No. _____

In The

Supreme Court of the United States

CORONAVIRUS REPORTER, CALID INC, PRIMARY PRODUCTIONS LLC & DR. JEFFREY ISAACS,

Petitioners,

v.

APPLE INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court err in denying leave to amend a first-to-file developer antitrust lawsuit concerning free digital apps, when Petitioner Dr. Jeffrey Isaacs had never amended his complaint once as a matter of course, and no *Foman v. Davis*, 371 U.S. 178 (1962) factors were analyzed?

2. Does the tying of digital software distribution stores to the iPhone device by Apple Inc., represent pernicious conduct subject to the *per se* antitrust rule established in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958)?

3. Does Apple's contrived digital notary stamp represent a modern-day stamp tax which facilitates gatekeeping and censorship of software distribution, violating *Northern Pacific* tying rules?

4. In light of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), and its established precedent on the significance of exclusionary conduct in Section 2 claims, beyond the confines of market definition, was a Rule 12 dismissal for purported market definition defects of free apps improper?

5. Is the failure of the current *Brown Shoe* pricing formulas to define free digital products as a relevant market, as practiced by Apple Inc., indicative of a need for the Court to revisit the original text of the Sherman Act or to refine the application of *Brown Shoe*?

QUESTIONS PRESENTED – Continued

6. Does Ninth Circuit *Hicks vs. PGA Tour* case law bypass mandatory fact-finding requirements under *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), contrast with economic reality and established jurisprudence, and improperly exonerate the largest monopoly in history at the pleading stage?

7. Did Apple advance knowingly disingenuous positions that violated the sanctity of the oath, including irreconcilable objection to and endorsement of *Epic's* relevance, and misrepresentation of *Microsoft* exemption for *per se* tying platforms?

PARTIES TO THE PROCEEDING

Petitioners are Coronavirus Reporter, CALID Inc, Primary Productions LLC, and Dr. Jeffrey Isaacs. Petitioners proceeded as Plaintiffs in the United States District Court for the Northern District of California, and as Appellants in the United States Court of Appeals for the Ninth Circuit.

Respondent Apple Inc. proceeded as Defendant in the District Court and Appellee in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The corporate entity Petitioners each do not have any parent corporations, and no publicly held corporation owns 10% or more of their stock.

STATEMENT OF RELATED CASES

Coronavirus Reporter et al. v. Apple Inc., U.S. Dist. Court District of NH 21-c-47-LM.

Primary Productions LLC v. Apple Inc., U.S. Dist. Court District of Maine 21-c-137-JDL.

Jeffrey D. Isaacs, Dr. and Coronavirus Reporter; Calid, Inc.; Primary Productions, LLC v. Apple Inc. and Federal Trade Commission, 9th Circuit Court of Appeals 22-15166, District Court Northern District of CA No. 3:21-cv-05567.

STATEMENT OF RELATED CASES – Continued

Coronavirus Reporter; Calid, Inc.; Primary Productions LLC and Jeffrey D. Isaacs, Dr. v. Apple Inc. and Federal Trade Commission, 9th Circuit Court of Appeals 22-15166, District Court Northern District of CA No. 3:21-cv-05567.

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PETITION FOR WRIT OF CERTIORARI

This Petition arises from a District Court's dismissal of a class action Sherman Act antitrust lawsuit, brought by several developers as lead Plaintiffs, against Apple Inc. The District Court, and the affirming *en banc* Ninth Circuit, erroneously determined that the First Amended Complaint failed to state a claim of relief, pursuant to Rule 12 of the Federal Rules of Civil Procedure. The underlying complaint presented compelling evidence of Respondent's anticompetitive practices. A Department of Justice lawsuit, filed last week, invokes similar allegations concerning identical conduct alleged by Petitioners. In light of the serious error of the courts below, Petitioners Coronavirus Reporter *et al.* submit this Petition for writ of certiorari to prevent ongoing censorship of software and to establish a Developer Compensation Fund to mitigate damages from this historic monopoly.

In their Answering Brief, Apple declared to the United States Court of Appeals that "censorship is not an antitrust injury." Apple's position throughout the underlying litigation is wholly inexcusable and necessitates a clear correction, in the form of a writ of certiorari from the Supreme Court of the United States. Apple's censorship declaration is at odds with centuries of competition law. The earliest antitrust ruling in English Common Law, the *Case of Monopolies*, found that "a monopoly prevents persons who may be skilled in a trade from practicing their trade, and therefore promotes idleness. A monopoly damages not only tradesmen in that field, but everyone who wants to use

the product, because the monopolist will raise the price, but will have no incentive to maintain the quality of the goods sold." *Edward Darcy Esquire v Thomas Allin of London Haberdasher* (1602) 74 ER 1131. From its origins, antitrust and competition law concerned injury to skilled tradesman. Whether it be a writer, painter, or a world-renowned scientist, as in this case, censorship by a monopoly is an injury to society at large, because it promotes idleness as defined by *Darcy*.

Apple's censorship mechanism functions primarily by tying app distribution to its iPhone smartphone, using a "notary stamp" to mark each piece of software approved in the App Store. The failure to address the illegal *per se* tying as elucidated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) threatens the very pillars of free commerce and discourse over the internet. The District Court and Ninth Circuit decisions both neglect to mention Petitioner's tying claims, undermining decades of established antitrust enforcement, and setting a dangerous precedent that portends a technological monopoly.

By preventing a jury fact-finding of the relevant markets, the Ninth Circuit defied the stringent standards set forth in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). It effectively exempted Apple from a lawsuit concerning anticompetitive conduct within the App Store and the broader smartphone app distribution market. This denial of Petitioners' right for determination of facts by jury is indefensible and constitutes a severe miscarriage of justice, circumscribing

the autonomy of the Sherman Act as it relates to the digital era.

Petitioners' Sherman Act claims have been cast aside by failing to contemplate metrics beyond price as seen in modern digital ecosystems. Likewise, the Ninth Circuit ignored the realities of the notary stamp as a tax, representing a departure from economic sensibility and a willful blindness to the predatory strategies employed by Apple to profit from and censor every aspect of software distribution.

Additionally, disregard for the crucial precedent of *Aspen Skiing Co. v. Aspen Highlands* Skiing Corp., 472 U.S. 585 (1985) allows Apple Inc. to circumvent the prohibition against exclusionary conduct without so much as judicial reproach. This precedent is indispensable to a cognizable understanding of Section 2 claims, and its exclusion smacks of inexcusable judicial oversight.

The Ninth Circuit has abdicated its judicial responsibility, allowing Apple unfettered exploitation of its userbase for its own economic and political agenda. A prompt remand of this case is indicated to preclude further irreparable harm to not only competition, but our American culture and the freedom it embraces.

Coronavirus Reporter embodies the perfect vehicle to redress Apple's conduct without delay and establish a Developer Compensation Fund. This Petition will demonstrate that, had the District Court and Ninth Circuit properly analyzed the relevant antitrust law, then it follows that the underlying Complaint stated a claim for relief.

This nation is confronted with the immeasurable influence of Apple Inc., a multi-national giant that warrants the most rigorous antitrust scrutiny. Apple's conduct presents an existential threat to consumer choice, market competition, and even the broader socio-political fabric. The outright dismissal of this lawsuit by the District Court, and affirming Ninth Circuit, has effectively permitted Apple's continuation of practices that constitute an unprecedented level of censorship and market control, under the guise of technological advancement, editorial curation, and other pretext.

Despite comprehensive briefing spanning two years, the Ninth Circuit failed to meaningfully address the actual issues raised on appeal. Monopolistic behavior, especially the coupling of the iPhone and App Store markets, has been allowed to perpetuate. This case presents sound, straightforward legal theory justifying a claim for relief pursuant to Sherman Act.

OPINIONS BELOW

A Petition for Rehearing and Rehearing *en banc* was denied by the United States Court of Appeals for the Ninth Circuit on January 4, 2024. The text order of the United States Court of Appeals for the Ninth Circuit, affirming the District Court's dismissal pursuant to FRCP Rule 12(b)(6), is attached hereto as Appendix A. Extensive FRAP Rule 28(j) correspondence coincided with the appellate briefing process, notably referencing a related guilty jury verdict against Google

LLC's *Google Play* store, and is hereto attached as Appendix B. The Ninth Circuit conducted a hearing on March 29, 2023, which is published on the internet: https://www.youtube.com/watch?v=tdV_1ZX6xpI.

The text of the order dismissing for failure to state a claim for relief by the United States District Court for Northern District of California is attached hereto as Appendix C.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254(1) to grant a writ of certiorari.

STATUTORY PROVISIONS

Sherman Act of 1890, Section 1

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment

not exceeding 10 years, or by both said punishments, in the discretion of the court.

Sherman Act of 1890, Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Dr. Robert Roberts, the Chief Medical Officer for Coronavirus Reporter, is a widely recognized figure in academia whose work has impacted the lives of many. Prerequisite to nearly every cardiac procedure or hospital screening for myocardial infarction ("heart attack") is laboratory blood analysis to detect damaged cardiac muscle tissue. In the 1980s, Dr. Roberts pioneered the MBCK blood test used for two decades as a "gold standard," and which directly laid the foundation for the current troponin lab test. Dr. Roberts earned the trust of NASA as Shuttle Cardiologist. Apple, however, deprived its userbase the benefit of Dr. Roberts' scientific expertise and dedication towards saving lives, when the Respondent corporation improperly

blocked his app in February 2020 to develop their own. Apple's SARS-CoV-2 tracing system never reached widespread availability or implementation in the United States. Dr. Roberts' voluntary symptom reporting app, the first of its kind, was exactly the app needed four years ago, at the onset of the pandemic. Notably, Apple blocked the entire class of independent COVID apps, even those with institutional affiliation such as Dr. Roberts, a Director of Cardiac Translational Research at University of Arizona.

Apple today wields authoritarian control over the vast network of interconnected smartphones that, combined, represent an extraordinary computational-communications capability ("network effect"). After the United States government spent decades building what is now known as the Internet, we as a nation collectively invested in putting a smartphone, an amalgamation of sensors, operating software, and communication devices, in the hands of nearly every citizen, forming a network with capabilities amounting to science-fiction of prior generations. But it is Apple that benefits from growing "services revenue" representing its own tax on nearly the entire internet economy created by the United States government.

The underlying action was brought to assert that the vast network capabilities of interconnected smartphones are the property of the customers who paid for them. Apple iPhone users should enjoy unrestricted use of their smartphones to run necessary applications,

such as *Coronavirus Reporter*[1], that ultimately are the *raison d'etre* of this network. Free markets should define what apps are selected by end-users, as opposed to Apple's regime.

There exist serious and growing ramifications of the monopoly. Apple's anticompetitive proceeds, a *de facto* tax on the Internet and developers, are increasingly influencing geopolitical matters. Apple endorsed changing "Made in Taiwan" product labels to "Made in Chinese Taipei." Similarly, the company's CEO was last year discovered to have made a surreptitious $270 billion payment to China, never disclosed to Apple shareholders. Political censorship of an entire domestic political party during an election, i.e. the *Parler* app, was highlighted in the underlying case. Apple has more recently attempted to censor Elon Musk's Twitter/X on the basis of similar political ideological differences. Censoring Dr. Roberts, trusted by NASA for John Glenn's final mission, was an assault on science, and certainly un-American.

There are reasons the Sherman Act was legislated to preempt one company taking on monopoly powers that could ultimately endanger not only the progress of scientific medical work like *Coronavirus Reporter*, but even geopolitical entities. The underlying Complaint describes an "international consensus," which

[1] Primary Productions' "Bitcoin Lottery" app was similarly censored by Apple. Dr. Jeffrey Isaacs' WebCaller app was "Sherlocked" three years after its release when Apple copied its core functionality into FaceTime 15. The Petitioners, as co-lead Plaintiffs, represent a class of developers damaged by Apple's conduct.

Apple never refuted exists, that denounces Apple's anticompetitive censorship.

Apple's opposition to Sherman Act enforcement echoes discredited fear-based arguments similar to those historically used by AT&T, claiming that safety and quality will decline. When the United States sought regulation of AT&T, the monopolist warned that telecommunication quality and cost would suffer from government intervention. That of course was plain wrong, as a telecommunications revolution occurred the following decade. The stakes here are higher than in 1984: 80% of commerce now takes place on Apple devices, and the entire free speech of a nation depends on its "network effect" infrastructure.

This case is an unprecedented confrontation with the largest monopoly in history, Apple Inc. – a $3 trillion behemoth whose market valuation eclipses that of the classic textbook example, the British East India Company, by tenfold. With iPhone's 65% market share, the vast majority of Americans find themselves with limited alternatives for conducting the essential tasks of daily life. Respondent's illegal trust operations extend beyond economic ambitions; this case concerns Apple's desire to censor health care and effect cultural political development on a worldwide basis. Apple's control over their userbase forms the largest censorship and surveillance network in world history.

Every effort until now has failed to stop Apple. In 2010, the United States Copyright Office recognized

the right of iPhone users to utilize their property free from Apple's control:

> "*the activity of an iPhone owner who modifies his or her iPhone's firmware/operating system in order to make it interoperable with an application that Apple has not approved, but that the iPhone owner wishes to run on the iPhone, fits comfortably within the four corners of fair use.*"

Apple swiftly maneuvered around the Copyright Office's decision by implementing aggressive changes to its programming code. Seventy-three percent of Americans supported now-disappeared 2023 legislation in the United States Senate to address app censorship and self-preferencing, which Senior Senator Blumenthal described as the "most offensive practice of how [Apple] strangles new app development." Senate Majority Leader Chuck Schumer of California never brought the bill to floor vote.

Coronavirus Reporter filed for a preliminary injunction to end Apple's monopolistic control of the internet immediately, which was dismissed as moot by the District Court under Rule 12(b)(6)[2]. Despite Apple

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[2] The Denial of the Injunction was the subject of Application 23A718 to this Court. Dr. Isaacs was not a party to the Preliminary Injunction motion. This Petition specifically concerns the premature dismissal under Rule 12, and the plausible relevant markets & Sherman Act theories that definitively stated a claim for relief. Should this Honorable Court grant writ of certiorari, it is respectfully requested that it issue an opinion on Apple's *per se* tying defenses to help direct the progression of the underlying case and any renewed injunctive motions.

forfeiting critical arguments related to *per se* tying in *Microsoft*, the Ninth Circuit Panel failed to even acknowledge the extensive two-year briefing process and substantial oral argument before dismissing the FAC markets as 'not based on economic reality' – an erroneous conclusion by the District Court now endorsed without scrutiny. The Ninth Circuit Panel's affirmance is in stark defiance of the Congressional Subcommittee's warning and objection, and hence, unambiguous legislative intent:

"courts have adopted the view that underenforcement of the antitrust laws is preferable to overenforcement, a position at odds with the clear legislative intent of the antitrust laws."

As Petitioners articulated in the appellate oral argument, three different approaches were pleaded to invoke Sherman Act. First, a *per se* tying claim between the iPhone and App Store exemplifies pernicious conduct under *Northern Pacific*. That tying claim also alleges a Notary Stamp tax – which amounts to the largest Stamp Tax in history. Second, Petitioners described an App Market for free apps. Third, Petitioners defined exclusionary behavior under *Aspen Skiing* that leveraged its userbase access monopoly.

The Ninth Circuit failed to meaningfully address any of these three approaches, which were not only reasonably based on economic reality, they were spot

on. Instead, the Panel parroted the farcical narrative Apple told the District Court that the FAC was an "eighth amendment" at "fifteen relevant Sherman Act markets."

A 12(b)(6) dismissal meant *Coronavirus Reporter* never benefitted from the requisite fact-finding inquiry of its relevant markets during trial. *Coronavirus Reporter's* primary market is hard to dispute: the U.S. Smartphone market, of which Apple controls 65%. This is consistent with Tim Cook's own testimony that "Apple sells devices." The FAC named all competitors, such as Android phones and even Blackberry, and incorporated a Congressional Subcommittee report detailing the U.S. Smartphone market. The lower courts simply ignored that Petitioners got the primary market correct.[3] They then proceeded to replace the FAC's downstream market for Apps – and App Stores (the "retail side of the App Market") – with an *Amex* transaction market. This was a sleight of hand, and it resulted in breathtaking erroneous conclusions by substantial press and legal journals that Sherman Act is an improper tool for digital products.

Ninth Circuit reliance on *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018), a case involving a

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[3] The recent DOJ/Apple lawsuit alleges one relevant market very similar to Petitioner's "U.S. Smartphone" market, and an alternative "U.S. Superphone" market where Apple holds over 70% market share. Assuming the DOJ complaint is not dismissed under 12(b)(6), which seems almost certain, that fact alone should warrant the remand of Petitioner's case, to uphold equal and consistent application of the law.

golf caddie advertising market deemed implausible, was plainly used to circumvent Supreme Court *Brown Shoe* authority. The Ninth Circuit was not even consistent with its own case law; *Hicks* is based on *Newcal*, which exempts *per se* tying from rigorous market definition: "Plaintiffs must plead a relevant market to state an antitrust claim under the Sherman Act, unless they assert a *per se* claim." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038,1044–45 (9th Cir. 2008).

Apple's Ninth Circuit Answering Brief and oral argument presented no viable defense to the legitimacy of Petitioner's Sherman markets. In fact, Respondent conceded that Notarization stamps are an Apple "mark of approval," refuting the District Court opinion that Notarization Stamps didn't reflect economic reality. Applicant's Closing Brief described how Apple advanced contradictory positions to its own CEO's testimony, violating the sanctity of the oath. This amounted to forfeiture of key *Microsoft* arguments with respect to Sherman Act illegal *per se* tying arrangements.

This case presents a unique opportunity to efficiently curtail Apple's unprecedented antitrust misconduct in the form a Developer Compensation Fund stemming from this private right of action, which complements any corrective measures sought by DOJ in their lawsuit. This case corroborates the Subcommittee Report revelation that Apple "closely monitors the success of apps in the App Store, only to copy the most successful. Apple takes other companies innovative features." Petitioners' software products were subjected to the conduct spotlighted in the Subcommittee

Report. Petitioners have properly invoked a tying cause of action which is the same tying scrutinized by multiple academic papers on the Apple monopoly, such as Loyola Law Review's *Epic Games v. Apple: Tech-Tying and the Future of Antitrust*, Vol. 41, Issue 3, 215 (2021). The appropriate *per se* should streamline and simplify the underlying trial, when compared to DOJ, *Epic*, or other cases concerning more complex rule-of-reason analysis.

The public interest could not be more compelling or immediate. Every moment that Respondent's anti-competitive practices endure, the very values that underpin the American marketplace are eroded. It is not simply a matter of economic theory but the safeguarding of consumer welfare, promotion of innovation, and the prevention of a monopolist sculpting the digital and cultural framework of society.

This Petition seeks to mitigate the never-ending expansion of a digital monopoly that has been given free rein by the judiciary for nearly two decades. At stake is the open market itself and the very principles of freedom and innovation that foster the American ideal. For the reasons stated herein, Petitioners implore this Honorable Court to grant the writ of certiorari, to uphold the antitrust framework that has been ignored too long, and to affirm the promise of American innovation driven by competition rather than coercion.

