not deleting
 11 reviews.” ¶ 182. Epic took the opposite tack, deciding to “cut game reviews entirely” on its
 12 competing platform. ¶ 17 n.7 (cited article). The Sherman Act, “the Magna Carta of free
 13 enterprise,” *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), does not empower the
 14 Court to decide whether online businesses should allow reviews or to regulate their management.

15 **F. Dark Catt’s CPA Claim Falls With Its Federal Antitrust Claims.**

16 Dark Catt bases its CPA claim, ¶¶ 233–40, entirely on its Sherman Act claims. “The
 17 [CPA] is modeled after federal antitrust statutes.” *Lubic v. Fid. Nat. Fin., Inc.*, 2009 WL
 18 2160777, at *5 (W.D. Wash. July 20, 2009). Courts routinely dismiss CPA claims along with
 19 federal antitrust claims. *See id.* (dismissing CPA claims for the same reasons as Sherman Act
 20 claims); *see also PBTM LLC v. Football Nw., LLC*, 511 F. Supp. 3d 1158, 1178–82 (W.D. Wash.
 21 2021) (same). This Court should too.

22 **IV. CONCLUSION**

23 Dark Catt fail to allege antitrust injury, market power, and unlawful conduct. Rather, it
 24 attacks a popular service consumers value in a competitive market. The Court should grant the
 25 motion and dismiss its claims, or stay them pending the *Wolfire* individual plaintiffs’ arbitration.

26 ¹¹ Although the Complaint alleges that “[v]ia its Steam review system, Valve is willing to ban games or Developers after little or no investigation of reported wrongful behavior,” ¶ 17, Dark Catt makes no factual allegation of any such ban.

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

DATED this 30th day of August 2021.

FOX ROTHSCHILD LLP

s/ Gavin W. Skok

Gavin W. Skok, WSBA #29766
Laura P. Hansen, WSBA #48669
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
Telephone: 206.624.3600
Facsimile: 206.389.1708
E-mail: gskok@foxrothschild.com
lhansen@foxrothschild.com

MONTGOMERY McCracken Walker &
Rhoads LLP

s/ Charles B. Casper

Charles B. Casper, *admitted pro hac vice*
1735 Market Street, 21st Floor
Philadelphia, PA 19103
Telephone: 215.772.1500
Email: ccasper@mmwr.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that I am a secretary at the law firm of Fox Rothschild LLP in Seattle, Washington. I am a U.S. citizen over the age of eighteen years and not a party to the within cause. On the date shown below, I caused to be served a true and correct copy of the foregoing on counsel of record for all other parties to this action as indicated below:

Service List

Stephanie L. Jenson
WILSON SONSINI GOODRICH & ROSATI, P.C.
701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
Telephone: (206) 883-2500
Facsimile: (206) 883-2699
Email: sjensen@wsgr.com

- Via US Mail
- Via Messenger
- Via CM/ECF / Email
- Via over-night delivery

Kenneth R. O'Rourke
Scott A. Sher
Allison B. Smith
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, NW, Suite 500
Washington, DC 20006
Telephone: (202) 973-8800
Facsimile: (202) 973-8899
Email: korourke@wsgr.com
ssher@wsgr.com; allison.smith@wsgr.com

W. Joseph Bruckner
Joseph C. Bourne
Leona B. Ajavon
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue S, Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981
Email: wjbruckner@locklaw.com;
jcboume@locklaw.com;
lbajavon@locklaw.com

Attorneys for Plaintiffs

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

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 30th day of August 2021, in Tacoma, Washington.



Courtney R. Brooks