The significance of the litigation against Apple Inc. before this Court transcends mere economic concerns. It calls to question the very fabric of our societal order,

defined and heavily influenced under the shadow of Apple's internet dominance. Apple's conduct, unchecked for over a decade, threatens this nation on a cultural, economic, and security basis. For nearly fifteen years, the internet as most Americans know it has been crafted and controlled by Apple Inc's exploitative policies. This has resulted in consequences that are admittedly difficult to assess, as for many it is difficult to now imagine a world without the iPhone. But what we do know is that Apple monetized people's attention, encouraging addicting apps and services that now constitute about a third – and growing – portion of Apple's profits. In other words, Apple as an ongoing concern requires increasing monetization of daily activities, rather than sale of hardware.

Apple's censorship of the internet is increasingly authoritarian. With *Coronavirus Reporter*, Apple prevented a world-renowned scientist from competing with their own COVID app. A year earlier, Apple notoriously banned the Parler App during a presidential election. We are approaching twenty years of an internet controlled by Apple. The internet has transformed our lives. But a free internet – one that could grow without Apple's corporate vice – is something we have never experienced as a nation. The time to liberate the nation's internet is now – not six months or six years from now. Apple will continue to censor the internet, stifling this country's economy[4] and creating

[4] Protectionist views, typically concerned about tempering Apple's historic stock performance, are myopic. Apple censors thousands of apps that collectively would create American

dangerous cultural voids, unless this Court intervenes with a clear message.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN DENYING LEAVE TO AMEND A FIRST-TO-FILE DEVELOPER ANTITRUST LAWSUIT CONCERNING FREE DIGITAL APPS, WHEN PETITIONER DR. JEFFREY ISAACS HAD NEVER AMENDED HIS COMPLAINT ONCE AS A MATTER OF COURSE, AND NO *FOMAN V. DAVIS*, 371 U.S. 178 (1962) FACTORS WERE ANALYZED.

Petitioners here were never afforded the opportunity to amend their Complaint based on the guidance of the District Court, in a plain showing of abuse of discretion. While the below sections make clear that the underlying Complaint stated a valid claim for relief under Sherman Act, if there were any minor defects, amendment was not "futile." Moreover, a disabled *pro se* litigant had not even exercised his right to amend "once as a matter of course." This dismissal was as if the District Court slammed its doors shut on an historic Apple monopoly case.

Leave to amend a complaint "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Dismissal without

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investment opportunity and cultural gains which surpass Apple's singular success.

leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc*., 942 F.2d 1467, 1472 (9th Cir.1991).

In other antitrust cases, a district court refusal to grant leave to amend has been held to be an abuse of discretion by the Ninth Circuit Court of Appeals. In *Hicks v. PGA Tour, Inc*., 897 F.3d 1109, 1124 (2018), the Ninth Circuit Court stated:

> The district court made a "simple denial of leave to amend" here without adequate explanation. Id. It only noted that the Caddies were not "able to explain how they could state an antitrust claim using a plausible product market definition." This insufficient consideration of the factors discussed in *Foman* constitutes an abuse of discretion.

Similarly, here, Petitioners' ability to plead a plausible product market was at issue in the District Court. Petitioners, as discussed in the below sections, assert that the U.S. Smartphone market was properly defined, and free app markets were exempt under *Aspen* or *Northern Pacific*, or required modification of *Brown Shoe* standards for free digital products. As the holding in *Hicks* demonstrates, even if there was a failure to plead a plausible product market, it is an abuse of discretion deny leave to amend, just as the District Court did here.

The Ninth Circuit defied its own ruling in *Eminence Capital, LLC et al. v. Aspeon, Inc*., 316 F.3d 1048

(9th Cir. 2003). In *Eminence Capital*, the Ninth Circuit reversed a district court's dismissal of leave to amend after the 'district court concluded that leave to amend should be denied because '[p]laintiffs have had three 'bites at the apple'." The court ruled that "we believe that the district court did not appropriately exercise its discretion by denying plaintiffs leave to amend where, as here, plaintiffs' allegations were not frivolous, plaintiffs were endeavoring in good faith to meet the heightened pleading requirements and to comply with court guidance, and, most importantly, it appears that plaintiffs had a reasonable chance of successfully stating a claim if given another opportunity." Id.

Here, Petitioner Isaacs had never amended his complaint, and the remaining Petitioners had never been given opportunity for any court commentary or guidance to cure any pleading defects. Instead, the District Court abused its discretion by using other earlier actions against Apple as its basis to deny leave to amend the complaint in this case.

The District Court made no attempt to discuss the *Foman* factors[5], just like the district court in *Hicks*,

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[5] In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court offered the following factors a district court should consider in deciding whether to grant leave to amend: "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Id.* at 182.

whose decision to deny leave to amend was reversed by the Ninth Circuit.

The District Court's language, relying on Apple's iteration count, is plainly erroneous. In the New Hampshire District, *Coronavirus Reporter* filed a First Amended Complaint – with Apple's consent – solely to provide Dr. Robert's CV and credentials as exhibit. The New Hampshire district disallowed an SAC in that case – and as the court below noted, the subsequent Complaint filed in this case was "substantially similar claims to the two prior actions."

Dr. Isaacs, a *pro se* party joined in the CAND FAC. The claims by that developer didn't even exist until a month before filing of the FAC, when FaceTime 15 was launched, "Sherlocking" his WebCaller app.

The District Court had no basis to suggest that an amendment (if even necessary) would be futile or lacking in good faith. To the contrary, Petitioners and their counsel have made substantial contribution towards increasing visibility of the free digital product antitrust censorship, as evidenced by the substantial technology and legal industry press attention to the underlying litigation. The recent DOJ complaint

employs a very similar U.S. Smartphone market[6] as Petitioners, and therefore, an amendment is certainly not futile, nor even necessary.

In short, Petitioners were amongst the first to bring Sherman Act claims against Apple for free apps. They should not be penalized for doing so, which is precisely what a judicial determination of "futility" comprises. As the DOJ lawsuit proves, it is not futile to draft a complaint based on the U.S. Smartphone market that seeks redress against anticompetitive practices against developers of free apps.

II. APPLE'S DESIGN OF THE IPHONE REQUIRES END-USERS TO PURCHASE SOFTWARE, I.E. APPS, THROUGH THE PROPRIETARY APP STORE. TYING DIGITAL SOFTWARE DISTRIBUTION STORES TO THE IPHONE DEVICE REPRESENTS PERNICIOUS CONDUCT PURSUANT TO *NORTHERN PACIFIC*.

Apple's design of the iPhone requires end-users to purchase software, i.e. apps, through the proprietary App Store. The pleadings in the underlying case make clear that before this tie, people almost exclusively bought software in brick-and-mortar stores. The case employed an analogy to book publishing, illustrating

[6] DOJ alleges the U.S. Smartphone market is a platform including iOS. Petitioners assert there is separate demand for operating systems, and the device, the primary purchase item, is bundled with iOS. This has significant implications under Microsoft.

that a competitive app distribution market would feature various publishers and retail outlets for creative works, underscoring the anticompetitive nature of the current marketplace. In the eyes of Petitioners, apps are creative works just like books, and deserve a similarly competitive distribution landscape. The facts, taken together, make it abundantly clear that Apple has, remarkably, tied its smartphone to eighty percent of all software distribution stores.

A Motion for Preliminary Injunction, filed simultaneously with the underlying Complaint, asserted a likelihood to prevail based upon a *per se* analysis of this Sherman-prohibited tying that bottlenecks the entire software industry. The Motion for Preliminary Injunction should have been granted after applying the *per se* standard, because Apple failed to raise any valid defenses on the likelihood to prevail. But rather than grant the preliminary injunction, the District Court dismissed the entire case on purported failure to state a claim for relief. This was a miscarriage of justice.

Apple has consistently raised plainly erroneous, misleading defenses to the *per se* tying claims. Apple claimed "the rule of reason, rather than *per se* analysis" governs Plaintiffs' tying claims because they "involve software that serves as a platform for third-party applications," citing *United States v. Microsoft Corp.*, 253 F.3d 34, 89 (D.C. Cir. 2001). This defense contradicts the *Microsoft* ruling, and moreover, contradicts Apple's own position in *Epic* that it is the hardware iPhone, not the iOS software, that what Apple sells.

The *Microsoft* court cautioned not to use that ruling for all software, let alone, hardware:

> "Because this claim applies with distinct force when the tying product is platform software, we have no present basis for finding the *per se* rule inapplicable to software markets generally. Nor should we be interpreted as setting a precedent for switching to the rule of reason every time a court identifies an efficiency justification for a tying arrangement. Our reading of the record suggests merely that integration of new functionality into platform software is a common practice and that wooden application of *per se* rules in this litigation may cast a cloud over platform innovation in the market for PCs, network computers and information appliances." *U.S. v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001)

The *Microsoft* ruling differentiated itself from prior *Jefferson Parish* precedent on hardware-software bundling:

> "Most tying cases in the computer industry involve bundling with hardware. See, e.g., *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991) (holding that plaintiff's allegation that defendant conditioned its software on purchase of its hardware was sufficient to survive summary judgment); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1341-47 (9th Cir. 1984) (holding that defendant's conditioning the sale of its OS on the purchase of its CPU constitutes a *per se* tying

> violation); *Cal. Computer Prods*., 613 F.2d at 743-44(holding that defendant's integration into its CPU of a disk controller designed for its own disk drives was a useful innovation and not an impermissible attempt to monopolize)" *Id*.

Apple opposed a correct tying analysis on these incorrect premises: 1) that *Microsoft* exempted it from *per se* tying analysis, 2) that the tying product was iOS rather than the iPhone, and 3) that the FAC's "smartphone" and "app distribution" markets weren't distinct markets in reality. All three arguments fail. When it suited them in *Epic*, Apple argued that a relevant market for iOS was "artificially drawn and entirely litigation based" – indeed, that finding exists in USDJ Gonzalez Rogers' final order on *Epic.* Apple can't argue it both ways – if the proper market, what Apple actually sells, is smartphones/iPhones, then *per se* analysis applies to the App Store tie. To defeat application on *Northern Pacific*, Apple would need to argue that smartphones and independent software stores don't exist, are all part of a single platform, and are litigation driven. And that is exactly what the company did – and the lower courts went conspicuously silent on Applicant's incorrect *per se* analysis.

It becomes evident that the tying arrangement of all software stores to one iPhone device represents exactly the sort of practice that concerned Justice Black in *Northern Pacific*:

> *"There are certain agreements or practices which because, of their pernicious effect on*

> *competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."*

To most smartphone users, the only "publisher" of apps they ever knew was Apple. This is fundamentally what has stalled Sherman Act enforcement, and the time to correct this dangerous acquiescence with the passage of a writ of certiorari upholding that a claim for relief existed under *Northern Pacific*.

The elements of a tying claim are: (1) that the purportedly tied and tying items entail separate products or services in the sense that there is separate market demand for each of them without the other; (2) that the availability of the tying item has been conditioned upon purchase, rental, or license of the tied item or on not dealing with the defendant's competitors in the market for the tied item; (3) that the party imposing the tie has sufficient market power in the market for the tying item to "appreciably restrain free competition" in the tied market; and (4) that a "not insubstantial" amount of commerce in the tied item is affected by the tying arrangement. *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 462-4 (1992).

The Ninth Circuit affirmance has no mention of the meticulous *per se* illegal tying claims that Petitioners implicated as a focal point of both the briefed submissions and the oral argument. Anchored in a lineage of case law, *per se* illegality does not necessitate a

sophisticated analysis of the relevant market when the conduct in question is so inherently anticompetitive.

The U.S. Smartphone market was unequivocally elucidated within the First Amended Complaint (FAC), where the Petitioners detailed the extensive and unambiguous market over which the Respondent has exerted control. Similarly, the downstream tied market for App Stores was delineated sufficiently to identify the concept, identifying all economically interchangeable substitutes (Google Play, and several Chinese app stores) – the undisputed standard for market definition. Petitioners' own store – a distribution website blocked by Apple's notarization requirements – also encompasses alternative digital distributions which end-users might have availed in the absence of Apple's monopolistic impositions. By pleading all conceivable App Store substitutes, the FAC set the stage for a classic tying arrangement bound by *per se* examination.

The Appellate Court oversight is not merely a matter of bypassing nuances but involves a fundamental refusal to acknowledge the most profitable tying arrangement in history. The District Court was provided a Loyola Law Review article on the illegality of Apple's tying the App Store to the iPhone. Foregoing the core argument – whereby the App Store's tie to the iPhone emerges from the FAC as "plain and simple" – is a judicial error necessitating correction. It is an error with egregious implications, not only in the context of antitrust jurisprudence but also for the voluminous number of developers and consumers directly impacted by such exclusionary practices.

The Petitioners have adequately contended, consistent with legal precedents such as *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and *International Salt Co. v. United States*, 332 U.S. 392 (1947), that *per se* tying need not be encumbered by a profound analysis of market definition. It is the tying itself – the deprivation of consumer choice and hindrance to competition – that the Sherman Act prohibits unambiguously. To hold that there was no claim for relief, when a pernicious, specific tying arrangement was alleged, is improper and must be corrected.

III. THE PANEL'S OVERLOOK OF NOTARY STAMPS AS A MODERN-DAY STAMP TAX DISREGARDS *NORTHERN PACIFIC*

The tying of the iPhone to Notary Stamps, an electronic signature to censor and charge commissions on software, was likewise alleged in the FAC's Tying Count V. Such description of tying practices uniquely positions our case in the antitrust landscape, differing from *Epic* and others on this landmark issue, necessitating this Honorable Court correctly adjudicate under the pernicious effect principle of tying set forth in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). Apple's requirement that third-party software be endorsed with a digital Notary Stamp to run on an iPhone device exemplifies two distinct products: the notary stamp, and the smartphone. In other words, Apple can't even attempt to defend this conduct with the *Microsoft* exemption for software platforms.

The Ninth Circuit decision fails to address the real and substantiated market of Apple's notarization requirement for software – deemed the largest stamp tax in history. This necessitates corrective action by this Court.

During oral argument, Apple made the breathtaking concession that notary stamps are indeed a digital product Apple designed to "mark software as approved." No computing platform in history had such a requirement. Apple's mandatory notarization stamp single handedly turned computers into authoritarian technology, where Apple decides the fate of every developer. This acknowledgment is in direct contrast to the district court's conclusory dismissal of the notary stamp as a fictional creation of the Plaintiffs. Such a characterization fails to grasp the impact of notarization as a gatekeeping tool in the software industry, and is precisely why a marketplace should be determined by fact-finding, not a court on a motion to dismiss.

The Appellate Panel's decision – by entangling itself in Defendant-Respondent's misrepresentation of relevant markets and theories – creates a precedent that fundamentally misunderstands and misapplies antitrust principles as applied to the digital economy.

Apple's notarization scheme represents far more than a mere procedural hurdle or a fictionalized market – it is a monetization and control strategy deftly positioned to exploit the indispensability of software distribution within the modern digital ecosystem.

Critically, embedding this notarization stamp requirement within a computing system showcases one of the most pernicious tying arrangements presently conceivable – a mechanism monopolizing approval and access within a field where openness and competition birth innovation and consumer value. This binding process, which imposes a stamp tax on the sale of digital goods, evokes historical precedents where, indeed, stamp taxes have reshaped economies.

This is not an obscure argument buried within the complexities of computational theory; it is the recognition of a monopolist seizing control over the very arteries that feed the software industry. The stark reality is that the practice of requiring notarization redefines power dynamics between platform providers and software creators, setting dangerous precedents on market control and operational freedom that the drafters of the Sherman Act envisioned in 1890.

The implications of ignoring this conspicuous tying scheme have profound consequences for the future of digital commerce and antitrust law interpretation. It is imperative to ensure that the judiciary adequately scrutinizes and reflects upon its capacity to adjudicate the actions of monopolistic forces with such unparalleled influence on the industry and society at large.

IV. THE NINTH CIRCUIT'S OVERLOOK OF APPLICANT'S INVOCATION OF *ASPEN SKIING CO. V. ASPEN HIGHLANDS SKIING CORP.* DISREGARDED SUPREME COURT PRECEDENT ON EXCLUSIONARY CONDUCT, RATHER THAN RELEVANT MARKET, AS THE FOUNDATION OF CERTAIN SECTION 2 CLAIMS.

The Ninth Circuit Panel's decision has engendered a significant lapse in antitrust jurisprudence by sidestepping the doctrinal implications of Applicant's invocation of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985). This oversight necessitates this Honorable Court correct the inadvertent narrowing of antitrust scrutiny and ensure adherence to established precedent for Section 2 of the Sherman Act.

Petitioners quoted Justice Clarence Thomas in the District Court, expressing in April 2021 how a technology platform, like the App Store, could be subject to Sherman-like claims. Justice Thomas stated the solution to the unprecedented issues presented by the tech platforms could lie "in doctrines that limit the right of a private company to exclude. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail," he wrote. "But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is." *Coronavirus Reporter* had no alternative. The District Court and Ninth

Circuit issued an erroneous and impermissible finding of fact that a web browser serves as a comparable alternative to an app, which squarely contradicts the Congressional Subcommittee finding.

Coronavirus Reporter needed to utilize GPS and other systems not readily available on websites. The underlying Complaint reasonably made Justice Thomas' point, that Apple excluded a rival in the free-app space. Neither the District Court nor the Ninth Circuit acknowledged the *Aspen* exclusionary conduct alleged in the FAC. Neither *per* se tying nor *Aspen* exclusionary conduct required extensive, or any, relevant market analysis. Because *Aspen* requires a trial on the exclusionary conduct, rather than the relevant markets, a dismissal for purported lack of market definitions was improper.

Aspen unequivocally broadens the examination of monopolistic behavior beyond the boundaries of market definition into the realm of exclusionary conduct. The Supreme Court laid vital groundwork, recognizing that a monopolist's refusal to deal with competitors, absent a credible efficiency rationale, can constitute a standalone concern under the purview of antitrust enforcement. The operative conduct under scrutiny is exclusion of rivals, not the defendant's power within a strictly defined market.

The record demonstrates that *Coronavirus Reporter* was a competing app to Apple's own Covid-19 SDK applications. Petitioners presented allegations that mirrored the factual antecedents of *Aspen Skiing*

– articulating a pattern of exclusionary actions directed against competitors by Apple which bore no relation to efficiency or consumer benefit, instead stifling innovation, competition, and market accessibility. This conduct, tantamount to the exclusionary practices in *Aspen Skiing*, where the Supreme Court found monopoly leveraging absent a detailed market analysis, calls for substance over strict formality in identifying antitrust violations.

By overlooking the critical *Aspen Skiing* precedent raised by the Petitioners, the Ninth Circuit Panel has inadvertently upheld a restrictive interpretation that may imperil rigorous and comprehensive antitrust enforcement, potentially allowing monopolistic entities to evade liability through a mechanical application of market definition.

A writ of certiorari is imperative not only to address this critical oversight but to anchor future adjudications firmly within the broad protective sweep intended by the antitrust statute – ensuring that exclusionary behavior, irrespective of exacting market definitions, does not escape due judicial intervention.

V. THE PANEL'S MISAPPLICATION OF RELEVANT MARKET STANDARDS IS ERRONEOUS UNDER *BROWN SHOE*.

The FAC asserts a U.S. Smartphone relevant market, which it elaborates: "the market[place] here is the smartphone internet access device. Most competitors in this space have succumbed to Apple – diagrammed

are Windows Phone and Blackberry. Google retains under half [20%] of the US market for smartphones." FAC ¶ 15.

After defining the U.S. Smartphone market, but prior to defining the App markets, the FAC annotates that

> Counsels' review of other pending antitrust claims in this District, and others nationally, neglect to formulate Sherman definitions that equally apply to free apps – a major component of the ecosystem and a significant source of lost "person-years" of work and innovation that is the pride of our Country. FAC ¶ 16.

This case defines app markets not transactionally on dollar amount, but on the software distribution points (retail side) and the work-product's inherent value (institutional value). This distinction allows this case to focus on the censorship of apps, including free apps. This has been reasonably clear to all press articles, and indeed the Honorable Yvonne Gonzalez Rogers refused to consolidate this case with *Cameron*, because it dealt with free-app censorship.

The FAC then defined these relevant markets:

> After applying these definitions, we then proceed to specification of the National Institutional App market[place]. Technically, this market[place] is the wholesale/B2B side of a two-sided National App Market[place] . . . That market[place], like the broader App Distribution Market[place], is two-sided, with a retail

side (the App Store) and an institutional side, which is pictured below: FAC ¶ 18.

Petitioners described a U.S. Smartphone market, and downstream retail and institutional sides for the National (US) App Market. This was of critical importance, as the retail value of free apps is zero, but the institutional/wholesale value is non-zero. For instance, a free-to-watch movie is zero priced to consumers, but it is purchased for a non-zero value from an author by a retail institution based on its potential revenue, i.e. advertising, marketing, etc.

Petitioners made a reasonable effort at the pleading stage to describe the market dynamics of free apps. Pursuant to *Brown Shoe*, a jury is assigned to conduct the fact-finding and ultimate market definition contours. But the courts below, through sleight of hand, turned the dynamics of wholesale and retail free apps into an *Amex* style transaction marketplace. *Amex* is exactly what the FAC did not describe, with its focus on free apps with zero-priced transactions. The misconstrued definition of retail and wholesale free app markets was the lower court's fundamental error leading to the denial of the injunction and the dismissal of the case.

The Panel's affirmation of the District Court's market definitions positions its ruling against the guidance of this Court's authority and the plain text of the Sherman Act. For over a century, antitrust law has recognized the nuanced reality presented by evolving markets. The United States Supreme Court in *Brown*

Shoe Co. v. United States, 370 U.S. 294 (1962), mandates judicial cognizance of varying dynamics in market interaction when assessing what constitutes a "relevant market." The imperative to allow for a fact-driven inquiry into the "reasonable interchangeability" and "cross-elasticity of demand" between Apple's App Store and reasonable alternatives was sidestepped by the Panel in favor of a narrow and constrained interpretation.

Contrary to established law, the Appellate Court underscored a singular, static view of market definition rather than embracing the necessary holistic and adaptable approach that the realities of digital commerce require. This approach is not only supported by *Brown Shoe* but also by recent jurisprudence, which recognizes that in the high-tech sector, particularly, market boundaries often defy conventional categorization (see *FTC v. Qualcomm Inc.*, 969 F.3d 974, 988 (9th Cir. 2020)). To declare at the Rule 12 level that all app markets are Amex-style "transaction marketplaces" was an incorrect factual determination by the District Judge, and an abuse of discretion.

VI. FREE APPS ARE UNDEFINED UNDER *BROWN SHOE* PRICING FORMULAS, AND REQUIRED THE COURT REVERT BACK TO THE ORIGINAL TEXT OF SHERMAN OR MODIFY *BROWN SHOE* FOR SSNDQ.

The District Court decision failed to acknowledge the inapplicability of traditional market analysis

methodologies, such as that stated in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), to the context of free applications (apps).

Free apps preclude the notion of price elasticity – a fundamental economic concept underpinning the competitive significance of market delineation as held in *Brown Shoe* – and thus evade the conventional frameworks for analyzing antitrust implications. Price elasticity concerns the responsiveness of consumer demand to price changes; however, for free apps, which bear no price tag, such elasticity is non-existent and mathematically undefined. Consequently, this economic measure falls short in assessing the unique marketplace for free apps – a space rife with innovation and competitive nuances.

Petitioners argued in depth through citation of academic journals that such a distinction could be resolved through novel measures such as SSNDQ (quality elasticity), or alternatively, a default to the plain language of the Sherman Act, which does not require an assessment of the relevant market or, indeed, any elasticity in establishing antitrust violations. The Sherman Act's unadorned text is clear and unequivocal, allowing no room for judicially-created market definitions to override the statute's fundamental purpose: the prohibition of monopolistic practices that tamper with the natural flow of commerce and innovation.

Despite this, the Ninth Circuit analysis remained tethered to an anachronistic application of market definition principles, ill-suited for the digital economy's

contemporary landscape, where many services and products are offered free of charge, yielding profits through alternative channels peripheral to direct consumer transactions. By failing to account for the inapplicability of *Brown Shoe's* market tests to free apps, the lower courts dismissed a crucial concept underlying Petitioners' case. Moreover, the courts missed a critical opportunity to demonstrate how Sherman Act can be relevant in today's digital market.

Given the burgeoning significance of free digital services in today's economy and their role in fostering a competitive landscape, a clear directive is needed from the Supreme Court to affirm that the antitrust laws of yesteryears adapt to the evolution within today's marketplace. Applying standards developed for an economy rooted in monetary transactions to markets operating primarily through free exchanges – where currency is a user's attention span and time, rather than money – is fundamentally incongruous. Indeed, not only are apps like *Coronavirus Reporter* free, but the App Store itself is also a free service product. To dismiss an entire Complaint because one or both of these types of products wasn't defined with regard to price elasticity – which would be mathematically impossible – is an absurdity, and certainly ample grounds for reversal of this judicial error. To hold that no plausible market for free apps could be found by a jury violates the plain language of the Sherman Act of 1890.

The Ninth Circuit Panel's silence on this critical distinction, briefed for over two years, underscores not just an analytical oversight but a pressing need for a

judicial framework attuned to the modern digital economy's complexities. It is, therefore, necessary and proper that this Honorable Court reconcile this misapplication and reinforce the enduring applicability of the Sherman Act in protecting against modern digital product anticompetitive practices, irrespective of whether those practices impact goods or services exchanged without a price.

VII. APPLE'S LITIGATION CONDUCT VIOLATED THE SANCTITY OF THE OATH WHEN THE CORPORATION ADVANCED CONTRADICTORY POSITIONS THAT CAN NOT BE RECONCILED

In December 2022, Apple, through a FRAP 28(j) submission, claimed that the *Dreamstime* Google search-ranking ruling supported affirmance. The Ninth Circuit Panel cited *Dreamstime* accordingly. A year later, a Jury found antitrust injury due to monopolization of smartphone app distribution. See *In Re Google Play Antitrust*(CAND-21-md-02981-JD). In contrast to three years of strawman arguments deflecting Petitioners' tying allegations, a San Francisco jury needed only three hours to denounce improper tying restraints yielding duopoly[7] control over the entire app industry.

The new ruling directly applies to and concerns identical conduct alleged in *Coronavirus Reporter*, hence the Court should issue the writ of certiorari in

[7] Apple's controls 80% of US app distribution, versus Android's 20%.

the interest of fairness and equality. The thresholds the *Google* jury faced were in all regards higher than Apple. Google's Android allows sideloading. Google Play is tied to the Android software platform, whereas App Store is tied to a physical iPhone device. Since the *Google* Jury found anticompetitive app distribution conduct under the rule-of-reason, certainly Apple's hardware tying, which is more pernicious, violates Sherman. Apple asked the Ninth Circuit to disregard the October 2023 *Google Play* jury verdict as "unrelated . . . has no bearing." This is simply not honest and not consistent with their previous position.

The District Court and Ninth Circuit also relied upon *Epic-Apple's* non-binding determination that "single brand markets are disfavored" to dismiss *Coronavirus Reporter's* alternate single brand theory. The *Epic-Google* jury demonstrated adeptness at determining market boundaries for digital apps, and indeed found a single-brand Android app distribution market. When *Coronavirus* pointed this out, Apple again argued that *Epic-Google* should be "non-binding."

There exists no doubt that Apple has consistently argued for the applicability of *Epic*. It follows that the Ninth Circuit should have permitted Petitioners to proceed under their similar theories validated by the *Epic-Google* jury verdict. Apple's positions were contradictory, violated the sanctity of the oath, and were rejected by a jury in three hours. The *Coronavirus* decision, representing years of Respondent's efforts to evade Sherman, rests upon a shattered foundation that must be corrected.

The Ninth Circuit appeared to disregard evidence presented in a Petition for Rehearing, which suggested that its decision led a California Law School Dean to inaccurately conclude that the Sherman Act was inapplicable to app censorship:

> "*Antitrust law is a terrible tool for regulating content moderation, and it was never designed to let unwanted app developers force their way into app stores.*"

Nearly two years of appellate briefings, hearings, and 28(j) letters circled back to *Microsoft* time and time again. Apple notably sought to evade *per se* tying applicability under a wholly misleading citation of *Microsoft* at least *five* times.

Take for instance Apple and Gibson Dunn's 28(j) correspondence dated May 4, 2023, which advanced a confusing attempt to inject *Microsoft*:

> Epic also supports affirmance on alternative grounds, including that Appellant's per se tying claim fails as a matter of law. The court held that "per se condemnation is inappropriate" for alleged "ties related to app-transaction platforms" like the App Store. Slip Op. 72–74; see Answering Br. 41. See Opening Br. 23 (arguing "the purported tied products in Epic Games (in-app purchases) differ[] from the tied products plead[ed] by Appellants (the app store, notary stamps, and onboarding software)").

Here, Respondent argues that because the *Epic* bench trial rejected *per se* tying under *Microsoft*, so too

should the courts reject it for *Coronavirus Reporter*. The problem with this position is that it is entirely dishonest. *Coronavirus Reporter* alleged tying of all software stores to the iPhone device. Hence Microsoft's "software platform" exception is inapplicable. The falsity exists in that the tying product in our case is hardware, not software. And the tied product is the App Store, which was referenced throughout the underlying injunction request as "all software stores." *Microsoft* was clear that it applied to software platforms as the tying product – not the tied product. The other way around is non-sensical. In any event, Applicant's Notary Stamp tying allegation has nothing to do with software platforms. It doesn't involve them, either on the tying or tied side. *Microsoft* is completely inapplicable to tying notary stamps to the iPhone device.

CONCLUSION

After years of previous attempts to regulate Apple's expansive reach have astonishingly failed, *Coronavirus Reporter* is notable for directly and accurately confronting the censorship of free digital creations by Apple. The District Court and Ninth Circuit perplexingly transmuted the Applicant's free app market theories into *Amex* transaction fee platforms. To witness its meticulously outlined claims translated into something they were not is not just disheartening but deeply concerning. This, at a time when Big Tech's pervasive grip impacts almost every aspect of our existence, is not acceptable. There exists no reasonable

basis that Petitioner's Complaint failed to state a claim for relief.

Public interest warrants issuing a writ of certiorari so that this case may proceed. Apple is the largest monopoly in history. The DOJ, in a recent *amicus* filing, asked the Ninth Circuit to "ensure that the Sherman Act is not unduly narrowed through legal error," but this is precisely what happened in the present litigation.

In March 2024, the European Union passed the Digital Markets Act to protect its citizens from Apple's conduct. In addition to competitive harm from Apple's conduct, America risks losing its leadership role in technology regulation if it fails to enforce its own antitrust laws. Petitioners case can coincide with last week's DOJ case, or even be held in abeyance, but fairness demands adjudication of the claims brought by these developers nearly four years ago.

The United States Copyright Office acknowledged the rights of iPhone users to run software of their choosing a decade ago. Since then, Apple has embarked on an obvious mission to stall enforcement in the courts. *Pepper*, despite winning in this Court, is in its twelfth year of litigation. *Coronavirus Reporter*, which invoked novel claims for free digital apps, deserves a chance to be heard.

For the foregoing reasons, the Petitioners hereby request this Honorable Court issue the writ of certiorari and corresponding guidance on *Northern Pacific* applicability. It is essential to uphold the principles of

antitrust laws as established by the Sherman Act and to intervene decisively before the tide of monopolistic power becomes unassailable. The potential damage left unchecked promises to be as significant as it is irreversible, for once a monopoly embeds itself into the societal fibre to the extent Apple has, dislodging it often comes at a prohibitive cost.

Date: April 3, 2024

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORONAVIRUS REPORTER; CALID, INC.; PRIMARY PRODUCTIONS LLC, *Plaintiffs-Appellants,* and JEFFREY D. ISAACS, Dr., *Plaintiff,* v. APPLE, INC., *Defendant-Appellee,* and FEDERAL TRADE COMMISSION, *Defendant.*	No. 22-15166 D.C. No. 3:21-cv-05567-EMC OPINION
JEFFREY D. ISAACS, Dr., *Plaintiff-Appellant,* and CORONAVIRUS REPORTER; CALID, INC.; PRIMARY PRODUCTIONS LLC, *Plaintiffs,* v.	No. 22-15167 D.C. No. 3:21-cv-05567-EMC

APPLE, INC.,

Defendant-Appellee,

and

FEDERAL TRADE COMMISSION,

Defendant.

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted March 29, 2023
San Francisco, California

Filed November 3, 2023

Before: Ronald M. Gould, Marsha S. Berzon, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Gould

SUMMARY*

Antitrust

The panel affirmed the district court's dismissal, for failure to state a claim, of an antitrust action against Apple, Inc., alleging monopolist operation of the Apple App Store.

The panel held that appellants failed to state an antitrust claim under Section 1 or Section 2 of the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Sherman Act, arising from Apple's rejection of their apps for distribution through the App Store, because they did not sufficiently allege a plausible relevant market, either for their rejected apps as compared to other apps, or for apps in general.

The panel held that appellants failed to state a claim for breach of contract under California law because they did not identify relevant specific provisions of Apple's Developer Agreement or Developer Program License Agreement or show that Apple breached a specific provision.

Appellants also failed to state a claim under the Racketeer Influenced and Corrupt Organizations Act or for fraud.

COUNSEL

Keith Mathews (argued), American Wealth Protection, Manchester, New Hampshire; Stephan M. Kernan, The Kernan Law Firm, Beverly Hills, California; for Plaintiffs-Appellants.

Jeffrey D. Isaacs (argued), West Palm Beach, Florida, pro se Petitioner.

Julian W. Kleinbrodt (argued) and Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, California; Cynthia E. Richman, Zachary B. Copeland, and Harry R. S. Phillips, Gibson Dunn & Crutcher LLP, Washington, D.C.; Mark A. Perry, Weil Gotshal & Manges LLP, Washington, D.C.; for Defendants-Appellee.

OPINION

GOULD, Circuit Judge:

Plaintiffs-Appellants Coronavirus Reporter, CALID, Inc., Primary Productions LLC, and Dr. Jeffrey D. Isaacs sued Defendant-Appellee Apple for its allegedly monopolist operation of the Apple App Store. The district court dismissed the claims with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and denied the remaining motions as moot. Plaintiffs-Appellants appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2008, a year after launching the iPhone, Apple introduced the App Store. In order to distribute apps on the App Store, app developers must abide by the App Store Review Guidelines ("the Guidelines") and enter into two agreements with Apple: the Developer Agreement and the Developer Program License Agreement ("DPLA"). By signing these agreements, app developers expressly "understand and agree" that Apple has "sole discretion" to reject apps. The Guidelines provide developers with the standards Apple applies when it reviews apps.

Plaintiffs-Appellants developed a group of apps that they sought to distribute on Apple's App Store. Two of their apps—Coronavirus Reporter and Bitcoin

Lottery—were not approved for distribution. The Coronavirus Reporter app sought to collect "bioinformatics data" from users about COVID-19 symptoms that the app would then share with "other users and [unidentified] epidemiology researchers." The Coronavirus Reporter team allegedly included Dr. Robert Roberts, a former cardiologist for NASA. Apple rejected Coronavirus Reporter under Apple's policy requiring that any apps related to COVID-19 be submitted by a recognized health entity such as a government organization or medical institution.[1] Apple rejected Bitcoin Lottery, a blockchain app, under its policy "generally block[ing] blockchain apps."

Plaintiffs-Appellants brought claims against Apple for antitrust violations pursuant to Sections 1 and 2 of the Sherman Act, breach of contract, racketeering, and fraud, challenging Apple's allegedly monopolist operation of the iPhone "App Store" through the "curation" and "censor[ship]" of apps. Plaintiffs-Appellants assert that they "seek to vindicate" the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers."

The district court dismissed Plaintiffs-Appellants' First Amended Complaint ("FAC") with prejudice on November 30, 2021. The district court dismissed

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[1] Guidelines § 5.1.1(ix): "Apps that provide services in highly-regulated fields (such as banking and financial services, healthcare, and air travel) or that require sensitive user information should be submitted by a legal entity that provides the services, and not by an individual developer."

Plaintiffs-Appellants' antitrust claims because they did not allege a plausible relevant market nor antitrust injury. The district court likewise dismissed the claims for breach of contract, racketeering, and fraud because the Plaintiffs-Appellants failed to plead required elements for each. Accordingly, the district court denied as moot Plaintiffs-Appellants' two preliminary injunction motions, Plaintiffs-Appellants' "motion to strike" Apple's motion to dismiss, and Plaintiffs-Appellants' Notices for Discovery of Apple executives and FTC Chair Lina Khan, along with Defendant-Appellee's motion to quash these requests. The district court later rejected Plaintiffs-Appellants' motions for reconsideration.

Plaintiffs-Appellants appeal the district court's dismissal of their claims, as well as the denial of their motions for reconsideration and for preliminary injunction.

II. STANDARDS OF REVIEW

We review *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6), "accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016) (quoting *Skilstaf Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012)). The complaint must "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "Conclusory allegations and unreasonable inferences" do

not provide such a basis. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A dismissal may be affirmed on any proper ground that is supported by the record. *See Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002).

Although decisions by the district court on the substance and merits of claims are reviewed *de novo, see Ebner*, 838 F.3d at 962, many matters that routinely come before a district court are committed to the sound discretion of the district court and reviewed for abuse of discretion. *See e.g.*, *Ordonez v. Johnson*, 254 F.3d 814, 815 (9th Cir. 2001) (per curiam) (dismissal with prejudice); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) (denial of a preliminary injunction); *Kerr v. Jewell*, 836 F.3d 1048, 1053 (9th Cir. 2016) (denial of a motion for reconsideration), *cert. denied sub nom. Kerr v. Haugrud*, 580 U.S. 1198 (2017); *cf. Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 759 (9th Cir. 2015) (denying leave to amend), *cert. denied*, 577 U.S. 876 (2015).

III. DISCUSSION

A. Antitrust claims

An antitrust claim brought pursuant to Section 1 of the Sherman Act requires a plaintiff to show: "(1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1177-78 (9th

Cir. 2016) (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189-90 (2010)); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 988 (9th Cir. 2020) (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018)).

An antitrust claim brought pursuant to Section 2 of the Sherman Act requires proving the following two elements: "(1) the defendant has monopoly power in the relevant market, and (2) the defendant has willfully acquired or maintained monopoly power in that market." *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1137 (9th Cir. 2022) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). To meet the first element, a plaintiff must "(1) define the relevant market, (2) establish that the defendant possesses market share in that market sufficient to constitute monopoly power, and (3) show that there are significant barriers to entering that market." *Id.* The second element requires showing that the defendant undertook anticompetitive conduct that harms the competitive process as a whole, rather than the success or failure of individual competitors. *Id.*; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977).

"A threshold step in any antitrust case is to accurately define the relevant market." *Qualcomm*, 969 F.3d at 992. For both Section 1 and Section 2 of the Sherman Act, a relevant market defines "the field in which meaningful competition is said to exist." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997). Market definition is essential to any antitrust case because "[w]ithout a definition of

[the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" *Am. Express*, 138 S. Ct. at 2285 (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (alternations in original). "The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979). Cross-elasticity of demand refers to the extent to which consumers view two "products [as] be[ing] reasonably interchangeable" or substitutable for one another. *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1025 (9th Cir. 2013) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). Products or services that are "reasonably interchangeable" should be considered as being in the same market for the purpose of an antitrust claim. *Kaplan*, 611 F.2d at 291-92 (citing *U.S. v. E.I. DuPont De Nemous & Co.*, 351 U.S. 377 (1956)). "A relevant market contains both a geographic component and a product or service component." *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 975 (9th Cir. 2023) (citing *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018)). Courts also consider the "practical indicia" of a market, including industrial or public recognition of a market as a separate entity or sensitivity to price changes. *Id.* at 976 (citing *Brown Shoe Co.*, 370 U.S. at 325).

A relevant market can be an aftermarket in which demand depends entirely upon prior purchases in a foremarket. *Id.* (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) and *Newcal*

Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1048 (9th Cir. 2008)). However, such a market generally shows that the defendant exploited consumers' unawareness of the restrictions on the aftermarket and must still show the cross-elasticity required to define a market. *Id.*

The relevant market can also be a two-sided market, with consumers on both sides of a platform.[2] *PLS.Com, LLC v. Nat'l Ass 'n of Realtors*, 32 F.4th 824, 837-39 (9th Cir. 2022); *see*, *e.g.*, *Epic Games*, 67 F.4th at 985 (discussing the "two-sided market for mobile-game transactions," in which the relevant consumers are both game developers and users). Under these circumstances, an antitrust plaintiff must show anticompetitive impact on the "market as a whole." *Id.* at 839 (quoting *Am. Express*, 138 S. Ct. at 2287).

Here, Plaintiffs-Appellants have not adequately defined the relevant market. Plaintiffs-Appellants' FAC alleged in scattergun fashion that there were at least fifteen "relevant markets" pertinent to its

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[2] "[A] two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them." *PLS.Com, LLC*, 32 F.4th at 837 (quoting *Am. Express Co.*, 138 S. Ct. at 2280). In *American Express*, the Supreme Court gave two examples of two-sided platforms: credit card companies and newspapers. "Credit card companies, the Court explained, sell credit to consumers on one side of the market and sell transaction-processing services to merchants on the other side of the market. Newspapers are also 'arguably' two-sided platforms: they sell advertising space to advertisers and news to subscribers." *Id.* (citing *Am. Express*, 138 S. Ct. at 2280, 2286).

antitrust claims but made no effort at all to define the markets or to distinguish them from one another.[3] For example, Plaintiffs-Appellants did not clarify whether the markets that Plaintiffs-Appellants identified are completely different from one another or whether they overlap. Plaintiffs-Appellants later impermissibly tried through a Motion to Strike to narrow their relevant markets to "two foremarkets" and "four downstream markets," but our "[r]eview is limited to the complaint." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir.1993)).

Even if we were to review the narrower set of markets posited in Plaintiffs-Appellants' Motion to Strike, the alleged markets lack sufficient clarity to state an antitrust claim plausibly. *See Am. Express*, 138 S. Ct. at 2285. The FAC does not attempt to demonstrate the cross-elasticity of iOS end users' demand either for Plaintiffs-Appellants' rejected apps as compared to other apps, or for apps in general, as it must. *See*

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[3] Plaintiffs-Appellants' alleged "relevant markets" are: (1) a "Smartphone Enhanced National Internet Access Devices" market; (2) a "smartphone market"; (3) a "single-product iOS Smartphone Enhanced Internet Access Device" market; (4) "[t]he iOS market"; (5) the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone"; (6) the "institutional app market"; (7) the "iOS institutional app market"; (8) the "iOS notary stamps" market; (9) the "iOS onboarding software" market; (10) the market for access rights to the iOS userbase; (11) the "national smartphone app distribution market"; (12) the "iOS App market"; (13) the "US iOS Device App market"; (14) the "market of COVID startups"; and (15) "the App Market."

Kaplan, 611 F.2d at 291-92. The FAC fails to draw the market's boundaries to "encompass the product at issue as well as all economic substitutes for the product." *Hicks*, 897 F.3d at 1120 (quoting *Newcal*, 513 F.3d at 1045).

Additionally, the Plaintiffs-Appellants allege downstream markets in a manner that implies that the Apple App Store's apps constitute their own market, which amounts to an allegation of a single-brand market. This allegation fails because Plaintiffs-Appellants did not allege the prerequisites for a single-brand market. For example, Plaintiffs-Appellants do not demonstrate that iOS end consumers lacked awareness that buying an iPhone constrains which apps would be available to them through the App Store. *See Epic Games*, 67 F.4th at 976-77 ("[T]o establish a single-brand aftermarket, a plaintiff must show . . . the challenged aftermarket restrictions are 'not generally known' when consumers make their foremarket purchase."). Nor do Plaintiffs-Appellants demonstrate that iOS end users would, if they could do so more readily, obtain apps through means other than Apple's App Store due to cost sensitivity or for other reasons. *See id.* at 976-77 ("[T]o establish a single-brand aftermarket, a plaintiff must show . . . 'significant' monetary or non-monetary switching costs exist."). To the extent that Plaintiffs-Appellants attempt to define a two-sided platform market, they fail to properly allege a relevant market (that is, a category of transactions between developers and consumers on a two-sided platform), given their reference to a broader market for

smartphones and the corresponding ability to access apps outside of the Apple App Store's two-sided platform. *See id.* at 976,985.

Because Plaintiffs-Appellants do not meet the threshold step of defining a relevant market, we reject their antitrust claims and need not proceed further with the analysis. Failing to define a relevant market alone is fatal to an antitrust claim. *See Qualcomm*, 969 F.3d at 992. Without a defined relevant market in terms of product or service, one cannot sensibly or seriously assess market power. *See Epic Games*, 67 F.4th at 975.

Because the Plaintiffs-Appellants did not define the relevant market, it follows that they could not, and did not, establish that the Defendant-Appellee created an agreement that unreasonably restrained trade, as required for a Section 1 claim. *See Aerotec Int'l*, 836 F.3d at 1177-78; *Qualcomm*, 969 F.3d at 988. It also follows that they could not, and did not, establish that the Defendant-Appellee possesses a market share in a relevant market sufficient to constitute monopoly power, nor did they show that there were existing barriers to entry to that market, as required for a Section 2 claim. *See Dreamstime.com*, 54 F.4th at 1137.[4]

Further, Plaintiffs-Appellants did not demonstrate that the Defendant-Appellee undertook anticompetitive conduct in that market sufficient to harm

[4] We do not address whether, under different circumstances, a complaint alleging antitrust claims could define a cognizable market encompassing the Apple App Store.

the competitive process as a whole. *See id.*; *see also Brunswick*, 429 U.S. at 489. Two of Plaintiffs-Appellants' five apps did not get approved for distribution for reasons explicitly set out in the Developer Agreement and the DPLA. Antitrust law does not seek to punish economic behavior that benefits consumers. *See Dreamstime.com*, 54 F.4th at 1137. Disapproval of these two apps on grounds ostensibly designed to protect consumers, absent factual allegations to believe that these disapprovals occurred for pretextual reasons, does not suffice to demonstrate anticompetitive conduct. Further, Plaintiffs-Appellants have not explained why or how they could not distribute their apps by other means, even if not by their most preferred means.

For all of these reasons, Plaintiffs-Appellants' antitrust claims must fail.

B. Breach of contract

To state a breach of contract claim under California law, plaintiffs must show: (1) there was a contract, (2) plaintiff either performed the contract or has an excuse for nonperformance, (3) defendant breached the contract, and (4) plaintiff suffered damages as a result of defendant's breach. *Hamilton v. Greenwich Invs. XXVI, LLC*, 126 Cal. Rptr. 3d 174, 183 (Cal. Ct. App. 2011).

Here, Plaintiffs-Appellants do not identify relevant specific provisions of the Developer Agreement or the DPLA, much less show that Apple breached a

specific provision. Plaintiffs-Appellants contend that there is a "promise" in the Developer Agreement that "entities with 'deeply rooted medical credentials' were permitted to publish COVID apps on the App Store." But neither the Developer Agreement nor any other contract between Plaintiffs-Appellants and Defendant-Appellee contains any such guarantee. Instead, and sharply to the contrary, the DPLA specifically states that Apple has "sole discretion" to approve or deny requests to distribute apps on the App Store. Plaintiffs-Appellants' contract claim fails because there was no breach of contract. Similarly, in an attempt to make a claim for breach of the covenant of good faith and fair dealing, Plaintiffs-Appellants simply repeat their breach allegations. This claim likewise fails.

C. RICO or fraud

To plead a civil claim under 18 U.S.C. § 1962(c) of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, Plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiffs business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quotation marks omitted). If a corporation is the enterprise, it cannot also at the same time be the RICO defendant. *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984). Parties must allege fraud with particularity under Federal Rule of Civil Procedure 9(b), including the "who, what, when, where, and how of the

misconduct charged. . . ." *See Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019) (internal quotations and citations omitted).

Here, Plaintiffs-Appellants allege that Apple and individuals within Apple's App Store management, App Review, their counsel, and friends formed a RICO enterprise and engaged in predicate acts such as screening Plaintiffs-Appellants' apps for purported compliance with the DPLA while appropriating Plaintiffs-Appellants' ideas into Apple's own competing apps, as well as wire and mail fraud by assigning Apple's App Review employees to give false, pretextual reasons for rejecting the apps of small developers. These allegations center on the conduct of Apple and its employees without describing in any particularity conduct or activity outside of Apple as a corporation. As articulated, this claim makes Apple as a corporation both the enterprise and the RICO defendant, which is not permitted in a RICO claim. *See Rae*, 725 F.2d at 481. To the extent the Plaintiffs-Appellants attempt to make out a further claim for fraud, their allegations are vague and conclusory without the particularity required by FRCP 9(b). *See Depot, Inc.*, 915 F.3d at 668.

D. Dismissal without leave to amend

Federal Rule of Civil Procedure 15(a) states that leave to amend "shall be freely given when justice so requires," but "[a] district court acts within its discretion to deny leave to amend when amendment would be futile[.]" *Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719,

725-26 (9th Cir. 2000). Here, the district court did not abuse its discretion in concluding that further amendment was not warranted. While the district court dismissed the Plaintiffs-Appellants' first amended complaint in this case, Plaintiffs-Appellants were given a total of seven opportunities to amend similar complaints across jurisdictions and between various permutations of plaintiffs, but still failed to state their claims here adequately. It is within the district court's discretion to determine that an eighth opportunity would produce a similar result. *See Ryan*, 786 F.3d at 759.

E. Remaining motions

Because the district court properly dismissed with prejudice all of the claims against Apple, it correctly denied the remaining pending motions as moot. The court also properly denied the motions for reconsideration by finding that the Plaintiffs-Appellants simply reiterated their prior claims and did not present newly discovered evidence or controlling law, nor an error of law or manifest injustice. *See Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Kerr*, 836 F.3d at 1053.

IV. CONCLUSION

We affirm the decisions of the district court to dismiss Plaintiffs-Appellants' FAC for failure to state any claim under Federal Rule of Civil Procedure 12(b)(6)

and to deny Plaintiffs-Appellants' motions for reconsideration and for preliminary injunction.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CORONAVIRUS REPORTER, et al., Plaintiffs, v. APPLE INC., et al., Defendants.	Case No. 21-cv-05567-EMC **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, AND DENYING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION, TO STRIKE, AND TO APPEND CLAIM** Docket Nos. 20, 45, 51, 52, 74

I. INTRODUCTION

Plaintiffs bring this action for antitrust and RICO violations, and breach of contract and fraud against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

Now pending is Apple's motion to dismiss all of Plaintiffs' claims against Apple. Docket No. 45. Additionally, Plaintiffs two motions for preliminary injunction, Docket Nos. 20, 52, motion to strike Apple's

motion to dismiss, Docket No. 51, and request to append a claim to its FAC, Docket No. 52, are also pending. Finally, Apple's motion to quash Plaintiffs' subpoena request, Docket No. 74, is pending. For the reasons explained below, the Court **GRANTS** Apple's motion to dismiss all of Plaintiffs' claims against Apple, and **DENIES AS MOOT** each of Plaintiffs' pending motions and Apple's motion to quash.

II. BACKGROUND

A. Summary of Allegations

Plaintiffs bring this antitrust and breach of contract action against Apple, Inc. ("Apple") to challenge Apple's allegedly monopolist operation of its "App Store" through "curation" and "censor[ship]" of smartphone apps. Docket No. 41 ("FAC") ¶ 1-2. Plaintiffs seek to vindicate the right of "the end users of Apple's iPhone" to "enjoy unrestricted use of their smartphones" to run "innovative applications, written by third party developers." *Id.* ¶ 5.

1. Apple's App Approval Process

Apple launched the iPhone and its proprietary iOS ecosystem in 2007. *See Epic Games, Inc. v. Apple Inc.*, 2021 WL 4128925, at *17 (N.D. Cal. Sept. 10, 2021). Apple introduced the App Store the following year. *Id.* at * 19. App developers wishing to distribute apps on the App Store must enter into two agreements with Apple: the Developer Agreement and the Developer Program License Agreement ("DPLA"). Developers must also

abide by the App Store Review Guidelines (the "Guidelines").[1] The Developer Agreement governs the relationship between a developer and Apple, *see* Docket No. 42 ("Brass Decl."), Exh. 1 ("Developer Agreement"), while the DPLA governs the distribution of apps created using Apple's proprietary tools and software, *see id.*, Exh. 2 ("DPLA"). By signing the DPLA, developers "understand and agree" that Apple may reject apps in its "sole discretion." *Id.* § 6.9(b). The Guidelines set out the standards Apple applies when exercising that discretion to review and approve apps for distribution on the App Store, a process known as "App Review." *See generally id.*, Exh. 3 ("Guidelines").

2. Plaintiffs' Apps

Plaintiffs allege they are developers of "a diverse group" of apps: Coronavirus Reporter, Bitcoin Lottery, CALID, WebCaller, and Caller-ID. FAC ¶¶ 8, 27-30. Two of these apps, Coronavirus Reporter and Bitcoin Lottery, were never approved for distribution on the App Store. *Id.* ¶¶ 29, 53.

Coronavirus Reporter sought to collect "bioinformatics data" from users about COVID-19 symptoms that it would then share with "other users and [unidentified] epidemiology researchers." FAC ¶¶ 48, 52.

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[1] The agreements and Guidelines are "central" to Plaintiffs' claims, FAC ¶ 273, and are incorporated by reference in the FAC. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also* FAC ¶¶ 19, 24, 56, 74, 113-14, 135, 145, 165, 186, 195-206, 245, 254-55, 258-59, 269-71.

The Coronavirus Reporter team allegedly included Dr. Robert Roberts, a former cardiologist for NASA. *Id.* ¶ 47. The Coronavirus Reporter app was developed in February 2020, and, if approved, "this startup COVID app" would allegedly have been "first-to-market." *Id.* The Coronavirus Reporter app was rejected by Apple on March 6, 2020, under Apple's policy requiring that any apps related to COVID-19 be submitted by a recognized health entity such as a government organization or medical institution. *Id.* ¶¶ 54, 56, 69, 94, 96, 98; *see also* Guidelines § 5.1.1(ix) ("Apps that provide services in highly-regulated fields (such as banking and financial services, healthcare, and air travel) or that require sensitive user information should be submitted by a legal entity that provides the services, and not by an individual developer"). Apple allegedly denied Coronavirus Reporter's appeal from rejection on March 26, 2020, which Plaintiffs alleged was concurrent with "Apples internal discussions with its own partners" in order to "further cement Apple's own monopolistic trust and medi[c]al endeavors." FAC ¶ 56.

Similarly, Apple allegedly rejected Plaintiff Primary Productions' Bitcoin Lottery, a "blockchain app" developed by Plaintiff Primary Productions, under its alleged policy "generally block[ing] blockchain apps." FAC ¶¶ 85-86.

Plaintiffs' other apps (CALID, Caller-ID, and WebCaller) allegedly were approved for distribution on Apple's App Store. FAC ¶¶ 97, 103. CALID, "a cross-platform scheduling platform with an initial focus on telehealth," *id.* ¶ 94, was approved after the developer

addressed several violations of Apple's Guidelines, including Apple's requirement that developers use Apple's payment system for in-app purchases. *Id.* ¶¶ 95, 97. Although Plaintiffs state that they later "abandoned" the app, *id.* ¶ 97, they allege "CALID was subject to ranking suppression," *id.* ¶ 28. Through "ranking suppression," Plaintiff allege that Apple rendered the app "invisible on App Store searches" by end users. *Id.* Plaintiffs similarly allege that Apple "suppressed" Caller-ID and WebCaller because it competed with Apple's own Facetime app and because Apple retaliated against Plaintiff Isaacs after he "informed Apple he held a patent on web caller ID, and that [Apple's] crony, Whitepages . . . violated his patent." *Id.* ¶¶ 104-07, 305. Plaintiffs concede, however, that Isaac's patent was invalidated. *Id.* ¶ 305.

3. Plaintiffs' Antitrust Claim Theory

The core of Plaintiffs antitrust claims are challenges to Apple's alleged exercise of market power in reviewing proposed apps and to Apple's unilateral authority to approve or deny which apps are allowed on the App Store. Plaintiffs challenge Apple's unilateral control over the ability of developers to access and provide apps to iOS users, including Apple's alleged practice of suppressing the visibility of apps which compete with Apple's own apps or apps of Apple's "cronies." FAC ¶¶ 21-23, 127, 199.

Plaintiffs' FAC articulates at least fifteen different relevant markets to its antitrust claims against Apple:

(1) a "Smartphone Enhanced National Internet Access Devices" market;

(2) a "smartphone market";

(3) a "single-product iOS Smartphone Enhanced Internet Access Device" market;

(4) "[t]he iOS market";

(5) the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone";

(6) the "institutional app market";

(7) the "iOS institutional app market";

(8) the "iOS notary stamps" market;

(9) the "iOS onboarding software" market;

(10) the market for access rights to the iOS userbase;

(11) the "national smartphone app distribution market";

(12) the "iOS App market";

(13) the "US iOS Device App market";

(14) the "market of COVID startups"; and

(15) "the App Market."

FAC ¶¶ 8 n.1, 11, 12, 17-18, 81, 121, 135-37, 142, 165-66, 168, 233, 235. Plaintiffs' Opposition brief attempts to clarify that certain of the alleged markets are synonyms for other alleged markets, and that, to simplify

for purposes of the instant motion, Plaintiffs are focused on "two relevant foremarkets" (apparently the "US smartphone market" and the "US iOS smartphone market" which "is an alternative single-produce market to the US smartphone market") and "five downstream markets":

> (1) the institutional app market (i.e. wholesale app competition);
>
> (2) the iOS institutional app market (iPhone app single-product wholesale marketplace);
>
> (3) iOS notary stamps market (permission tokens to launch iOS apps);
>
> (4) iOS onboarding software ('Mac Finder' capability disabled on all nonenterprise iOS devices); and
>
> (5) access rights to the iOS userbase").

Docket No. 55 ("Opp.") at 7 (citing FAC ¶¶ 8 n.1, 16, 18). Plaintiffs allege that its market definitions cover and "equally apply to free apps—a major component of the ecosystem" of iOS app purchases. FAC ¶ 16.

Plaintiffs' antitrust theory allegedly "flow[s] logically" from the key fact that "the only marketplace, the only seller of apps to end-users, is Apple itself' and thus Apple monopolizes an "institutional smartphone application software marketplace" in which Apple "purchase[s]" apps from developers—by approving or rejecting them through the App Review process—and then resells them to consumers on its own terms. *Id.* ¶¶ 9-11, 19.

Plaintiffs allege that "Apple's App Store retails approximately 80% of the apps in the US consumer-facing market for smartphone apps," but that the relevant market for its antitrust claims is the "national institutional app market" where Apple "is a monopsony buyer of developers' apps." *Id.* ¶ 121. Plaintiffs allege that "Apple has complete control of pricing and contractual terms in [the national institutional app market]" and, accordingly, "they can reject apps simply because the app competes with Apple's own competitor app, or its cronies." *Id.* ¶ 127. Plaintiffs allege that Apple monopolizes three additional downstream markets, (a) iOS notary stamps market (permission tokens to launch iOS apps), (b) iOS onboarding software, and (c) access rights to the iOS userbase, through Apple's unilateral control of access to those markets. FAC ¶¶ 135-41.

4. Class Allegations

Plaintiffs propose to represent various classes pursuant to "Fed R. Civ. P. 23(b)(1), (2), and (3)," including for "All U.S. iOS developers of any app that was excluded through disallowance and/or ranking suppression on the App Store," and "Any iOS developer who paid a $99 annual subscription fee[ ] to Apple for access to the iOS userbase and/or 'app notarization.'" FAC ¶¶ 148-51. Plaintiffs allege that the $99 annual fee is required for app developers to access the "App Store Connect developer portal" to develop and test apps on Apple's software, and to submit apps to for Apple to consider for inclusion on the App Store. *Id.* ¶ 135.

5. Causes of Action

Plaintiffs allege eleven causes of action against Apple:

> (1) Violation of § 2 of the Sherman Act for "interstate restriction of smartphone enhanced interne userbase access services, iOS notary stamp and iOS onboarding software markets." FAC ¶¶ 160-172.
>
> (2) Violation of § 2 of the Sherman Act for "denial of essential facility in the institutional app markets" for Apple's "exclusionary behavior that denies essential facilities" that are necessary to compete in the smartphone market, such as denying "notary stamps." *Id.* ¶¶ 180-88.
>
> (3) Violation of § 1 of the Sherman Act because the "DPLA [is an] unreasonable restraint of trade" by "limiting competition in the critically important US institutional app marketplace." *Id.* ¶¶ 195-206.
>
> (4) Violation of § 2 of the Sherman Act for "ranking suppression as restraint of interstate trade." *Id.* ¶¶ 207-212.
>
> (5) Violation of § 1 of the Sherman Act for "tying the App Store, Notary Stamps and Software Onboarding to the iOS device market." *Id.* ¶¶ 213-217. Plaintiffs allege that "Apple is able to unlawfully condition access to iOS device to the use of a second product—App Store app marketplace." *Id.* ¶ 217.

(6) Violation of § 2 of the Sherman Act for "$99 fee illegality." FAC ¶¶ 231-234. Plaintiffs allege "Apple unlawfully maintains is monopoly powers in the aforementioned markets" by "issuing an illegal demand of money from 20 million aspiring developers" of $99 each year "if they wish to access the iOS userbase or get their software notarized on an iOS device." *Id.* ¶ 235.

(7) "*Cameron* Antitrust Class Action Opt Out:" Plaintiffs CALID and Jeffrey Isaacs "assert claims for non-zero price apps as specified in the already docketed complaint *Cameron v. Apple*." *Id.* ¶¶ 241-43. Plaintiffs allege the *Cameron* case, No. 19-cv-3074-YGR (N.D. Cal.) is a "developer class-action antitrust suit" where the "class is restricted to app developers who sold apps for non-zero prices." *Id.* ¶ 36. Plaintiffs allege that certain Plaintiffs in this case are *Cameron* class action opt-outs, and state the *Cameron* causes of action in this suit through "reference to the *Cameron* complaint." *Id.* ¶ 132. Plaintiffs allege that Judge Gonzalez Rogers deemed this litigation not subject to consolidation with *Cameron*. *Id.* ¶ 243.

(8) Breach of Contract for Apple's pretextual refusal to approve the Coronavirus Reporter app for distribution on the App Store in violation of the DPLA and Developer Agreement. *Id.* ¶¶ 244-260.

(9) Breach of the Covenant of Good Faith and Fair Dealing for Apple's refusal to

approve the Coronavirus Reporter app. FAC ¶¶ 261-66.

(10) Violation of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. § 1962(c) because "Apple and its cronies formed an enterprise meant to exploit the work of developers by screening their ideas for purported compliance with DPLA, meanwhile lifting and appropriating their ideas for their own competing apps[.]" *Id.* ¶ 269.

(11) Fraud for improper rejections of and ranking suppression of disfavored apps. *Id.* ¶¶ 309-23.

Plaintiffs initially alleged a twelfth claim against the Federal Trade Commission ("FTC") under the Administrative Procedure Act, FAC ¶¶ 324-25, but voluntarily dismissed and withdrew that claim on November 23, 201, *see* Docket No. 83.

Plaintiffs seek damages of an estimated $200 billion and a permanent injunction restraining Apple from "denying developers access to the smartphone enhance Internet userbase." FAC at 106-07.

B. Procedural Background

On January 19, 2021, Plaintiff Coronavirus Reporter filed the first iteration of this lawsuit in the District of New Hampshire. *Coronavirus Reporter v. Apple, Inc.* ("DNH Docket"), No. 21-cv-47, Docket No. 1 (D.N.H.). Coronavirus Reporter twice amended its complaint in response to then-pending motions to

dismiss, and then voluntarily dismissed the case when the court ordered it transferred to this jurisdiction. DNH Docket Nos. 17, 19, 26-27, 32-33, 39-40.

On May 17, 2021, Plaintiff Primary Productions—represented by the same counsel—filed a separate, nearly identical lawsuit in the District of Maine. *Primary Prods. LLC v. Apple Inc.* ("D. Me. Docket"), No. 21-cv-137, Docket No, 1 (D. Me.). There, Primary Productions amended its complaint in response to Apple's motion to dismiss. D. Me. Docket Nos. 17, 21. That case was then transferred to this Court, and Apple moved to dismiss the action. *See Primary Prods. LLC v. Apple Inc.*, No. 3:21-cv-6841-EMC, Docket Nos. 27 & 32 (N.D. Cal.). Thereafter, Plaintiff Primary Productions voluntarily dismissed that action. *Primary Prods.*, No. 3:21-cv-6841-EMC, Docket. 36.

Plaintiffs Coronavirus Reporter and CALID filed this putative class action on July 20, 2021, raising substantially similar claims to the prior two actions. Docket. 1. They then moved for a preliminary injunction. Docket No. 20. Apple moved to dismiss the complaint, and Plaintiffs again amended their complaint in response. Docket No. 41. The FAC—a putative class action was brought on behalf of Coronavirus Reporter, CALID, Primary Productions LLC, Jeffrey Isaacs, and two different classes of app developers affected by Apple's practices—is thus the seventh complaint filed by one or more of these related plaintiffs, all making similar allegations and claims.

Apple moves to dismiss the FAC. Docket No. 45 ("Motion to Dismiss"). After amending their complaint, Plaintiffs did not withdraw their motion for preliminary injunction, Docket No. 20, which remains pending. Instead, Plaintiffs filed a *second* motion for preliminary injunction, which is also pending. Docket No. 52. In that motion, Plaintiffs also request "appending" another claim to their FAC, under the California Unfair Competition Law (although Plaintiffs did not seek leave to amend their complaint as required under Fed. R. Civ. P. 15(a)(2)). *Id.*

Finally, in response to Apple's motion to dismiss the FAC, Plaintiffs filed a "motion to strike" Apple's motion to dismiss (although Plaintiffs did not cite any legal authority authorizing them to move to strike Apple's motion to dismiss). Docket No. 51 ("MTS"). *Cf.* 5C Wright & Miller, Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("Rule 12(f) motions [to strike] only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).").

III. LEGAL STANDARD

A. Failure to State a Claim (Rule 12(b)(6))

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule

12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt*, 765 F.3d at 1135 (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

IV. ANALYSIS

A. Antitrust Claims (Counts 1-7)

Apple argues that all seven of Plaintiffs' antitrust claims should be dismissed because Plaintiffs fail to

allege facts sufficient to meet two threshold conditions to proceed on any antitrust theory: (1) Plaintiffs fail to allege a plausible relevant market for their claims, and (2) Plaintiffs fail to allege antitrust injury.

As explained below, the Court dismisses all of the antitrust claims for Plaintiffs' failure to satisfy these threshold conditions. As such, the Court cannot and does not address whether Plaintiffs have sufficiently plead facts to state substantive antitrust claims.

1. Relevant Market for Antitrust Claims

"A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.'" *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (citation omitted); *see also Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ("The relevant market is the field in which meaningful competition is said to exist." (citing *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964))). Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.'" *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018).

Typically, the relevant market is the "arena within which significant substitution in consumption or production occurs." *Id.* (citation omitted). But courts should "combine different products or services into 'a single market' when "that combination reflects

commercial realities." *Id.* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-337 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry")). "The principle most fundamental to product market definition is 'cross-elasticity of demand' for certain products or services." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291-92 (9th Cir. 1979). "Commodities which are 'reasonably interchangeable' for the same or similar uses normally should be included in the same product market for antitrust purposes." *Id.* "This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 380-81 (1956). "In defining the relevant market, the court must look beyond the particular commodity produced by an alleged monopolist because the relevant product market for determining monopoly power, or the threat of monopoly control, depends upon the availability of alternative commodities for buyers." *Kaplan*, 611 F.3d at 292 (citing *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978)). A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims"; rather, the plaintiff must "justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand." *Buccaneer Energy (USA) v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) (internal quotation marks and citation omitted).

Where a complaint fails to adequately allege a relevant market underlying its antitrust claims, those claims must be dismissed. *Pistacchio v. Apple Inc.*, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021).

a. Unclear Market Definitions

First, Apple correctly observes that the FAC lacks clarity as to the relevant product markets for Plaintiffs' antitrust claims. The FAC articulates and references at least fifteen different markets and does not always define the boundaries of or differences between those markets. *See e.g.*, FAC ¶¶ 8 n.1, 11, 12, 17-18, 81, 121, 135-37, 142, 165-66, 168, 233, 235; Motion to Dismiss at 7-9. For example, Plaintiffs mention the "the App Market" twice in the complaint but do not define it. FAC ¶¶ 109, 183. It is not clear whether this is the same as, distinct from or overlapping with the "national market of apps for smartphone enhanced internet access devices," *id.* ¶ 121; "the US consumer-facing market for smartphone apps," *id.*; or the undefined "app submarkets" referenced elsewhere, *id.* ¶¶ 168, 235. Plaintiffs suggest at one point that these "app markets . . . are downstream from the smartphone enhanced device market." *Id.* ¶ 183. But this articulation would seem to contradict Plaintiffs' allegations that hardware and software are "bundle[d]" together in a single "Smartphone Enhanced Internet Information and Commerce Access Device" market, *id.* ¶¶ 15-16, which itself is an apparent sub-market of the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national

internet backbone," *id.* ¶ 234. The FAC does not define these terms. And, depending on the boundaries of the alleged markets, they do not seem to correspond with the products subject to the alleged antitrust conduct. For instance, it is not clear why the Coronavirus Reporter is an app or program that can only be used on Apple smartphones and not on other smartphone enhanced Internet access devices, or any other device that has access to the internet. Why can the app not be used on laptops and desktops?

Plaintiffs attempt to bring clarity to the FAC through its briefing by seeking to narrow the relevant markets upon which it relies, and abandoning many markets alleged in the FAC. However, it is not permissible for Plaintiffs to amend their complaint through motion practice. *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010). But even if the Court were to credit Plaintiffs' attempt at clarifying the scope of the FAC through briefing, Plaintiffs' newly proposed relevant markets still rely on inconsistent explanations regarding the relevant product markets.

Plaintiffs now argue that the principal markets on which their antitrust claims are two foremarkets—"US Smartphones" or "an alternative single brand foremarket" of "US iOS Smartphones"—and *four* downstream markets, "which by definition, Apple has 100% control over: the iOS institutional App Market, the iOS notary stamp market, the iOS application loader market and the iOS userbase market." MTS ¶¶ 11-12. But then, in Plaintiffs' Opposition to Apple's Motion to Dismiss, they contend that, notwithstanding

the various references to other markets throughout the complaint, their antitrust claims are predicated on two foremarkets and five downstream markets. Docket No. 45 ("Opposition") at 7. More notably, the term "foremarket" does not appear in Plaintiffs' FAC; it is an entirely new concept unanchored to the FAC.

Even if the Court were to proceed from Plaintiffs' narrowest formulation of the relevant markets for its claims—the two foremarkets and four downstream markets to which Plaintiffs refer in their Motion to Strike, MTS ¶¶ 11-12—this attempt at creating a narrower framework for the product market analysis fails to provide sufficient clarity to pass muster. Does the "market for smartphone enhanced commerce and information flow (devices and apps) transacted via the national internet backbone," FAC ¶ 234, correspond to Plaintiffs' now asserted "US smartphones" foremarket or to one of Plaintiffs' single-brand downstream markets? What is included in the market for U.S. smartphones? All brands? What about devices such as tablets? Do the included products have to be Internet-enabled? What if they access the Internet only through a Wi-Fi connection? And where do Plaintiffs' allegations about Apple's monopoly over "the iOS market," *id.* ¶ 124 fit into its proposed framework of two foremarkets and four downstream markets? How do the newly asserted markets relate to Plaintiffs' allege antitrust injury in the "market of COVID startups"? *Id.* ¶ 81.

In summary, the FAC does not provide sufficient clarity for the Court to assess the threshold question

of whether there is a relevant market for Plaintiffs antitrust claims. One cannot discern what is included and what is not, and thus analysis of cross-elasticity of demand is not possible. Nor do the newly asserted markets appear to correspond to the markets and allegations pleaded in the FAC.

The Court may dismiss Plaintiffs' antitrust claims based on these findings alone. *Sumotext Corp. v. Zoove, Inc.*, No. 16-CV-01370-BLF, 2016 WL 6524409, at *3 (N.D. Cal. Nov. 3, 2016) ("The Court also finds the allegations of the relevant market to be unclear, and it disagrees with Sumotext that the relevant market need not be alleged at the pleading stage."); *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 & n.3 (9th Cir. 2008) (a plaintiff alleging a claim under either Section 1 or Section 2 of the Sherman Act must allege the existence of a relevant market and that the defendant has power within that market); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1064 (9th Cir. 2001) (affirming dismissal based on contradictory market definitions).

b. Plausibility of Alleged Product Markets

In light of the foregoing analysis that Plaintiffs' alleged product markets lack clarity, the Court need not analyze the plausibility of any of the product markets which Plaintiffs allege. Nonetheless, the Court will assume *arguendo* Plaintiffs' attempt to narrow the relevant markets to two foremarkets and four downstream markets are defined with sufficient clarity, MTS ¶¶ 11-12, and thus analyzes the plausibility of

those six markets (while ignoring other markets that Plaintiffs alleged in the FAC and now seem to abandon). The Court finds that these alleged markets do not satisfy Rule 12(b)(6)'s plausibility standard.

Plaintiffs' Motion to Strike proposes the following six markets to underlie Plaintiff s antitrust claims:

> (1) Foremarket 1: "US Smartphones." MTS ¶ 11 ; FAC ¶ 15 ("Smartphone Enhanced Internet Information and Commerce Access Device Marketplace"); *id.* ("A smartphone is an ecosystem of hardware AND software . . . The iPhone exists within the marketplace for smartphones."); *id.* ¶ 16 ("The marketplace here is the smartphone internet access device."); *id.* ¶ 121 ("There is a relevant national market of apps for smartphone enhance internet access devices, which are critical to the flow of information and commerce.").
>
> (2) Foremarket 2: "an alternative single brand foremarket" of "US iOS Smartphones." MTS ¶ 12; FAC ¶ 18 ("Lastly, we define the single-product marketplace for iOS devices, a subset (80%) of the US smartphone internet access device marketplace."); *id.* ¶ 124 ("the iOS smartphone internet access device market is a relevant market under Sherman.").
>
> (3) Downstream Market 1: "iOS institutional App Market." MTS ¶ 12; FAC ¶ 18 ("iOS Device Application Institutional Marketplace . . . Distributors buy apps, like film studios buy movie rights . . . Largely Theoretical Marketplace: Apple does not recognize it

> as a legitimate market in their DPLA agreement. Nonetheless, Apple monopsony "buys" millions of apps at a price of zero."). Plaintiffs allege that "by definition, Apple controls nearly 100% of the iOS institutional App marketplace . . . and hence no competing institutional app buyers." FAC ¶ 126.
>
> (4) Downstream Market 2: "iOS notary stamp market." MTS ¶ 12. Plaintiffs allege that "Apple must issue a 'notarization' or digital encryption signature, in order for an app to launch . . . Apple is the sole producer of these notarizations stamps." FAC ¶ 135.
>
> (5) Downstream Market 3: "iOS application loader market." MTS ¶ 12. Plaintiffs allege that "like the iOS app notarization stamp, the iOS app onboarding software is a critical component to access the critical infrastructure that is the national iOS 'network effect.'" FAC ¶ 136.
>
> (6) Downstream Market 4: "iOS userbase market." MTS ¶ 12. Plaintiffs allege that there is a market "for access rights to the smartphone enhanced internet userbase" and "Apple . . . charges developers $99 for these (partial, selectively limited) access rights." FAC ¶ 140.

There are several problems under Rule 12(b)(6) with the relevant markets which Plaintiffs propose.

First, Plaintiffs do not plead facts sufficient to justify their proposed relevant markets. Recall that the "principle most fundamental to product market

definition is 'cross-elasticity of demand' for certain products or services." *Kaplan*, 611 F.2d at 291-92. The FAC lacks any discussion of cross-elasticity of demand for certain products or services (a point Plaintiffs concede, Opp. at 7). Moreover, five of the six markets that Plaintiffs allege are single-brand markets in which Plaintiffs have drawn the definitional lines to such that the *only market participant* is inherently and necessarily Apple, MTS ¶¶ 11-12, however, Plaintiffs have not alleged facts required to justify defining these markets as *single-brand* markets.

"Single-brand markets are, at a minimum, extremely rare" and courts have rejected such market definitions "[e]ven where brand loyalty is intense." *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008) (internal quotation marks and citation omitted). *But see id.* "It is an understatement to say that single-brand markets are disfavored. From nearly the inception of modern antitrust law, the Supreme Court has expressed skepticism of single-brand markets[.]" *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 361 F. Supp. 3d 324, 343 (E.D.N.Y. 2019); Herbert J. Hovenkamp, *Markets in IP & Antitrust*, 100 Geo. L.J. 2133, 2137 (2012) ("[A]ntitrust law has found that a single firm's brand constitutes a relevant market in only a few situations."). To be sure, "[a]ntitrust markets consisting of just a single brand, however, are not per se prohibited. . . . In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product." *Apple, Inc. v. Psystar Corp.* at 1198. On the other hand, as the

court in *Epic v. Apple* recently reiterated, "[a] single brand is *never* a relevant market when the underlying product is fungible." *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2021 WL 4128925, at *87 (N.D. Cal. Sept. 10, 2021) (citation omitted, emphasis in the original).

Despite the foregoing, "in some instances one brand of a product can constitute a separate market." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 482 (1992) ("*Eastman Kodak*"). Determining whether a single-brand market is proper requires "a factual inquiry into the 'commercial realities' faced by consumers." *Id.* (quoting, *Grinnell Corp.*, 384 U.S. at 572). In *Eastman Kodak*, the Supreme Court considered whether summary judgment was appropriate for Kodak on Sections 1 and 2 claims where the plaintiffs had argued that Kodak possessed monopoly power in the *aftermarket* of sales of parts and repair services, despite not having such power in the foremarket of equipment sales. 504 U.S. at 466-471. In affirming the Ninth Circuit's reversal of summary judgment, the Supreme Court identified two factors that supported the aftermarket framework: the existence of significant (i) "information" costs and (ii) "switching costs." *Id.* at 473.

Since then, the Ninth Circuit in *Newcal Industries Inc. v. Ikon Office Solution* outlined four factors that could indicate whether an alleged market is a properly defined single-brand aftermarket under *Eastman Kodak* at the motion to dismiss stage. *See* 513 F.3d 1038, 1049-50 (9th Cir. 2008). The first indicator of an aftermarket is that the market is "wholly derivative from

and dependent on the primary market." *Id.* at 1049. The second indicator is that the "illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market." *Id.* at 1050. The third indicator is that the defendant's market power "flows from its relationship with its consumers" and the defendant did "not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market." *Id.* The fourth indicator is that "[c]ompetition in the initial market . . . does not necessarily suffice to discipline anticompetitive practices in the aftermarket." *Id.*

"[T]o establish a single-brand aftermarket under *Kodak* and *Newcal*, the restriction in the aftermarket must not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily." *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 987 (N.D. Cal. 2010). Indeed, "[m]arket imperfections" may "prevent consumers from discovering" that purchasing a product in the initial market could restrict their freedom to shop in the aftermarket. *Newcal*, 513 F.3d at 1048. In other words, a plaintiff must show evidence "to rebut the economic presumption that [defendant's] consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to" purchase in the foremarket. *Newcal*, 513 F.3d at 1050.

As to Plaintiffs' attempt to allege a single-brand market, Plaintiffs provide no response to Apple's argument that they fail to allege facts going to the four

factors as required by *Newcal* to survive a motion to dismiss to justify their proposed *single brand aftermarkets*. 513 F.3d at 104950. Plaintiffs *cannot* satisfy *Newcal* based on the facts they have alleged. Plaintiffs suggest that the four *single-brand* downstream markets (or aftermarkets) flow from the ***single-brand foremarket*** of iOS smartphones. *See* FAC ¶¶ 125 ("the iOS Institutional App marketplace is downstream . . . from the single-product iOS device market"), 135 ("The citizens of our country have invested around a trillion dollars in the iOS network effect . . . the market for iOS app notarization stamps is a relevant antitrust market"), 136 ("Like the iOS app notarization stamp, the iOS app onboarding software is a critical component to access the critical infrastructure that is the national iOS network effect"); MTS ¶ 12 ("Four downstream markets are alleged, which by definition, Apple has 100% control over."). Yet, Plaintiffs do not cite a single antitrust case that has *ever* recognized a ***single-brand foremarket***, and their attempt to define a single-brand foremarket market around "iOS smartphones" without any explanation for why that market should be so limited and without any reference to competitor products or substitutes runs afoul of the principle that "[a] single brand is *never* a relevant market when the underlying product is fungible." *Epic*, 2021 WL 4128925, at *87.

Moreover, Plaintiffs do not attempt to plead facts to satisfy *Newcal's* four factors to justify their proposed single brand aftermarkets. *Newcal* requires Plaintiffs to show (1) the aftermarket is wholly derivative from

the primary market, (2) the illegal restraints of trade relate only to the aftermarket, (3) the defendant did not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market, and (4) competition in the initial market does not suffice to discipline anticompetitive practices in the aftermarket. 513 F.3d at 1048-50. Importantly, the *Newcal* factors require Plaintiffs to articulate the relationship between a *non-brand limited foremarket* and *the single-brand aftermarkets*. But, here, Plaintiffs do not plead any facts demonstrating the relationship between the non-brand limited foremarket of US Smartphones and the four single-brand aftermarkets. Thus, Plaintiffs fail to allege facts as required by *Newcal* to sustain their single-brand markets.

On a broader level, Plaintiffs fail to plead facts sufficient to justify any of the six alleged relevant markets under the standard rules for *any* market, let alone do they plead the specific facts required to justify its five single-brand markets as required by *Newcal* at the motion to dismiss stage. *See Buccaneer Energy*, 846 F.3d at 1313 (A plaintiff cannot ignore economic reality and "arbitrarily choose the product market relevant to its claims;" rather, the plaintiff must "justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand."). The asserted markets are not secondary markets derived from consumers who are unknowingly captured and held prisoner through a primary market. Instead, according to Plaintiffs' theory, the

asserted markets appear to stand on their own, and, for the reasons stated above, lack plausibility.

Plaintiffs do not dispute Apple's arguments about lack of interchangeability analysis. They argue that their failure to provide analysis of cross-elasticity of demand in the FAC "is not fatal to Plaintiffs' claims" because each of the submarkets alleged are well-defined in themselves, and their boundaries can be refined through discovery. Opp. at 7-8 (citing *Brown Shoe Co. v. US.*, 370 U.S. 294, 325 (1962)). This is incorrect. "Authorities far too numerous to cite or discuss in detail have established" that "[t]he principle most fundamental to product market definition is 'cross-elasticity of demand.' *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979). "[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," therefore, "the relevant market is legally insufficient." *City of N.Y. v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011).

But even if Plaintiffs' alleged Foremarket 1 of "US Smartphones" could be sustained, none of Plaintiffs' antitrust claims about Apple's actions are shown to impact that market. Plaintiffs must define "the relevant market, which refers to 'the area of effective competition.' *Qualcomm.*, 969 F.3d at 992. Plaintiffs fail to define that area of effective competition in which they compete. They are not smartphone manufacturers. Nor do they provide any other basis for the Court to find that the market of US Smartphones is the "area of effective competition" for Plaintiffs' claims. *See e.g.*,

Pistacchio v. Apple Inc., No. 4:20-CV-07034-YGR, 2021 WL 949422, at *2 (N.D. Cal. Mar. 11, 2021) ("[T]he relevant market definition contains sparse supporting allegations. First, as noted, Pistacchio is required, and has not included appropriate allegations demonstrating that there are *not* appropriate economic substitutes for Apple Arcade on the iOS platform. . . . The complaint offers no specific allegations supporting the sole focus of the market definition on cloud gaming alternatives as opposed to the broader video game market generally, including those individually sold both in the Apple App Store or by competitors on computer or console platforms, nor does the complaint contain allegations supporting the narrowing of a market to consideration of a subscription based payment model.").

Second, the four downstream single-brand markets on which Plaintiffs' antitrust claims rely run afoul of a fundamental principle for antitrust market definition: they are not markets for products or services. *See e.g.*, *Newcal*, 513 F.3d at 1045 ("First and foremost, the relevant market must be *a product* market. The consumers do not define the boundaries of the market; the products or producers do.") (Emphasis in original); *Kaplan*, 611 F.2d at 292 ("In arriving at an adequate market definition, price differential between competing products and services is a relevant factor to consider[.]"). For example, Plaintiffs alleged iOS Institutional App Market is defined as a market in which Apple "buy[s]" apps from developers by approving or rejecting them for distribution on the App Store. But Plaintiffs themselves admit this "market" is

"largely theoretical," "hypothetical," and untethered to the licensing arrangement on which the App Store is actually predicated. *Id.* ¶¶ 18, 19, 121. Plaintiffs acknowledge that Apple's app review process is not one in which Apple buys the apps of developers, but, rather the "DPLA and App Store employ language that a free app is 'For Sale' or 'Available' through the App Store after gaining 'approval' by Apple for 'adherence to iOS standards.' *Id.* ¶ 19. The DPLA confirms this arrangement, explaining that "Applications that meet Apple's Documentation and Program Requirements may be submitted for consideration by Apple for distribution via the App Store" and if "selected by Apple, Your Applications will be digitally signed by Apple and distributed[.]" DPLA § Purpose. The DPLA does not include any provisions indicating that Apple pays developers or "buys" apps through the app review process. Rather than buying apps, as discussed in greater detail below, Apple enables the distribution of apps to end users through the app review process.

Similarly, there is no basis supporting Plaintiffs' notion that the proposed downstream markets of "iOS notary stamps," "iOS application loaders," and "iOS userbase" are markets for *products*. Rather, as Plaintiffs acknowledge, each of these three markets refer to component parts a developer may access and use when a developer's app is approved for distribution on the App Store. *See* FAC ¶¶ 135-40. These three markets are neither *markets* nor do they describe *products* but integrated features of Apple's app approval process. Plaintiffs' articulation of these markets is contrived

and does not reflect the reality of an actually-existing product market. Indeed, the Court in *Epic* rejected the alleged "foremarket for Apple's own operating system" on Apple mobile devices as "'artificial,' "entirely litigation driven, misconceived, and bear[ing] little relationship to the reality of the marketplace" because the Court determined that the operating system was an integrated feature of the mobile devices, and that it was "illogical to argue that there is a market for something that is not licensed or sold to anyone." *Epic*, 2021 WL 4128925, at *29. The *Epic* Court summarized that there were "fundamental factual flaws with Epic Games' market structure" because "[w]ithout a product, there is no market for the non-product, and the requisite analysis cannot occur." *Id.* at *86; *see also id.* ("Thus, where there is no product or market for smartphone operating systems, there are no derivative markets."). The *Epic* Court also rejected the proposed "payment solutions aftermarket" for "the independent reason that [the "In App Purchases" feature set out in Apple's DPLA] is not a product for which there is a market." *Id.* The same analysis applies here: in the absence of information demonstrating that Plaintiffs' downstream markets describe *actually existing products* that are sold or licensed, Plaintiffs' aftermarkets are "without a product, there is no market for the non-product, and the requisite analysis cannot occur." *Id.*

Third, the markets Plaintiffs allege fail to grapple with their own admission and economic reality that the "iOS App market is two-sided." FAC ¶ 12; *accord id.* ¶¶ 11, 17, 18, 123, 125. The Court in *Epic* addressed

the nature of the Apple's iOS App marketplace, and Plaintiffs do not dispute its analysis or conclusion that as a two-sided market the iOS App marketplace is a market not for products but for *transactions*:

> As a threshold issue, the Court considers whether the App Store provides two-sided transaction services or as Epic Games argues "distribution services." The Supreme Court has seemingly resolved the question: two-sided transaction platforms sell transactions. In two-sided markets, a seller "offers different products or services to two different groups who both depend on the platform to intermediate between them." *Amex*, 138 S. Ct. at 2280. Here, try as it might, Epic Games cannot avoid the obvious. Plaintiff only sells to iOS users through the App Store on Apple's platform. No other channel exists for the transaction to characterize the market as one involving "distribution services." . . . Accordingly, the Court finds that the relevant App Store product is transactions[.]

Epic, 2021 WL 4128925, at *83. As such, Apple's iOS App two-sided app market is "best understood as supplying only one product—transactions—which is jointly consumed" by developers and consumers on opposing sides of the platform. *Amex*, 138 S. Ct. at 2286 n.8. Therefore, the relevant market must be some category of "transactions" between developers and consumers. *Epic*, 2021 WL 4128925, at *83-86; *accord Amex*, 138 S. Ct. at 2287 ("[W]e will analyze the two-sided market for credit-card transactions as a whole to

determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects."). As the court in *US Airways v. Sabre Holdings Corp.*, 938 F.3d 43, 57 (2d Cir. 2019), explained, "A transaction platform is a two-sided platform where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other . . . As a result, "[e]valuating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition."

Despite conceding the fact that the iOS App market is a two-sided market of transactions, Plaintiffs four proposed downstream single-brand markets each cut up the app marketplace into admittedly "hypothetical" and "theoretical," FAC ¶¶ 18-19, one-sided markets, with no reference to the *transaction between* developers and consumers that is the actual product on the platform. Instead, it posits Apple as the monopsony buyer of the apps. *See* FAC ¶ 121 ("The other side of this market is the national institutional app market . . . Apple is a monopsony buyer of developers' apps, in the institutional app market, because they are sole distributor on the retail side."). Specifically, Plaintiffs advance a *theory* that Apple is an "institutional buyer" of apps and that it "sells" notary stamps, onboarding software and userbase access to developers. But this theoretical framework does not align with the economic reality that Plaintiffs concede: that the iOS App market is a two-sided market of transactions between developers and consumers. Developers are engaged in a *transaction* with consumers, not selling to Apple.

As the court in *Epic* explained, although Apple may be involved in facilitating an exchange through its operation of the App Store platform, ultimately "users and developers consume App Store transactions." 2021 WL 4128925, at *83. Plaintiffs' failure to allege relevant markets that encompass or even address the two-sided nature of the iOS App market renders their market definitions insufficient as a matter of law. *Amex*, 138 S. Ct. at 2287 ("[C]ompetition cannot be accurately assessed by looking at only one side of the platform in isolation."); *Sabre Holdings Corp.*, 938 F.3d at 57 ("In other words: In cases involving two-sided transaction platforms, the relevant market must, as a matter of law, include both sides of the platform."); *Epic*, 2021 WL 4128925, at *86 ("Epic Games' afternarket approach to market definition is inconsistent with its recognition that the App Store constitutes a two-sided transaction platform which it fails to properly analyze."). Plaintiffs offer no argument on this point.

In summary, missing from Plaintiffs' market definitions is the identification of *any* well-pleaded allegations that support the boundaries they seek to defined. Plaintiffs fail to plead facts sufficient to adequately define any of their markets (making any kind of analysis on interchangeability and cross-elasticity of demand impossible), fail to rationalize and defend the five single-brand markets; do not define markets for actual products; and ignore the two-sided nature of the iOS app market. "A threshold step in any antitrust case is to accurately define the relevant market." *Qualcomm Inc.*, 969 F.3d at 992. Because Plaintiffs have failed to

"rigorously address[]" market definition, their complaint warrants dismissal. *City of Oakland v. Oakland Raiders*, 445 F. Supp. 3d 587, 600 (N.D. Cal. 2020).

2. Antitrust Injury

Apple also argues that Plaintiffs fail to plead antitrust injury.

To plausibly state antitrust claims in this market for transactions of apps (which cannot plausibly be limited to iOS apps based on the allegations in the FAC, as discussed above), Plaintiffs must allege injury to "competition in the market as a whole"—such as marketwide reduction in output or increase in prices—"not merely injury to itself as a competitor" in the market. *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1024-25 (9th Cir. 2013). This alleged harm also must be "'attributable to an anticompetitive aspect of the practice under scrutiny"; "harm that could have occurred under the normal circumstances of free competition" does not suffice. *In re NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1150 (9th Cir. 2019) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

Apple argues that Plaintiffs' theory of injury is that *their* apps were rejected from the App Store or subjected to alleged ranking suppression. Motion to Dismiss at 6; FAC ¶¶ 28-30, 53, 87. Yet, Apple contends, Plaintiffs make no allegation that Apple's conduct excluded Apple competitors, suppressed output of the market, increased app prices, or otherwise harmed

competition *in the market* beyond Plaintiffs' conclusory allegations of "damage to an entire market," FAC ¶ 81, or unadorned references to "restricted output, quality, and innovation." *Id.* ¶¶ 115, 191. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Additionally, Apple argues that Plaintiffs ignore the nature of the App Store platform such that for every app that is allegedly "suppressed" in search rankings, another app's visibility is lifted. Motion to Dismiss at 6. The effect of "suppression" in search rankings affects the relative positions among products in the market; but there is no showing of harm to competition across the market. Effects on *Plaintiffs'* apps alone, which may raise equitable issues as *between* app developers, do not establish *antitrust* injury. As the Court noted in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), "[t]he antitrust laws . . . were enacted for the protection of competition not competitors." (Quotation marks omitted).

Finally, Apple argues that Plaintiffs cannot merely declare that every app rejection injures competition by decreasing output and constricting consumer choice, because "if that were the rule, the Sherman Act would inhibit competition by requiring all platforms to increase the number of available apps—no matter if they contained malware, were offensive, sought to scam users, or were inferior copycats that could confuse consumers." Docket No. 64 ("Reply") at 8. Relying on the *Epic's* analysis, Apple contends that consumers instead "should be able to choose between the type of

ecosystems and antitrust law should not artificially eliminate them." *Epic*, 2021 WL 4128925, at *29. The App Store's curation—which differentiates it from other platforms—helps "maintain[] a healthy ecosystem that ultimately benefits" users and developers. *Id.* at *75. Thus, Apple concludes, Plaintiffs offer no plausible theory that Apple's policies reduce the net quality of transactions in a relevant market, their allegations amount only to individual harm. *See Gorlick*, 723 F.3d at 1025.

Plaintiffs respond by arguing that they plead "harm to competitors" or "harm to the market" throughout the FAC, and that it is enough that Plaintiffs plead the harm generally at the motion to dismiss stage. Opp. at 11-12 (citing FAC ¶¶ 53, 81, 173, 174, 179, 200). Additionally, Plaintiffs point to a Congressional Subcommittee report which they contend provides the requisite detail to sustain their allegations of marketwide harm. Opp. at 12.

The Court disagrees. The allegations of injury contained in the FAC are either confined to specific harms experienced by Plaintiffs or a small group of competitors, rather than harm to the market. None of the allegations in the FAC allege harm generally to the market of transactions for apps across a relevant market.

Plaintiffs' allege various types of antitrust injury, all of which are insufficient:

- "Apple's refusal to sell notarization stamps or onboarding software . . . is

intended to harm competition app developers, like Plaintiffs and Class Members." FAC ¶ 173.

- "The artificial monopoly created by notarization stamps and software onboarding results in damages to nearly twenty million proposed class members of approximately one thousand dollars each . . . When the stamps aren't issued, further damages accrue from lost app revenues . . . In China, 'open' app stores are ten times the size of Apple's App Store in China." FAC ¶ 174.
- "Much damage is done to the overall competition within the institutional app markets, as a result of Apple's anticompetitive practices in userbase access, notarization and onboarding. But the damages extend beyond those markets, into the overall US economy, and even public health response, in the case of Coronavirus Reporter." FAC ¶ 179
- "Apple's conduct and unlawful contractual restrains harm a market that forms a substantial part of the domestic economy, the smartphone enhanced interne device app market." FAC ¶ 200.

The assertions at FAC ¶¶ 173, 179 and 200 amount to conclusory and "threadbare recitals" of the elements of antitrust injury that are insufficient to state a claim. *Iqbal*, 556 U.S. at 663; *see also*, *e.g.*, *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health*

Plan, Inc., 305 F. Supp. 3d 1065, 1074 (N.D. Cal. 2018) (dismissing antitrust claims because "there are no non-conclusory allegations that [Defendant's] actions restrained trade in the relevant market or injured overall competition" and the allegations "lack factual enhancement and are conclusory."); *Eastman v. Quest Diagnostics Inc.*, 108 F. Supp. 3d 827, 835 (N.D. Cal. 2015) (same); *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1029 (N.D. Cal. 2015) (same). Additionally, as discussed above, these allegations relate to harms in hypothetical, non-existent single-brand markets—not in a relevant, actually-existing, two-sided, brand-differentiated market for app transactions.

Although the allegation at FAC ¶ 174 provides some factual basis for Plaintiffs' theory of injury—asserting that Apple's App Review process necessarily injures competition by excluding a number of developers from launching apps on Apple's App Store—this allegation on its own is not sufficient to plead to antitrust injury for two reasons. First, Plaintiffs ignore the App Store serves a two-sided transaction market. As *Epic* held, in a two-sided transaction market, there must be consideration of the "effects on both sides of the market." 2021 WL 4128925, at *102. Plaintiffs' theory of antitrust injury alleges injury on only one side of the transaction—developers—but fails to grapple with the second side of the transaction market, consumers. Indeed, that apps which comply with Apple's generally applicable "Guidelines" regarding security, functionality and reliability are approved over those that do not is consistent with "normal circumstances of free

competition" and may well serve the best interests of consumers. *In re NFL's Sunday Ticket Antitrust Litig.*, 933 F.3d at 1150. It is not enough that conduct "has the effect of reducing consumers' choices or increasing prices to consumers." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012)). That is because these effects may arise for procompetitive reasons, such as increased interbrand competition. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 891-93 (2007). As the court held in *Epic*, Apple's "centralized app distribution and the 'walled garden' approach differentiates Apple from Google." 2021 WL 4128925, at * 102. "That distinction ultimately increases consumer choice by allowing users who value open distribution to purchase Android devices, while those who value security and the protection of a 'walled garden' to purchase iOS devices." Although the conclusion in *Epic* is not necessarily controlling here, Plaintiffs alleged theory of antitrust injury fails to give *any* consideration of the consumer-side of the two-sided transaction market. Failure to allege injury that harmed overall competition in the relevant market—here, a two-sided market of transactions—undermines Plaintiffs' theory of antitrust injury. *See NorthBay Healthcare*, 305 F. Supp. 3d at 1074.

Second, even if it is assumed that Apple exercised monopsonist market power in the apps transaction market, its decisions as to which apps are allowed to sell through the App Store is not an act that in itself causes harm the antitrust laws were designed to protect. Plaintiffs failed to make any allegation the Apple

benefits from its rejection of apps or from suppression of apps in the search function. There is no showing that Apple is reaping the fruits of anti-competitive conduct. The deficiency of Plaintiffs' claim in asserting an anti-trust injury is demonstrated by the following analogy. Query: if the only newspaper in town decides which advertisements may properly be posted or which advertisements to accept, does a rejected advertiser suffer an anti-trust injury? No. That is not the kind of injury antitrust laws are intended to protect. As noted above, antitrust law protections competition, not competitors. In contrast, if the newspaper attempted to squelch competition by telling advertisers if they dare advertise in an up-and-coming competing newspaper or radio station, they will be barred from its newspaper, that could suffice to show antitrust injury. *See e.g.*, *Lorain J. Co. v. United States*, 342 U.S. 143, 150-51, 152 (1951) ("The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2" of the Sherman Act). Plaintiffs do not allege facts any such antitrust injury in the FAC.

To be sure, Plaintiffs allege that:

> "Apple rejected Coronavirus Reporter on March 6, 2020, knowing apps from large institutions and strategic partners were in the pipeline but not yet ready. Apple specifically strategized to prevent the Coronavirus Reporter app, and *all* COVID startup firms, from setting a precedent or amassing a user base, which could jeopardize its own pipeline and/or

> the first-mover advantage of desirable institutional partners of a monopolistic trust." FAC ¶ 53.

If Apple were to reject or suppress Plaintiffs' apps to diminish competition for Apple's own apps or apps of other developers with whom Apple is conspiring, that might be deemed to inflict antitrust injury. But the FAC and ¶ 53 fail to plausibly allege such conduct with any specificity.

Finally, Plaintiffs' argument that by incorporating by reference a "House Subcommittee report" regarding Apple's business practices into the FAC they have sufficiently plead antitrust injury is unavailing. Opp. at 12. Although the FAC makes reference to the report and states that the report is incorporated by reference, FAC ¶¶ 37-45, Plaintiffs do not connect the findings in the report to their theory and allegations of antitrust injury to the entire market in this case. At most, Plaintiffs allege that aspects of Apple's business practices described in the report "directly harmed Plaintiffs and class members," FAC ¶¶ 40-41, but go no further in elaborating how the practices alleged in this case inflicted antitrust injury in the two-sided market relevant here.

Thus, in addition to Plaintiffs failing to define a relevant market for their antitrust claims, Plaintiffs fail to sufficiently plead antitrust injury in the FAC even if the Court were to assume a relevant market had been defined. This failure provides a second and independent basis for the Court to dismiss Plaintiffs'

antitrust claims (Claims 1-7). Because Plaintiffs have failed to make the threshold showings of a plausible a relevant market and alleging antitrust injury, the Court need not analyze whether they have alleged facts sufficient to satisfy the substantive elements of Plaintiffs' particular antitrust claims. *See e.g.*, *Amex*, 138 S. Ct. at 2285 (Market definition is an essential predicate to the entire case, for "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition.").

B. Contract Claims (Claims 8 and 9)

Plaintiffs bring two breach of contract claims: (1) breach of contract for Apple's pretextual refusal to approve the Coronavirus Reporter app for distribution on the App Store in violation of the DPLA and Developer Agreement, FAC ¶¶ 244-260 (Claim 8), and (2) breach of the covenant of good faith and fair dealing for Apple's refusal to approve the Coronavirus Reporter app, *id.* ¶¶ 261-66 (Claim 9). Plaintiffs fail to state claims for breach of contract and, accordingly, these claims are dismissed.

To state a breach of contract claim under California law, DPLA § 14.10, a plaintiff must plead: (1) a contract; (2) plaintiffs performance or excuse for nonperformance; (3) breach; and (4) damages. *Hamilton v. Greenwich Invs. XXVI, LLC*, 126 Cal. Rptr. 3d 174, 183 (Cal. Ct. App. 2011). Plaintiffs fail to "identify the specific provision of the contract" at issue, much

less allege facts establishing breach. *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012).

Plaintiffs allege that Apple breached the 'promise[]" in its "Developer Agreement as amended in March 2020 . . . that entities with 'deeply rooted medical credentials' were permitted to publish COVID apps on the App Store." FAC ¶¶ 245, 254. But nothing in the Developer Agreement (or any other contract) contained such a promise, much less *obligated* Apple to distribute any particular app through the App Store, even those submitted by institutions. *See Donohue*, 871 F. Supp. 2d at 931 (rejecting argument that a user guide contained contractual promises because it "includes no 'promises' which plaintiff could have 'accepted"). Plaintiffs do not identify any contractual provision that they allege was breached.

Instead, Apple points out that the contract governing app distribution is the DPLA. The DPLA expressly states that approval decisions are in Apple's "sole discretion." DPLA § 3.2(g) ("Applications for iOS Products . . . **may be distributed only if selected by Apple (in its sole discretion)** for distribution via the App Store . . . as contemplated in this Agreement.") (Emphasis added). Plaintiffs agreed to this arrangement in exchange for use to Apple's propriety software, tools, and services. *See* DPLA § 1.1 (developers must "accept and agree to the terms" of the DPLA to "use the Apple Software or Services"). Thus, Plaintiffs fail to state a claim for breach of contract (Claim 8) because they fail to allege a breach.

Similarly, Plaintiffs' claim for breach of the covenant of good faith and fair dealing (Claim 9) fails because it re-hashes Plaintiffs' breach allegations (*compare* FAC ¶¶ 254, 260, *with id.* ¶¶ 263, 26). Plaintiffs do not allege that Apple frustrated any specific contractual term. *See Soundgarden*, 2020 WL 1815855, at *17. Thus, it is dismissed for the same reasons. *See Soundgarden v. UMG Recordings, Inc.*, 2020 WL 1815855, at * 17 (C.D. Cal. Apr. 6, 2020) ("no additional claim is actually stated" where allegations "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief'). Moreover, the "implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." *Donohue*, 871 F. Supp. 2d at 932 (quotation marks omitted). The express conferral of "sole discretion" upon Apple under the DPLA cannot be contradicted by the implied covenant. *See Rockridge Tr. v. Wells Fargo, NA.*, 985 F. Supp. 2d 1110, 1156 (N.D. Cal. 2013) ("An implied covenant of good faith and fair dealing cannot contradict the express terms of a contract.").

C. RICO and Fraud Claims (Claims 10 and 11)

To plead a civil RICO claim under § 1962(c), Plaintiffs must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. El Dupont de*

Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (quotation marks omitted).

Plaintiffs allege that Apple, unnamed "individuals within Apple," "Apple's App Review team," "PR firms, law firms, and rival developer cronies," FAC ¶¶ 269, 270, 273, formed a RICO enterprise and "engaged in a distinct pattern of predicate acts over a multi-year timespan," *id.* ¶ 274, including "wire fraud and mail fraud by assigning junior App Review members to issue false, pretextual reasons for rejection to small developers," *id.* ¶ 275, and "lifting and appropriating their ideas into their own competing apps, and suppressing the original creators' work by blocking app store distribution," *id.* ¶ 269.

Plaintiffs' RICO claim sounds in fraud and must be pled with particularity under Rule 9(b). *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (en banc). The FAC therefore "must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019) (quotation marks omitted). Plaintiffs' allegations do not meet Rule 9(b)'s standard.

Plaintiffs rely on vague, conclusory allusions to Apple's alleged practice of "assigning junior App Review members to issue false, pretextual reasons for rejection to small developers." FAC ¶ 275; *see also*, *e.g.*, *id.* ¶¶ 42, 87, 104, 257. These general allegations do not identify the specific who, what, when, where, and how.

Plaintiffs' attempts to describe discrete instances of fraud are no more detailed. For example, Plaintiffs point to a communication from Apple stating that Coronavirus Reporter was rejected because it contained "data that has not been vetted for accuracy by a reputable source" and was not associated with a "recognized institution." *Id.* ¶ 278. There is no plausible allegation that this was false, *id.* ¶ 277, only, at most, that Apple's requirements were poorly considered, *id.* ¶¶ 277-78. The decision was consistent with Apple's Guidelines. *See* Guidelines § 5.1.1(ix). Similarly, Plaintiffs suggest that Apple rejected Bitcoin Lottery because its "primary purpose" was to "encourage users to watch ads or perform marketing-oriented tasks," which was "not appropriate for the App Store." *Id.* ¶ 280. But here too, Plaintiffs do not dispute that the rejection was made pursuant to Apple's Guidelines. *See* Guidelines § 3.2.2(vi) ("Apps should allow a user to get what they've paid for without performing additional tasks . . . Apps should not require users to rate the app, review the app, watch videos, download other apps . . . or take other similar actions in order to access functionality, content, use the app, or receive monetary or other compensation, including but not limited to gift cards and codes."). Thus, Plaintiffs' RICO claim fails to sufficiently allege fraudulent behavior with particularity as required under Rule 9(b) and should be dismissed. Rule 9(b) also applies to Plaintiffs' derivative fraud claim (Count 11), and thus that claim fails for the same reason.

Additionally, Plaintiffs' RICO claim fails for another reason. Plaintiffs must allege an enterprise that is *separate* from the "person employed by or associated with" that enterprise who engaged in the unlawful RICO conduct. 18 U.S.C. § 1962(c); *see also Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986). In other words, "[i]f [a corporation] is the enterprise, it cannot also be the RICO defendant." *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984). Plaintiffs' allegations make clear that the alleged enterprise *is* Apple itself. According to the FAC, it consists of "Apple," *id.* ¶ 269, "Apple's App Review team," and "senior Apple management," *id.* ¶ 270. Where, as here, the "enterprise consist[s] only of [the corporation] and its employees, the pleading . . . fail[s] for lack of distinctiveness." *Living Designs, Inc.*, 431 F.3d at 361.

Finally, Plaintiffs' assertions that the alleged enterprise consisted of Apple's "crony app developers," "law firms," and "PR firms" who allegedly "divert profits," "spread Apple's gospel," or obfuscate "Apple's anticompetitive agenda," FAC ¶¶ 271-72, fails because none of these groups are alleged to have participated in an alleged enterprise involving the predicate acts of wire and mail fraud. The allegations are also conclusory.

Thus, the Court dismisses Plaintiffs' RICO and fraud claims (Claims 10 and 11).

D. Leave to Amend

Based on the foregoing analysis, the Court dismisses all eleven of Plaintiffs' claims against Apple in the FAC. Accordingly, because all of the claims against Apple are dismissed, so too are Plaintiffs' class allegations stemming from those claims.

The Court addresses whether Plaintiffs should be given leave to amend any or all of their claims. While Fed. R. Civ. P. 15(a) states that leave to amend "shall be freely given when justice so requires," nonetheless "[a] district court acts within its discretion to deny leave to amend when amendment would be futile[.]" *Chappel v. Lab'y Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000).

Although Plaintiffs are correct to note that this will be the first ruling under rule 12(b)(6) concerning Plaintiffs' complaint, Apple is also correct in observing that between the various iterations of this case being filed across jurisdictions and by different configurations of Plaintiffs—all challenging the same conduct by Apple and all by the same counsel—this is Plaintiffs *seventh* amended complaint on these claims. *See supra* Procedural Background. Plaintiffs have had the benefit of responding to Apple's fully briefed motions to dismiss in this case and previous cases, and, yet, in this seventh complaint they still fail to state any claims. Accordingly, the Court finds that it would be futile to grant leave to Plaintiffs to bring an *eighth* amended complaint, and thus dismisses the claims with prejudice.

E. Other Issues

1. Plaintiffs' Motions for Preliminary Injunction and to Strike

Because the Plaintiffs' claims against Apple are dismissed with prejudice, Plaintiffs pending motions for preliminary injunction are denied as moot. Docket Nos. 20, 52.

The Court denies Plaintiffs' motion to strike Apple's motion to dismiss, Docket No. 51. There is no basis for a party to strike a motion. *See* 5C Wright & Miller, Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("Rule 12(f) motions [to strike] only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).").

2. Plaintiffs' Motion to Append Claim

Plaintiffs' second motion for preliminary injunction additionally asserts that Plaintiffs are authorized to append an "addendum [] two-pages in length that succinctly raises" a new claim (Claim 12) under California' Unfair Competition Law, and proceeds to assume that "the operative complaint" is now "the FAC + UCL Addendum." Docket No. 51 at 3. The Court need not consider Plaintiffs' procedurally improper attempt to amend their complaint. This addendum is a nullity because Plaintiffs did not notice a motion for such relief, much less complied with the Court's procedures for doing so. *See Hocking v. City of Roseville*, 2007 WL 3240300, at *5 (E.D. Cal. Nov. 2, 2007) ("Because this

request was not submitted by properly noticed motion, it is not presently before the court and the court therefore declines to address it at this time."); *see also* N.D. Cal. L.R. 7-1 & 10 (explaining the rules for moving for leave to amend a complaint). The Court denies the request to append a claim to the FAC on this procedural grounds.

Even if the Court were to consider Plaintiffs' request on the merits, it would deny the motion. Plaintiffs' proposed UCL claim draws from an article published in Politico describing Apple's lobbying efforts in state legislature, which Plaintiffs characterize as allegedly "expos[ing] a quid pro quo to rescind Apple's $25 million donation to an historically black college (HBCU) in Georgia, alleged to be the most disgraceful scandal in Apple's forty-year history." Docket No. 53 ("UCL Claim") ¶ 3. Plaintiffs claim that this allegation presents additional predicate acts for their RICO claim (Count 10), that the RICO enterprise should be amended to include the lobbyists and law firms mentioned in the article, and that they bring a UCL claim under the "unfair" prong derived from the RICO claim. *Id.* ¶ 5. Notably, the Politico article they reference was published on August 20, 2021, which was 17 days *before* Plaintiffs filed their FAC. There was no superseding development warranting the amendment. Moreover, this conduct has nothing to do with Plaintiffs. Plaintiffs do not include allegations about how they were injured by the actions described in the article, and, thus, it is not apparent that the Plaintiffs have standing to pursue this claim. *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 560 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact").

Furthermore, the attempted amendment is problematic because Apple's First Amendment-protected lobbying activity cannot form the basis for antitrust liability, RICO and UCL liability under the *Noerr-Pennington* doctrine. *See Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998) ("This circuit has clarified that the *Noerr-Pennington* doctrine is not merely a narrow interpretation of the Sherman Act in order to avoid a statutory clash with First Amendment values . . . rather, the doctrine is a direct application of the Petition Clause, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law."); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (extending *Noerr-Pennington* to RICO); *Multimedia Patent Tr. v. LG Elecs., Inc.*, 2013 WL 12073800, at *3 (S.D. Cal. Aug. 1, 2013) (same for UCL). Plaintiffs' asserted allegations appear meritless and it would likely be futile for them to attempt to cure this deficiency.

Thus, on procedural grounds and on the merits, the Court denies Plaintiffs' attempt to add another claim to their complaint under the UCL. Docket No. 52.

3. Plaintiffs' Notices for Discovery and Apple's Motion to Quash

On October 25, 2021, Plaintiffs filed a notice informing the Court of recently submitted petitions for cert. requesting that the U.S. Supreme Court "invoke original jurisdiction and assign a special master to ensure" that proceedings involving antitrust claims against Apple, including this case, "are not contaminated by Gibson Dunn's [counsel for Apple] political retaliation against Dr. Isaacs," a party to this case. Docket No. 65. The information Plaintiffs bring to the Court's attention in the notice is not relevant this case and the Court takes no action on the notice.

Plaintiffs appear to refer to a case in which Isaacs alleged a RICO claim against Gibson, Dunn & Crutcher LLP but not any individual lawyers. Plaintiffs do not allege that any attorneys are Apple's attorneys of record in this case. That case was dismissed—with fees awarded to the defendants—and all appeals are exhausted. *See Isaacs v. USC Keck Sch. of Med.*, 853 F. App'x 114, 117-18 (9th Cir. 2021); *Isaacs v. USC Keck Sch. of Med.*, No. 19-8000 DSF, Dkt. 112 (C.D. Cal. May 15, 2020).

Apple's counsel filed a declaration stating, "We are aware of no reasonable basis for Plaintiffs' assertion that counsel for Apple in this case (or, for that matter, any attorney of Gibson, Dunn & Crutcher LLP) would be a witness in this litigation. To the extent that Plaintiffs have asserted that Gibson, Dunn & Crutcher LLP as an entity may be a witness, we are aware of no

reasonable basis for that statement either. Nor are we aware of any reasonable basis for Plaintiffs' assertion that counsel for Apple have a conflict of interest or are subject to disqualification for any reason. Gibson Dunn has been retained by Apple to represent the company in this litigation, and we will continue to do so." Docket No. 63 ¶¶ 2-3.

Plaintiffs also filed notices pursuant to California Code of Civil Procedure § 1987 purporting to require Apple executives and Lina Khan, Chair of the Federal Trade Commission, to appear for live examination at the hearing on November 4, 2021. Docket Nos. 66-68. Those state civil procedure notices have no effect in federal court and were improper. *See Castillo-Antonio v. Hernandez*, 2019 WL 2716289, at *3 (N.D. Cal. June 28, 2019). Plaintiffs did not seek nor obtain leave to present live testimony at the upcoming November 4 motions hearing, and in any event, no live testimony is needed. *See* N.D. Cal. L.R. 7-6 ("No oral testimony will be received in connection with any motion, unless otherwise ordered by the assigned Judge."). Furthermore, the hearing has passed—any issues that were raised by the notices are now moot.

Finally, Apple moved to quash Plaintiffs' subpoena requests. Docket No. 74. However, now that the Court has dismissed all of Plaintiffs' claims against Apple with prejudice, there is no basis for Plaintiffs' subpoena requests. Thus, Apple's motion to quash is also denied as moot.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Apple's motion to dismiss all of Plaintiffs' claims against Apple. Docket No. 45. The Court DENIES AS MOOT Plaintiffs' pending motions for preliminary injunction, to strike and to append claim, as well as Apple's motion to quash. Docket Nos. 20, 51, 52, 74.

This order disposes of Docket Nos. 20, 45, 51, 52, and 74. The Clerk is instructed to enter Judgment and close the case.

IT IS SO ORDERED.

Dated: November 30, 2021

/s/ EDWARD M. CHEN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORONAVIRUS REPORTER; CALID, INC.; PRIMARY PRODUCTIONS LLC, Plaintiffs-Appellants, and JEFFREY D. ISAACS, Dr., Plaintiff, v. APPLE, INC., Defendant-Appellee, and FEDERAL TRADE COMMISSION, Defendant.	No. 22-15166 D.C. No. 3:21-cv-05567-EMC Northern District of California, San Francisco ORDER (Filed Jan. 4, 2024)
JEFFREY D. ISAACS, Dr., Plaintiff-Appellant, and CORONAVIRUS REPORTER; CALID, INC.; PRIMARY PRODUCTIONS LLC, Plaintiffs, v.	No. 22-15167 D.C. No. 3:21-cv-05567-EMC Northern District of California, San Francisco ORDER

APPLE, INC.,

Defendant-Appellee,

and

FEDERAL TRADE COMMISSION,

Defendant.

Before: GOULD, BERZON, and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the Petitions for Panel Rehearing. The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35(f).

The Petitions for Panel Rehearing and for Rehearing En Banc are **DENIED**. Plaintiffs-Appellants' requests for a special master are **DENIED**. Plaintiff-Appellant Jeffrey Isaacs's request for a referral to the U.S. Marshal is **DENIED**.

APPENDIX D

[LOGO]
American Wealth Protection

December 13, 2023

Molly C. Dwyer, Clerk of Court
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Coronavirus Reporter, et al. v. Apple, Inc.*,
Case Nos. 22-15166 & 22-15167

Dear Ms. Dwyer,

Pursuant to Rule 28(j), this week a Jury found antitrust injury due to monopolization of smartphone app distribution. See *In Re Google Play Antitrust*(CAND-21-md-02981-JD). In contrast to three years of strawman arguments deflecting our tying allegations, a San Francisco jury needed only three hours to "call a spade a spade" and denounce improper tying restraints yielding duopoly[1] control over the entire app industry.

The ruling directly applies to and concerns identical conduct alleged in *Coronavirus Reporter*, hence the Court should immediately issue the preliminary injunction in the interest of fairness and equality. In fact, the thresholds the *Google* jury faced were in all regards higher than Apple. Google's Android allows sideloading. Google Play is tied to the Android software

[1] Apple's controls 80% of US app distribution, versus Android's 20%.

platform, whereas App Store is tied to a physical iPhone device. Since the *Google* Jury found anticompetitive app distribution conduct under the rule-of-reason, certainly Apple's hardware tying, which is more pernicious, violates Sherman. FACT224 invoked *per se* tying since the outset of this case, despite Apple's claims otherwise earlier today(Dkt.71,p.11).

The Court – and the court below – relied heavily upon *Epic-Apple.* Apple has consistently argued for the applicability of *Epic*, as recently as today(Dkt71,p12). It follows Apple must be bound to the adverse ruling in *Epic-Google.* In their Rehearing response, Apple notably seeks to evade *per se* tying applicability under inapt citation of *Microsoft* for the fifth time.

The first jury to address smartphone app distribution has spoken unambiguously. At least a dozen major news bureaus published the verdict "spells trouble for app stores," "threatens to roil an app store duopoly," "puts Apple back under pressure," "is bad news for Apple," etc. In that light, this notice effectuates the people's voice – that the courts apply the *Google* verdict to Apple without delay.

To enforce Sherman Act upon Google, but not Apple's more egregious conduct, would be unjust. Separate and apart from the underlying briefings, this Court may

invoke All Writs Act to enforce equality. The world is watching – the people have spoken.

Respectfully Submitted,

/s/ Keith A. Mathews

Counsel for the Appellants
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December 15, 2023

VIA ECF

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 93939
San Francisco, CA 94119-3939

Re: *Coronavirus Reporter v. Apple Inc.*,
Case Nos. 22-15166 & 22-15167

Dear Ms. Dwyer:

The Court should disregard Appellants' December 13, 2023, letter ("Letter") addressing a jury verdict in an unrelated district court case, *In re Google Play Antitrust Litigation*, No. 21-md-02981-JD (N.D. Cal.). The verdict in *Google Play* has no bearing at all on this case, much less on Appellants' petitions for rehearing.

Appellants have cast their case as "notably differentiated" from other antitrust litigation over Apple's App Store. ER955. *Google Play* lies even further afield from this matter, involving a different plaintiff (Epic Games) suing a different defendant (Google) about a

different app marketplace (Google Play), imposing different alleged anticompetitive restraints. That jury's verdict (and the yet to be determined equitable relief) is entirely irrelevant to the question presented in Appellants' petitions for rehearing: Whether the panel's decision in this case about the insufficiency of Appellants' allegations concerning market definition and antitrust injury conflicts with Supreme Court or Ninth Circuit precedent or presents questions of exceptional importance. Fed. R. App. P. 35(b)(1). As an unrelated district court decision, it certainly does not and cannot "b[i]nd" this Court or Apple, contrary to Appellants' suggestion. Letter at 1.

Instead, the relevant binding precedent here is this Court's decision in *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946 (9th Cir. 2023), which rejected per *se* condemnation of an alleged tie involving the very platform at issue and is fully consistent with the panel's decision affirming dismissal here. *Id.* at 997; *see* Response to Reh'g Pet. at 12. Even if this Court were inclined to consider the *Google Play* case, the application of the *per se* standard was also rejected there. *See* Final Jury Instructions No. 33, No. 21-md-02981-JD, Dkt. 850 (Dec. 6, 2023). Appellants' submission therefore fails to identify any significant authority pertinent to the petitions pending before the Court. The Court should deny those petitions.

Sincerely,

/s/ Julian W. Kleinbrodt

Jeffrey D. Isaacs, M.D.
11482 Key Deer Circle
Wellington, FL 33449

December 25, 2023

VIA ECF

Molly C. Dwyer, Clerk of Court
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Coronavirus Reporter, et al. v. Apple, Inc.*,
Case Nos. 22-15166 & 22-15167

Dear Ms. Dwyer,

Last December, Appellee wrote under 28(j) claiming the *Dreamstime* Google search-ranking ruling supported affirmance.*Dkt.56*. The Panel cited *Dreamstime* accordingly. Now, Appellee asks you to disregard the *Google Play* jury verdict as "unrelated. . . has no bearing."*Dkt. 74.*

Likewise, at Appellee's suggestion, the court below and Panel relied upon *Epic's* non-binding determination that "single brand markets are disfavored." The *Google Play* jury demonstrated adeptness at determining market boundaries for digital apps, and indeed found a single-brand Android app distribution market. Appellee asks you to reject that as "non-binding."

Appellee's positions are contradictory, violate the sanctity of the oath, and were rejected by a jury in three hours. The *Coronavirus* decision, representing years of

Appellee's efforts to evade Sherman, rests upon a shattered foundation that must be re-decided.

The contradiction has been apparent to the press:

> *"Apple rules the iPhone's App Store with an iron fist — sideloading outside it is not allowed. Google lets anyone install any app on an Android phone. But guess which one of these two companies has an illegal monopoly, according to the courts?"Ex.A.*

Last week, twelve nonprofits petitioned the DOJ[1] to investigate App Store censorship – the very same conduct *Coronavirus* seeks to redress. Notably differentiated for covering free apps – *Coronavirus* nonetheless concerns entirely identical censorship conduct to *Play Store*, Beeper, Parler, etc. Censorship will continue until this Court holds Appellee accountable under Sherman Act.

A jury rejected the idea of one software store with absolute censorship authority. This meets rehearing criteria of "exceptional importance." The Panel decision jeopardizes the very heart of the Sherman Act. Notably, it induced a California Law Dean to erroneously conclude:

> *"Antitrust law is a terrible tool for regulating content moderation, and it was never designed to let unwanted app developers force their way into app stores."Ex.B.*

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[1] Exhibit C

The Dean has been miseducated by the Court – Sherman Act is actually an elegant instrument, born in 1890, that governs the tying of app stores to hardware phones – two FAC claims never addressed by the court below, Appellee, or the Panel. The decision must be urgently repaired by rehearing – the most appropriate solution – FRCP 60(b), or *certiorari.*

Sincerely,

/s/ Jeffrey D. Isaacs

Dr. Jeffrey D. Isaacs

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May 4, 2023

VIA ECF

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 93939
San Francisco, CA 94119-3939

Re: *Coronavirus Reporter v. Apple Inc.*,
Case Nos. 22-15166 & 22-15167

Dear Ms. Dwyer:

I write under Rule 28(j) regarding *Epic Games, Inc. v. Apple Inc.*, Nos. 21-16506 & 21-16695 (9th Cir. Apr. 24, 2023) (Attachment A), which upheld Apple's App Store restrictions—also challenged by Appellants—as "plainly procompetitive" and without viable alternative. Slip Op. 53, 58.

The decision supports affirmance here by underscoring the legal invalidity of Appellants' purported markets. First, *Epic* explains that Appellants must "rebut the economic presumption" against single-brand markets by showing that the challenged restrictions were "not

generally known." Slip Op. 33. This is dispositive because Appellants concede that developers have *always* knowingly agreed to Apple's requirement that apps be distributed through the App Store. *See* Answering Br. 24–25; Opening Br. (Dkt. 17) 29–30; 5-ER-968. Second, *Epic* confirms that all markets—including single-brand markets—must be defined according to "principles regarding cross-elasticity of demand." Slip Op. 33–34. But as the district court here observed, Appellants do not dispute that the Complaint lacks allegations of interchangeability. 1-ER-27; *see* Answering Br. 31. Third, the Court agreed that the App Store resides in a two-sided market for *transactions*. Slip Op. 41, 53. That determination refutes Appellants' arguments that its markets are one-sided. *See* Answering Br. 27–28; Opening Br. 28–30.*

Epic also supports affirmance on alternative grounds, including that Appellants' *per se* tying claim fails as a matter of law. The court held that "*per se* condemnation is inappropriate" for alleged "ties related to app-transaction platforms" like the App Store. Slip Op. 72–74; *see* Answering Br. 41.

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* *Epic* does not address antitrust injury, the other threshold ground for affirmance, and much of *Epic's* remaining analysis—including its discussion of separateness of products, agreement under Section 1, or competitive effects—rests on that case's factual record, distinct from the implausible allegations here. *See* Opening Br. 23 (arguing "the purported tied products in Epic Games (in-app purchases) differ[] from the tied products plead[ed] by Appellants (the app store, notary stamps, and onboarding software)").

The Court's decision in *Epic* thus confirms the Court should affirm the order below dismissing the complaint with prejudice.

Sincerely,

/s/ Julian W. Kleinbrodt

Jeffrey D. Isaacs, M.D.
11482 Key Deer Circle
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May 8, 2023

VIA ECF

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Coronavirus Reporter, et al. v. Apple, Inc.*,
Case Nos. 22-15166 & 22-15167

Gibson Dunn's 28(j) letter appears to misrepresent that the App Store is a tying platform, when it is in fact tied to iPhone devices. This, following their failure to provide any substantive answer to *Microsoft* analysis in the Opening Brief, creates serious ramifications as Apple engages in conduct which violates Sherman civil-criminal code.

The Opening Brief cited *Microsoft* "applies with distinct force when the tying product is platform software."(EOB p19) Unlike *Microsoft* and *Epic*, our tying claim does not involve a software platform as the tying product. Our tying product is a physical device. We cited Loyola Law Review which concluded that *Epic's* IAP tying claim did "not capture the full scope of Apple's tying conduct."

Apple's answering brief did not meaningfully address *Microsoft, Hewlett-Packard*, and related tech-tying cases.

Per *Retlaw*, Apple's underdeveloped reply constitutes forfeiture.(Reply p9) Apple notably declined to defend their position in the April hearing.

Apple did not and cannot refute that every computing system historically permitted competing software stores. Software stores are simply not within the intent or scope of *Microsoft*, which meant to encourage first-mover innovation of features within software platforms. Apple was not the first-mover, as *Cydia* created the first iOS software store. By disallowing all traditional competing software stores, the App Store does not become a "feature" of a software platform as defined by Microsoft.

Our tying claim also extends to Notary Stamps, which *Epic* does not allege. Appellee uses the tying product to require purchase of Notary Stamps. Gibson Dunn reluctantly conceded that "Apple has an electronic signature [*i.e.* digital product] that can identify a particular piece of software as having been approved." (Transcript @23:09). A jury may determine Notary Stamps fabricated by Apple are purchased through IAP commissions and developer fees. This constitutes a modern-day Stamp Tax on the internet.

Northern Pacific teaches *per se* condemnation of tying is appropriate when a pernicious effect exists on competition. Apple imposes a 30% tax on the lifetime use of iOS. We would condemn an automobile monopolist

that required lifetime purchase of their own 30% surtaxed fuel. Apple's Stamp Tax is no different.

Sincerely,

/s/ Jeffrey D. Isaacs

Jeffrey D. Isaacs, M.D.

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December 16, 2022

VIA ECF

Molly Dwyer, Clerk of Court
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U.S. Court of Appeals for the Ninth Circuit
P.O. Box 93939
San Francisco, CA 94119-3939

Re: *Coronavirus Reporter v. Apple Inc.*,
Case Nos. 22-15166 & 22-15167

Dear Ms. Dwyer:

I write under Rule 28(j) regarding *Dreamstime.com, LLC v. Google LLC*, No. 20-16472 (9th Cir. Dec. 6, 2022) (Attachment A). In *Dreamstime.com*, this Court affirmed dismissal of antitrust claims asserting that Google had manipulated its online search algorithm to suppress the plaintiff in online search results. Slip Op. at 1–6. The decision addresses two points relevant to this appeal, both supporting affirmance.

First, the Court rejected the argument—advanced by Appellants here—that allegedly "demoting [a plaintiff's] organic search results" and "elevating inferior"

results constitutes antitrust injury. *Compare* Slip Op. at 19–20 *with* Opening Br. (Dkt. 17) 16–17 & Reply Br. (Dkt. 52) 24–28 (arguing that "ranking suppression" of Appellants' apps in App Store search results "evidenced antitrust injury"). As the Court explained, one competitor's "diminished performance in . . . search results" does not harm competition *marketwide* as required. Slip Op. at 20–21; *see also* Answering Br. (Dkt. 38) 39–40 (citing the now-affirmed order in *Dreamstime.com*). That is true even where a platform allegedly "preferenc[ed]" results from its own partners, "selectively enforc[ed] the [platform] rules," "suspend[ed] [the plaintiffs] mobile application," and "misappropriat[ed]" the plaintiffs intellectual property. Slip Op. at 17, 20–21; *see also* Opening Br. 16–17 (advancing similar arguments). *Dreamstime.com*'s reasoning parallels that of the district court here, ER31–36, and underscores the absence of alleged antitrust injury in this case.

Second, the Court held that a district court properly denies leave to amend where a plaintiff "failed to add the requisite particularity to its claims" despite multiple opportunities to amend. Slip Op. at 23–24 (quotation omitted). In *Dreamstime.com*, fatal pleading defects including the "definition of the relevant market" had been raised "from the outset," and the plaintiff "repeatedly . . . declined" to rectify deficiencies despite "several opportunities" to do so. *Id.* at 24. Here, similar defects (and more) were identified in seven different Rule 12 motions before dismissal, making any further amendment futile. Answering Br. 56–57.

The Court's decision in *Dreamstime.com* confirms the Court should affirm the order below dismissing the complaint with prejudice.

Sincerely,

/s/ Julian W. Kleinbrodt

Julian W. Kleinbrodt